P.E.R.C. NO. 2022-13

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IRVINGTON HOUSING AUTHORITY,

Respondent,

-and-

OAL DKT. NO. PRC 03911-17
P.E.R.C. DKT. NO. CO-2016-193

SEIU, LOCAL 617
(JEFFREY BARRETT, ET AL.)

Charging Party.

JEFFREY BARRETT, ET AL.,
IRVINGTON HOUSING AUTHORITY
LAYOFF - 2016

OAL DKT. NO. CSV 06051-16
AGENCY DKT. NO. 2016-3370

SYNOPSIS

The Public Employment Relations Commission rejects exceptions filed by SEIU Local 617, and adopts the Initial Decision of an Administrative Law Judge (ALJ), in a consolidated unfair practice case before the Commission and a good faith layoff appeal before the Civil Service Commission, which contested layoffs implemented by the Irvington Housing Authority (IHA) in July 2016, affecting certain IHA employees including Local 617 members. The Commission cannot conclude the ALJ erred in finding that Local 617 failed to meet its initial burden of proving, by a preponderance of the evidence on the entire record, that protected conduct, an allegedly outstanding grievance at the time the layoff decision was made and allegedly numerous meetings Local 617 had with IHA in regards to its members, was a substantial or motivating factor in the layoff action; where Local 617 presented no documentary evidence of that protected conduct or concrete, specific testimonial facts that would, if true, establish when the grievance was filed or the dates of the meetings, their subject matter, and what was said in them. The Commission transfers the remaining aspects of the case to the Civil Service Commission.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Friend & Wenzel, L.L.C. (Joseph M. Wenzel, of counsel)

For the Charging Party, Oxfeld Cohen, P.C. (Arnold Shep Cohen, of counsel)

DECISION

This case comes to us by way of exceptions, filed by SEIU Local 617 (Local 617), to the Initial Decision of an Administrative Law Judge (ALJ) in a consolidated unfair practice case before this Commission and a good faith layoff appeal before the Civil Service Commission (CSC), which contested layoffs implemented by the Irvington Housing Authority (IHA) in July 2016, affecting certain IHA employees including Local 617 members. For the reasons discussed below, we adopt the ALJ's Initial Decision.

Local 617 filed an unfair practice charge and amended charge with the Public Employment Relations Commission (PERC) on March 21 and June 28, 2016, respectively. The charge, as amended, alleges the layoffs were not done for economic reasons, but were in retaliation for Local 617 members seeking payment for accumulated paid time off, and for the Charging Party's vigorous enforcement of the parties' collective negotiations agreement (CNA), in violation of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4(1),(3) and (5).[1/] The charge further alleges that IHA issued bogus disciplinary actions against Local 617 members after the layoff notices were sent. On March 22, 2016, twelve of the affected employees filed a good faith appeal with the Civil Service Commission.

On July 6, 2016, PERC's Director of Unfair Practices issued a Complaint on the allegations contained in the charges, as amended, determining that the allegations, if true, may constitute an unfair practice.

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. ... (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. ... [and] (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On October 18, 2016, Local 617 filed a motion for Consolidation and Predominant Interest with the Office of Administrative Law. On November 30, 2016, IHA filed a response to the motion. On February 15, 2017, Administrative Law Judge Leslie Z. Celentano issued an Order of Consolidation and Predominant Interest.[2/] On March 21, 2017, the PERC case was transferred to the Office of Administrative Law for a hearing before Judge Celentano.

The ALJ issued an Initial Decision on August 17, 2021, dismissing both the unfair practice charge and the good faith layoff appeal. The ALJ found that IHA did not commit an unfair practice in laying off union employees, and that its layoff plan was done in good faith. With respect to the unfair practice charge, the ALJ found, in pertinent part:

> I FIND that a preponderance of the evidence does not exist to support Local 617's unfair practice charge. I specifically FIND that the union has failed to make a prima facie showing that protected union conduct motivated the IHA's decision to lay off union employees. . . . That is, Local 617 has not provided any direct evidence of anti-union animus, or evidence that Local 617

2/ The Order determined, in pertinent part, that upon issuance of the Initial Decision, the matter will be sent first to PERC to decide whether IHA laid off appellants as retaliation for protected union activity; whereupon PERC will forward the matter to the CSC to determine whether the employer acted in bad faith and grant any warranted relief. The Order further determined that, where appropriate, the matter will be returned to PERC for its consideration of any specialized relief.

> engaged in protected activity, that the IHA knew of this activity, and that the IHA was hostile toward the exercise of the protected rights.
>
> First, although Caleb Bryant[3/] testified about an outstanding leave time grievance at the time of the layoffs, which would qualify as protected union activity, Local 617 otherwise failed to show that the IHA knew about the grievance or that the IHA was hostile toward Local 617 because of the grievance. In this regard, in its unfair practice filing, Local 617 stated that the layoffs were "in retaliation for Local 617 member seeking payment for accumulated paid time off," but did not specifically mention a grievance in the filing, and the IHA notes in its post-hearing brief that there is no documentation regarding the grievance referenced by Caleb Bryant in his testimony, and the IHA denies any knowledge of the grievance.
>
> Even assuming that Local 617 filed such a grievance and that the IHA knew about the grievance, Local 617 has not shown that the IHA was hostile toward the union for filing a grievance regarding leave time. . . . Local 617 has not pointed to any remarks or other actions reflecting any such hostility by the IHA. Importantly, not all of the thirteen employees originally identified under the layoff plan or the eight employees who were ultimately laid off were members of Local 617.
>
> Moreover, even if Local 617 had made a prima facie case, such that there was sufficient evidence to support the inference that the union filed a grievance, the IHA knew about the grievance, and the IHA was hostile toward this protected union activity,

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3/ Bryant, a building maintenance worker at IHA for 14 years, was part of the layoff, a member of Local 617 and had served as shop steward.

> and the grievance motivated the IHA's layoff plan, there is a preponderance of evidence showing that "the same action would have taken place even in the absence of the protected activity." . . . [T]he layoff plan and the IHA Board of Commissioner's resolution approving the layoff plan both indicate that the layoffs were necessary because the IHA was operating at a deficit and was advised by HUD to reduce its costs. And . . . not all of the employees who were laid off were members of Local 617.
>
> Thus, even if Local 617 made a prima facie case to support the inference that the grievance was a motivating factor or a substantial factor in the IHA's layoff decision, there is a preponderance of evidence showing that the IHA would have instituted the layoffs despite the grievance.
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> [Initial Decision at 14-16.]

On August 24, 2021, Local 617 filed exceptions to the ALJ's Initial Decision. IHA filed a response on August 27. In its exceptions brief Local 617 reiterates arguments it made to the ALJ in its post-hearing brief. As to the PERC case, Local 617 again argues:

> Based on the evidence presented, the layoffs were not for purposes of economy and efficiency. Rather, they were in bad faith and for anti-union reasons. Local 617 was a very active union that had numerous meetings with the IHA with regards to its members. Obviously, this bothered the IHA.

IHA, in opposition, argues that Local 617's exceptions do not meet any of the standards set forth in N.J.A.C. 1:1-

18.4(b).[4/] IHA further argues that there is no basis to disturb the ALJ's Initial Decision, because her factual determinations were based upon the evidence and testimony presented, and her decision was otherwise sound, logical and well-reasoned.

We have reviewed the record, and we find no basis in Local 617's exceptions to modify or reject the ALJ's determinations regarding the unfair practice charge.

Analysis

Allegations of anti-union discrimination are governed by In re Bridgewater Tp., 95 N.J. 235 (1984). The charging party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246. If the employer did not present any evidence of a

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4/ This provision states that exceptions shall:

1. Specify the findings of fact, conclusions of law or dispositions to which exception is taken;

2. Set out specific findings of fact, conclusions of law or dispositions proposed in lieu of or in addition to those reached by the judge;

3. Set forth supporting reasons. Exceptions to factual findings shall describe the witnesses' testimony or documentary or other evidence relied upon. Exceptions to conclusions of law shall set forth the authorities relied upon.

motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242.

Commission decisions cited by Local 617, wherein layoffs were found to have been motivated by hostility and/or were pretextual, were premised on specific factual records that predominantly established direct or circumstantial evidence of those findings. See, e.g., Passaic Cty Superintendent of Elections, H.E. No. 2011-12, 38 NJPER 35 (¶5 2011), adopted, P.E.R.C. No. 2014-1, 40 NJPER 136 (¶51 2013) (record was replete with proofs of hostility to union, including, inter alia, credible testimonial evidence that superintendent stated "she didn't give two shits about the Union" and that "before she's done the Union will be gone"); Bor. of Teterboro, P.E.R.C. No. 83-137, 9 NJPER 278 (¶14128 1983), aff'd, NJPER Supp.2d 142 (¶127 App. Div. 1984)(employer received notice of representation petition on August 6, called meeting with employees who supported it on August 10, threatened to lay them off if they proceeded

with attempts to unionize, then laid them off later that day or the next).

Here, Local 617 identifies no specific findings of fact or conclusions of law to which it takes exception with respect to the ALJ's determination that Local 617 failed to make a prima facie showing that protected union conduct motivated IHA's decision to lay off union employees. The documentary record contains no evidence of an outstanding leave-time grievance at the time the layoff decision was made, or of the allegedly numerous meetings Local 617 had with IHA in regards to its members. Local 617 identifies no concrete, specific facts in Mr. Bryant's disputed testimony (whether as relayed in the ALJ's Initial Decision or in Local 617's exceptions brief) that would, if true, establish when the leave-time grievance was filed, or the dates, times and subject matter of any particular meetings between Local 617 and IHA, let alone what was said in such meetings, in advance of the layoff decision.

Absent the presentation of such facts here, we cannot conclude the ALJ erred in finding that Local 617 failed to meet its initial burden of proving, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the layoff action. As such, Local 617's exception to the ALJ's finding that IHA conducted a legitimate cost-benefit analysis to justify the layoffs for economic reasons

is a matter to be determined by the CSC in the context of the good faith layoff appeal.[5/]

Pursuant to the Order of Consolidation, this case shall proceed to the Civil Service Commission.

ORDER

The unfair practice Complaint is dismissed. The remaining aspects of the case are transferred to the Civil Service Commission.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Papero and Voos voted in favor of this decision. Commissioner Jones voted against this decision. Commissioner Ford recused himself.

ISSUED: September 30, 2021

Trenton, New Jersey

5/ Local 617 relies heavily on an audit report of the U.S. Department of Housing and Urban Development (HUD) in support of its claim that the layoffs were done in bad faith, in violation of civil service law and regulations. HUD's investigation was instigated, in part, by complaints HUD received from Local 617 after IHA issued the layoff notices. Local 617, in its amended unfair practice charge, claimed "bogus" disciplinary actions were taken against unit members after the layoff notices were issued. In its answer to the amended charge, IHA admitted the disciplinary actions occurred, but denied they were for bogus or retaliatory purposes. Local 617 presented no documentary or other evidence relating to these disciplinary actions, either with its amended charge or in its case in chief before the ALJ.