P.E.R.C. NO. 99-79

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RAHWAY VALLEY SEWERAGE AUTHORITY,

Respondent,

-and- Docket No. CO-H-97-21

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO,
LOCAL 8-149,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Rahway Valley Sewerage Authority violated the New Jersey Employer-Employee Relations Act when it refused a demand to negotiate over layoff and recall procedures at the time the Authority announced a layoff. The Commission dismisses Local 8-149's allegations that protected activity motivated its decision to lay off two employees. The Commission orders the Authority to negotiate in good faith with the Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local 8-149 concerning layoff and recall procedures.

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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-and- Docket No. CO-H-97-21

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, LOCAL 8-149,

Charging Party.

Appearances:

For the Respondent, Stanton, Hughes, Diana, Salsberg, Cerra & Mariani, attorneys (Richard M. Salsberg, of counsel)

For the Charging Party, Kevin Kiernan, attorney

DECISION

On July 19, 1996, the Oil, Chemical and Atomic Workers International Union, Local 8-149, filed an unfair practice charge alleging that the Rahway Valley Sewerage Authority violated 5.4a(1), (3), (4), (5) & (7)[1/] of the New Jersey

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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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony

Footnote Continued on Next Page

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it discriminatorily laid off shop steward John Vanco, out of seniority and in violation of established disciplinary procedures. In addition, the charge alleges that the Authority violated the Act when it: (1) laid off Kevin Thompson in retaliation for Local 8-149's pursuing a grievance to arbitration and (2) refused Local 8-149's demand to negotiate over layoff and recall procedures.

On February 19, 1997, a Complaint and Notice of Hearing issued. On February 28, the Authority filed an Answer denying that it had violated the Act and asserting that it had complied with all of its contractual and legal obligations and had a managerial prerogative to act as it did.

On June 10, 1998, a hearing was conducted. The parties examined witnesses, introduced exhibits and filed post-hearing briefs. On November 20, the Hearing Examiner issued his report. H.E. No. 99-12, 25 NJPER 27 (¶30010 1998). He recommended dismissal of the Complaint, finding that Local 8-149 had waived its right to negotiate over layoff and recall procedures and that

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1/ Footnote Continued From Previous Page

under this act. (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. (7) Violating any of the rules and regulations established by the commission."

the record did not establish that the Authority knew Vanco was a union steward. While he found that an Authority representative had threatened that layoffs would probably occur if Local 8-149 did not withdraw a grievance from arbitration, he also found that the Authority had decided to layoff Thompson before the threats. He therefore recommended that the 5.4a(3) allegation be dismissed.

On December 3, 1998, Local 8-149 filed exceptions. It maintains that the Authority knew that Vanco was a union steward and requests a remand for the Hearing Examiner to determine whether Vanco was laid off because of his union position. With respect to Thompson's layoff, Local 8-149 claims that the Authority decided to lay off Thompson only after Local 8-149 refused the Authority's request to withdraw a demand for arbitration. It also maintains that the Hearing Examiner applied the wrong legal standard in concluding that the 5.4a(3) allegation should be dismissed. Finally, Local 8-149 excepts to the Hearing Examiner's findings and analysis concerning its alleged waiver of its right to negotiate over layoff procedures. On January 7, 1999, the Authority filed a response urging adoption of the Hearing Examiner's recommendations.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. No. 99-12, 25 NJPER at 27-29) as supplemented by this opinion.

We start with the facts and chronology. For several years, the Authority, at its Commissioners' direction, has been cutting costs by automating procedures, subcontracting services, and combining job titles. In October and November 1993, the Authority informed employees that, as of January 1994, it was eliminating the positions of "process operator/primary" and "process operator/thickener-digester" and creating a new "process operator" title. We add to finding no. 3 that on November 12, 1993, the Authority's assistant director Andrew Doyle advised Local 8-149's chief steward that the Authority was not yet sure whether the "reorganization" would cause any layoffs (R-4). Doyle added that that determination would be made after a study of the staffing requirements in various job classifications (R-4).

In accordance with the parties' agreement, the Authority set the hourly rate for the new processor operator title pending negotiations. On November 30, 1993, after the parties were unable to agree on a new wage rate, Local 8-149 filed a grievance protesting the rate set by the Authority.

In March 1994, the Authority assigned five of the eight employees in the old processor titles to the new process operator position. The three other employees, including Thompson, were temporarily assigned to the maintenance laborer category. We add to finding no. 5 that a March 1994 memorandum to the eight employees stated that "[t]he ultimate status and permanent assignment for these three [temporarily assigned] individuals will be determined through further negotiations with the Union" (R-6).

Local 8-149 did not submit proposals for layoff and recall procedures during negotiations for the parties' July 1, 1995 through June 30, 1998 agreement. It did propose that Thompson be placed in a permanent position, but the Authority responded that Local 8-149 should not push the issue because it might not like what would happen if the Authority had to take action with respect to Thompson.2/

In April or May 1996, Vanco was elected assistant shop steward. In early May 1996, Doyle and Richard Tokarski, the Authority's executive director, asked to meet with Local 8-149. The local was represented by its president, its chief steward and an OCAW international representative, Lawrence Graham. At the meeting, Tokarski stated that the Commissioners were talking about budget constraints and the possibility of cutbacks and were concerned about the grievance load. The parties agreed to contact this agency about developing a labor-management program to create a more productive and cooperative atmosphere.

We supplement finding no. 12 as follows. Sometime before June 11, 1996, Tokarski asked all department managers to determine if they had excess staff (T85). Plant superintendent Arthur

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2/ Of the two other temporarily assigned employees, one resigned and one was selected for a permanent position in another department.

Wright evaluated the staff under his direct supervision and, on June 11, wrote Tokarski that there were six individuals in the "maintenance laborer" job classification; five laborers would be sufficient; and Thompson should be laid off because he was the only one temporarily assigned to the group (T-84; R-14). On June 12, Gary Fortner, maintenance supervisor, advised Wright that he believed the maintenance department could operate with up to three fewer "maintenance men" (R-15). On June 13, Wright wrote Tokarski, attached the Fortner memorandum, and recommended that one maintenance man be laid off (R-16). He recommended Vanco because, of the eight maintenance men, he had the worst disciplinary record (R-16).

On June 14, 1996, Vanco was laid off. On June 17, Graham called Tokarski and asked why Vanco was laid off when they were trying to set up a program to improve the parties' relationship and avoid layoffs. Tokarski responded that the Authority believed the maintenance department was overstaffed and that there would probably be more layoffs if Local 8-149 did not drop the arbitration over the process operator pay rate.

On June 18, 1996, Local 8-149 demanded that the Authority negotiate for mutually agreeable procedures for layoffs and recall of unit members. On June 21, Thompson was laid off. On June 24, the Authority refused to negotiate over layoff procedures. We add to finding no. 12 that the Authority stated that it had no continuing obligation to negotiate because it had a managerial

prerogative to reduce its work force and the agreement gave it the right to use its judgment and discretion in determining which employees should be laid off. It added that it was "prepared to discuss this and any other issues you wish to raise during the next round of bargaining" (CP-1).

Local 8-149 first contends that Hearing Examiner erred in finding that the Authority was unaware of Vanco's union position before it decided to lay him off. We disagree. Union representatives acknowledged at the hearing that they did not provide written notice to the Authority of Vanco's election and Tokarski testified that he was not aware of Vanco's status when he decided to lay him off. While Vanco stated that he had written up a few grievances in the approximately two months he was a steward and had discussed some of them with Wright, the Hearing Examiner did not credit that testimony. He found that Vanco was evasive and that Local 8-149 had not submitted any of the grievances allegedly prepared by Vanco. We have no warrant to disturb the Hearing Examiner's credibility determination or his resulting conclusion that the Authority was unaware that Vanco was a steward when it terminated him. Therefore, there is no need for a remand to determine whether protected activity was a motivating factor in Vanco's layoff. See In re Bridgewater Tp., 95 N.J. 235 (1984)(charging party must prove, by a preponderance of the evidence, that employer knew of the party's protected activity).

We turn next to Local 8-149's challenges to the Hearing Examiner's findings and analysis concerning Thompson's layoff. Local 8-149 first excepts to the Hearing Examiner's conclusion that Tokarski had decided to lay off Thompson before his June 17 warning to Graham that "more layoffs" would probably occur if the union did not withdraw its demand for arbitration. It maintains that the memorandum from Wright to Tokarski recommending that Thompson be laid off was written after the June 17 conversation but was backdated to show a June 11 date, as evidenced by the fact that the June 11 memorandum shows a lower identification number ("2803P") then that on the June 12 memorandum from Fortner to Wright ("2811P"). This numbering by itself, however, does not establish alteration because the documents were typed by different secretaries (and composed by different authors) and no evidence was adduced concerning how or when the document numbers were assigned.

Moreover, we do not agree with the Hearing Examiner that the content of R-14 and R-15 suggests that R-15, the June 12 Fortner document, was written first and may have been misdated. The Hearing Examiner surmised that Wright would not have recommended Thompson's layoff until he received Fortner's memo. But it appears to us that on June 11 and 12, Fortner and Wright were evaluating staffing requirements for different maintenance positions. Fortner evaluated "maintenance man" positions and Wright focused on "maintenance laborers." After Wright received

Fortner's memorandum opining that up to three maintenance men could be laid off, Wright, on June 13, sent that memorandum on to Tokarski and recommended that one maintenance man be laid off. That recommendation appears to have been in addition to his June 11 recommendation concerning Thompson.3/

Similarly, we find no basis to disturb the Hearing Examiner's decision to credit Tokarski's statement that he decided to lay off Thompson before June 17. Tokarski's statement is buttressed, as the Hearing Examiner found, by R-14 and R-15. That the Hearing Examiner had earlier decided not to credit Tokarski's version of his June 17 conversation with Graham did not compel him to discredit his testimony on all points.

Local 8-149 also argues however, that even assuming that Tokarski's decision was made before June 17, the Hearing Examiner applied the wrong legal standard in determining whether he was laid off in retaliation for the union exercising its right to arbitrate a grievance. We agree.

The legal standard for evaluating a 5.4a(3) charge is well established. Under In re Bridgewater Tp., no violation of 5.4(a)(3) will be found unless the charging party has proved, by a preponderance of the evidence, that protected conduct was a

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3/ Wright's June 13 memo does not list Thompson as one of the eight men holding the "maintenance man" position and thus indicates that Wright's June 11 memorandum was concerned with the different "maintenance laborer" position that was held by six men.

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 does not present any evidence of another motive 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. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs about the employer's motives are for us to resolve.

The Hearing Examiner set forth this standard. He found that Local 8-149's refusal to withdraw the process operator grievance from arbitration was a motivating factor in the Authority's decision to lay off Thompson. Nevertheless, he concluded that the 5.4a(3) allegation should be dismissed because the layoff decision was made before Tokarski threatened Graham and

because the decision was "at least in part" legitimately designed to reduce the size of the workforce and lower costs. He also found that dual motivations existed at the time of Thompson's layoff, which occurred on June 21.

We agree with Local 8-149 that a 5.4a(3) charge may not be dismissed based solely on a finding of dual motivation or a conclusion that a decision is "in part" motivated by legitimate business reasons. But, reading the Hearing Examiner's decision as a whole, it is clear that he recognized that, once protected activity is found to be a motivating factor in an adverse employment decision, a 5.4a(3) charge may be dismissed only if the employer proves that it would have taken the adverse action absent the protected conduct.

Against this backdrop, we agree with the Hearing Examiner that the 5.4a(3) allegation should be dismissed. In the absence of employer exceptions, we accept his determination that the union's refusal to withdraw the arbitration demand was a motivating factor in the June 21 decision to lay off Thompson. But we are also satisfied that the Authority has proven, by a preponderance of the evidence, that it would have taken this action even absent the protected conduct. Logically, this element of the Bridgewater standard will usually be satisfied where there is a finding that the decision to take the adverse action was made before the protected conduct occurred. The Hearing Examiner made such a finding, which we have found to be supported by the

record. While the union's subsequent refusal to withdraw the arbitration was a motivating factor in the sense that it reinforced the layoff decision the Authority had already made, we find that the Authority would have laid off Thompson even if the union had not pursued the grievance to arbitration. This conclusion is supported not only by the timing of the Authority's decision, but by the fact that the Authority had long-standing budget concerns; Thompson was placed in a temporary position in 1994; and before the grievance was filed, the Authority advised the union that the reorganization might result in layoffs, depending on the results of its staffing review. Further, the Authority intimated during negotiations for the 1995-1998 agreement -- which were completed in late 1995 -- that Thompson's position was not secure.

Finally, Local 8-149 seeks an order requiring the Authority to negotiate in good faith over layoff and recall procedures. It contends that the Hearing Examiner erred in concluding that it waived its right to negotiate over these issues because it did not raise them in negotiations for the 1995-1998 contract, despite having been advised by the Authority prior to negotiations that layoffs could occur. It contends that it did not seek to negotiate over layoff and recall procedures because the Authority had assured it there would be no layoffs.

The Authority counters that Local 8-149 cites no evidence that the Authority promised not to layoff employees. Further,

while it recognizes that the procedures for implementing layoffs are mandatorily negotiable, see State v. State Supervisory Employees Ass'n, 78 N.J. 54 (1978), it contends that a management rights clause in the 1995-1998 agreement gave it the right to use its discretion and judgment in determining which employees to layoff. It maintains that the parties had already agreed to layoff procedures and that it had no mid-contract obligation to reopen negotiations on this point.

We accept the finding that the Authority made no commitment not to lay off unit employees. However, we hold that the union had not waived its right to negotiate over layoff and recall procedures.

As we recently held in New Jersey Turnpike Auth., P.E.R.C. No. 99-49, 25 NJPER 29 (¶30011 1998), there may be a duty to accept a request to negotiate mid-contract as to subjects which were neither discussed in contract negotiations nor embodied in contract terms. See also Hardin, The Developing Labor Law, pp. 733-737 (3d ed. 1992). That may happen, for example, when an employer's exercise of a managerial prerogative raises issues about mandatorily negotiable employment conditions. The majority representative in such instances bears the burden of demanding negotiations over specific issues. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 99-39, 24 NJPER 520 (¶29242 1998).

Here, the employer exercised its managerial prerogative to layoff employees mid-contract. The majority representative

demanded negotiations over layoff and recall procedures. Those issues are conceded to be mandatorily negotiable. A refusal to negotiate over them violated 5.4a(5) unless the employer had a contractual right to resolve those issues unilaterally or the majority representative had waived its right to demand negotiations.

The parties' 1995-1998 contract did not include layoff or recall procedures so there was no controlling contract provision indicating that the parties had already negotiated over these topics. A management rights clause gave the Authority the right to, among other things, use its judgment and discretion in managing its operations, except as limited by the agreement or law. But that general clause did not in itself establish layoff or recall procedures or indicate that Local 8-149 clearly waived its right to negotiate on this issue. See Hardin, pp. 703-704 (NLRB and federal court cases hold that, by agreeing to a general management rights clause, union does not relinquish right to negotiate over a particular subject not mentioned in the clause).

Further, we find that Local 8-149 did not waive its mid-contract right to negotiate over layoff and recall procedures by not raising those subjects during the previous round of contract negotiations. We recognize that a waiver may be found where a union declines an opportunity to negotiate after being apprised that the employer intends to change existing, or implement new, terms and conditions of employment. State of New

Jersey, P.E.R.C. No. 89-129, 15 NJPER 343 (¶20152 1989); South River Bd. of Ed., P.E.R.C. No. 86-132, 12 NJPER 447 (¶17167 1986), aff'd NJPER Supp.2d 170 (¶149 App. Div. 1987); see also Hardin, pp. 708-710. And the Authority's November 9, 1993 memorandum did advise the union that it was unsure whether the reorganization would result in layoffs. But in our view, that document was not a definitive enough notice of an intent to effect layoffs so as to form the basis for a "clear and unequivocal waiver" of Local 8-149's right to negotiate over layoff and recall procedures. This is particularly so since the Authority later stated that the status of the employees affected by the reorganization would be negotiated with the union -- an issue on which Local 8-149 did submit a proposal. Further, Local 8-149 demanded negotiations as soon as Vanco was laid off.4/

In these circumstances, we conclude that the Authority violated 5.4a(1) and (5) when it refused a demand to negotiate over layoff and recall procedures at the time the Authority announced a layoff. In framing our order, we recognize that the

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4/ The Authority's reliance on Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1998), to support a waiver is misplaced. Middletown explained that a waiver may be found where a representative expressly agreed to a provision authorizing a change or impliedly accepted an established past practice permitting similar actions without prior negotiations. Local 8-149 did not agree to a provision concerning layoff procedures. Nor did the Authority introduce evidence that Local 8-149 previously permitted the Authority to determine, without prior negotiations, procedures for implementing layoff decisions.

1995-1998 contract has expired and that, in June 1996, the Authority offered to negotiate over layoff and recall procedures in the next round of negotiations. However, the record does not disclose whether successor negotiations are completed or whether layoff and recall procedures have been or are being discussed. In this posture, we will order the Authority to negotiate over layoff and recall procedures.

For the reasons stated earlier in this opinion, we dismiss the 5.4a(3) allegation. In the absence of exceptions, we also dismiss the 5.4a(4) and a(7) allegations.

We deny Local 8-149's request for attorney's fees. See Commercial Tp. Bd. of Ed. v. Commercial Tp. Supportive Staff Ass'n, 10 NJPER 78 (¶15043 App. Div. 1983).

ORDER

The Rahway Valley Sewerage Authority is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by refusing to negotiate in good faith with OCAW Local 8-149 concerning layoff and recall procedures.

2. Refusing to negotiate in good faith with OCAW Local 8-149 concerning layoff and recall procedures.

B. Take this action:

1. Negotiate with OCAW Local 8-149 before establishing layoff and recall procedures.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Boose, Buchanan, Finn and Ricci voted in favor of this decision. None opposed.

DATED: February 25, 1999
Trenton, New Jersey
ISSUED: February 26, 1999

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by refusing to negotiate in good faith with OCAW Local 8-149 concerning layoff and recall procedures.

WE WILL cease and desist from refusing to negotiate in good faith with OCAW Local 8-149 concerning layoff and recall procedures.

WE WILL negotiate with OCAW Local 8-149 before establishing layoff and recall procedures.

Docket No. CO-H-97-21

RAHWAY VALLEY SEWERAGE AUTHORITY
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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H.E. NO. 99-12

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RAHWAY VALLEY SEWERAGE AUTHORITY,

Respondent,

-and- Docket No. CO-H-97-21

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO,
LOCAL 8-149,

Charging Party.

Appearances:

For the Respondent, Stanton, Hughes, Diana, Salsberg, Cerra & Mariani, attorneys
(Richard M. Salsberg, of counsel)

For the Charging Party, Kevin Kiernan, attorney

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Rahway Valley Sewerage Authority did not violate the New Jersey Employer-Employee Relations Act by refusing to negotiate layoff procedures with the Oil, Chemical and Atomic Workers International Union, AFL-CIO, Local 8-149. The content of the parties agreement coupled with their conduct demonstrates a waiver of any right to negotiate.

It is also recommended the Commission find the Authority did not violate the Act when it laid off an employee, Kevin Thompson, even though the layoff was in part illegally motivated. The employer threatened to layoff Thompson if an unrelated arbitration proceeding were not withdrawn by the union. The union refused to withdraw the arbitration and Thompson was laid off. However, the Authority had planned to make the same layoff for legitimate business reasons. Where such dual motive exists, the Commission will not find a violation. In re Bridgewater Tp., 95 N.J 235 (1984).

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 99-12

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RAHWAY VALLEY SEWERAGE AUTHORITY,

Respondent,

-and- Docket No. CO-H-97-21

OIL, CHEMICAL AND ATOMIC WORKERS
INTERNATIONAL UNION, AFL-CIO,
LOCAL 8-149,

Charging Party.

Appearances:

For the Respondent, Stanton, Hughes, Diana, Salsberg, Cerra & Mariani, attorneys
(Richard M. Salsberg, of counsel)

For the Charging Party, Kevin Kiernan, attorney

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 19, 1996, the Oil, Chemical and Atomic Workers International Union, Local 8-149, filed an unfair practice charge with the Public Employment Relations Commission alleging that the Rahway Valley Sewerage Authority discriminatorily laid off John Vanco, a shop steward, out of seniority, rather than using established disciplinary procedures. On June 24, 1996 and to the present, the Authority has refused to bargain in good faith with the Union over a procedure for layoff and recall of employees. Further, on June 21, 1996, the Authority laid off Kevin Thompson in retaliation for the Union exercising its lawful right to

arbitrate a grievance. It is alleged that this conduct was violative of N.J.S.A. 34:13A-5.4a(1), (3), (4), (5) & (7) of the New Jersey Public Employment Relations Act[1/]

It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 19, 1997. The Authority filed an answer to the Complaint on February 28, 1997, in which it admits that it laid off John Vanco and Kevin Thompson and the Union did seek to bargain over layoff procedures but it denied all the other allegations of the Complaint. The Authority alleges the Complaint fails to state a claim upon which relief can be granted, the Authority's actions were good faith managerial prerogatives and its actions were in conformance with and satisfied its contractual obligations and applicable law.

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. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (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. (7) Violating any of the rules and regulations established by the commission."

A hearing was held on June 10, 1998, at which time both parties were given an opportunity to examine and cross-examine witnesses, introduce evidence and argue orally. Both parties filed briefs which were received by September 2, 1998.

FINDINGS OF FACT

1. The parties are signatories to a collective negotiations agreement which was effective from July 1, 1995 through June 30 1998. It provides, in pertinent part:

> Article V, Management Rights:
>
> A. The Authority hereby retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it prior to the signing of this Agreement by the Laws and Constitution of the State of New Jersey and of the United States, including, but without limiting the generality of the foregoing, the following rights:
>
> ....
>
> B. The exercise of the foregoing powers, rights, authority, duties and responsibilities of the Authority, the adoption of policies, rules, regulations and practices in furtherance thereof, and the use of judgment and discretion in connection therewith shall be limited by the terms of this agreement provided those terms are in conformance with the Constitution of the State of New Jersey, the Constitution of the United States, the laws of the Sate of New Jersey and of the United States, and Court decisions of the State of New Jersey and of the United States.

Article VIII, Seniority:

> B. Seniority Termination
> Any employee shall be considered discharged and terminated from his/her employment effective when the employee resigns; the employee is discharged; the employee is laid off for a period in excess of one (1) year; upon a leave of absence (not caused by accident or illness) being extended without approval beyond ninety (90) days; upon absence without leave in excess of three (3) consecutive working days without calling in and without justifiable reasons for not calling in and upon failure of an employee to accept a recall, in writing, from a lay off within one (1) working week after receiving notice of recall from the Authority.

2. The Authority is governed by a Commission with 10 members, one member from each town the Authority serves. Richard Tokarski serves as the executive director of the Authority. He is responsible for the personnel functions of the Authority.

3. In March 1994, the Authority eliminated two older titles and placed five employees into the new title of process operator. It was the Authority's contention that many of the former duties of the two old positions had been eliminated so the new job was comparable in terms of both work and responsibility. Therefore, it did not believe that the new position warranted a higher salary. The Union, however, believed that the new job was more demanding and sought to negotiate a higher wage rate. The Authority set its own rate for the new classification as per the collective negotiations agreement. The parties negotiated for a new wage rate but did not reach an agreement. The Union grieved and pursuant to the contract, filed for arbitration of the rate of pay for the new process operator position. On August 6, 1996, an arbirator found the rate

of pay established by the employer was appropriate and dismissed the Union's grievance.

4. The Authority, at the direction of its Commissioners has been cutting costs for seven years. A number of procedures have been automated and services were outsourced (T66, T70). The number of employees in the unit has declined from 40 in 1992 to 27 at the time of the hearing (R.12 in evid.; T70).

5. When the new process operator position was first posted in October 1994, there were eight employees in the old titles. All eight employees bid on the five new positions. On November 12, 1993, the Union was notified that the creation of the new process operator position might result in layoffs (T42). The five new positions were filled on the basis of seniority (R-5 in evid.). The three remaining employees were temporarily assigned to the maintenance labor job classification. Subsequently, one resigned or "took an opportunity to resign" (T63), one successfully bid on a different vacant position and one, Kevin Thompson, remained temporarily assigned.

6. Tokarski believed that Thompson was not needed in the maintenance position but was carried for some time in the hope that a position would become available for him. Although Mark Dudzic, the President of Local 8-149, testified that the Authority gave a commitment to the union that there would be no layoffs, he also admitted that, in November of 1993, the Authority notified the Union, that there might be layoffs (T42, T75). The Union knew

Thompson's position was not secure. In the 1995 negotiations for the current contract the Union sought to have the Authority create a permanent position for Thompson. The Authority suggested that the Union not push this issue for the Union might not like what it might do if it had to take action on Thompson. The Union did not seek to negotiate procedures for a layoff in the 1995 negotiations (T29, T30).

7. In early May, 1996, there was a meeting between the Union and the Authority. The Union was represented by Mark Dudzic, Lawrence Graham, an international representative, and Glen Smith, the Local's chief shop steward. The Authority was represented by Richard Tokarski and Andy Doyle, the assistant director. The Authority contended that the Authority's commissioners were talking about budget constraints and cutbacks might be needed. There had to be a more productive and cooperative atmosphere at the Authority. The Authority was concerned about the large grievance load. It was agreed that the parties enter into a labor-management cooperation program to improve the atmosphere at the Authority. Graham contacted PERC and steps were taken to initiate such a program.

7. A month later, in June of 1996, while Graham was attempting to set up a cooperative program, he was contacted by the Authority. An employee, John Vanco, was accused of insubordination and the Authority wanted to conduct an investigatory interview of Vanco. Both of the Union's shop stewards were on vacation and Vanco wanted Union representation. Graham represented Vanco at the

interview. At the end of the week, on June 14, 1996, Vanco was laid off. Vanco was just made assistant shop steward in April or May of 1996 (T113). There had never been a layoff under the contract before (T32-33, T78) and the Authority did not indicate at the May meeting that it was contemplating an imminent layoff (T33).

8. The record does not establish that the Authority knew that Vanco was a shop steward at the time of his layoff. There was no written notification to the Authority of Vanco's Union office.2/ Tokarski denies he was aware of Vanco's new position (T78). Vanco testified, "if I recall, there were a few grievances written up that I turned in for the Union" as a shop steward (T.114). However, no record of such grievances were ever introduced into evidence. Vanco's testimony was evasive, particularly as to his own disciplinary history (T116) and I do not credit his testimony. Accordingly, although Vanco claims he had quite a few conversations with plant supervisor Arthur Wright in connection with his being shop steward (T114), I cannot accept his testimony. Vanco was called as a rebuttal witness at the end of the hearing and Wright was not present at the hearing.

9. The following Monday, June 17, 1996, Graham called Tokarski and asked why Vanco was laid off while they were trying to set up a program to improve the parties' relationship and avoid layoffs. Tokarski responded that the Authority believed it was

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2/ CP 1 was written after Vanco's layoff.

overstaffed in maintenance and decided to layoff Vanco. Graham further testified that Tokarski also said if the Union did not drop the arbitation concerning the rate of pay for process operators (scheduled to be heard in July, 1996), there were probably going to be more layoffs (T14).

10. Tokarski did not deny the conversation took place. However, he denied he threatened to terminate Thompson if the Union proceeded to arbitration (T75-T76) and he did not recall when he had the conversation (T92-T93). He testified that he told the Union if there was going to be a substantial increase in the hourly rate, it would negatively impact the Authority's budget and other changes would have to be made.

I found Graham's testimony to be forthright and candid while Tokarski's testimony as to the conversation was ambiguous. He never specifically denied he threatened more layoffs if the arbitration was not withdrawn. Rather, he denied he threatened to lay off Thompson. Accordingly, I find Tokarski threatened to lay off employees if the Union did not withdraw the arbitration.

11. One week later, on June 21, 1996, Kevin Thompson was laid off (T82).

12. Tokarski testified that the decision to layoff Thompson was made prior to his conversation with Graham. He had asked Plant Superintendent Wright to evaluate the staff and determine if there was someone that was not needed. Wright recommended Thompson. He was not in a permanent position and the

Authority was always trying to find work for him (T84). In support of this testimony, the Authority introduced a memo from Wright to Tokarski, R-14 in evidence, dated June 11, 1996 and a memo from Gary Fortner to Wright, R-15 in evidence, dated June 12, 1996. The Union points to document numbers which appear on R-14 and R-15 immediately below the secretary identification line. It argues that these number are out of sequence. R-14 is dated June 11, 1996 and numbered 2811P while R-15 is dated June 12, 1996 but numbered 2803P. According to the Union, this shows R-14 was altered by backdating to make it appear that the decision to lay off Thompson was made prior to Tokarski's threat to Graham.

These documents were apparently typed by different secretaries as the initials on the secretary identification line are different. No evidence was introduced by the Union to establish how or when the document identification numbers were assigned.[3/] This inconsistency in document numbering raises a question as to the alteration, but does not prove alteration. Significantly, R-15, Fortner's memo to Wright is not in dispute and this document demonstrates that the Authority was actively considering layoffs on June 11, 1996. R-14 and R-15 buttress Tokarski's testimony that the decision to layoff Thompson was made prior to his conversation with

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3/ It is possible that R-15, a letter to Wright as to the feasibility of reducing the maintenance staff was misdated when first typed. R-14, a letter from Wright to Tokarski recommending layoff, would seemingly have been written after R-15.

Graham. I credit exhibits R-14 and R-15 and Tokaski's testimony and find the Authority made its decision to layoff Thompson before Graham's conversation with Tokarski on June 17, 1996.

On June 18, 1996, the Union demanded the Authority bargain with the Union for mutally agreeable procedures for layoff and recall of bargaining unit members (CP-1 in evid.). On June 24, 1998, the Authority notified the Union that it believed it had no obligation to bargain over such procedures and refused to negotiate.

ANALYSIS

The Union argues that the Authority committed an unfair practice when it refused to negotiate procedures for layoff and recall. The Union acknowledges that the Authority has the right to make layoffs. However, since the contract is silent as to the procedures for layoffs, the Authority had the obligation to negotiate.

The Authority argues that the contract contains certain procedural rights regarding recall from layoff in Article VIII B, Seniority Termination. This language, when read with Article V, Management Rights, grant it the contractual right to layoff and it has no obligation to negotiate the procedures for the layoff.

Since Article VIII B grants recall rights from layoff, it must be inferred that layoffs could take place. Significantly, in November 1994, the Authority notified the Union that there was a possibility that layoffs might occur. Although the Union sought to

negotiate job security for Thompson in the subsequent negotiations it never sought to negotiate layoff procedures. Even assuming Dudzic was reassured that Thompson would not be laid off, under these circumstances, the Union waived its right to negotiate procedures for layoff. Township of Middletown P.E.R.C. No. 98-77, 24 NJPER 28 (¶29016 1997).

Tokarski threatened Graham that more layoffs would occur if the outstanding arbitration was not withdrawn. The Union did not withdraw the arbitration and Thompson was laid off. This action was designed to discourage the exercise of a protected right within the meaning of the Act--the right to use the contract's grievance procedure. However, the decision to layoff Thompson had actually been made before the threat was made.

Under In re Bridgewater Tp., 95 N.J. 235 (1984), to find a violation of 5.4a(3) of the Act, 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. The refusal of the union to withdraw the salary grievance from arbitration was a motivating factor for Thompson's layoff.

However, the record also demonstrates other motives contributed to the layoff. In a dual motive case such as this, 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.

The decision to layoff Thompson was made before Tokarski threatened Graham and the decision, at least in part, was legitimately designed or motivated to reduce the size of the workforce to lower costs. Dual motivations existed at the time of Thompson's discharge. Accordingly, I find the Authorty did not violate the Act and will recommend the Commission dismiss the unfair practice charge.

RECOMMENDATION

I recommend the Complaint be dismissed.

Edmund G. Gerber
Hearing Examiner

Dated: November 20, 1998
Trenton, New Jersey