H.E. NO. 87-30

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

In the Matter of

BELLEVILLE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-86-184-132

BELLEVILLE AIDES AND BUS DRIVERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the Board violated 5.4(a)(3) and, derivatively, (a)(1) when it reduced the hours of its bus drivers and bus aides in retaliation for their assertion of protected rights. As a remedy, the Hearing Examiner recommends a restoration of the hours of bus drivers and aides to the status quo ante, with the right to all statutory benefits accruing thereby.

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.

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Appearances:

For the Respondent, Schwartz, Pisano & Simon, Esqs.
(Nathanya Simon, Esq.)

For the Charging Party, Zazzali, Zazzali & Kroll, Esqs.
(Paul L. Kleinbaum, Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On July 17, 1986, the Belleville Aides and Bus Drivers Association filed an Unfair Practice Charge with the Public Employment Relations Commission. The Association alleged that the Belleville Board of Education violated N.J.S.A. 34:13A-5.4(a)(1) and (3),[1/] of the Act when, in retaliation for organizational rights

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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; and (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."

asserted by the Association, it reduced the hours of bus drivers and aides on January 13, 1986, from 20 hours to 17-1/2 hours per week.

On March 14, 1986, the Board filed an Answer denying all allegations contained in the Unfair Practice Charge, and stating affirmatively that, as a matter of Board directive, part-time school bus drivers and attendants are to work approximately 17-1/2 to 18-3/4 hours per week.

It appearing that the allegations of the charge, if true, might constitute an unfair practice, a Complaint and Notice of Hearing was issued on March 5, 1986. An evidentiary hearing, at which the parties examined witnesses, presented evidence and argued orally, was conducted on May 12, 1986.

Thereafter, following the granting of requests to file briefs, the Association filed a post-hearing memorandum on June 30, 1986. The Board filed a post-hearing brief on July 2, 1986. The Association filed a reply memorandum on July 9, 1986.

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

FINDINGS OF FACT

1. The Belleville Board of Education is a public employer within the meaning of the Act (T 8).

2. The Belleville Aides and Bus Drivers Association is a public employee representative within the meaning of the Act (T 8).

3. On November 27, 1985, the Belleville Aides and Bus Drivers Association wrote to Board Secretary Appleton requesting

recognition of their union (CP-1). Thereafter, on December 13, 1985, the Belleville Aides and Bus Drivers Association wrote to Appleton asserting that under N.J.S.A. 18A:30-2, bus drivers, bus aides and classroom aides are entitled to health benefits including sick leave, and to enrollment in the Public Employees Retirement System (CP-2). The Board acknowledged receipt of both communications during December, 1985 (T 97). Following the Board's refusal to grant voluntary recognition, the parties entered into a consent agreement for an election on January 10, 1986, which was conducted on February 10, 1986 (J-5).[2/]

4. It has been an unwritten policy for six years that part-time bus drivers and bus aides would work 20 hours per week or less in order that they not be eligible to receive health benefits under the State Health Benefits Plan, which benefits would have represented considerable expense to the Board (T 59-60). However, the bus drivers and aides, themselves, were unaware of this policy (T 18-19; T 30). Moreover, prior to January 10, 1986, every bus driver and aide employed by the Board, with the exception of Lisa Dellaterza, worked 20 hours per week (J-1).[3/] On January 10, 1986, the Board, through its secretary, Edward Appleton, advised all bus drivers and aides that their hours were to be reduced for

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2/ The Belleville Aides and Bus Drivers Association was elected as the majority representative at the February 10, 1986 election.

3/ Dellaterza worked 23 hours and 45 minutes per week.

budgetary reasons (J-1; T 19, 30, 80). Appleton testified that this change was made as a result of his sudden realization that benefits had to be paid for employees who worked 20 or more hours per week, and not more than 20 hours per week, as he had thought (T 79). Appleton further testified that this reduction was "triggered" by the employees' assertion of their right to organize.(T 97).

5. Belleville has had a long history of cost and budgetary problems resulting, in part, from its relative lack of success in achieving passage of its proposed budgets on a year-to-year basis (T 54-55).[4/] Since 1980, and possibly before, the Board has been attempting to modify some procedures and make certain other personnel changes in an effort to conserve expenditures; however, it never before sought to cut the hours of bus drivers and aides (T 60, 68-69, 71).[5/] Despite all this, however, prior to the 1985-86 school year there existed a larger than usual dollar surplus, collectively, for all departments (T 55). Prior to the 1985-86 school year, however, the defeat of the budget and the sudden increase in insurance costs (T 75-76) required a concerted effort to cut costs wherever possible. Thus, it took certain measures to reduce costs (T 79-80, 99-100, 106-107).

4/ Only two budgets have been passed in the last 27 years.

5/ The Board asserts that this was because it believed they were not entitled to benefits for the hours they worked; however, this rationale seems questionable in light of the fact that as soon as they asserted protected rights, their hours were cut.

However, after the Board became aware of the increased budget difficulties for the 1985-86 school year and at the time it acted to make modifications to deal with the "crisis" (October 1985), it made no effort to reduce any employee's hours (T 77). Instead, the Board concerned itself with route consolidations (T 78). Thus, it was not until after the Board's receipt of CP-2 in December 1985, that it acted to reduce the hours of bus drivers and aides. Prior to January 10, 1986, bus drivers and aides consistently worked 20 hours per week (T 87-88).

LEGAL ANALYSIS

The Charging Party asserts that the Board violated §(a)(3) and, derivatively, (1), by its unilateral reduction in the hours of bus drivers and aides, in retaliation for their organization and assertion of rights pursuant to statute, which rights were demanded as a direct result of their organization. In support, the Association cites the Supreme Court's decision in In re Bridgewater Tp., 95 N.J. 235 (1984). There the Court held that:

> ...the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating factor or a substantial reason for the employer's action. [citation omitted] Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place in the absence of the protected activity. Id at 44. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense. Under Bridgewater, the charging party can

> establish a prima facie case by showing that the employees were engaged in protected activity, that the employer knew of this activity and that the employer was hostile towards the exercise of protected rights. [Id at 246].

The critical element in the Bridgewater test is the requirement that the employer was hostile toward the protected activity. While that may be established by inference, it is not sufficient merely to establish "the presence of anti-union animus." Rather, the test requires that such animus be a "motivating force or substantial reason for the employer's action." Bridgewater at 242. Then, even assuming the Charging Party is able to establish a prima facie case, the employer is free to offer a valid business justification for its action, and in the event of a finding that the action would have been taken in the absence of the protected activities, no violation will be found. Bridgewater, supra.

Here, the Association asserts that the employees' organization constituted the exercise of protected activity, and that the Board, by virtue of correspondence between the Association and itself, was aware of the employees' exercise of protected rights. I agree. The Association further argues that hostility may be inferred by the timing of the Board's reduction in hours on January 10, 1986, following the employees' request for recognition and benefits in December 1985.[6/]

6/ The issue of suspicious timing can be a valid element of the employer's hostility toward the exercise of protected right. See eg., Downe Township Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, 9 (¶ 17002 1985).

Furthermore, the Charging Party relies on testimony from the Board's business administrator in which he admitted that the Board's action was "triggered by the fact that these employees were now beginning to assert their rights to organize" (T 97). The Association further asserts that having made out a prima facie case, the Board's proffered business justification based upon budgetary restraints, does not establish that aides and bus drivers' hours would have been reduced in the absence of their protected activity.

The Board argues that despite the employees' exercise of protected activities and its knowledge thereof, the timing of its reduction in hours for bus drivers and aides is not evidence of its hostility toward the exercise of protected rights, but instead, largely coincidental, and actually occasioned by the realization that these employees' schedules qualified them to receive benefits which they had not been receiving, and which would cost the Board a great deal of money. Thus, the Board asserts that these facts constitute a rationale which precludes a finding of hostility. The Board further argues in the alternative that, even assuming a finding of hostility from the facts of this case, these same facts constitute a valid business justification for its actions, and; thus, preclude a finding of a violation under Bridgewater, supra.

The Board further relies on a series of Hearing Examiner's decisions in support of its position.

The Board cites Dennis Tp. Board of Education, H.E. No. 83-6, 11 NJPER 549 (¶16192 1985), as support for its position that

the Association has failed to make out a prima facie case, as there is "sufficient credible evidence in the record to show that consideration of reduction of hours and cuts to be made in the budget necessitated by serious financial problems were deliberated and considered long before January 1986." I disagree. Although I determined that the Board has been faced with budgetary concerns for some years, I find that prior to December 1985, the Board had, at best, considered only consolidation of runs wherever possible, but never considered an across-the-board reduction in hours for all bus drivers and aides.

The Board next cites Atlantic City Convention Center Authority, H.E. No. 85-27, 11 NJPER 68 (¶16034 1985). That case dealt with a charge of retaliation in the form of a letter of warning and a denial of sick days following close in time, and in retaliation for a grievance filed by the employee. There the Hearing Examiner reasoned that timing alone does not prove a violation of §(a)(3) and derivatively (a)(1); but, instead, the charging party must meet the twofold test established in Bridgewater, supra. Furthermore, the proofs supported the conclusion that the employer would have taken these actions even in the absence of protected activity. Thus, a legitimate business justification. Here, however, the Board tolerated the bus drivers and aides working 20 hours per week for a period of at least six years. The Board asserts that it was unaware of this situation and its ramifications; however, it should have been aware. Then, when

finally made aware by the new Association in the form of a request for rights guaranteed by statute, it acted to reduce hours. Therefore, it appears clear that it was only the employees' assertion of a right, occasioned by their organization, that prompted the Board into action. Thus, I would differentiate Atlantic City, supra, on this basis.

The Board next cites Spotswood Board of Education, H.E. No. 85-43, 11 NJPER 382 (¶ 16139 1985). It argues that the Spotswood Board's proffered business justification was that prior to the implementation of layoffs, it had knowledge of fiscal problems and the necessity for cuts involving labor. Thus, its business justification was legitimate. Here, however, although the Board had some prior knowledge of fiscal restraints and difficulties, these restraints and difficulties had been going on, in varying intensity, for at least six years.7/ The Board always took actions to help defray costs, but never considered cutting hours of bus drivers and aides. It wasn't until these bus drivers and aides asserted protected rights that the Board took its action. It, thus, seems logical to conclude that had these rights not been asserted, the Board would have been content to proceed as before. Thus, this case contains factual differences from Spotswood, supra, which are

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7/ According to the Board witnesses, this reached "crisis" stage approximately 4 or 5 months before the Board cut the bus drivers and aides' hours (See testimony at T 75 indicating that the Board became aware of its increased insurance costs during the Summer of 1985).

significant, and from which the element of hostility in the Association's prima facie case can be inferred.

Finally, the Board cites Ridgefield Park Board of Education, H.E. No. 85-51, 11 NJPER 468 (¶16169 1985). The Board asserts that Ridgefield Park is comparable to this case in that in both, there is no direct evidence of anti-union motivation and the decision made by management was based upon other considerations which were independent of employees' protected activities. Further, the Board asserts that in Ridgefield Park, the Hearing Examiner determined that the Board's action did not really interfere with, restrain or coerce any employee in the exercise of rights under the Act, that further union activity took place subsequent to the employer's action and that there was an absence of any testimony or evidence that the employees were acting under fear of reprisal.

Here, although the Board asserted a valid business justification for its action, I did not credit its assertion based upon (1) the long-standing fiscal difficulties experienced by the Board and its continual decisions to address them by other means, (2) the Board's failure in the face of such allegedly serious fiscal problems to cut any other employees' positions or hours except by attrition (See T 81), (3) the Board's failure to reduce hours of bus drivers and aides in October of 1985 after becoming aware of its increased insurance costs during the summer, and its decision instead to concentrate on route consolidation (T 99), and (4) the eventual decision in January 1985, to reduce the hours of bus

drivers and aides such a short time after these employees asserted rights under the PERC Act and under N.J.S.A. 18A:30-2. Thus, I disagree with the Board that there is a fatal lack of indirect evidence to sustain the charging party's "necessary burden of proof concerning anti-union animus," and I find instead that the employer failed to meet its burden in establishing that its action would have occurred in the absence of the employees' protected activities. Accordingly, I find that the Board's actions did interfere with the employees' exercise of protected rights, and were discriminatory in regard to a term and condition of employment set by statute. I distinguish Ridgefield Park, supra, on this basis.

In State of New Jersey, Dept. of Higher Education, P.E.R.C. No. 85-77, 11 NJPER 74 (¶ 16306 1985), aff'd App. Div. Dkt. Nos. A-2920-84T7 and A-3124-84T7 (4/7/86), the Commission decided a case which is applicable to these proceedings. In that case, until 1980, certain part-time clerical and professional employees at Kean College consistently worked 20 hours or more per week. These employees and other part-time employees were paid on an hourly basis and did not receive any fringe benefits. Thereafter, one of the affected employees protested this situation by filing a petition, signed by several other part-time employees, with the Governor's Task Force, on January 9, 1980. She forwarded a copy of the petition to the college's president. The petitioning employee spoke at Task Force hearings in January 1980, and prior to speaking, advised the College's Registrar of her intention. The Registrar

advised the employee that she could speak, but it would not "do any good; if anything it might make things worse." The Assistant Registrar also so advised the employee. Thereafter, in February 1980, shortly after the employee's actions, the hours of the college's part-time employees were reduced to a maximum of 20 hours per week. Subsequently, the Registrar advised the petitioning employee that the College could not afford to pay part-time benefits and that if it were required to do so, it would make more sense to terminate such employees.

In July 1980, the College notified its part-time employees that it intended to reduce their hours to 15 per week. In September 1980, the hours of part-time employees were in fact reduced to 15 hours per week. On October 26, 1980, the College confirmed, in writing, that because of the "fiscal cut backs in appropriations," part-time employees would not be permitted to work more than 15 hours per week. In addition, cutbacks were made in the purchase of library books, equipment, travel, and adjunct expenditures.

The officials involved in reducing the hours did not know how much money would be saved by this measure, nor was a study instituted to determine the amount of the savings. New part-timers were hired after this policy was initiated, however. The college employed slightly over 200 part-time employees, most of whom worked more than 20 hours per week until February 1980. Prior to this date, the college had stated that part-time employees were not to work more than 20 hours per week, but had never enforced that

intention. In 1978, for example, the college's personnel officer reminded supervisors that part-time employees should not work more than 20 hours per week. This memorandum was issued several months after part-time employees petitioned the registrar for certain fringe benefits. Nevertheless, many part-time employees, with the college's knowledge and acquiescence, continued to exceed this limitation.

In affirming the Hearing Examiner's finding of a violation, the Commission reasoned as follows:

> Here, the charging party has established the elements of a prima facie case. First, the filing of the petition with the Governor's Task Force constituted protected activity. E.g., Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228 (1977). The College's management employees knew of the petition and were hostile to the assertion of such right. This hostility was graphically evidenced by Babey's assertion that part-time employees might have to be terminated if they were to be deemed eligible for benefits and the other supervisors' statements that things would get worse in the event Demel spoke to the Task Force.
>
> In agreement with the Hearing Examiner, we do not believe the employer established that the reduction in hours was for legitimate business reasons. The direct evidence is to the contrary. Demel's uncontradicted testimony was that in July 1980 Westman told her that "Demel had made matters worse and because of what I had been doing, the hours would be cut." Indeed, we agree with the Hearing Examiner that the clear inference is that the hours were reduced to 15 in an attempt to defeat these employees' claims to contractual coverage. Further, little fiscal planning was evident regarding this decision. No calculation was made to determine the amount of money to be saved. The hours had never been reduced before under other fiscal difficulties. Nor were any other reductions made from the full-time work force. In light of the strong prima facie case established, we simply cannot accept the employer's proffered

> justification. Accordingly, we conclude that the College violated subsection 5.4(a)(3)....[11 NJPER at 81]

Here, although we don't have a Board spokesman advising the employees not to assert their rights, all of the other facts are comparable. Both cases deal with a situation that had gone on for a long period of time; the employer's action was taken soon after a claim, by the employees, for rights owing to them -- there by contract and here by statute; and despite the presence of previous fiscal difficulties, this action had never been taken, although many of the same facts had existed previously and for enough time to have taken corrective action.

Therefore, I find the Commission's decision in New Jersey Department of Higher Education, supra, to be supportive of the finding of a violation in the instant matter, and I recommend that the Commission find that the Belleville Board of Education violated §5.4(a)(3) and derivatively (1) when it reduced the hours of bus drivers and aides on January 10, 1986.

Therefore, it is recommended that the Commission issue the following:

ORDER

The Respondent, Belleville Board of Education is hereby ORDERED to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by reducing the hours of employment for bus

drivers and aides because they exercised protected rights by organizing and seeking health benefits, sick leave and participation in the State pension plan in accordance with State statute.

2. Discriminating in regard to a term and condition of employment to discourage employees in the exercise of rights guaranteed to them by the Act, particularly by taking the same actions described in paragraph 1, supra.

B. Take the following affirmative action:

1. Forthwith offer to all bus drivers and aides, the opportunity to restore their hours to the status quo ante, and provide them with all statutory benefits accruing thereby.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt, what steps the Respondent has taken to comply herewith.

Marc F. Stuart
Hearing Examine

Dated: October 31, 1986
Trenton, New Jersey

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by reducing the hours of employment for bus drivers and aides because they exercised protected rights by organizing and seeking health benefits, sick leave and participation in the State pension plan in accordance with State statute.

WE WILL cease and desist from discriminating in regard to a term and condition of employment to discourage employees in the exercise of rights guaranteed to them by the Act, particularly by taking the same actions described in paragraph 1, supra.

WE WILL forwith offer to all bus drivers and aides, the opportunity to restore their hours to the status quo ante, and provide them with all statutory benefits accruing thereby.

Docket No. CO-86-184-132 BELLEVILLE BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.