

H.E. NO. 92-36

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

In the Matter of

CUMBERLAND REGIONAL SCHOOL  
DISTRICT BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-149

CUMBERLAND REGIONAL EDUCATION  
ASSOCIATION and EDWARD WHALEN,

Charging Party.

**SYNOPSIS**

A Hearing Examiner of the Public Employment Relations Commission denied a motion and cross-motion for summary judgment. After reviewing the summary judgment standards, the Hearing Examiner concluded that material factual issues remained in dispute that could not be resolved in a summary judgment proceeding.

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Appearances:

For the Respondent, Gruccio, Pepper, Giovinazzi, DeSanto & Farnoly, attorneys (Thomas P. Farnoly, of counsel)

For the Charging Party, Selikoff & Cohen, attorneys (Steven Cohen, of counsel; Carol H. Sapakie, on the motion)

HEARING EXAMINER'S DECISION ON MOTION AND  
CROSS-MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission on November 21, 1989 by Cumberland Regional Education Association and Edward Whalen alleging that the Cumberland Regional School District Board of Education violated subsections 5.4(a)(1) and (3) of the New Jersey Public Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by terminating Association President Edward Whalen because of the exercise of his protected activity. Charging Party further alleged that Whalen's termination had a chilling effect on the Association and interfered with the protected rights of other members of the Association's unit. A Complaint and Notice of Hearing was issued on

December 8, 1989. The Respondent filed an Answer on January 17, 1990 denying it violated the Act and raising certain defenses.

Hearings were held on April 4, August 6, 7, 8, and December 10 and 13, 1990; and February 4, March 4, 7, and 8, 1991. The Charging Party presented its entire case, resting on March 4, 1991. The Respondent moved to dismiss at that time. I applied traditional motion to dismiss standards which required me - for purposes of the motion only - to draw all favorable inferences in favor of the party opposing the motion. See Dolson v. Anastasia, 55 N.J. 2 (1959); North Bergen, P.E.R.C. No. 78-28, 4 NJPER 15 (¶4008 1978); N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979).

By applying those standards I was satisfied that at least a scintilla of evidence existed to support Charging Party's allegations. Thus, I issued a bench decision denying Respondent's motion. (8T87-8T91).<sup>1/</sup> In my bench decision I found that the Charging Party had established that Mr. Whalen engaged in protected activity and that the Respondent was aware of that activity. But I also clearly explained that I was not finding whether the Charging Party met the third standard established in Bridgewater Tp. v. Bridgewater Tp. Pub. Wks. Assn., 95 N.J. 235 (1984), i.e. proving that the Respondent was hostile to Whalen's exercise of protected activity (8T87, 8T90). I only found that with favorable inferences there was enough evidence to require the Board to proceed. I

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<sup>1/</sup> 8T refers to the transcript of March 4, 1991, the eighth day of hearing.

further explained that the inferences I drew in deciding the motion had no bearing on how I would draw inferences after examining the case as a whole (8T89).

The Respondent began the presentation of its case on March 7, 1991, but we had not finished with the examination of its first witness by the close of hearing on March 8, 1991.

On January 14, 1992 the Charging Party filed its Motion for Summary Judgment with the Chairman. The Respondent's brief in opposition to Charging Party's Motion, and its own Cross-Motion for Summary Judgment was filed with the Chairman on February 25, 1992. Pursuant to N.J.A.C. 19:14-4.8(a) these motions were referred to me for consideration on March 10, 1992. On March 23, 1992 the Charging Party filed a late response to the Respondent's Cross-Motion. Despite the late response, I have reviewed all of these pleadings.

Summary judgment practice before the Commission is guided by N.J.A.C. 19:14-4.8, by the Court's decision in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-77 (1954), and by developing case law. In considering a motion for summary judgment all inferences or doubts are drawn against the moving party and in favor of the party opposing the motion. No credibility determinations may be made, and the motion must be denied if

material factual issues exist.<sup>2/</sup> A motion for summary judgment should only be granted with extreme caution, and the summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 117 N.J. Super. 182 (App. Div. 1981); Essex Cty. Ed. Services Comm., P.E.R.C. No. 83-65, 9 NJPER 19 (¶14009 1982); N.J. Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

In Judson the Court explained that the role of a judge in a summary judgment procedure:

... is to determine whether there is a genuine issue as to a material fact, but not to decide the issue if he finds it to exist. 17 N.J. at 73.

The Court further explained that:

Issues of credibility are ordinarily for the trier of fact, and the judge does not function as a trier of fact in determining a motion for summary judgment. 17 N.J. at 75.

Having considered the parties arguments, and having applied the summary judgment standards, I am denying both the Motion and Cross-Motion for Summary Judgment. The parties respective arguments--to be accepted--require me to make credibility

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<sup>2/</sup> N.J.A.C. 19:14-4.8(d) explains that summary judgment may be granted only if there are no material facts in dispute. That rule provides:

(d) If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

determinations and draw inferences from certain facts in favor of their respective positions. That is the antithesis of the summary judgment standard. In summary judgment I cannot draw inferences in support of the parties respective positions when there is even the slightest possibility that those inferences may be drawn against their positions. That is the case here. Thus, there remains a disputed material fact: What was the Respondent's motive for selecting Ed Whalen for a RIF?<sup>3/</sup>

The burden in 5.4(a)(3) cases such as this is on the Charging Party to prove an illegal motive. The parties are aware that pursuant to Bridgewater, a charging party must prove that: 1) the affected employee engaged in protected activity, 2) the employer was aware of the activity and, 3) the employer took action against the employee (or was hostile toward the employee) because of the exercise of the protected activity.

There is no dispute here regarding the first two standards. I found that those standards have been met. (8T87). The dispute is over the third standard. The Charging Party's Motion papers give the appearance that it believes it has already conclusively proved its case. But the Respondent disputes that notion, and further argues that it has not had an opportunity to complete its case.

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<sup>3/</sup> RIF means "reduction in force," and amounts to a layoff in more traditional terms.

I am concerned that the Charging Party might believe that because it has overcome the motion to dismiss, that my decision on that motion serves as a finding that it has met its Bridgewater burden of proof. That is not accurate. A finding on whether or not the Charging Party has proved hostility as the motive for Whalen's RIF will be based upon consideration of all evidence presented at hearing, as well as credibility determinations and inferences I draw. It is not based only on the evidence produced by the Charging Party, nor by the mere denial of the motion to dismiss. The Commission clearly established these principles in Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987). Thus, since I have not found that the Charging Party has proved its case, and since the Respondent has the right to present its evidence before I make any finding on motive, the summary judgment motions are premature.

In its Motion papers the Charging Party also argued that even if the 5.4(a)(3) claim was not ripe for summary judgment, that it was entitled to summary judgment on its 5.4(a)(1) claims. I do not agree.

The Charge here is composed of two counts. Paragraphs 5 and 7 of the Charge (which are included in the first count) allege, respectively, that the Respondent was hostile towards Whalen's exercise of protected activity, and "terminated" him in retaliation for the exercise of that activity. Paragraph 10 of the Charge (which is part of count two) alleges that the Respondent's action

against Whalen had a chilling effect upon the Association's ability to perform its duty. Paragraph 11 of the Charge (also part of count two) alleges that the Respondent's action against Whalen interfered with the right of other unit members to engage in protected activities. Paragraphs 5 and 7 allege a subsection 5.4(a)(3), and derivative (a)(1) violation of the Act. Paragraphs 10 and 11 also allege 5.4(a)(1) violations that are derivative of the 5.4(a)(3) allegation. There are no allegations of independent 5.4(a)(1) violations on the face of the Charge. No allegation, for example, that anything someone said or wrote to - or about - Whalen, or the Association had the tendency to interfere with protected rights.

The Charging Party made two legal arguments or assumptions. First, that I held that even if the RIF were found lawful it (the RIF) could still be discriminatory under the Act; and second, that the Respondent must show that Whalen's RIF was required by significant economic or educational interest. Those arguments/assumptions lack merit.

At page 2 of its responsive brief the Charging Party said that:

The Hearing Examiner expressly rejected as legally insufficient Respondent's present argument that if the reduction in force (RIF) were lawful, it could not be discriminatory under the Public Employment Relations Act.

The Charging Party cited remarks from my bench decision on the motion to dismiss believing it supported its above statement:

"...this case is not whether a public employer has the right to RIF. Of course, that's a



managerial prerogative. The issue is, did they RIF Ed Whalen because of his exercise in protected activity. (8T88).

The Charging Party's apparent inference from or interpretation of my bench decision is incorrect. I neither held nor said that if Whalen's RIF were lawful, it could still be a violation of the Act. The above quote from my decision simply means that although a RIF is a managerial prerogative, if the motive for the RIF was unlawful - such as Whalen's exercise of protected activity - then the RIF was unlawful. If the RIF is unlawful it will violate (a)(3), and derivatively violate (a)(1) since the unlawful RIF would have the tendency to interfere with union and employee rights. If I find, however, that the RIF was lawfully motivated, the Complaint (charge) could be dismissed in its entirety. All of the 5.4(a)(1) allegations in the Charge are derivative of the 5.4(a)(3) allegation, and if the (a)(3) is dismissed, the (a)(1) allegations will fall.<sup>4/</sup>

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<sup>4/</sup> The Charging Party's interpretation of my bench decision suggests that an employer who, under 5.4(a)(3), lawfully terminates a union official, would or could violate 5.4(a)(1) because the termination of a union official would have the tendency to interfere with protected rights and have a chilling effect on the exercise of protected activity. But that is not the law in this state.

Obviously, even the lawful termination of a union official may be perceived as having a chilling effect by some unit members, and some members may also feel it has the tendency to interfere with their protected rights. But that does not make it an independent (a)(1) violation of the Act. In an (a)(3)

Finally, at page 3 of its Motion and page 4 of its response to the Respondent's Motion, the Charging Party argued that Whalen's termination violated (a)(1) of the Act because the Respondent could not show it was "required" to terminate him based upon significant economic or educational reasons, or that there was "substantial justification" for its action. That argument lacks merit. That is not the standard for finding an (a)(1) violation, and no independent (a)(1) violations were alleged here.<sup>5/</sup>

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4/ Footnote Continued From Previous Page

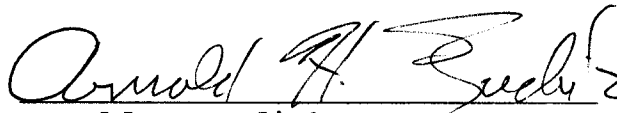
termination case such as this, any chilling effect, or tendency to interfere arising from the employers termination of a union official, is derivative of the termination itself. If the termination violates (a)(3), it also violates (a)(1). But if the termination is lawful, then legally, despite contrary personal interpretations, there is no chilling effect or tendency to interfere arising from the termination. In order for there to be an (a)(1) despite the dismissal of an (a)(3) there would need to be an allegation of - and proof of - either oral or written remarks made to or about an employee or union official. Those remarks would have to exist independent of the (a)(3) and then meet the (a)(1) standards. There was no allegation of - or proof of - independent (a)(1) violations here.

5/ In fact, the Respondent did not claim it was "required" to RIF Whalen nor that it could not afford to employ him. Rather, it alleged that it implemented a RIF because it did not need an extra industrial arts teacher due to declining enrollment. That can be a legitimate reason for a RIF, and if I find that to be the motive for Whalen's RIF, the Complaint could be dismissed.

The term "substantial business justification" is used in the Commission's (a)(1) standard but not in the context used by the Charging Party in its argument. In New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285

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Accordingly, based upon the above discussion, the Summary Judgment Motion and Cross-Motion are denied.

  
Arnold H. Zudick  
Hearing Examiner

DATED: May 27, 1992  
Trenton, New Jersey

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5/ Footnote Continued From Previous Page

1979), The Commission held:

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

But it is the charging party that has the burden of proof in the first instance, not the public employer. Here, since the Charging Party did not plead or prove independent (a)(1) violations the Respondent is not obligated to prove substantial business justification in the (a)(1) context. The justification evidence will/may be presented in the (a)(3) context and be considered, first, in deciding the Respondent's motive for the RIF, and second, if the motive for the RIF is found to be unlawful, the justification evidence will be considered in deciding whether the RIF would have occurred even absent the exercise of protected activity.