

L.D. NO. 93-1

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION  
LITIGATION ALTERNATIVE PROGRAM

In the Matter of

OLD BRIDGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-L-91-279

OLD BRIDGE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent  
Wilentz, Goldman & Spitzer, attorneys  
(Steven J. Tripp, of counsel)

For the Charging Party  
Glenn R. Johnson, President, OBEA

DECISION

On December 3, 1992, the Old Bridge Board of Education and the Old Bridge Education Association jointly requested that a dispute concerning the appointment of Carol Johnson to a sabbatical/intern position, created for the 1990-91 school year, be submitted to the Commission's Litigation Alternative Program. On December 9 and December 21, 1992 via telephone conference calls, the parties presented their respective positions and submitted documents concerning this matter to me as Commission designee. The parties seek an advisory opinion which, if accepted, would resolve the outstanding issues of the unfair practice charge, Docket No. CO-H-91-279 filed before the Commission; the implementation of the arbitration award regarding the elementary internship position

(hereinafter "Johnson arbitration award"); and the unresolved grievance involving the secondary internship position (hereinafter "Popovich grievance").

The following facts appear. In August 1990, the Board approved a memorandum of agreement with the Association establishing two in-district administrative internships at full pay as part of the sabbatical leave program for the 1990-91 school year: one elementary and one secondary school administrative intership. The Board subsequently adopted and posted job descriptions for both positions.

In response to the many applications filed for both intern positions, the superintendent formed an interview committee in September, 1990. The committee consisted of central administrators, principals and a board member. It screened the candidates and recommended finalists who were then interviewed by the superintendent and either the assistant superintendent of secondary education or the assistant superintendent of elementary education.

In October 1990, the Board accepted the superintendent's recommendation of Kenneth Popovich for the secondary school administrative intern position. Without comment, it appointed Popovich, effective October 16, 1990.

In November 1990, the superintendent recommended Carol Johnson to the Board for the elementary school administrative intern position. Johnson is the Association's secretary and the wife of the Association's president. Johnson's recommendation was

considered at a Board meeting held on November 20, 1990. During the public session of the meeting, a member of the public stated that it "stinks" that the Board would appoint the wife of the Association president. The superintendent responded that Johnson was the most qualified for the position. Board member Michael Heggarty acknowledged that the Board had to make a difficult decision; but, he stated, "Carol Johnson should not be punished because of who she is married to." The Board voted to reject the recommendation in a 5 to 4 vote.

On November 28, 1990, the Association filed a grievance concerning this matter. It alleged that the Board (1) violated the parties' memorandum of agreement when it considered an appointment for less than a school year; and (2) denied Johnson the position solely on the basis of her union affiliations.<sup>1/</sup>

At the next Board meeting held in December 1990, Johnson was again recommended for appointment to the elementary school administrative internship over the objections of the Association. It reiterated its contractual argument and requested that the Board wait until the grievance was arbitrated. The Board, however, voted

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<sup>1/</sup> The Association chose to litigate the anti-union animus claim with this agency; therefore, it dropped the second allegation from the grievance proceedings and filed the unfair practice charge, CO-H-91-279, with this agency. The remaining issue, concerning the claimed breach of contract, was arbitrated by the parties. In his award, the arbitrator ordered the Board to appoint an elementary school intern, effective for the 1991-92 school year, however, the parties agreed not to implement the award until CO-H-91-279 is resolved.

5 to 4 in favor of her appointment, effective from January 2, 1991 to the end of the 1990-91 school year.

On December 19, 1990, the Association sent a letter to the superintendent urging him to recommend that the Board rescind Johnson's appointment, thereby returning her to her teaching assignment. In addition to its assertion that the contract was violated, the Association argued that Johnson's students would be negatively affected by her leaving in January.<sup>2/</sup> At its January 1991 meeting, the Board rescinded Johnson's appointment. It did not post the vacancy and the elementary school intern position was left unfilled.<sup>3/</sup>

The Association argues in its unfair practice charge, Docket No. CO-H-91-279, that the Board violated subsection 5.4(a)(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq, when it initially refused in November 1990 to appoint

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<sup>2/</sup> Johnson's principal, Manuel Martin, also felt that a change of teachers in January would have a destabilizing effect on Johnson's students. On December 21, 1990, Martin sent the superintendent a memo stating that, while he fully supported Johnson as the Board's choice for the intern position, he requested that the superintendent recommend to the Board that her appointment be postponed until September 1991.

<sup>3/</sup> Shortly thereafter in February, the other intern position in the secondary school was vacated when Popovich was appointed to an acting vice-principal's position. When the Board failed to appoint a successor to Popovich, the Association filed a second grievance, claiming a breach of the parties' memorandum of agreement. This grievance remains unresolved.

Johnson to the internship.<sup>4/</sup> It claims that the Board's actions were motivated solely by Johnson's affiliation with the Association.

An employer violates this subsection if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. UMDNJ - 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); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Gorman, Basic Text on Labor Law, at 132-34 (1976). The charging party need not prove an illegal motive. Morris, The Developing Labor Law at 75-78 (2d ed. 1983). Public employers violate subsection 5.4(a)(1) when their agents make statements threatening or implicating an employee's job status, not because of the employee's job performance, but because of the employee's conduct as an employee representative. Blackhorse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981); Ridgefield Park Bd. of Ed., P.E.R.C. No. 84-120, 10 NJPER 266 (¶15130 1984); 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).

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<sup>4/</sup> 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. The Association also alleges that the Board violated subsection 5.4 (a)(7) which prohibits a public employer from violating any of the rules and regulations established by the commission. However, the parties have not submitted any facts that involve a violation of this subsection; therefore, I make no findings as to this allegation.

Johnson had come through the superintendent's comprehensive, two tiered interview process as the candidate to be recommended to the Board. She was chosen by the interview committee and the superintendent as the employee best suited for the internship position. The superintendent stated this publically to the Board at its November 1990 meeting. However, I find that there is evidence that the Board considered not just Johnson's professional capabilities, but also her ties to the Association. First, the Board was publicly reminded she was the wife of the Association president. Secondly, the Board was urged by one of its members to not "punish" Johnson because of this fact.

The Board may exercise its prerogative to appoint the most qualified employee for the job and, conversely, to reject those candidates that it feels are not appropriate. It may not, however, base its action upon an employee's union involvement. Commercial Tp. Bd. of Ed. There are no facts presented here to indicate that the Board voted against Johnson for any legitimate and substantial business justification, that is that she was unfit for the position. The only public discussion centered upon the issue that Johnson was married to the Association president. The contrast between the Board's response to Popovich's recommendation and Johnson's recommendation is also instructive: The Board appointed Popovich without comment; whereas, with Johnson's recommendation, one of its members was pressing the Board to essentially "do the right thing." The fact that the Board subsequently changed its mind and

appointed Johnson one month later further strengthens the inference that the Board had looked past Johnson's professional qualifications and considered her union affiliation to her detriment.

Based upon the foregoing, I recommend the following finding: The Old Bridge Board Of Education violated subsection 5.4(a)(1) of the Act when it did not appoint Johnson in November 1990 to the position of elementary school intern for the school year 1990-91.

The appropriate remedy in this case is one that resolves all the related issues in this matter. The parties' agreement establishing the in-district administrative interships has not been satisfactorily fulfilled as to either of the two positions; the elementary school internship has never been filled and Popovich held the secondary school internship for only four months. Therefore, I recommend that (1) the parties agree that Johnson be appointed as soon as practicable to the position of elementary school intern; (2) the term of her appointment be combined with the remainder of Popovich's unfilled term as secondary school intern for an aggregate term of one-and -a-half school years; and (3) the Association, upon the Board's adoption of the first two recommendations, withdraw unfair practice Docket No. CO-H-91-279 and the Popovich grievance.

  
Ilse E. Goldfarb  
Commission Designee

DATED: January 7, 1993  
Trenton, New Jersey