

P.E.R.C. No. 83-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JERSEY CITY BOARD OF EDUCATION AND
JERSEY CITY EDUCATION ASSOCIATION,

Respondents,

- and -

Docket No. CI-81-84-94

JOHN PACIFICO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge John Pacifico filed against the Jersey City Board of Education and the Jersey City Education Association. The Charge alleged that the Board and the Association violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3) and (b)(1), when they mishandled a grievance he had filed. The Commission adopts the factual findings and reasoning of its Hearing Examiner.

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Appearances:

For the Jersey City Board of Education
(Louis Serterides, Esq.)

For the Jersey City Education Association
(Philip Feintuch, Esq.)

For the Charging Party
Howard Schwartz, Esq.

DECISION AND ORDER

On June 9, 1981, John Pacifico filed an unfair practice charge against the Jersey City Education Association ("Association") and the Jersey City Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Association violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsection (b)(1)^{1/}, when the Association failed to process a grievance on behalf of Pacifico.

The charge further alleged that the Board violated subsections

^{1/} This subsection prohibits public employee representatives, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act."

5.4(a)(1) and (3)^{2/} when it intentionally delayed the processing of the grievance.

On March 18, 1982, Pacifico amended his charge. He alleged that the Association and the Board failed to divulge certain information necessary to the processing of the grievance, notwithstanding an agreement to do so.

On March 30, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On June 1, 1982, Commission Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses, presented evidence, and argued orally. The parties did not file post-hearing briefs.

On June 7, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 82-56, 8 NJPER ____ (¶ ____ 1982) (copy attached). He recommended that the Complaint be dismissed. He reasoned that Pacifico's grievance -- which concerned the Board's 1980 decision to appoint Anthony Strangia rather than Pacifico to the position of supervisor of social studies -- was now moot because an arbitrator and a reviewing court had already found Strangia's appointment invalid and directed the Board to rerun the appointment process. Thus, he concluded that

2/ 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.

"(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 would be futile to resurrect this grievance proceeding since Pacifico had already received the opportunity to have his application considered anew.

On June 14, 1982, Pacifico filed Exceptions. He asserts that the arbitration award should not bind him since he was not notified of the proceeding, the delay caused him to lose the opportunity to act as supervisor during the litigation, and the parties should be required to disclose the documents they agreed to disclose.^{3/}

We have reviewed the record. The Hearing Examiner's findings of fact are supported by substantial evidence. We adopt and incorporate them here.

Based on these findings, we agree that the Complaint should be dismissed. Like the Hearing Examiner, we believe that Pacifico must instead avail himself of the opportunity to participate in the appointment process which is now underway as a result of the arbitrator's decision.^{4/}


^{3/} Pacifico has also requested oral argument. Because this matter has been fully presented, we deny this request.

^{4/} On this record, it appears that even if he prevailed, Pacifico would not be entitled to any greater relief than he has already received.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani and Commissioner Butch voted for this decision. Commissioners Graves, Hipp and Newbaker abstained. None opposed. Commissioners Hartnett and Suskin were not present.

DATED: Trenton, New Jersey
July 20, 1982
ISSUED: July 21, 1982

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

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-and-

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JOHN PACIFICO,

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SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Board did not violate Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act and that the Association did not violate Subsection 5.4(b)(1) of the Act by their conduct herein. The Charging Party alleged that the Association had failed and refused to process his grievance of October 30, 1980 through the negotiated grievance procedure and that the Respondents intentionally delayed the processing of the said grievance. Further, the Charging Party alleged that the Respondents had failed to divulge certain information necessary to the processing of his grievance, notwithstanding an agreement on August 26, 1981 so to do.

The Hearing Examiner found that the essential claim of the Charging Party for information dated back to June 3, 1977 while the grievance pertained to the Charging Party's dissatisfaction with his failure to have been appointed to a Supervisory position by the Board in October 1980. An arbitration award thereafter invalidated the promotional list from which the appointment was made and after proceedings in the Superior Court, which confirmed the award and thereafter ordered the promulgation of a new promotional list May 25, 1982, the Hearing Examiner concluded that the subject matter of the grievance was moot and that an affirmative order on the Respondents to process the grievance would not be in furtherance of the purposes of the Act.

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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For the Jersey City Board of Education
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HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on June 9, 1981, and amended on March 18, 1982, alleging that the Jersey City Board of Education (hereinafter the "Respondent Board" or the "Board") and the Jersey City Education Association (hereinafter the "Respondent Association" or the "Association") 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 Respondent Association has failed to process the Charging Party's grievance under the negotiated agreement and that the Association and the Board have intentionally delayed the processing of the said grievance and, further, that the Association and the Board have failed to divulge certain information necessary to the processing of the said grievance, notwithstanding an agreement on August 26, 1981 so to do, all of which is alleged to be a violation by the Respondent Board of N.J.S.A. 34:13A

5.4(a)(1) and (3) of the Act ^{1/} and by the Respondent Association of N.J.S.A.
34:13A-5.4(b)(1) of the Act. ^{2/}

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 30, 1982. Pursuant to the Complaint and Notice of Hearing, a hearing was held on June 1, 1982 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally.

Neither the Board nor the Association filed an answer to the Complaint as of date of the hearing and counsel for the Board and the Association acknowledged this fact. Therefore, the facts pleaded by the Charging Party in its Unfair Practice Charge, as amended, "...shall be deemed to be admitted to be true and shall be so found by the commission..." pursuant to N.J.A.C. 19:14-3.1. ^{3/}

Under date of May 19, 1982 the Hearing Examiner received a copy of a Notice to Produce Documents, which was directed by the Charging Party to the Board and the Association. The Charging Party sought to have produced "...the written test results of all persons taking the oral test on June 3, 1977; the scoring system used on test; the names and addresses of all persons participating in the testing

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.

"(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."

2/ This Subsection prohibits public employee representatives, 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/ An examination of the Unfair Practice Charge, as amended, discloses that the admissions of the Board and the Association consist only of the fact that they have delayed the processing of the grievance by the Charging Party and have refused to divulge certain information to the Charging Party necessary to the processing of the grievance. There was no specification of what the grievance consisted of nor what documentation was to be provided to the Charging Party.

procedures; names and addresses of all persons participating in the oral part of the examination; the test scores for each employee who took the test and particularly for employee, Anthony Strangia, who was awarded the position (of Supervisor of Social Studies) on or about October 15, 1980 by the Jersey City Board of Education." (C-2).

The response of counsel for the Association was that it had none of the documents requested. Counsel for the Board stated that he had no knowledge of the existence of any of the documents requested by the Charging Party. It was established at the hearing that what the Charging Party is basically seeking are the names of the persons on the Board of Pupil Personnel Services, which administered a test on June 3, 1977, together with the oral test scores which they gave to the Charging Party on that date. The Charging Party's stated purpose in obtaining this information is to ascertain whether certain members of the Board were biased against him in the oral test.

The parties argued orally and waived the filing of post-hearing briefs.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations 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.

FINDINGS OF FACT

1. The Jersey City Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Jersey City Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. John Pacifico is a public employee within the meaning of the Act, as amended, and is subject to its provisions.
4. An oral test for the position of Supervisor of Social Studies was

administered by the Board of Pupil Personnel Services on June 3, 1977. A written test had been administered about sixty days earlier. The results of the written and oral test were sent to Educational Testing Service of Princeton, New Jersey and a ranking of applicants, based on a weighting of the tests results, was thereafter sent by Educational Testing Service to the Board.

5. The Board did not make an appointment from the list until October 15, 1980 when Anthony Strangia was awarded the position of Supervisor of Social Studies.

6. On October 30, 1980 the Charging Party mailed a grievance to the Association, which contested the failure of the Board to have appointed him to the position of Supervisor of Social Studies.

7. On November 7, 1980 the Association's Grievance Chairman, Louis Lanzillo, presented the grievance to the Board's Assistant Superintendent, James Jencarelli, and requested that a Step 4 hearing be scheduled before the Board's Personnel Committee.

8. Thereafter nothing at all happened with respect to the Charging Party's grievance and, as a result, the instant Unfair Practice Charge was filed on June 9, 1981.

9. However, the Jersey City Administrators and Supervisors Association, immediately after the Board's appointment of Anthony Strangia to the position of Supervisor of Social Studies on October 15, 1980, initiated an arbitration proceeding where the issue was whether or not the Board violated the contract when it reinstated an already expired promotional list from which the appointment of Strangia had been made.

10. On December 2, 1980 Arbitrator Jonas Silver held that the list had expired prior to the appointment of Strangia, and that, while Strangia might continue temporarily in the position pending the promulgation of a new list, his appointment was invalid. This arbitration award was confirmed by the Superior

Court on April 6, 1981.

11. Thereafter counsel for the Association filed a Motion for Enforcement of Litigant's Rights and on April 8, 1982 the Superior Court ordered the Board to administer a new promotional examination no later than May 25, 1982.

12. The Board administered a new written examination on May 22, 1982 and an oral examination is to be conducted within approximately sixty days of May 22, 1982. Thereafter the results will be submitted to Educational Testing Service in Princeton, New Jersey and again the Board will promulgate a new promotional list for appointment to the position of Supervisor of Social Studies.

DISCUSSION AND ANALYSIS

Essentially, what the Charging Party seeks in this proceeding is to have his October 30, 1980 grievance processed by the Association through Step 4 of the grievance procedure and, in connection therewith, the Charging Party seeks to have made available to him the names of the members of the Board of Pupil Personnel Services with the oral test scores that each gave the Charging Party on June 3, 1977.

Counsel for the Association contends that it would be futile to hold a Step 4 hearing before the Board's Personnel Committee because the promotional list from which the appointment of Anthony Strangia was made on October 15, 1980 had expired in 1979. Counsel for the Association points out further that Arbitrator Jonas Silver found that the list had expired and that the appointment of Strangia was invalid and, finally, that the arbitration award was confirmed by the Superior Court. Counsel for the Board questions whether or not a "grievance" still exists since the facts on which it is based date back to June 1977 when the oral test was administered by the Board of Pupil Personnel Services.

Based on all the foregoing, the Hearing Examiner finds and concludes that in view of the fact that the original list of applicants for promotion to the position of Supervisor of Social Studies was declared by an arbitrator to have

expired, and which arbitration award was confirmed by the Superior Court, the October 30, 1980 grievance of the Charging Party deals with a moot issue. The subject matter of the grievance dates back to the oral test of June 3, 1977, which is neither relevant nor germane to an unfair practice determination by the Hearing Examiner at this time. Thus, the Hearing Examiner agrees with counsel for the Association that it would be futile to proceed to a Step 4 hearing at this time.

The Hearing Examiner takes note of the fact that a new list for appointment to the position of Supervisor of Social Studies is in process of being assembled. The written examination was given on May 22, 1982 with the Charging Party being one of those having taken the written examination. Approximately sixty days thereafter a new oral test will be given the applicants and Educational Testing Service of Princeton, New Jersey will submit to the Board a new promotional list for the position of Supervisor of Social Studies. Thereafter the Charging Party may or may not be appointed. In the event that the Charging Party is dissatisfied with the Board's appointment and he is frustrated in the grievance procedure a new proceeding can be instituted before the Commission by the filing of another Unfair Practice Charge.

In other words, the Hearing Examiner determines herein that an affirmative order upon the Association and the Board to process the October 30, 1980 grievance of the Charging Party through Step 4 of the grievance procedure would not be in furtherance of the purposes of the Act inasmuch as there is no essential infringement of the Charging Party's rights, which need vindication at this time.

Accordingly, the Hearing Examiner will recommend dismissal of the allegations of unfair practices against both the Board and the Association.

* * * *

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

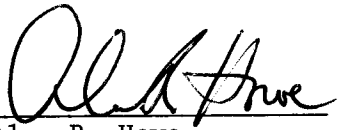
CONCLUSIONS OF LAW

1. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a) (1) and (3) by its conduct herein in connection with the Charging Party's grievance.

2. The Respondent Association did not violate N.J.S.A. 34:13A-5.4(b) (1) by its conduct herein with respect to the Charging Party's grievance.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.


Alan R. Howe
Hearing Examiner

Dated: June 7, 1982
Trenton, New Jersey