P.E.R.C. NO. 2024-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BLOOMFIELD,

Respondent,

-and-

OAL Dkt. No. PRC 02350-23
PERC Dkt. No. CO-2022-214

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 68,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands an unfair practice case to the Administrative Law Judge (ALJ) in a consolidated matter with the Civil Service Commission. The Commission instructs the ALJ to determine whether Local 68's unfair practice charge was timely filed and, if so, whether the Township's enforcement of its no recording policy against an employee which resulted in her termination violated the Act.

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.

P.E.R.C. NO. 2024-51

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF BLOOMFIELD,

Respondent,

-and-

OAL Dkt. No. PRC 02350-23
PERC Dkt. No. CO-2022-214

INTERNATIONAL UNION OF
OPERATING ENGINEERS, LOCAL 68,

Charging Party.

Appearances:

For the Respondent, Antonelli Kantor Rivera, attorneys (John J.D. Burke, of counsel)

For the Charging Party, Kroll Heineman Ptasiewicz & Parsons, LLC, attorneys (Raymond G. Heineman, of counsel)

DECISION

This case comes to us by way of exceptions to the Initial Decision of an Administrative Law Judge in a consolidated unfair practice case before this Commission and a consolidated appeal before the Civil Service Commission (CSC). The Township of Bloomfield (Township) issued an employee (Y.M.) a final notice of disciplinary action (FNDA) for a 90-day suspension without pay on December 10, 2021 and another FNDA for a termination on June 6, 2022. Y.M. appealed both matters to the CSC, which transmitted them to the Office of Administrative Law (OAL) on January 1, 2022 and June 16, 2022 for a hearing. On April 25, 2022, the International Union of Operating Engineers, Local 68 (Local 68),

filed an unfair practice charge with the Public Employment Relations Commission (PERC), with amended charges filed on May 6, 2022 and June 3, 2022.

Local 68's amended unfair practice charge alleges that the Township violated N.J.S.A. 34:13A-5.4a(1) and 5.4a(3)[1/] of the New Jersey Employer-Employee Relations Act (Act), when on April 21, 2022 it terminated Y.M. for submitting recordings of workplace interactions as part of her defense in the CSC hearing for her first FNDA. Local 68 asserts that the Township's enforcement of a policy restricting the use of electronic recording devices can reasonably be construed to impermissibly restrict protected activities under the Act. On August 30, 2022, PERC's Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing, determining "that the allegations in the charge, if true, may constitute unfair practices."

On October 27, 2022, Y.M. filed a motion for consolidation and determination of predominant interest with the OAL. On March 3, 2023, OAL Administrative Law Judge Andrew W. Baron (ALJ) issued an Order of Consolidation and Predominant Interest. The

---

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. ...[and](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."

Order consolidated the PERC unfair practice case with the two CSC appeals and determined that PERC has the predominant interest. On March 13, 2023, the PERC case was transferred to the ALJ for hearing. The ALJ held hearings on the consolidated CSC and PERC matters on March 27, April 18 and 24, May 23, and June 9, 2023.

On March 7, 2024, the ALJ issued an Initial Decision. As to the Civil Service FNDA appeals, the ALJ sustained the first FNDA (90-day unpaid suspension for insubordination due to conflicts with coworkers) and modified the second FNDA (termination for violation of no recording policy) by converting it to a 45-day suspension consecutive to the initial 90-day suspension and reinstating Y.M. with back pay. As to the PERC unfair practice complaint, the ALJ dismissed it, determining: "With the limited information presented to me on this issue and without expert testimony, I cannot find whether or not the Bloomfield no recording policy is or is not valid from a constitutional or other perspective." (Initial Decision at 17). The ALJ also found that "[t]here is a question of timeliness as to challenging the entire policy as a whole." Ibid. The ALJ found that there is no basis at this time to examine the questions of whether the circumstances between Y.M. and the Township created sufficient justification to violate the recording policy, and whether the policy is valid on its face. Ibid. The ALJ also noted that he saw no reason to address the recording policy in the context of

the unfair practice charge because his conclusion on the second Civil Service FNDA appeal found that termination for violation of the no recording policy was excessive and too harsh under the standards of progressive discipline. Ibid.

On March 18, 2024, Local 68 filed exceptions to the ALJ's Initial Decision. As to the PERC case, Local 68 asserts that its unfair practice charge challenging the Township's "no recording" rule as a work rule in violation of the Act was timely filed. Citing federal National Labor Relations Board (NLRB) precedent under the National Labor Relations Act (NLRA) and Labor Management Relations Act (LMRA),[2/] Local 68 argues that where an employer maintains a work rule that may interfere with employees' protected rights, the six-month statute of limitations does not apply to bar an unfair practice charge based on the date the work rule was originally adopted. Local 68 specifically asserts that in this case the Township implemented the no recording policy on April 1, 2022 when it issued a PNDA (Preliminary Notice of Disciplinary Action) against Y.M. terminating her for submitting workplace recordings as evidence in her CSC disciplinary hearing. Local 68 argues that its April 25, 2022 unfair practice charge

---

2/ NLRB and federal court decisions interpreting the NLRA and LMRA in the private sector may be used as a guide in interpreting the unfair practice and representation provision of our Act. Lullo v. International Ass'n of Firefighters, 55 N.J. 409, 423-424 (1970); Galloway Twp. Ass'n of Educ. Secs., 78 N.J. 1, 9 (1978).

was therefore timely filed. Local 68 asserts that the Township's no recording policy violates the Act because it does not provide any exceptions for protected activity. Local 68 contends that the Township violated the Act by using the no recording policy to terminate Y.M. in retaliation for her protected activity of recording workplace conversations to aid in her union's defense of her during her disciplinary hearings.

In response, the Township asserts that Local 68's unfair practice charge must be dismissed because it was filed more than six months after the Township's January 2021 employee handbook was issued which contained the no recording policy. The Township argues that Local 68's unfair practice charge should be substantively dismissed because it has a managerial prerogative to maintain its no recording policy that outweighs any employee interest in being able to record statements by co-workers for evidentiary support in a claim or defense.

We have reviewed the record and remand the case back to the Administrative Law Judge to make procedural and substantive findings concerning Local 68's unfair practice charge.

First, we remand the case for a determination as to whether Local 68's unfair practice charge was timely filed as a challenge to the Township's alleged improper implementation of its no recording policy when it issued Y.M. a PNDA on April 1, 2022 resulting in her June 6 termination. N.J.S.A. 34:13A-5.4(c)

provides that no complaint shall issue based upon any unfair practice occurring more than six months before the filing of the charge unless the charging party was prevented from filing a charge earlier. Unfair practice charges may be timely based on the implementation date of a policy rather than when it was approved, decided, or announced by the public employer. See, e.g., Jamesburg Bd. of Ed., P.E.R.C. No. 80-56, 5 NJPER 496 (¶10253 1979), aff'd, 1980 N.J. Super. Unpub. LEXIS 15 (App. Div. 1980); Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 78-69, 4 NJPER 188 (¶4094 1978). The event triggering the running of the limitations period is the implementation or effective date of an adverse personnel action as opposed to notice of the action. State of New Jersey (Office of the Public Defender), P.E.R.C. No. 2009-32, 34 NJPER 439 (¶137 2008). A discrete personnel action, such as a termination, provides a new operative date for purposes of determining timeliness of a charge because it "is a discrete act which gives rise to a separate and distinct charge alleging discrimination in retaliation for the exercise of protected rights under 5.4a(3) and derivatively (1) of the Act." Rutgers University, H.E. No. 2003-2, 28 NJPER 466, 538-539 (¶33171 2002).

Next, if the ALJ finds the charge was timely filed, he should determine whether the Township's enforcement of its no recording policy against Y.M. violated subsections 5.4a(1) and/or 5.4a(3) of the Act.

"An employer violates subsection 5.4a(1) if it engages in activities which tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER (¶17197 1986). For a 5.4a(1) violation to be found, proof of actual interference, intimidation, restraint, coercion, or motive is unnecessary; the tendency to interfere is sufficient. Trenton Bd. of Ed., P.E.R.C. No. 2022-20, 48 NJPER 245 (¶55 2021). This provision will be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Allegations of anti-union discrimination under N.J.S.A. 34:13A-5.4a(3) are governed by In re Bridgewater Tp., 95 N.J. 235, 240-246 (1984). Bridgewater established that 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 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. Id. at 241. 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.

As to the issue of whether a public employer's policy on making recordings in the workplace is mandatorily negotiable, both parties cited and discussed North Hudson Reg. Fire and Rescue, P.E.R.C. No. 2010-3, 35 NJPER 279 (¶96 2009). North Hudson is a scope of negotiations case, while the instant matter is an unfair practice dispute which triggers different legal questions. In North Hudson, the Commission restrained binding arbitration of a grievance challenging the employer's implementation of a work rule prohibiting employees from using recording devices while on duty. We agreed with the employer "that surreptitious recording could chill communication between employees and that supervisors and co-employees may fear that statements they make could be used against them at some future date." Id. However, we also recognized "that employees have an interest in being able to record hostile or illegal statements by supervisors and co-employees and that such recordings have provided evidentiary support for discrimination claims." Id.

The Commission ultimately held that, on balance, the employer's interests outweighed the employees' interests because the employer had identified specific concerns and an example where secret recording adversely affected department operations, whereas the Association identified only speculative interests. Id.

The Township asserts that North Hudson supports the validity of its no recording policy. Local 68 asserts that North Hudson recognized employees' valid interests in being able to record co-workers under circumstances such as those involved here. Regardless of whether the Township's no recording policy is mandatorily negotiable or non-negotiable, an employer may not exercise a managerial prerogative for anti-union reasons. As discussed above, this is an unfair practice case that must be evaluated under subsections 5.4a(1) and (3) of the Act.

In his evaluation of the 5.4a(3) charge, the ALJ should apply Bridgewater and make specific factual findings and legal conclusions as to whether Local 68 met its burden of proving, by a preponderance of the evidence, that hostility to protected activity was a substantial or motivating factor in the decision to apply the no recording policy to Y.M. and terminate her. If Local 68 did meet that burden, the ALJ should make specific factual findings and legal conclusions as to whether the Township met its burden of proving, by a preponderance of the evidence,

that it would have enforced the no recording policy and terminated Y.M. even absent protected activity. The ALJ should review the testimony and exhibits and make any necessary credibility determinations in issuing findings of fact and legal conclusions about the Township's motivation for enforcing the no recordings policy against Y.M.

Finally, we note that the ALJ stated that the testimonial part of the case had "less emphasis on the challenge to the overall recording policy filed before PERC" and that he could not make a finding on the issue given the "limited information" and lack of expert testimony. (Initial Decision at 3, 17). Therefore, we find that on remand the ALJ should, if he deems it necessary, re-open the record to accept additional evidence and/or schedule another hearing to develop the record further concerning the unfair practice allegations.

ORDER

We remand the case back to the Administrative Law Judge to determine whether Local 68's unfair practice charge was timely filed and, if so, whether the Township's enforcement of its no recording policy against Y.M. and termination of her violated subsections 5.4a(1) and/or 5.4a(3) of the Act.

BY ORDER OF THE COMMISSION

Chair Hennessy-Shotter, Commissioners Eaton, Ford, Higgins, Kushnir and Papero voted in favor of this decision. None opposed.

ISSUED: April 25, 2024

Trenton, New Jersey