P.E.R.C. NO.88-147

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

STATE OF NEW JERSEY,

Respondent,

-and- Docket No. CO-H-88-28

COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO against the State of New Jersey. The charge alleged that the State violated the New Jersey Employer-Employee Relations Act when a Dean of Jersey City State College complained to the Council's local president and staff representative that Professor Lawyer had sought union assistance before discussing a grievance with the department and criticized Lawyer for seeking union representation after he was contacted by a union staff representative. The Commission finds that the Dean's comments were permissible.

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Charging Party.

Appearances:

For the Respondent, (Cary Edwards, Attorney General)
(Melvin E. Mounts, Deputy Attorney General)

For the Charging Party, Dr. Thomas Wirth; Bennett Muraskin, on the brief and exceptions

DECISION AND ORDER

On July 21, 1987, the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO ("Council") filed an unfair practice charge against the State of New Jersey (Office of Employee Relations) ("State"). The charge alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when Dean Joseph Weisberg of Jersey City State College: (1) complained to the Council's local president and staff representative that Professor Viiu Lawyer had sought union assistance before discussing a grievance with the department and (2) criticized Lawyer for seeking union representation after he was contacted by a union staff representative.

On October 14, 1987, a Complaint and Notice of Hearing issued. On November 4, 1987, the State filed its Answer denying the Complaint's material allegations.

On December 2, 1987, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On May 5, 1988, the Hearing Examiner recommended that the Complaint be dismissed. H.E. No. 88-53, 14 NJPER ___ (¶_____ 1988). He found, relying on Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981), that the Dean's statements to the local president, staff representative and grievant were permissible comments about labor relations.

On May 17, 1988, the Council filed exceptions. It excepts to the Hearing Examiner's (1) conclusion that Weisberg was trying to resolve an employment matter when he spoke with the union's local president; (2) failing to find that Weisberg was hostile to the union and (3) failing to find that Weisberg's comments to Lawyer and Silberman violated the Act.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-8) are accurate with one exception: Dean Weisberg did not tell Lawyer that she contacted the union prematurely. He said that to the union's staff representative. We adopt and incorporate his other findings here.[1/]

1/ We will not disturb his findings that Weisberg was attempting to resolve an employment matter and was not hostile or uncooperative when speaking with Silberman, the local's president.

This is another case which requires us to balance the employer's right of free speech and the employee's right to be free from coercion, restraint or interference in the exercise of protected rights. Trenton State Coll., P.E.R.C. No. 88-19, 13 NJPER 720, 721 (¶18269 1987). In striking that balance, all the case's circumstances must be examined.

We agree that the Dean's statements to both the Council's local president and staff representative did not violate the Act.[2/] He was speaking on equal terms with experienced union representatives. He was critical of the union's conduct. This criticism may have been unduly harsh since the union was attempting to resolve a matter of utmost importance to one of its members. But the key fact is that the Dean's comments were unaccompanied by threats and could not be deemed coercive.

We also agree that the Dean's comments to Lawyer were permissible. She was not criticized for contacting the union, coerced or threatened. He did criticize the union for what he perceived to be "harassment." But, under Black Horse Pike, he has that right. Compare Trenton State Coll.[3/]

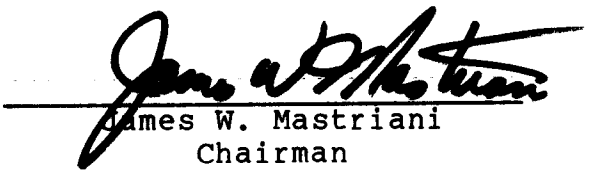
2/ The Council has not excepted to that determination.

3/ The Council has relied on Trenton Bd. of Ed., H.E. No. 88-52, 14 NJPER 319 (¶19117 1988), recommending that the Board violated the Act when it directed an employee to contact the Board rather than the union to resolve a grievance and implied that the employee would be treated differently because union representation was sought. We have adopted that recommendation today. P.E.R.C. No. 88-___, 14 NJPER ___ (¶_____ 1988).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Reid, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Bertolino abstained.

DATED: Trenton, New Jersey
June 23, 1988
ISSUED: June 24, 1988

H.E. NO. 88-53

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

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COUNCIL OF NEW JERSEY STATE
COLLEGE LOCALS, NJSFT-AFT/AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss an unfair practice charge filed by NJSFT, AFL-CIO against the Office of Employee Relations. The charge alleged that a dean violated subsection 5.4(a)(1) of the Act by interfering with employees' exercise of protected activities. The Hearing Examiner finds that the dean's comments to the unit employees contained no veiled or explicit threats or inherently coercive statements. His actions had no tendency to interfere with statutory rights.

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. 88-53

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Charging Party.

Appearances:

For the Respondent
Melvin E. Mounts, DAG

For the Charging Party
Dr. Thomas Wirth, Staff Rep.

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 21, 1987, the Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO ("Union" or "Council") filed an unfair practice charge against the New Jersey Office of Employee Relations ("OER" or "Employer"). The charge alleged that OER violated subsection 5.4(a)(1)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when a dean of Jersey City State College complained to two union representatives

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1/ This subsection prohibits 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."

that a unit employee sought union assistance for an employment problem before discussing the matter in her department and with colleagues. The charge also alleged that the dean complained to the unit employee that a union staff representative "harassed" him in a telephone call.

On October 14, 1987, the Director of Unfair Practices issued a complaint and notice of hearing. On November 4, 1987, OER filed an answer denying the substance of the charge and alleging that the dean's comments to union staff representatives were based upon an agreement between the dean and the local union president and grievance chairman. On December 2, 1987, I conducted a hearing at which the parties presented evidence and examined witnesses. Post-hearing briefs were filed by February 5, 1988. Based upon the entire record, I make the following:

FINDINGS OF FACT

The parties stipulated:

1. OER and the Union have executed a collective negotiations agreement extending from July 1, 1986 to June 30, 1989 (C-3; T5).[2/] The agreement recognizes the Union as the exclusive representative of full-time teaching and research faculty, department chairpersons, administrative staff, librarians and others. The agreement also contains a grievance procedure ending

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2/ "T" refers to the transcript of the hearing.

in binding and advisory arbitrations and includes a "preliminary informal procedure" (C-3).

I find:

2. Viiu Lawyer has been a faculty member in the English department at Jersey City State College since 1972. She has spent most of her time teaching English as a Second Language (ESL). In April 1986, Lawyer was declared legally blind following an attack of optic neuritis. She can no longer read normal size print. In September 1986, Lawyer returned to the College to teach half of her normal course load of six credits per semester. She maintained her salary by exhausting her sick leave (T16).

3. On March 13, 1987, Lawyer sent a memorandum to Joseph Weisberg, Dean of the School of Arts and Sciences at the College, requesting his help in acquiring a print enlarger. Lawyer had been assured in September 1986, that the equipment was ordered (CP-1). She wanted to know if the enlarger would be available before having the make a decision about her teaching load and schedule for the 1987-88 school term. Weisberg acknowledged his receipt of CP-1 which "did not make any direct requests for release time and did not evoke [his] immediate response." Weisberg was not sure when Lawyer requested the equipment. He thought "there was some confusion as to exactly what an enlarger was." (TE3). After Lawyer sent CP-1 to Weisberg, she spoke with Donald Silberman, a faculty member and president of the local, about her disability and teaching schedule for the upcoming school year (T17). Lawyer was

most interested in sabbatical leave. Silberman gave Lawyer the Union, N.J. central office phone number and the names of staff representatives, including Barbara Hoerner (T19).

4. On or about May 5, 1987, Lawyer sent a letter to Weisberg requesting six hours of release time per semester and a limited teaching schedule. Lawyer requested the changes to restructure her courses because blindness made reading a time-consuming task (CP-2). She wrote that her request was based on her long tenure with the College, status in the ESL program, participation in curriculum development, and expertise in areas of instruction. CP-2 concludes: "In view of my present effort to reestablish my self as a handicapped professional, I hope you will support my request for release time. I would welcome a meeting with you in regard to this request. I look forward to hearing from you."

5. On May 20, 1987, Weisberg sent a memoradum to Lawyer (T89; CP-3). He wrote that she would not receive six hours of release time to "rework [the] courses without outside funding of your time." He suggested that she either accept a position at one-half time and one-half pay or teach nine hours each semester and accept three credits of release time to write special materials for the visually handicapped, enabling her to be paid half salary in the 1988-89 school year. Weisberg's memorandum also states that the options are "predicated on the fact that this is suitable to your department and ESL staff, none of whom were consulted prior to

your original memo. Please advise me as to your decision." (CP-3).

6. Donald Silberman is a professor at Jersey City State College and president of the local which represents the faculty. He has held the office for at least six years and has informally resolved "possible" greivances with Weisberg (T63, T89). Sometime in spring 1987, he had a chance meeting with Weisberg on campus in which they discussed Lawyer's employment. Silberman asked Weisberg to grant Lawyer release time. Weisberg declined, but agreed to speak with the College's vice president (T65). After Lawyer received the May 20 memorandum (CP-3), Silberman telephoned Weisberg and covered "the same ground." (T65). Weisberg criticized Lawyer for not speaking with the ESL chairman and objected to her requesting union assistance prematurely. Weisberg also disputed Silberman's contention that Lawyer had accomplished much in the ESL program.

Their testimonies differ about two subjects. Weisberg asserted that he has a "standard practice" of asking the union representative if he is "talking to me as a representative or as a concerned colleague." He recalled Silberman saying "Joe, I'm a concerned colleague in her department" (T85, T86). Weisberg testified that when he speaks with a faculty member as a "colleague" he withholds "privileged information" about third parties. He "rarely comments very much" (T109, T110). If, on the other hand, he speaks with a faculty member as a union

representative, "he might discuss it with him" (T110). Weisberg also testified that in 1986, he spoke with a union representative at the central office in Union, N.J. about the proposed retirement of a unit employee. Afterwards, he spoke with Silberman and the grievance chairperson. "There was concern at the local level the fact that this gentleman was dealing with the Union office and the local did not know about it." (T87). Weisberg testified that he concurred that it was inappropriate to deal with the Union, N.J. office and not work through the local.

Silberman flatly denied that Weisberg asked him if he was speaking as a faculty member or concerned colleague. He denied having an agreement with Weisberg which permitted him to refuse to speak with staff representatives in the central office. Silberman also denied that he agreed with the dean that he would not deal with Council staff without permission of the local or local president (T67, T69, T72). Weisberg's comments to Silberman about Lawyer strongly suggest that he was trying to resolve an employment matter. As the next factual finding shows, Weisberg also spoke with Council staff without "approval" of the local.

7. On May 27, Barbara Hoerner, staff representative for the Council, telephoned Weisberg after she had learned that Silberman had failed to get the dean to reconsider release time for Lawyer (T75). After identifying herself, Hoerner stated that she had spoken with Silberman about Lawyer's request for release time. She mentioned that employers have a duty under federal law to make

reasonable accomodations to handicapped employees (T76). Weisberg did not want to discuss the details of the matter with Hoerner because she was a stranger. Weisberg then responded that Lawyer had not consulted with the department chairperson or the coordinator about the effect her release time would have on staffing (T93). Weisberg also stated that Lawyer should have contacted him rather than Silberman about the problem (T77, T78). Weisberg asserted that it was premature for Lawyer to have contacted the union because she had not exhausted "channels on campus" (T94). Finally, Hoerner asked Weisberg what Lawyer should do. Weisberg suggested that Lawyer should see him about the problem (T77).

Hoerner told Lawyer Weisberg's suggestion and reported that the dean did not wish to discuss or review his decision in the May 20th letter. Lawyer tried several times to meet with Weisberg. In mid-June, she spoke with him in the dean's office (T25). At their ten-minute meeting, Lawyer explained that the first option was not possible and that the second option would be too time consuming. He assured her that the enlarger would be "forthcoming" (T27). Lawyer did not understand at the time that three credits of release time were part of an existing grant to the College (T52). Weisberg told Lawyer that she contacted the union prematurely because she had not exhausted the "channels on the campus" (T94). When she repeated her request for release time, Weisberg denied it and said, "What I really resent is when people like Barbara Hoerner call me

up; I really consider that harassment" (T27). Lawyer did not press her request and the meeting ended (T27).

ANALYSIS

The charge essentially alleges that OER, through the College's dean of arts and sciences, interfered with the exercise of protected rights. N.J.S.A. 34:13A-5.4(a)(1) prohibits a public employer from "interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by this act." Those rights include:

> [T]he right, freely and without fear of penalty of reprimand, to form, join and assist any employee organization or to refrain from any such activity...[N.J.S.A. 34:13A-5.3].

An employer violates subsection 5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. State of N.J. (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987); U.M.D.N.J.-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The tendency of the employer's conduct, and not its result or motivation is the threshold issue. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83).

The Act also grants a public employer the right to express opinions about labor relations provided that the statements are not

coercive. In Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981), the Commission stated:

> A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. [Id. at 503]

Analyzing 5.4(a)(1) cases therefore requires a balancing of two equally important and conflicting rights: the employer's right of free speech and the right of an employee to be free from coercion, restraint or interference in his exercise of protected activities. See County of Mercer, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985).3/

The Union alleges that some of Weisberg's comments to Silberman, Hoerner and Lawyer constitute unlawful interference. I find that Weisberg's comments to Silberman do not violate §5.4(a)(1). Silberman has been president of the local for six years and has informally resolved several potentially grievable matters with Weisberg. No evidence suggests that their relationship,

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3/ The Commission's standard mirrors that developed in the private sector under the Labor Management Relations Act, 29 USC §141 et seq. See NLRB v. Gissel Packing Co., 395 US 575, 71 LRRM 2481 (1969). In determining whether a statement is coercive, the National Labor Relations Board considers the "total context of the situation from the standpoint of employees over whom the employer has a measure of economic power." NLRB v. E. I. Dupont Nemours, __ F.2d __, 118 LRRM 2014, 2016 (6th Cir. 1984).

collegial or union/management, was marked by coercion. The settings of the two conversations were informal. Weisberg's comments were largely his opinions of the merits of Lawyer's request for release time and of her accomplishments as a faculty member. His complaint that she requested union assistance prematurely was neither the basis nor the focus of the conversations. It contained no veiled threat and was not inherently coercive. Weisberg essentially voiced his dismay over the procedural path Lawyer's complaint was taking. His detailed testimony about the "appropriate channels" a faculty member should follow to resolve a work place problem corroborates that concern. Regardless of the merits of his view, I find that Weisberg's criticism of Lawyer to Silberman was an employer's legitimate comment about labor relations. It did not tend to interfere with the exercise of statutory rights.

OER's failure to secure a print enlarger and Weisberg's denial of requests for release time frustrated Lawyer. Delays in arranging the June 1987 meeting exacerbated her anxiety. In the dean's office, Weisberg and Lawyer reviewed the merits of her request and the alternatives for a reduced teaching schedule in the 1987-88 term. Weisberg then criticized Lawyer for not having processed her complaint appropriately. In fact, Lawyer had simply availed herself of statutory rights by seeking union assistance in resolving a problem that had started long before the May meeting. Nor was Lawyer fairly criticized for the heated telephone conversation between the dean and Hoerner. That conversation did

not breach the "employee representative's right to criticize those actions of the employer which it believes are inconsistent with [good labor relations]." Black Horse Pike Reg. Bd. of Ed. Considering Lawyer's dedicated and persistent efforts to continue her profession in spite of her disability, and her measured attempts to get OER to provide some assistance, I find Weisberg's criticism hardly supportive of the labor relations process. Weisberg however, did not violate the Act: his complaints of union "harassment" and failure to "follow channels" does not rise to the level of veiled or explicit threats or inherently coercive statements found in other cases where the Commission sustains independent violations of §5.4(a)(1). See In re City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd on other grounds, 162 N.J. Super 1 (App. Div. 1978); Mine Hill Tp.; Black Horse Pike Reg. Bd. of Ed.; Commercial Tp. Bd. of Ed.; Mercer County, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985); State of N.J. (Trenton State College); State of N.J. (Dept. of Human Services), P.E.R.C. No. 88-8, 13 NJPER 642 (¶18242 1987). That Lawyer may have actually been discouraged from continuing the meeting does not meet the burden of proof; the standard requires the employer's actions to have reasonably tended to interfere with the exercise of statutory rights. Although Weisberg expressed dissatisfaction with attitudes and activities which he found inconsistent with good labor relations, his comments were permissible under Black Horse Pike Reg. Bd. of Ed.

I recommend that the Commission dismiss the complaint.[4/]

Jonathon Roth, Hearing Examiner

DATED: May 5, 1988
Trenton, New Jersey

4/ To the extent that the charge alleges that Weisberg's comments to Hoerner violates 5.4(a)(1), I recommend that it be dismissed. Hoerner is not an "employee" within the meaning of the Act and cannot personally assert statutory rights.