

P.E.R.C. NO. 79-97

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WESTERN MONMOUTH UTILITIES
AUTHORITY,

Respondent,

-and-

Docket No. CI-79-42-65

TIMOTHY GRAHAM,

Charging Party.

SYNOPSIS

In the absence of exceptions, the Commission adopts the Hearing Examiner's recommendation that the Complaint be dismissed in its entirety. The Charging Party failed to prove that the Authority was aware of the Charging Party's exercise of protected activity.

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TIMOTHY GRAHAM,

Charging Party.

Appearances:

For the Respondent, Morton P. Kramer, Esquire

For the Charging Party, Pasquale Menna, Esquire

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on February 1, 1979 by Timothy Graham alleging that the Western Monmouth Utilities Authority (the "Authority") engaged in unfair practices within the meaning of the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act") by terminating Mr. Graham on September 8, 1978 allegedly for his activities on behalf of a union being organized among the employees of the Authority. This action was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.

A hearing was held before Commission Hearing Examiner Alan R. Howe who, following a hearing on April 9, 1979, issued his Recommended Report and Decision on April 12, 1979, H.E. No. 79-39, 5 NJPER ____ (¶ ____ 1979). Utilizing the standard developed by the Commission in In re Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977), the Hearing Examiner concluded that the charging party failed to meet its burden of proof in proving

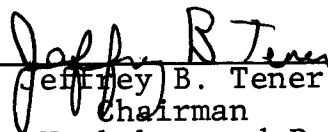
the allegations contained in the complaint. The evidence revealed that Mr. Graham was not prominent among the employees who attempted to organize the employees of the Authority nor did the Authority have any knowledge of organizational activities on behalf of the two unions involved by Mr. Graham. Furthermore, there was evidence which indicated that Mr. Graham's discharge was not without legitimate cause.

Having reviewed the record ourselves, and noting the absence of exceptions to the Hearing Examiner's Recommended Report and Decision,^{1/} the Commission hereby adopts the findings of fact and conclusions of law contained within the Hearing Examiner's Report. The Commission, therefore, will dismiss the complaint in its entirety.

ORDER

For the reasons set forth and upon the entire record, it is hereby ORDERED that the complaint herein is dismissed.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Newbaker and Parcels voted for this decision. Commissioners Graves and Hipp voted against this decision.

DATED: Trenton, New Jersey
May 22, 1979
ISSUED: May 23, 1979

^{1/} N.J.A.C. 19:14-7.3(b) provides in part that, "Any exception which is not specifically urged shall be deemed to have been waived."

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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- and -

Docket No. CI-79-42-65

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Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices against the Authority, which alleged that the Authority had on September 8, 1978 terminated Timothy Graham on account of his union organization activities in 1977 and 1978.

The Hearing Examiner found that the Authority had no knowledge of any activities of Graham on behalf of two unions which were involved in organizing employees in 1977 and 1978. Further, the Hearing Examiner found that Graham had failed to prove any anti-union animus or any causal connection between Graham's exercise of protected rights under the New Jersey Employer-Employee Relations Act and his termination. The Hearing Examiner credited the Authority's contention that it had no knowledge of any union activities by Graham and that it terminated him for reasons unrelated to the exercise by Graham of any union activity.

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.

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WESTERN MONMOUTH UTILITIES AUTHORITY,

Respondent,

- and -

Docket No. CI-79-42-65

TIMOTHY GRAHAM,

Charging Party.

Appearances:

For the Western Monmouth Utilities Authority
(Morton P. Kramer, Esq.)

For Timothy Graham
Shebell & Schibell, Esqs.
(Pasquale Menna, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 1, 1979 by Timothy Graham (hereinafter the "Charging Party" or "Graham") alleging that the Western Monmouth Utilities Authority (hereinafter the "Respondent" or the "Authority") had 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 the Authority terminated Graham as of September 8, 1978, allegedly for Graham's activities on behalf of a union being organized among the Authority's employees, which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act. ^{1/}

^{1/} These Subsections prohibit 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."

It appearing that the allegations of the above charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 1, 1979. Pursuant to the Complaint and Notice of Hearing, a hearing was held on April 9, 1979 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Both parties argued orally at the conclusion of the hearing and waived the filing of post-hearing briefs.

An Unfair Practice Charge having been filed with the Commission, a question concerning an alleged violation of the Act, as amended, exists and, after hearing and after consideration of the oral argument 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 Western Monmouth Utilities Authority is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

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

3. Graham was hired by the Authority on December 3, 1975 as a septic truck driver. His training for the position was acquired on the job. Graham worked 40 hours per week with occasional overtime on Saturdays and Sundays when emergencies arose.

4. Over the course of his employment Graham received periodic hourly wage increases with his last increase being 25¢ an hour in February 1978. At the time of his termination Graham was earning \$5.55 per hour.

5. Graham suffered compensable injuries on the job on the following dates after commencing employment: December 10, 1975; January 31, 1976; May 26, 1976; October 13, 1976; January 19, 1978 and July 24, 1978. All of these injuries were duly reported to the Authority and on all but two of the occasions Graham lost some time from work.

6. According to Graham union organization began sometime in 1977 and continued into 1978. Initially the employees were seeking to organize with the International Brotherhood of Teamsters but this was abandoned in favor of organization for an independent union known as the Personnel Committee/Western Monmouth Utilities Authority. Graham signed an authorization card for the Teamsters and

also signed a petition for the Personnel Committee, which he also circulated for signature among other employees. Graham was not on the Committee, which consisted initially of Michael Ruppel, John Farrell, Ronald Sackowitz and Daniel Hutt. The initial committee was later reconstituted as the Personnel Committee and included as its principal members Martin Ferry, James Germann, Michael Ruppel and Devone Lamberson.

7. Graham claimed that although he was not on either the initial or the subsequent Committee he assisted the members of the Committee and, in particular, made safety an issue in the efforts at union organization.

8. A petition for certification of representatives was filed with the Commission in the name of the Personnel Committee/W.M.U.A. by Ferry, Germann, Ruppel and Lamberson on July 3, 1978: Docket No. RO-79-1. The said petition was withdrawn on November 1, 1978 after the Personnel Committee/W.M.U.A. was voluntarily recognized by the Authority on a date prior to the withdrawal of the petition.^{2/} No collective negotiations agreement had been consummated as of the date of the hearing.

9. The record contains no evidence that the Authority ever acquired knowledge of any organization activities on behalf of either union by Graham. Graham did testify that he was threatened just before Christmas in 1977 by Eunice Bowers, the General Manager of the Authority, in her office. Graham stated that Bowers said that the Authority had always treated Graham "good", that he had had alot of accidents and that the "union couldn't do much for you." Graham construed this as a threat.

10. Graham also testified that a supervisor, George Tracy, had told him that "Mrs. Bowers has it in for you - she'll burn you." Graham said that this was related to him sometime in 1976 or 1977 although Graham acknowledged on cross-examination that Tracy had been terminated in 1976. Graham also acknowledged on cross-examination that Mrs. Bowers had never indicated to him that he would be terminated if he pursued union activities.

11. Mrs. Bowers testified credibly for the Respondent that she never threatened Graham in any manner and that she did not know that Graham was involved with union organization. She also credibly testified that she never sought to discourage union activity by any employee of the Authority.

^{2/} The data for this finding was obtained by the Hearing Examiner post-hearing from the records of the Commission.

12. Two quarterly personnel report forms were received in evidence, which were prepared by Graham's supervisor, James Germann, and which covered the period January 1 through August 1, 1978 (R-1, R-2). The first of these reports covering the period January 1 through May 1 indicated that Graham's performance was "average". However, the second report covering the period June 1 through August 1 showed clearly that Graham's performance was considerably "below average".

13. The Respondent also submitted two memos from James Germann to Eunice Bowers dated, respectively, July 25 and August 17, 1978, which were negative as to Graham's performance in his job (R-3, R-4).

14. At the meeting of the Commissioners of the Authority on September 5, 1978, the first meeting following Germann's memo of August 17 (R-4), Graham's performance was the subject of consideration and the Commissioners instructed Mrs. Bowers to terminate Graham as of September 8, 1978.

15. Under date of September 6, 1978, Mrs. Bowers arranged for the personal delivery to Graham of a letter advising him that he was terminated as of September 8, 1978 (CP-3). The said letter of termination in substance states that Graham is deemed a high risk and accident-prone employee and that his services must be terminated in the best interests of co-employees and the Authority.

16. The action of Mrs. Bowers on September 6, 1978 was ratified by the Commissioners of the Authority at a regular meeting on September 19, 1978 (CP-4).

THE ISSUE

Did the Respondent Authority violate the Act when it terminated Timothy Graham as of September 8, 1978?

DISCUSSION AND ANALYSIS

The Respondent Authority Did Not Violate Subsections (a)(1) and (3) of the Act When It Terminated Timothy Graham

The Commission in Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977) adopted the following standard in cases alleging a violation of Subsection (a)(3) of the Act:

"...A violation of N.J.S.A. 34:13A-5.4(a)(3) should be found if it is determined that a public employer's discriminatory acts were motivated in whole or in part

by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the effect of so encouraging or discouraging employees in the exercise of those rights.

"Application of this two-fold standard will normally involve a preliminary showing by the Charging Party of two essential elements. There must be proof that the employee was exercising the rights guaranteed to him by the Act, or that the employer believed said employee was exercising such rights, and proof that the public employer had knowledge, either actual or implied, of such activity.

"...Discriminatory acts by employers, even if only partly motivated by an employee's union activities, or acts that would discourage exercise of such rights, would clearly tend to frustrate the express intent of the Act.

"Furthermore, the two-fold test upholds the employer's legitimate prerogative to discharge, suspend or refuse to promote employees for reasons unrelated to union activities. The employer may take such action for any cause or no cause at all as long as it is not retaliatory. It is the Charging Party that must prove its case by the preponderance of the evidence (citing N.J.A.C. 19:14-6.8)." (Emphasis supplied in part) (3 NJPER at 72)

See also, 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); pet. for certif. granted, 78 N.J. 404 (1978).

In Haddonfield, supra, the Commission agreed with the Hearing Examiner in that case that the Charging Party had failed to meet its burden of proof by a preponderance of the evidence. So, too, must the Hearing Examiner conclude in the instant case.

According to Graham's own testimony he was not in any sense a leader in the efforts of the Authority's employees to organize a union. He was on neither of the four-man Committees and, notwithstanding that he said that he assisted the Committees, he in no way stood out from other employees of the Authority who had signed the authorization cards for the Teamsters and the petition for the independent, who were interested in seeing a union organized. There is no evidence that Graham was instrumental in any way in bringing about ultimate recognition by the Authority of the Personnel Committee/W.M.U.A.

The Hearing Examiner has found that the Authority had no knowledge

of any organizational activities on behalf of either union by Graham (Finding of Fact No. 9, supra). Clearly, Graham was not threatened by Eunice Bowers in her office just prior to Christmas 1977 since Graham's own testimony plainly does not indicate a threat by Bowers. It is noted by the Hearing Examiner that the alleged threat by Bowers to Graham took place nine months prior to his discharge and could not conceivably be deemed causally connected to termination. Graham's testimony that George Tracy told him Bowers "has it in for you - she'll burn you" took place in 1976 and was clearly remote in time from the termination on September 8, 1978 (Finding of Fact No. 10, supra).

The Hearing Examiner credits Bowers' testimony that she never threatened Graham in any manner and did not know that he was involved with union organization. The Hearing Examiner has also accepted her testimony that she never sought to discourage union activity by any employee of the Authority (Finding of Fact No. 11, supra).

From the record in this case the Hearing Examiner finds and concludes that the Authority had some cause for its decision to terminate Graham. As indicated in the Findings of Fact Nos. 12 and 13, supra, Graham's job performance had suffered in the several months before his termination. The Authority acted on this data at its first meeting following the last memorandum of August 17, 1978 (R-4) when it instructed Bowers to terminate Graham as of September 8, 1978.

While the letter of termination refers to Graham's "high risk" and being "accident-prone" this is merely the emphasis which Mrs. Bowers decided upon in setting forth the reasons for termination. The reasons were not pretextual. As noted in the above-quoted portions of the decision of the Commission in Haddonfield, the test adopted by the Commission for a Subsection (a) (3) violation clearly recognizes the prerogative of the employer to suspend and/or discharge "...for reasons unrelated to union activities" and, further, that the employer "...may take such action for any cause or no cause at all as long as it is not retaliatory..."

The Hearing Examiner finds and concludes that the actions of the Authority herein were not retaliatory and were not related to any union activities in which Graham participated. Graham, having failed to prove any anti-union animus by the Authority toward him and, further, having failed to prove any employer knowledge of his alleged union activities as well as any causal

connection between his activities and his termination, the Hearing Examiner must recommend dismissal of the Complaint.

* * * *

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

CONCLUSIONS OF LAW

The Respondent Authority did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it terminated Timothy Graham on September 8, 1978.

RECOMMENDED ORDER

The Respondent Authority not having violated the Act, supra, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: April 12, 1979
Trenton, New Jersey