

P.E.R.C. NO. 84-46

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FAIR LAWN BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-83-10-38

RAYMOND ROBERT GROSIK,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge Raymond Robert Grosiak filed against the Fair Lawn Board of Education. The charge had alleged that the Board discharged Grosiak from his position as a custodian, allegedly because he was an officer of the Fair Lawn Custodian's Association and he had filed a grievance against the Board. The Commission finds that Grosiak did not prove by a preponderance of the evidence that his Association position or grievance was a substantial or motivating factor in his discharge.

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Appearances:

For the Respondent, Jeffer, Hopkinson & Vogel, Esqs.  
(Reginald F. Hopkinson, of Counsel)

For the Charging Party, Diamond, Diamond & Afflitto,  
Esqs. (Thomas R. Raimondi, of Counsel)

DECISION AND ORDER

On August 19, 1982, Raymond R. Grosiak filed an unfair practice charge against the Fair Lawn Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1), (2), (3), (4), and (7),<sup>1/</sup> when it discharged Grosiak from his position as a custodian, allegedly because he

<sup>1/</sup> 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; and (7) Violating any of the rules and regulations established by the commission."

was an officer of the Fair Lawn Custodian's Association ("Association") and he had filed a grievance against the Board.<sup>2/</sup>

On November 3, 1982, the Director of Representation issued a Complaint and Notice of Hearing. On November 23, 1983, the Board filed an Answer in which it denied that it terminated Grosiak because of his Association position and grievance and instead asserted it discharged him because of his poor performance.

On March 8 and 9, 1983, Commission Hearing Examiner Arnold H. Zudick conducted a hearing.<sup>3/</sup> The parties examined witnesses, presented evidence, and argued orally. The Board filed a post-hearing brief, but Grosiak did not.

On August 19, 1983, the Hearing Examiner issued his report and recommendations, H.E. No. 84-13, 9 NJPER \_\_ (¶ \_\_\_\_\_ 1983) (copy attached). He concluded that Grosiak had failed to prove by a preponderance of the evidence that he was terminated because of his Association position or grievance. Rather, the Hearing Examiner found that Grosiak was terminated because of his poor work record. The Hearing Examiner recommended that the Complaint be dismissed.

<sup>2/</sup> In an amended charge filed on February 28, 1983, Grosiak alleged that the Board meeting at which his discharge was approved violated the Open Public Meetings Act, N.J.S.A. 19:4-6 et seq.

<sup>3/</sup> At the outset of the hearing, the Hearing Examiner dismissed the amended charge since it was untimely and the Commission has no jurisdiction over alleged violations of the Open Public Meetings Act. Grosiak did not request special permission to appeal that ruling. N.J.A.C. 19:14-4.6.

The Hearing Examiner promptly served a copy of his report on the parties. The cover letter stated that Exceptions were due within ten days from the date of service of the report. N.J.A.C. 19:14-7.3. No Exceptions have been filed and neither party has requested an extension of time.

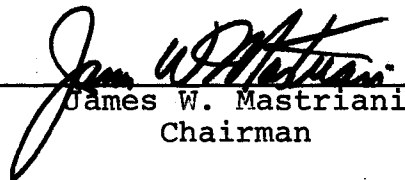
We have reviewed the record. The Hearing Examiner's findings of fact are supported by substantial evidence and specific credibility determinations. We adopt and incorporate them here.

Based on our review of the record, we agree with the Hearing Examiner that Grosiak did not prove by a preponderance of the evidence that his Association position or grievance was a substantial or motivating factor in his discharge. See East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981); NLRB v. Transportation Management Corp., \_\_\_ U.S. \_\_\_, 113 LRRM 2857 (1983). Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
\_\_\_\_\_  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Butch, Suskin, and Hartnett voted for this decision. Commissioner Graves voted against this decision. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey  
October 19, 1983  
ISSUED: October 20, 1983

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

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-and-

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Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Board did not violate the New Jersey Employer-Employee Relations Act when it terminated Raymond Grosiak. The Charging Party failed to prove by a preponderance of the evidence that he was terminated because he filed a grievance. Rather, the Hearing Examiner found that Grosiak was terminated as a result of his poor work record.

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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(Reginald F. Hopkinson, Of Counsel)

For the Charging Party  
Diamond, Diamond & Afflitto, Esqs.  
(Thomas R. Raimondi, Of Counsel)

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on August 19, 1982, and amended on February 28, 1983, by Raymond R. Grosiak ("Charging Party") alleging that the Fair Lawn Board of Education ("Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Party has alleged that the Board unlawfully discharged him because he filed a grievance which was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (7) of the Act. 1/

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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condi-

The Charging Party alleged that he was an officer in the Fair Lawn Custodian's Association ("Association") and that on July 2, 1982 he filed a grievance pursuant to the collective agreement claiming that he was not interviewed for certain positions for which he had applied. He argued that he was told that he would be terminated if he did not withdraw the grievance. The grievance was not withdrawn and he was notified of termination by letter dated July 16, 1982. <sup>2/</sup> The Board denies that it terminated the Charging Party because he filed the grievance and asserts that he was terminated because of the poor quality of his work. The Board argues that the recommendation and decision to terminate the Charging Party was made prior to the filing of the grievance.

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 3, 1982, and hearings were held in this matter on March 8 and 9, 1983, in Newark, New Jersey, at which time the parties were given the

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1/ (cont'd)

tion of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (7) Violating any of the rules and regulations established by the commission."

2/ In addition to alleging that he was unlawfully discharged because he filed the grievance, the Charging Party alleged in count two of his amended charge that the Board meeting of July 15, 1982 at which the Board approved his termination, was in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq. The Board moved to dismiss that allegation on the record on March 8, 1983, alleging that it was beyond the statute of limitations and that the Commission lacked jurisdiction to hear that matter. The undersigned granted the Board's Motion to Dismiss that count, Transcript ("T") I pp. 20-21, because it was a new allegation filed more than six (6) months after the occurrence of the event, and because of the lack of jurisdiction over the Open Public Meetings Act. No request for special permission to appeal that decision was filed with the Commission concerning that count.

opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. <sup>3/</sup> The Respondent filed a post-hearing brief herein which was received on March 31, 1983.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the post-hearing brief, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Fair Lawn Board of Education is a public employer within the meaning of the Act and is subject to its provisions.

2. The Charging Party, Raymond R. Grosiak, as a former employee of the Board, was a public employee within the meaning of the Act.

3. The Charging Party was hired by the Board as a part-time night custodian on or about November 1, 1981 but became a full-time night custodian on or about December 1, 1981. Beginning in at least December 1981 he worked from 3:00 p.m. until midnight in the West Moreland Elementary School, and his immediate supervisor was head custodian Stanley Frey whose title was included in the Association's collective agreement (Exhibit J-1). The Charging Party joined the Association in December 1981, and was elected to the executive board of the Association in January 1982.

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<sup>3/</sup> The hearing in this matter was originally scheduled for January 18, 1983, but by agreement of the parties it was rescheduled for March 1983.



4. The facts show that after the Charging Party was hired Frey trained him how to perform the job. Thereafter, pursuant to a request by Peter Monaco, Supervisor of Buildings and Grounds, in mid-January 1982, both Frey, and West Moreland Principal Elmer Campbell prepared evaluations of the Charging Party's performance.

In Frey's evaluation (Exhibit J-2F) dated January 29, 1982, the Charging Party's performance was found to be satisfactory. However, evidence shows that subsequent to that evaluation Frey had several conversations with the Charging Party about the poor quality of his work (T II pp. 29-30).

In contrast to Frey's evaluation, however, Campbell's evaluation of the Charging Party (Exhibit J-2C) which was also dated January 29, 1982, listed several deficiencies in his work. In particular, Campbell indicated that bathroom sinks had not been cleaned well, and that a soap and a towel dispenser had not been refilled.

5. By April 1982, Campbell was still unhappy with the Charging Party's work and he complained to Monaco who requested that Campbell put any further complaints in writing. (T I p. 123)

In addition, during the early spring of 1982 the Charging Party was observed watching television one evening when he should have been working. Cecelia Murphy, a clerk aide, had returned to the West Moreland School at approximately 7:00 p.m. one Friday night and observed the Charging Party watching television in a kindergarten room. (T II pp. 4-6). <sup>4/</sup> The following Monday she

<sup>4/</sup> The Charging Party denied watching television and testified that he does not recall ever letting Murphy into the building. (T I pp. 73-74). The undersigned credits Murphy's description of the facts. If the Charging Party could not remember letting Murphy into the building he could not have recalled whether he was watching television. His explanation is not credible. However, Murphy appeared to clearly recall the incident including the Charging Party's reaction.

explained the incident to a school secretary, and she gave Campbell a written report just prior to the start of the instant hearing.

(T II p. 7)

6. In May 1982 Campbell felt that the Charging Party's performance had further deteriorated and on May 13, 1982, he informed the Charging Party in person that he was unhappy with his work. On May 17, 1982 Campbell sent the Charging Party a memorandum (Exhibit J-2E) confirming their discussion of May 13, and listed several job functions which had not been performed properly. That same day, May 17, Campbell sent Monaco a memorandum (Exhibit J-2D) concerning the Charging Party's poor performance record including a copy of J-2E.

After receiving J-2E Monaco began contemplating the Charging Party's termination. (T I p. 133). As a result thereof, in late May or early June, Monaco made a surprise spot inspection of the Charging Party's work at 1:00 one morning and found that the Charging Party had not adequately performed his job. (T I pp. 124-126).

During that same time period, late May or early June, the Charging Party applied for three vacant Board positions; custodian at Memorial School; night custodian at the high school; and a bus driver position. Subsequently, during the first week of June 1982, the Charging Party received a standard form letter from the Superintendent of Schools rehiring him as night custodian for the following school year.

7. As a result of Campbell's memorandums (J-2C and J-2D) and his own inspection of the Charging Party's work, Monaco decided to recommend Grosiak's termination. However, Monaco indicated that there had not been enough time to make that recommendation prior to

the mailing of the Charging Party's rehiring letter, nor before the Board's June meeting. (T I p. 130). Consequently, Monaco waited until late June 1982 to meet with Donald Fusco, Board Secretary and Assistant Superintendent for Business, regarding the Charging Party's performance record. As a result of that meeting Monaco, on June 29, 1982, gave Fusco a formal written recommendation (Exhibit J-2B) to terminate Grosiak. (T I pp. 126, 139). Thereafter, on June 30, 1982, Monaco went on vacation and did not return to work until July 12, 1982. (T I pp. 128, 137).

8. Several events occurred in July 1982 leading up to Charging Party's termination.

a) On July 2 the Charging Party filed a grievance (Exhibit J-8) with Monaco's assistant, Bernard Piela, alleging that he was not interviewed for two of the positions for which he had applied, high school custodian and bus driver.

b) On July 7, Piela, in a memorandum to Grosiak (Exhibit CP-2), responded to the grievance and arranged to meet with him on July 13 to explain why he did not get the positions in question.

On July 9 Fusco sent a memorandum to the Board (Exhibit J-2A) indicating that at the July 15 Board meeting he would recommend Grosiak's termination for the reasons set forth in Monaco's memorandum. <sup>5/</sup>

c) Since by July 12 the Board had not acted upon Fusco's recommendation to terminate Grosiak, Monaco decided to meet with the Charging Party in response to his grievance to explain why he was not selected for another position. Monaco met with Grosiak on

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<sup>5/</sup> Exhibits J-2B, J-2C, J-2E, and J-2F were attached to J-2A.

The Board actually had two meetings in July 1982, the first of which was on July 8. However, Fusco had not prepared his recommendation in time to be considered at that meeting.

that day but an argument ensued between them and no opportunity arose to discuss the grievance. The undersigned does not credit the Charging Party's allegation that Monaco threatened him during that argument.

d) On July 14 Monaco sent the Charging Party a letter (Exhibit J-7) indicating that he had recommended Grosiak's termination.

e) On July 15, 1982, the Board officially adopted Fusco's recommendation and voted to terminate the Charging Party effective July 31, 1982. The Charging Party alleged that on or about the same day, July 15, Walter Taylor, grounds foreman, told him (Grosiak) that Monaco said that if he (Grosiak) continued the grievance he would be fired. Monaco denies having made any such comments.

The undersigned cannot credit Grosiak's hearsay testimony that Monaco said that if Grosiak continued the grievance he would be fired. The allegation by Grosiak that Taylor told him what Monaco had said is double hearsay and cannot be relied upon to prove what Monaco said.

f) Subsequently, on July 16, 1982, Fusco sent the Charging Party a letter (Exhibit J-3) informing him of his termination. Grosiak alleges that he did not receive J-7 and J-3 until July 17, 1982.

#### ANALYSIS

Having reviewed all of the evidence the undersigned is convinced beyond any doubt that the Charging Party was terminated only because of his poor performance record. There is not even a need in this case to apply the "business justification" or "motivating

factor" rationale which was developed in Wright-Line Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980), and Mt. Healthy City Bd/Ed v. Doyle, 429 U.S. 274 (1977), and adopted in New Jersey in East Orange Public Library v. Taliferro, 180 N.J. Super. 155, 7 NJPER 415 (¶12182 (App. Div.) 1981), because the Charging Party did not even establish a prima facie case. Grosiak's protected activity, the filing of his grievance, was not only less than a substantial or a motivating factor for his termination, it was no factor at all in the Board's decision to terminate the Charging Party. The Charging Party had a poor evaluation in January and May of 1982, and Monaco personally inspected and observed an example of Grosiak's poor performance in late May or early June 1982. Finally, the evidence clearly shows that Monaco's recommendation for Grosiak's termination was made on June 29, which was prior to the filing of the Charging Party's grievance. Although Fusco's recommendation to the Board, and the Board's approval of Grosiak's termination, occurred after the Charging Party's grievance, since the grievance was filed on the Monday following Monaco's Friday recommendation, it was inevitable that any official Board action on Monaco's recommendation had to occur subsequent to the filing of the grievance. That certainly does not establish a violation of the Act.

Notwithstanding all of the above, even if the Charging Party established a prima facie case, the undersigned finds that there was more than ample business justification pursuant to Wright-Line, supra, to justify Grosiak's termination because of the poor quality of his work.

Accordingly, the undersigned will recommend dismissal of the 5.4(a)(1) and (3) allegations in the Charge.

Finally, the Charging Party has not presented any evidence that the Board dominated or interfered with the Association (5.4(a)(2)); he has not established that he was discharged because he filed the instant charge or any other matter under the Act (5.4(a)(4)); and, he has not established that the Board violated any rule or regulation established by the Commission (5.4(a)(7)). Consequently, the 5.4(a)(2), (4) and (7) allegations should be dismissed. 6/

Based upon the entire record and the foregoing analysis the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (2)(3), (4) or (7) by terminating Raymond Grosiak.

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6/ The Charging Party apparently misunderstood the meaning and purpose of §5.4(a)(2), (4) and (7) of the Act. Under 5.4(a)(2) it is a violation for a public employer to dominate or interfere with a labor organization. This is a charge that may normally be filed only by an employee organization in a CO case. Individuals (CI cases) may not normally process (a)(2) allegations. In addition, there was no allegation herein that the Board interfered with the Association.

Under 5.4(a)(4) it is a violation for a public employer to discriminate or discharge an employee because he/she filed a charge or petition with this Commission, or filed an affidavit or gave testimony before the Commission. The Charging Party never alleged herein that he was discharged because of any action he had or was involved in before this Commission.

Finally, under 5.4(a)(7) it is a violation for a public employer to violate any rule or regulation established by the Commission. Those rules and regulations are compiled in N.J.A.C. 19:10-1.1 et seq., and the Charging Party has not alleged any rule that has been violated.

RECOMMENDED ORDER

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

  
Arnold H. Zudick  
Hearing Examiner

Dated: August 19, 1983  
Trenton, New Jersey