

P.E.R.C. NO. 2009-48

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2006-127

IRVINGTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

_____The Public Employment Relations Commission adopts, with modification, the Hearing Examiner's recommended decision and finds that the Irvington Board of Education violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) and (3), when it awarded a not effective rating in the area, Personal/Professional Development, to Association Building Representative Barbara Whitaker. In the absence of cross-exceptions, the Commission adopts the recommendation that the Board did not violate the Act by awarding two other "not effective" ratings in the same evaluation.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Hunt, Hamlin & Ridley, attorneys
(Ronald C. Hunt, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys
(Nancy I. Oxfeld, of counsel)

DECISION

_____ On November 28, 2008, the Irvington Board of Education filed exceptions to a Hearing Examiner's report and recommendation. H.E. No. 2009-5, 34 NJPER 426 (¶133 2008). In that decision, the Hearing Examiner recommended a finding that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when a principal gave an "NE" or "not effective" observation rating to an Irvington Education Association building representative. The Hearing Examiner recommended dismissing allegations concerning two other "NE" ratings. The Association opposes the exceptions, but has not filed cross-exceptions. We adopt the Hearing Examiner's recommendation.

The Association filed its unfair practice charge on November 9, 2005. The charge alleges that the Board violated the Act, specifically 5.4a(1) and (3)^{1/}, when Building Representative Barbara Whitaker received three "NE" ratings on an evaluation allegedly in retaliation for her Association activities.

On March 14, 2006, a Complaint and Notice of Hearing issued. On April 26, the Board filed its Answer denying that it violated the Act. The Hearing Examiner conducted two days of hearing.

On December 15, 2008, the Hearing Examiner issued his report and recommendations. On December 30, the Board filed exceptions. On January 29, 2009, the Association filed its answering brief.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 2-24), except for the findings and related inferences noted on page 4 of this decision.

Allegations of retaliation for the exercise of protected rights are governed by the standards set out in In re Bridgewater Tp., 95 N.J. 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of

^{1/} These provisions 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."

the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

Barbara Whitaker has been employed by the Board for over 30 years. She is currently assigned to the Madison Avenue School as a school facilitator. Whitaker is also an Association building

representative and held that position for approximately eight years prior to the filing of the charge. Whitaker was also a stipended secretary for the School Leadership Council ("SLC"), a volunteer committee of parents, teachers and administrators. As the secretary for the Madison Avenue School SLC, Whitaker took the minutes of the meetings and prepared the agenda of the meetings.

In November 2004, Julia Slattery was appointed principal at the Madison Avenue School. Slattery has been employed by the Board for over 25 years. She was a teacher and an acting principal prior to her appointment. She was also an Association building representative.

The Hearing Examiner found direct evidence establishing Slattery's hostility to Whitaker's protected activity. Slattery testified that with regard to Whitaker, "it was always about the union; it was just uncomfortable for me from the beginning." The Board has not explained away that finding and we agree with the Hearing Examiner that it proves anti-union animus. We have some questions about, and therefore do not rely on, two of his additional findings: that Slattery acknowledged being physically intimidated by Whitaker and that she disbelieved Whitaker's explanation about who had removed a ballot box because of Slattery's hostility to Whitaker's protected conduct.

In June 2005, Slattery completed Whitaker's evaluation. Slattery gave Whitaker three "NE" ratings. The Hearing Examiner found that Slattery wrote "NA" (not applicable) in four of the five general areas because Whitaker was a facilitator and not in the classroom. In the general area "Personal/Professional Development," Slattery gave Whitaker an overall rating of "E" (effective), but rated her "NE" in three of the ten enumerated indicators in the section. Because the Hearing Examiner had found hostility to protected activity, he went on to examine whether Slattery would have issued those ratings even absent Whitaker's protected activity. Bridgewater. We now apply that same analysis to determine whether the Board met its burden.

The indicators receiving "NE" ratings involved "Interpersonal and Public Relations Skills," specifically "Demonstration of tact, courtesy, sensitivity and poise" and "Cooperativeness with staff, parents and administrators." The Hearing Examiner found that these ratings would have been given even absent Whitaker's protected activity and the Association has not excepted to those determinations.

In the general area "Commitment, Enthusiasm and Concern," Slattery gave Whitaker an "NE" rating for "Capability of self-analysis; acceptance and utilization of professional criticism." A comment stated: "You respond in a negative way. You have difficulty accepting things when it's not your way."

The Hearing Examiner looked to Slattery's own explanations for the rating and noted that she testified that Whitaker's aggressive opposition to the choice of other SLC members for teacher of the month was a reason. The Hearing Examiner also found that Slattery disapproved of Whitaker's conduct at several SLC meetings and inferred that her disapproval formed the basis for the rating. Finding that Whitaker's conduct at the meetings was protected under the Act, the Hearing Examiner concluded that this one rating violated the Act. Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502, 503 (¶12223 1981) (when an employee's protected conduct is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the representative's employment).

The Board argues that: there was no evidence of anti-union animus and/or that the "NE" ratings were motivated by anti-union animus; the Hearing Examiner ignored Slattery's testimony regarding her past union activities; Slattery did nothing to interrupt an Association meeting where she thought a no confidence vote was to be taken; and another building representative was treated fairly.^{2/}

^{2/} The Board has not specified each question of procedure, fact, law or policy to which exception is taken nor has it identified that part of the record and recommended decision to which exception is taken. N.J.A.C. 19:14-7.3(b). We
(continued...)

The Association argues that the Hearing Examiner appropriately relied on Slattery's testimony to find hostility including her statement that "it was always about the union" with Whitaker and that she believed her confidential secretary over a unit member because her secretary was not in the union.

The Hearing Examiner thoughtfully concluded that Whitaker's Association activities motivated the "NE" for "capability for self-analysis, acceptance and utilization of professional criticism." There was direct evidence of hostility to her protected activity and the Board did not explain away Slattery's discomfort with Whitaker's union activity or meet its burden of proving that this single "NE" rating would have been given had Slattery not been hostile to that activity. In response to the Board's exceptions, we note that the Hearing Examiner did find that Slattery was a former Association representative (finding no. 4) and that she did not interfere with an Association meeting to discuss concerns about her governance of the school (finding no. 8). As for the alleged "fair" treatment of another Association representative, we do not suggest that Slattery was hostile to all Association activity. This case deals with her response to one Association representative.

2/ (...continued)
will nevertheless consider its exceptions in this case.

Under these circumstances, we adopt the Hearing Examiner's recommendation that the Irvington Board of Education violated 5.4a(3) and, derivatively, a(1) of the Act by awarding Whitaker an "NE" rating in one portion of her evaluation. In the absence of cross-exceptions, we also adopt the recommendation that the Board did not violate the Act by awarding other "NE" ratings to Whitaker in the same evaluation.

ORDER

The Irvington Board of Education is 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 awarding an "NE" (not effective) in the area, "Personal/Professional Development," specifically indicator section 3.1, "capability for self analysis; acceptance and utilization of professional criticism" and writing an accompanying criticism on a year-end evaluation of teacher and building facilitator Barbara Whitaker.

2. 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 the Act, particularly by awarding an "NE" (not effective) in the area, "Personal Professional Development," specifically indicator section 3.1, "capability for self-analysis; acceptance

and utilization professional criticism" and writing an accompanying criticism on a year-end evaluation of teacher and building facilitator Barbara Whitaker.

B. Take the following affirmative action:

1. Delete the "X" under "NE" awarded to Barbara Whitaker in the area, "Personal/Professional Development, specifically, indicator section 3.1 of her 2004-05 year-end evaluation form and the written comment for that section in the margin of the form.

2. Insert an "X" under "E" (effective) in the area, "Personal/Professional Development," specifically at indicator section 3.1 of Whitaker's 2004-05 year-end evaluation form.

3. Delete "3.1" from the "not effective" column on the summary page of Whitaker's 2004-05 year-end evaluation.

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

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Buchanan, Colligan, Fuller and Joanis voted in favor of this decision. None opposed. Commissioner Watkins was not present.

ISSUED: March 26, 2009

Trenton, New Jersey

NOTICE TO 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 awarding an "NE" (not effective) in the area, "Personal/Professional Development," specifically indicator section 3.1, "capability for self analysis; acceptance and utilization of professional criticism" and writing an accompanying criticism on a year-end evaluation of teacher and building facilitator Barbara Whitaker.

WE WILL cease and desist from 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 the Act, particularly by awarding an "NE" (not effective) in the area, "Personal Professional Development," specifically indicator section 3.1, "capability for self-analysis; acceptance and utilization professional criticism" and writing an accompanying criticism on a year-end evaluation of teacher and building facilitator Barbara Whitaker.

WE WILL delete the "X" under "NE" awarded to Barbara Whitaker in the area, "Personal/Professional Development, specifically, indicator section 3.1 of her 2004-05 year-end evaluation form and the written comment for that section in the margin of the form.

WE WILL insert an "X" under "E" (effective) in the area, "Personal/Professional Development," specifically at indicator section 3.1 of Whitaker's 2004-05 year-end evaluation form.

WE WILL delete "3.1" from the "not effective" column on the summary page of Whitaker's 2004-05 year-end evaluation.

Docket No. CO-2006-127

IRVINGTON BOARD OF EDUCATION
(Public Employer)

Date: _____

By: _____

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 Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372