

P.E.R.C. NO. 87-86

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY, TRAINING
SCHOOL FOR BOYS, SKILLMAN,

Respondent,

-and-

Docket No. CI-86-16-149

DOUGLAS TINSLEY,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a Complaint based on an unfair practice charge filed by Douglas Tinsley against the State of New Jersey, Training School for Boys, Skillman. The charge alleged the State violated the New Jersey Employer-Employee Relations Act when it recommended that Tinsley attend counselling with the Employee Advisory Service in retaliation for filing grievances. The Chairman, in agreement with a Commission Hearing Examiner and in the absence of exceptions, finds that Tinsley did not prove these allegations by a preponderance of the evidence.

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Appearances:

For the Respondent, W. Cary Edwards, Attorney General
of New Jersey (Maureen Adams, Deputy Attorney General)

For the Charging Party, Douglas Tinsley, Pro Se

DECISION AND ORDER

On October 21, 1985, Douglas Tinsley ("Tinsley") filed an unfair practice charge against the State of New Jersey, Training School for Boys, Skillman ("State"). The charge alleges the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (4) and (7),^{1/} when it recommended that Tinsley attend counselling with

^{1/} These subsections 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; (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; and (7) Violating any of the rules and regulations established by the commission."

the Employee Advisory Service ("EAS") in retaliation for filing grievances.

On April 2, 1986, a Complaint^{2/} and Notice of Hearing issued. On April 9, 1986, the State submitted its previously filed statement of position as its Answer. It denies the Complaint's material allegations and asserts that the State's referral of Tinsley to the EAS was not a disciplinary action, but was to assist him.

On May 27, July 9 and 15, 1986, Hearing Examiner Alan R. Howe conducted hearings. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On November 3, 1986, the Hearing Examiner issued his report and recommendation dismissing the Complaint. H.E. No. 87-31, 12 NJPER ____ (¶ ____ 1986) (copy attached). He found that the State was not hostile to Tinsley's filing of grievances and that it acted in accordance with Civil Service regulations in referring him to EAS.

The Hearing Examiner served his report on the parties and informed them that exceptions, if any, were due on November 17, 1986. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (3-10) are accurate. I adopt and incorporate them here.

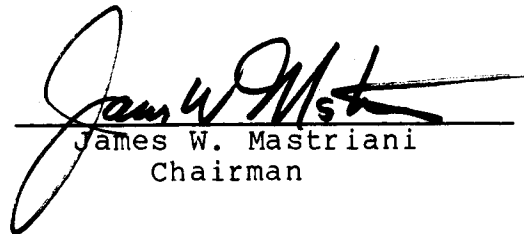
^{2/} A Complaint issued only on the subsection 5.4(a)(1) allegation.

Under all the circumstances of this case, and acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I also adopt his recommendation that the Complaint be dismissed.^{3/}

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
December 30, 1986

^{3/} I have treated the Complaint as also alleging a violation of subsection 5.4(a)(5) in addition to the other allegations and have applied In re Bridgewater, 95 N.J. 235 (1984).

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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-and-

Docket No. CI-86-16-149

DOUGLAS TINSLEY,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent did not violate §5.4(a)(1) of the New Jersey Employer-Employee Relations Act when its supervisor, Michael P. Loughrey, referred Douglas Tinsley, the Charging Party, to the Employee Advisory Service on and after October 3, 1985. Tinsley claimed that he was referred to the Employee Advisory Service by Loughrey because he had filed several grievances on and after September 20, 1985. The Hearing Examiner concluded that Tinsley had failed to satisfy the requisites of Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) in that there was no showing of hostility or animus toward Tinsley in the decision of Loughrey to refer him to the Employee Advisory Service. Tinsley had had problems with supervision and staff since August 1985 and Loughrey was seeking to remedy Tinsley's problems by obtaining counseling for him through the Employee Advisory Service. Thus, the referral by Loughrey was not retaliatory nor motivated by animus because Tinsley had filed several grievances.

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.

H.E. NO. 87-31

STATE OF NEW JERSEY
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Appearances:

For the Respondent
W. Cary Edwards, Attorney General
(Maureen Adams, D.A.G.)

For the Charging Party
Douglas Tinsley, Pro Se

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on October 21, 1985, by Douglas Tinsley (hereinafter the "Charging Party" or "Tinsley") alleging that the State of New Jersey, Training School for Boys, Skillman (hereinafter the "Respondent" or the "State") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that after Tinsley sought to invoke the grievance procedure on two occasions in

September 1985, he received a hearing on his grievances on or about October 1, 1985, following which the hearing officer, Michael P. Loughrey, a supervisor of the Respondent, recommended that Tinsley be referred to the Employee Advisory Service due to his continuing problems with staff, which Tinsley alleges was disciplinary in nature and in retaliation for his invoking the grievance procedure; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (4) and (7) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 2, 1986.^{2/} Pursuant to the Complaint and Notice of Hearing, hearings were held on May 27, July 9 and July 15, 1986, in Trenton, New Jersey,, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral

^{1/} These subsections 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; (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; and (7) Violating any of the rules and regulations established by the commission."

^{2/} The Director of Unfair Practices, having found that Tinsley failed to allege any facts sufficient to support a finding that the Respondent violated §§5.4(a)(4) or (7) of the Act, refused to issue a Complaint as to these subsections. Accordingly, the Complaint and Notice of Hearing issued only on the allegation that the Respondent violated §5.4(a)(1) of the Act but not §§5.4(a)(4) and (7) of the Act.

argument was waived and the parties filed post-hearing briefs by September 11, 1986.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The State of New Jersey, Training School for Boys, Skillman is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Douglas Tinsley is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Tinsley has been a Senior Corrections Officer at Skillman for 6-1/2 years. He is directly supervised by Lt. Andra W. Allen on the 7:00 a.m. to 3:00 p.m. shift. His ultimate supervisor is Michael P. Loughrey, the Director of Custody Operations, who supervises seven lieutenants, two sergeants and 66 corrections officers, who work in twelve cottages in six buildings. For approximately 4-1/2 years prior to September 1985, Tinsley was assigned to the desk in Room 162 in Building 2 on the 7:00 a.m. to 3:00 p.m. shift.

4. Loughrey testified regarding the responsibilities of Corrections Officers on the 7:00 a.m. to 3:00 p.m. shift, namely, the Officers are assigned to cottages housing students and oversee them from the time that they arise through the attendance of classes, during which time the Officers monitor classrooms, hallways and the gym (2 Tr 27, 28). After the students return to their cottages at approximately 3:30 p.m. they are escorted by Officers working on the second shift (2 Tr 29).

5. On September 18, 1985, Tinsley submitted an Incident Report, Form 217-B,^{3/} to Lt. Joyce Burke, regarding the conduct of a teacher, Todd Richter, in the handling of student "DM" (CP-1). Burke, who has supervised Corrections Officers, including Tinsley, since June 1985, testified that Tinsley requested that she sign a hand-written receipt, prepared by Tinsley, evidencing the submission to her of the 217-B. Burke refused to do on the ground that it was not an official form (3 Tr 9).^{4/} On the following day, September 19th, Burke did make a notation on the second page of CP-1, in which

^{3/} This is a report prepared by officers and supervisors at Skillman to alert management to incidents occurring during a shift. Any type of unusual occurrence is to be placed upon a Form 217-B, i.e., altercations involving students and teachers, automobile accidents, staff confrontations, etc. (2 Tr 38-40).

^{4/} Burke corroborated the testimony of Tinsley that his request for a receipt was based on a suggestion by his collective negotiations representative that Corrections Officers get receipts to counter the contention of the administration that there were no incidents (1 Tr 54, 55; 3 Tr 9, 10).

she stated that a copy of the original 217-B was given to her on September 18th, after she had written a 217-B of her own at about noontime on September 19th, which she submitted to Loughrey (3 Tr 11-14; R-8). In R-8, Burke stated that during the morning of September 19, 1985, Tinsley said that he had rewritten the 217-B form of September 18th and requested another receipt, which Burke again refused on the ground that it was not an official form (3 Tr 13, 14). When Tinsley asked Burke if that was her "final word," she replied in the affirmative and Tinsley stated that he would initiate step one of the formal grievance procedure against her (3 Tr 14; R-8). Burke's response was that this was Tinsley's prerogative (R-8).

6. Also on September 19, 1985, Burke reassigned Tinsley from his former post in Room 162 to the Learning Lab (3 Tr 23, 24). Tinsley filed a grievance on the same date, September 19th, claiming that because he has submitted the 217-B to Burke that she harassed him by assigning him to a post he had never been assigned to previously (R-2). Burke testified^{5/} that the Learning Lab post had been created in August 1985, because the administration had requested that Room 162 not be used as a "punishment room" and that the Corrections Officers who had been assigned there be rotated among three posts; Room 162, the Learning Lab and the Gym (3 Tr 7,

^{5/} The Hearing Examiner found Burke to be a credible witness, based on her demeanor and, also, because she was essentially uncontradicted by Tinsley.

8, 20, 23, 25). Further, the Hearing Examiner credits the testimony of Burke that the Learning Lab assignment is a desirable one and that she did not reassign Tinsley to it because he had threatened to file a grievance against her (3 Tr 24,25). Finally, the reassignment of Tinsley to the Learning Lab was of limited duration, namely, less than thirty days (3 Tr 21, 22).

7. At about 1:10 p.m. on September 19, 1985, Tinsley submitted a 217-B to Lt. Allen, which stated that Tinsley had witnessed a threat by a student to commit suicide. Tinsley requested a receipt from Allen but Allen refused, stating that he did not have to comply with Tinsley's request since there was no policy at Skillman requiring him to do so (2 Tr 6-8). Tinsley then told Allen that he was harassing him and that he was going to invoke the first step of the grievance procedure (1 Tr 24; 2 Tr 8). Tinsley filed a grievance, complaining about Allen's refusal to provide him with a receipt, on September 19, 1985 (R-1).^{6/}

8. Loughrey conducted a first level hearing under the grievance procedure as to Tinsley's grievances against Allen and Burke, supra, on October 2, 1985. Loughrey denied both grievances on that date (1 Tr 28).^{7/}

^{6/} Tinsley testified without contradiction that although his grievances against Burke and Allen complained of events on September 19, 1985 (R-1 & R-2), he reduced them to writing on September 20, 1985 (1 Tr 24, 25).

^{7/} Both R-1 and R-2, supra, were processed through the third level of the grievance procedure and denied (see the attachments to R-1 and R-2).

9. On October 3, 1985, Loughrey called Tinsley into his office in the company of Lt. Allen. Tinsley's request for union representation was granted and Allen brought in Paul Liles, a PBA representative. There is no dispute but that Loughrey recommended to Tinsley that he enroll in the Employee Advisory Service (hereinafter "EAS") on the ground that Tinsley was having difficulties with his supervisors. Loughrey testified credibly at the hearing that he had two reasons for suggesting that Tinsley enroll in EAS, namely, the two incidents regarding Tinsley's request for a receipt for submitting a 217-B to Burke and to Allen and confrontations with staff, giving as an example, a grievance that Tinsley filed on August 9, 1985, regarding the refusal of the State to pay a parking ticket (2 Tr 41-45; R-5). Tinsley objected to Loughrey's recommendation that Tinsley enroll in EAS and requested that Loughrey reduce his recommendation regarding EAS to writing (CP-2), which Loughrey did on the same date (CP-3).^{8/} In the third paragraph of Loughrey's October 3rd memo to Tinsley (CP-3, supra) Loughrey stated: "...Again, you are not being directed to attend this service (EAS), however, I am strongly suggesting that you take advantage of the program..."

10. On October 8, 1985, Burke submitted to Loughrey a 217-B, regarding Tinsley's attitude toward her on that date when she assigned him to the Learning Lab (R-6). Burke complained that when

^{8/} Neither party called Liles as a witness.

she asked Tinsley if he understood her direction his only response was to walk away. This incident prompted Loughrey on the same date, October 8th, to send a second memorandum to Tinsley, in which he stated, in part: "...At this time I am required under N.J.A.C. 4:2-20.11 to refer you to this service (EAS). This I deem necessary due to our concern over your continuing problems with staff..." (CP-4).^{9/} Enclosed in Loughrey's October 8, 1985 memo (CP-4, supra) was a pamphlet on EAS (R-7). Loughrey, in testifying at the hearing, stated that page 6 of R-7 required him to refer Tinsley to EAS, referring to paragraph 1, which provides, in part, as follows: "...Civil Service regulations...require you to refer any employees under your supervision to the EMPLOYEE ADVISORY SERVICE should you have concern regarding their work performance..."

12. On October 4, 1985, Tinsley filed a grievance against Loughrey for his having violated the integrity of Tinsley's grievance hearing on October 2, 1985, by performing the dual function of hearing officer and administration representative

^{9/} N.J.A.C. 4:2-20.7 (not 20.11) establishes an Employee Advisory Service under the Department of Civil Service to assist State employees in achieving and maintaining the highest level of job performance of which they are capable. Subsection (b)(2) provides for the referral of employees for counseling if "The employee is experiencing personal problems which are manifested on the job..." Subsection (c) provides, in part: "Appointing authorities should refer to employees to the EAS when an employee's job performance causes concern, rather than relying on a report of job performance..." Subsection (e) provides, in part: "No confidential information concerning an employee referred by his or her supervisor...shall be released except as authorized by the employee..."

(R-3). This grievance was denied after hearing by Loughrey on October 9, 1985, and was processed through the third step with Loughrey being sustained.

13. On October 7, 1985, Tinsley filed another grievance based on his October 3rd meeting with Loughrey where Loughrey recommended that Tinsley enroll in EAS, claiming that Loughrey's recommendation was a reprisal against Tinsley for having "submitted grievances." (R-4). At a hearing on October 9, 1985, Loughrey denied the grievance and was sustained through the third step of the grievance procedure. The Hearing Examiner credits the denial of Loughrey at the hearing that he referred Tinsley to EAS because he had filed grievances. ^{10/} Loughrey testified that it was clear to him that Tinsley understood that the referral to EAS was voluntary, notwithstanding that Loughrey was required to refer Tinsley to EAS. Loughrey's two memoranda to Tinsley on this subject corroborate his testimony (CP-3 & CP-4, supra).^{11/}

14. On October 15, 1985, after Loughrey had scheduled an appointment with EAS, Tinsley appeared and met with Drew, the Chief Counselor, supra. After Drew communicated with Tinsley on January 6, 1986, Tinsley met with him a second time and apparently

^{10/} Loughrey impressed the Hearing Examiner as a truthful witness with no axe to grind against Tinsley.

^{11/} Monroe Drew, Jr., the Chief Counselor of EAS, testified for the Respondent that an employee can say "no" and EAS cannot force attendance, adding that EAS is not disciplinary (2 Tr 18, 22).

nothing has occurred since. Tinsley acknowledged that he had been referred to EAS in 1982 or 1983 by Loughrey for excessive absenteeism. That referral, according to Tinsley, was appropriate but is distinguishable from the October 1985 referral, which he claims was based on his using the grievance procedure, supra.^{12/}

DISCUSSION AND ANALYSIS

The Respondent Did Not Violate §5.4(a)(1) Of The Act When Michael P. Loughrey Recommended That Douglas Tinsley Be Referred To The Employee Advisory Service On and After October 3, 1985.

Under Commission decisions since Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) it is clear that the Bridgewater^{13/} analysis is applicable to alleged violations of the §5.4(a)(1) of the Act in "dual motive" cases. In such cases the New Jersey Supreme Court's decision in Bridgewater dictates the following analysis: In assessing employer motivation (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a substantial or a motivating factor in the employer's decision to discipline; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (95 N.J. at 242).

^{12/} There is no dispute between the parties regarding the job performance of Tinsley as reflected in an evaluation by Lt. Allen on October 31, 1984 (CP-5) and the testimony of Lt. Burke at the hearing (3 Tr 8, 24).

^{13/} See Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984)

The Court in Bridgewater further refined the test in dual motive cases by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity (95 N.J. at 246).

There is no question whatsoever that when Tinsley filed his several grievances, on and after September 20, 1985, he was engaged in protected activity under the Act: Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434 (¶17161 1986); and Hunterdon County Sheriff, P.E.R.C. No. 87-13, 12 NJPER ____ (¶____ 1986). Further, it is clear beyond doubt that the Respondent had knowledge of the various grievances and protected activity engaged in by Tinsley since the grievances were submitted to it for processing.

The problem arises as to whether or not Tinsley has established prima facie that the Respondent was hostile towards his exercise of the protected activity of filing grievances through the conduct of Loughrey. Tinsley's evidence purports to show that Loughrey referred Tinsley to EAS because he filed his several grievances. The Hearing Examiner has credited the testimony of Loughrey, Burke and Allen that their responses to the conduct of Tinsley were not based on his having filed grievances. Tinsley has adduced no independent evidence, which would lead ineluctably to the

conclusion that hostility or animus towards Tinsley was involved in the conduct of Loughrey.

The Hearing Examiner is mindful of the fact that it is rare that direct evidence of hostility can be established and that, therefore, a prima facie case may be inferred by certain employer conduct: Bridgewater, supra, and Sayreville Bd. of Ed., P.E.R.C. No. 86-120, 12 NJPER 375 (¶17145 1986). However, the instant record affords no basis for the Hearing Examiner to draw any inferences of hostility or animus toward Tinsley by Loughrey in his recommendation that Tinsley involve himself with EAS. It is noted that EAS is voluntary and that Tinsley could in no way, under the facts of this case, be compelled to participate in EAS counseling. Loughrey made this clear from the outset, notwithstanding that he felt compelled by the provisions set forth in R-7 to refer Tinsley to EAS. The testimony of Monroe, the Chief Counselor of EAS, corroborates Loughrey vis-a-vis the totally voluntary nature of an EAS referral.

Thus, based upon the first part of the Bridgewater analysis, supra, Tinsley has failed to establish a prima facie case that all of the requisites have been met. However, even if the Hearing Examiner was to assume arguendo that the first part of the Bridgewater test had been satisfied by Tinsley's proofs, he would necessarily conclude that the actions of the Respondent through Loughrey would have occurred even in the absence of Tinsley's protected activity in filing his several grievances. This implicates the second part of the Bridgewater test and analysis.

The decision of Loughrey to refer Tinsley to EAS on and after October 3, 1985, came about because of the conduct of Tinsley, beginning in August 1985. Loughrey testified credibly that Tinsley's grievance of August 9, 1985 (R-5) originated because Tinsley became "upset" over the State's refusal to pay a parking ticket, which Tinsley had incurred (2 Tr 41-43). Further, Loughrey testified credibly that Tinsley's conduct regarding requests for receipts from Burke and Allen for his 217-B's and his claim of harassment for their refusal indicated a "conflict" with supervision (2 Tr 44, 45). Under the circumstances of the provision in R-7, p. 6, supra, Loughrey was acting in accordance with Civil Service regulations when he referred Tinsley to EAS. Additionally, given the totally voluntary nature of referrals to EAS on the part of the referred employee, the Respondent appears to have established that not only did it have a legitimate business justification in referring Tinsley to EAS but Tinsley was under no compulsion to respond to the recommendation.

Thus, under the twofold test of Bridgewater, supra, the Hearing Examiner must necessarily find and conclude that the Charging Party has failed to establish by a preponderance of the evidence that the Respondent violated §5.4(a)(1) of the Act. Accordingly, the Hearing Examiner will recommend dismissal of the Unfair Practice Charge in its entirety.

* * * *

Upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) when Michael P. Loughrey referred Douglas Tinsley to the Employee Advisory Service on and after October 3, 1985.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: November 3, 1986
Trenton, New Jersey