P.E.R.C. NO. 99-114

STATE OF NEW JERSEY
BEFORE THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of	:	
ALFRED VAN SLYCK,	:	
Appellant,	:	OAL Docket No. CSVLT-11039-97N
v.	:	
VILLAGE OF RIDGEWOOD,	:	
Respondent.	:	
VILLAGE OF RIDGEWOOD,	:	
Respondent,	:	
-and-	:	PERC Docket No. CI-H-98-24
ALFRED VAN SLYCK,	:	
Charging Party.	:	

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Village of Ridgewood. The Complaint was based on an unfair practice charge filed by Alfred Van Slyck alleging that the village violated the New Jersey Employer-Employee Relations Act by terminating him because of his activities as a shop steward for Local 29, RWDSU, AFL-CIO, the recognized collective negotiations representative of the Village's blue collar employees. Van Slyck also filed an appeal with the Merit System Board. The Complaint and the Appeal were consolidated by joint order and an Administrative Law Judge held a hearing. The ALJ issued an Initial Decision containing findings of fact and conclusions of law for review by each agency. With respect to the unfair practice charge, the ALJ concluded that the employer's hostility toward the charging party's protected activity led to its decision to terminate him. The Commission holds that the ALJ did not adequately consider Van Slyck's disciplinary record when she concluded that his termination evidenced anti-union animus because another employee involved received only a three day suspension. The Commission finds that the other evidence the ALJ relied on is insufficient to establish a nexus between Van Slyck's activities as a shop steward and his termination.

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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Charging Party.	

Appearances:

For the Appellant-Charging Party, John Russo, attorney

For Respondent, Grotta, Glassman & Hoffman, attorneys (Beth Hinsdale, of counsel)

DECISION

On April 18, 1997, Alfred Van Slyck, an employee of the Village of Ridgewood, was terminated allegedly for violating a Village policy and defying the order of a Village manager. Van Slyck, a civil service employee, appealed to the Merit System Board ("MSB") and the matter was transmitted to the Office of Administrative Law for determination as a contested case.

In addition, on October 16, 1997, Van Slyck filed an unfair practice charge with the Public Employment Relations Commission alleging that the Village violated the New Jersey Employer- Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(3),[1/] by terminating Van Slyck because of his activities as a shop steward for Local 29, RWDSU, AFL-CIO. Local 29 is the recognized collective negotiations representative of the Village's blue collar employees.

On November 21, 1997, the Commission's Director of Unfair Practices issued a Complaint.[2/]

The Appeal and the Complaint were consolidated by joint order of the Commission Chair and the MSB. P.E.R.C. No. 99-16, 24 NJPER 432 (¶29199 1998). The joint order provides that: (1) following a hearing, the assigned Administrative Law Judge will provide both agencies with findings of fact and conclusions of law disposing of all issues in controversy through a single initial decision under N.J.S.A. 1:1-18.3 and consistent with N.J.A.C. 1:1-17.8(a); (2) on transmittal of the initial decision to both

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1/ This provision prohibits public employers, their representatives or agents from "Discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

2/ The charge also alleges that the Village harassed Van Slyck for having engaged in protected activity on several occasions. All of these alleged incidents of harassment occurred more than six months before the filing of the charge.

agencies, the underlying record will be forwarded to the Commission to determine whether Van Slyck engaged in activity protected under the New Jersey Employer-Employee Relations Act and whether that activity, if protected, was a substantial or motivating factor in his termination; and (3) the Commission's decision and the complete record will then be sent to the Merit System Board which will then determine whether Van Slyck's termination was for legitimate business reasons and was otherwise warranted under Merit System law. The order further provided that, if appropriate, the matter will be returned to the Commission for consideration of whether specialized relief is warranted under its Act.

On February 16, 1999, Administrative Law Judge Margaret M. Hayden issued her Initial Decision. It identified the issues, listed the uncontested facts, and summarized the testimony of each witness as to contested facts. Relying primarily on the testimony of five "non-involved" employees, she concluded that: (1) a policy against non-Fleet Services personnel being in the garage was not enforced and was not clearly applicable to the employees' eating at the garage coffee break table during their unpaid half-hour lunch break; and (2) Van Slyck did not disobey a supervisor's directive nor did he challenge the supervisor. The ALJ concluded that the Village had not met its burden of proving, by a preponderance of the evidence, that Van Slyck was guilty of insubordination. Her Initial Decision recommended that the Merit

System Board dismiss the charges against Van Slyck and order him reinstated with back pay.

With respect to the unfair practice charge, the ALJ evaluated the evidence in light of In re Bridgewater Tp., 95 N.J. 235 (1984). She found that it was undisputed that Van Slyck engaged in protected activity of which the employer was aware. She concluded that the employer's hostility to Van Slyck's activity led to the Village's decision to terminate him. She stated that while there was no direct evidence of hostility to Van Slyck's union activity, DPW supervisors and managers in the DPW resented Van Slyck because he consistently and forcefully stuck up for the men in the blue collar unit.

The ALJ also concluded that hostility was demonstrated by disparate discipline resulting from the lunch table incident. She noted that Andre Sofianek, who challenged and disobeyed a supervisor, only received a 3-day suspension and Van Slyck, who had a lesser role, was terminated. The ALJ found that Van Slyck was also treated differently when, after an incident involving a fire to a vehicle he was operating, a supervisor "wrote him up" even though other employees were not disciplined for the same alleged transgressions. She also inferred hostility from the fact that non-Fleet employees regularly ate at the garage table during lunch without being disciplined.

On March 17, 1999 the Village filed exceptions. On April 1, the charging party filed a response.

We have reviewed the record. We adopt the portion of the Initial Decision labeled "undisputed facts" which are included in our numbered findings of fact.[3/] Based upon the entire record, including the exhibits, we find these facts:

1. At the time of his termination, Alfred Van Slyck had been employed by the Village for nine years and was a heavy equipment operator in the Street Division of the Department of Public Works ("DPW").

2. The DPW has several divisions, among them the Street Division headed by Robert Rohl and the Fleet Services Division headed by Joseph Loprieno. Rohl and Loprieno report to David Baker, the DPW Director.

3. Van Slyck was a shop steward in the Street Division for Local 29 of the RWDSU, AFL-CIO, the recognized collective negotiations representative of the Village's blue collar employees.

4. A 1995 report on the possibility of privatizing the Village's garage operations had cited having non-garage staff in the work area as "presenting both interference and a safety hazard to its operations."

5. In May 1996, to curb that practice, the Village adopted this policy:

> Effective 2400 hours June 2, 1996, all Village of Ridgewood personnel are hereby directed to:
>
> 1. NOT enter the work areas of the Fleet Services operations.

3/ The parties executed a stipulation of uncontested facts.

> 2. NOT interfere or converse with the Fleet Services mechanics while they are working on equipment or vehicles.
>
> 3. NOT enter into the area of the coffee break table which is located within the Fleet Services work area.
>
> 4. Contact Mr. Joseph Loprieno, Fleet Services Manager, or Mr. Fred Schrader, Supervising Mechanic, regarding work scheduling, work status, emergency work, etc., only!
>
> The only exception to this directive is when a non-Fleet Services employee is aiding a mechanic with a piece of equipment/vehicle with the permission and knowledge of the Fleet Services management.
>
> Village employees that fail to follow this directive are subject to disciplinary actions.

6. Mechanics assigned to the garage and other DPW employees had a half-hour unpaid lunch break between noon and 12:30 p.m. No work was normally performed in the garage during the lunch break. Workers ate at the table which the policy identifies as the "coffee break" table.

7. Some Street Division employees, Van Slyck among them, regularly ate lunch at the table. Although another lunch area was available to them, these non-Fleet Services employees preferred the garage table because no smoking occurred there. Van Slyck ate lunch at the table for seven years. The composition of the lunch crowd, both Fleet Services and Street Division employees, was so stable the workers had "de facto" assigned places at the table.

8. Both before and after April 15, 1997, no Street Division employee was disciplined for, or barred from, eating lunch at the garage table between noon and 12:30 p.m.

9. Before April 15, 1997, Van Slyck had received three separate multi-day suspensions: a three-day suspension in 1990, a five-day suspension in 1992, and another five-day suspension in 1996 with a final written warning that any subsequent transgression would result in termination. Insubordination was among the charges in all three cases.

10. The 1990 and 1995 suspensions were sustained by separate arbitrators. Each commented that Van Slyck did not appear to understand the common workplace rule that an employee given a directive should obey it and then file a grievance.

11. After receiving the final warning, Van Slyck was involved in these four incidents:

A. Drug Testing On November 6, 1996, unit employees were being drug tested for the first time. Van Slyck was at a work site and received radio calls from other employees asking him to be present as a shop steward during the testing. Van Slyck left to go to the testing. He was accused of leaving without permission, lying about it and refusing an order to go back to his work site. Rohl recommended that Van Slyck be fired, but Baker decided not to institute any discipline because it was the first drug test in the Village.

B. Vehicle Fire On January 2, 1997, a piece of Village equipment Van Slyck took out on the street lacked a fire extinguisher and an operable radio. It caught fire. As many Village vehicles lacked fire extinguishers, Van Slyck was not faulted for the damage. Van Slyck had not filled out a pre-operational report, a common transgression, but later he allegedly pre-dated one. Neither Rohl nor Baker recommended termination.

C. Uniform selection On February 20, 1997, during a uniform selection meeting, Van Slyck,

with Rohl and two other supervisors present, became angry and refused to sign a selection form. He profanely demeaned the selection procedure and the uniforms. Although Rohl recommended termination, Baker decided against it after Van Slyck relented and signed the form the next day.

D. Paycheck On March 20, 1997, Van Slyck left work early because of sickness. Before leaving, Van Slyck went to Finance and picked up his paycheck early, allegedly lying to office personnel that he had permission from his foreman. No discipline was recommended.

12. Memoranda prepared by supervisors about these incidents were placed in Van Slyck's personnel file but were not shown to him.

13. Article XXIII of the Village-Local 29 agreement, effective January 1, 1996, provides that employees have a right to notice of new information placed into their personnel files and to respond.

14. In early April 1997, Baker alerted Loprieno and other supervisors that the operations of the garage and the DPW were about to be reviewed by an outside consultant. The DPW managers feared that privatization might result and again looked to keep non-Fleet Services personnel out of the garage. Copies of the policy adopted the previous year were posted.

15. About a week before the incident that triggered Van Slyck's termination, Loprieno approached John Maratene, a Street Division supervisor whose subordinates included Van Slyck and Sofianek. Loprieno told Maratene about Baker's directive. He also described a recent incident where Maratene's employees had

gathered at the garage table before the lunch break. Maratene then told Sofianek, Van Slyck and at least one other employee that Loprieno's concern was that non-Fleet Service employees were coming into the garage about twenty minutes before the noon lunch break. According to Maratene, Van Slyck expressed his disdain for the policy with an expletive. Van Slyck denied this. The policy was also posted in the Street Division employee locker room. Van Slyck acknowledged seeing the notice.

16. On April 15, shortly after 9 a.m., Loprieno approached Charles Pladey, a Street Division employee who was finishing his morning coffee break at the table in the garage. Pladey had once been a supervisor and the acting DPW superintendent. Loprieno told Pladey not to be in the garage, warning him that someone's "head was going to roll" for violating the policy. Pladey left.

17. At 11:45 a.m., Loprieno, seeking to enforce the policy, sat at the garage table to do some paperwork. No other non-Fleet Services employees entered the garage between 11:45 and noon, when worked stopped in the garage and the lunch break began.

18. At 12:05 p.m., some mechanics were already seated at the table with Loprieno. Van Slyck and Sofianek entered the garage. Sofianek went straight to the table and Van Slyck to a washroom. As Sofianek sat down, Loprieno told him that he was not allowed to eat at the table. Loprieno directed Sofianek to leave. Sofianek balked at this, responding, "you're not a cop."

19. When Van Slyck emerged, Sofianek and Loprieno were already engaged in their argument. Van Slyck asked what was going on. Upon finding out that Loprieno wanted to bar non-Fleet Services employees from eating their lunch at the table, he allegedly commented, "this is bullshit." The confrontation started with and primarily involved Sofianek and Loprieno. Loprieno did not order Van Slyck to leave the garage.

20. When Loprieno realized that Van Slyck and Sofianek did not want to leave, he threw up his hands and went back to his office to contact the DPW Director. Baker told Loprieno to immediately type up a report of the incident, and a separate memo about the "20 minutes before Noon" gathering a week earlier.

21. Loprieno's written accounts of the incidents contain no recommendation concerning discipline. Baker decided that Van Slyck should be terminated and his recommendation was adopted by the Village Manager, Larry Worth. Rohl, who had twice urged that Van Slyck be fired, was on vacation when the incident occurred.

22. On April 18, Van Slyck was summoned to a meeting with Baker. His union representative was with him. Baker gave him a Preliminary Notice of Disciplinary Action and told him that he was terminated effective immediately.

23. On April 21, Sofianek was notified that he would be suspended for three days for having refused to comply with Loprieno's directive that he leave the garage.

24. On May 16, Worth presided at a hearing, after which he issued a decision upholding the termination.

Analysis

The allegation that Van Slyck was discharged in retaliation for his exercise of protected rights must be viewed in the proper context. Under In re Bridgewater Tp., 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a 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 did not present any evidence of a motive not illegal under our Act 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. Id. at 242. 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.

Our application of the first part of the Bridgewater standards under the joint order with the MSB must consider that this employee had received his final disciplinary warning and could be terminated for any new transgression.

The employer does not dispute that Van Slyck engaged in protected activity of which it was aware, but the Village argues that the record fails to show that Van Slyck's termination was motivated by hostility to his union activities. It asserts that had the DPW officials harbored animus, Van Slyck would have been terminated after one or more of the four incidents which occurred between his "final warning" suspension and the discharge. It notes that Baker would not accept Rohl's recommendation for discharge in two of those cases and that Rohl, whom union witnesses identified as the most hostile to Van Slyck, was on vacation at the time Van Slyck was terminated. It also stresses that the ALJ's "disparate treatment" finding is faulty because it fails to consider Van Slyck's history of discipline and Sofianek's unblemished record. The employer asserts that the different penalties reflect progressive discipline, not disparate treatment.

No direct evidence shows that the termination was the result of the employer's hostility toward Van Slyck's protected activity. That some supervisors were annoyed when Van Slyck stood up for his co-workers does not establish that anti-union animus motivated his termination. We note in particular that Rohl, the supervisor alleged to be the most hostile to Van Slyck, was away at the time.

We now consider whether hostility can be inferred. An arbitration award issued on July 19, 1996 sustained a five-day suspension given to Van Slyck as a result of a December 1995 incident. The sanction was the third multi-day suspension Van Slyck had received and was accompanied by a warning that any future transgression would warrant termination. We thus conclude that anti-union animus does not account for the disparity in the disciplinary sanctions received by Van Slyck and Sofianek. We believe that Van Slyck's prior record is the reason his disciplinary sanction was a discharge rather than a suspension or reprimand. We reject the assertion in the charging party's response to the exceptions that his suspensions were the product of anti-union animus and establish that the discharge was retaliatory.

The ALJ also concluded that hostility could be inferred from the fact that anyone at all was disciplined for having lunch at the garage table between noon and 12:30 p.m. Though the ALJ found that the policy did not apply to the lunch break, we do not find that its (arguably mistaken) application by Loprieno in that circumstance shows anti-union hostility. The record contains no evidence to establish that Loprieno was hostile to Van Slyck's union activities. Van Slyck was not the chief steward and only represented employees in the Street Division. As Loprieno supervised Fleet Services, he did not deal with Van Slyck about union issues or grievances.

We also find that Rohl's reactions to one or more of the four incidents between Van Slyck's final warning and his discharge do not show a link between Van Slyck's protected activity and his termination. And given the facts of this case, we cannot conclude that Baker's decision to fire Van Slyck was tainted by anti-union animus as he declined to follow Rohl's recommendations that Van Slyck be fired after the drug testing and uniform selection incidents.

The charging party argues in its response to the exceptions that the placement of memoranda in his personnel file involving the drug testing, vehicle fire, uniform selection and paycheck incidents (R-6 though R-10) violated the agreement and shows hostility to his actions as a shop steward. The retention of those documents in the personnel file without notice to Van Slyck arguably violates the contract clause providing for employee access to personnel files and notice to them of new insertions. However, those memoranda were not used as reasons to terminate Van Slyck and under these circumstances the Village's failure to inform Van Slyck about them does not establish hostility to his union activity.

Thus, we conclude that the ALJ did not adequately consider Van Slyck's disciplinary record when she concluded that his termination evidenced anti-union animus because the other employee involved received only a three day suspension. We also conclude that the other evidence she relied upon does not

establish a nexus between Van Slyck's activities as a shop steward and his termination.

We agree with the ALJ that the policy prohibiting non-Fleet employees from congregating at the garage table did not clearly apply to lunch time nor was Van Slyck directly told to leave the garage table during the incident involving him, Sofianek and Fleet Services supervisor Loprieno. Her conclusion that the employer did not sustain its burden of demonstrating that Van Slyck was guilty of insubordination will be reviewed by the Merit System Board. Our dismissing the Complaint in the unfair practice proceeding does not compel the Merit System Board to reach any particular conclusion with respect to the matters within its jurisdiction. Regardless of its final determination, there will be no need for us to consider this matter further as Van Slyck is not entitled to any relief under the Act.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn and Ricci voted in favor of this decision. None opposed. Commissioner Boose was not present.

DATED: June 22, 1999
Trenton, New Jersey
ISSUED: June 23, 1999