

P.E.R.C. NO. 86-131

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF HEALTH,

Respondent,

-and-

Docket No. CO-86-128-125

COMMUNICATIONS WORKERS OF
AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that an unfair practice charge filed by the Communications Workers of America against the State of New Jersey, Department of Health with the Commission should be consolidated with an appeal filed by Patricia Hegarty with the Civil Service Commission for a hearing before the Office of Administrative Law. The charge alleged the State violated the New Jersey Employer-Employee Relations Act when it removed Hegarty from one Civil Service title and demoted her to her previous title, allegedly in retaliation against her exercise of union activities. Hegarty filed an appeal with the Civil Service Commission challenging her removal from her position. The Commission further holds, in agreement with a recommendation by an Administrative Law Judge, that the Civil Service Commission has the predominant interest to decide the dispute, but that the Commission has jurisdiction to decide the unfair practice issues.

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Appearances:

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

For the Charging Party, Steven P. Weissman, Esq.

DECISION AND ORDER

On November 25, 1985, the Communications Workers of America ("CWA") filed an unfair practice charge against the State of New Jersey, Department of Health ("State") with the Public Employment Relations Commission. The charge alleges that the State violated the New Jersey Employer-Employee Relations Act ("Act"), specifically subsections 5.4(a)(1),(3) and (5), when it removed Patricia Hagerty from her Civil Service title "Health Economics Research Specialist II" prior to the conclusion of her working test period and demoted her to her previous Civil Service title "Senior Training Technician." This action was allegedly taken in retaliation against Hagerty's exercise of protected activities. Specifically, the

charge alleged Hagerty's supervisor issued critical memos concerning her work performance in retaliation against her filing a "discrimination and harassment" grievance and refused to train her in retaliation against her grievance filings.

On October 31, 1986, Hagerty appealed her removal from her position with the Civil Service Commission ("Civil Service").

On February 28, 1986, the Commission's Director of Unfair Practices issued a Complaint and Notice of Hearing. On March 10, 1986, the State filed its Answer. It admitted demoting Hagerty, but denied it was in retaliation against her protected activities. Rather, it contends that "Patricia Hagerty failed to perform in the title...in a satisfactory manner."

On February 13, 1986, CWA filed a motion for consolidation and predominant interest determination with the Office of Administrative Law. It contends that Civil Service and Commission proceedings should be consolidated because both proceedings involve "common questions of fact...and consolidation would save time and expense and avoid duplication and inconsistencies in factual findings." It further contends "PERC should issue a final determination with respect to the allegations contained in the unfair practice charge and that Civil Service should issue a final decision with respect to the question of bad faith."

On February 26, 1986, the State filed its response. It agrees that the matters should be consolidated, but contends "the Civil Service Commission has the predominant interest and should

issue a final decision with respect to all issues in the consolidated proceedings."

On March 31, 1986, Hon. August E. Thomas, A.L.J., issued an "Order on Motion for Consolidation and to Determine Predominant Interest." The ALJ first concluded, in agreement with the parties, that consolidation was appropriate. He then found Civil Service to have the predominant interest. He concluded "the dominant issue in dispute is the matter before the [Civil Service Commission], and its resolution will serve to moot or substantially affect the remaining unfair practice complaints." Therefore, he ordered, in pertinent part:

- (1) Civil Service Commission has the predominant interest;
- (2) absent a finding that the appointing authority acted in bad faith, any remaining allegations of an unfair practice will become moot; and
- (3) a finding of sufficient legal grounds to uphold appellant's charge of unfair practices will vest in PERC the authority to make the final decision after review of the initial decision of the administrative law judge concerning the unfair practice charges.

On April 10, 1986, CWA filed an interlocutory appeal from this decision. It disagrees with the ALJ's conclusion "that a finding of no bad faith pursuant to Civil Service law precludes a finding of an unfair practice violation" and asserts the ALJ's order should be modified to permit PERC to review his legal conclusions with respect to the alleged violations of N.J.S.A. 34:13A-5.4(a)(1) and (3).

On April 17, 1986, the State filed its response. It contends that the Civil Service Commission should hear and decide all the issues...and any other conclusions drawn by Judge Thomas which may be inconsistent with the predominant interest determination should be modified."

We agree with Judge Thomas that these two cases should be consolidated. N.J.A.C. 1:1-14.3. We also agree that, under the circumstances of this case, the Civil Service Commission has the predominant interest. N.J.A.C. 1:1-14.5. Next, we agree, in part, but also disagree in part, with his conclusion that "absent a finding that the appointing authority acted in bad faith [in demoting Hagerty], any remaining allegations of an unfair practice will become moot." To the extent that anti-union animus is equivalent to "bad faith," we agree that the absence of such bad faith would require dismissal of the charge alleging that Hagerty was demoted because of her union activity under the requisite "In re Bridgewater Township, 95 N.J. 236 (1984) test. However, we believe other unfair practice allegations remain even assuming no bad faith existed in the demotion decision. The charge specifically alleges that she was threatened for filing grievances and discouraged from engaging in protected activity which would violate subsections 5.4(a)(1) and (a)(3) of our Act even if these actions did not pertain to the demotion. Accordingly, we direct the Administrative

Law Judge to apply the Bridgewater test to determine whether subsection 5.4(a)(3) was violated^{1/} and the New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979) test^{2/} to determine whether subsection 5.4(a)(1) has been violated.

Finally, under the particular circumstances of this case, we see no reason to disturb the Judge's determination that we have the authority to make the final decision concerning the unfair practice charges. As we have just said, the Civil Service determination would not necessarily moot the unfair practice determination and therefore we may properly decide those remaining issues. N.J.A.C. 1:1-14.8(b).

1/ See also Manchester Regional High School Education Association, P.E.R.C. No. 86-119, 12 NJPER _____ (¶ _____ 1986), where we said: "We emphasize that an examination of the employer's reasons is necessary to apply the test. However, it is not enough that a set of facts exists which could constitute "cause" for the employer action. The employer's burden, assuming the prima facie case has been made, goes beyond a finding of "cause." Rather, it must establish not simply "cause," but more importantly "that the same action would have taken place even in the absence of the protected activity." Id. at 242.

2/ This test provides:
 "It shall be an unfair practice for an employr to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.
Id. at 551, n. 1.

ORDER

The consolidation and predominant interest orders are affirmed. The aspect of the order which moots the unfair practice charge absent a finding that the State acted in bad faith is modified consistent with this opinion.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hipp, Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Horan was not present.

DATED: Trenton, New Jersey
May 21, 1986
ISSUED: May 22, 1986