

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of	:	
	:	
EWING TOWNSHIP BUS DRIVERS'	:	
ASSOCIATION and CARL INGLESE et al.	:	
	:	
Charging Party-Petitioners,	:	
	:	PERC DOCKET NO. CO-H-89-36
-v-	:	EDU DOCKET NO. 257-8/88
	:	OAL DOCKET NO. EDU 6671-88
EWING TOWNSHIP BOARD OF EDUCATION,	:	
	:	
Respondent.	:	
	:	

SYNOPSIS

The Public Employment Relations Commission adopts an Administrative Law Judge's recommendation that the Ewing Township Board of Education violated the New Jersey Employer-Employee Relations Act when it discharged Carl Inglese in retaliation for his activity as Association president and that Inglese be reinstated with backpay, less any income earned since his dismissal. In the absence of exceptions, the Commission dismisses the allegations that the Board unilaterally changed terms or conditions of employment in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). The remaining issues in this consolidated matter will be decided by the Commissioner of Education.

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	:	
Respondent.	:	
	:	

Appearances:

For the Charging Party-Petitioners, Katzenbach, Glidea & Rudner, attorneys (Ezra D. Rosenberg, of counsel)

For the Respondent, David W. Carroll, attorney

DECISION AND ORDER

Carl Inglese, Rose A. Lanning and Florine Warner appealed to the Commissioner of Education concerning the termination of their employment, effective June 30, 1988, as bus drivers for the Ewing Township Board of Education. The matter was transmitted to the Office of Administrative Law for determination as a contested case. In addition, the Ewing Township Bus Drivers' Association filed an unfair practice charge. The Association alleges that the Board, by unilaterally changing terms and conditions of the collective negotiations agreement between the Board and the charging party, violated N.J.S.A. 34:13A-5.4(1) and (5). It further alleges that Inglese was discharged in retaliation for his activity as Association president.

After a predominant interest determination, the petition and charge were consolidated. We were determined to have the predominant interest in the conduct and outcome of the consolidated matter and will render a final decision on all findings and conclusions on the unfair practice allegations. The Commissioner will render a final decision on any remaining issues.

On April 24 and 25, 1989, Administrative Law Judge Richard J. Murphy conducted a hearing. The record closed on June 9, 1989.

On January 17, 1991, after a number of extensions of time, the judge issued his initial decision. He concluded that Carl Inglese's termination violated N.J.S.A. 34:13A-5.4(a)(1), (3), and (4). He recommended that Inglese be reinstated with backpay. He also concluded that Inglese's dismissal was discriminatory and retaliatory under N.J.S.A. 18A:6-9 et seq., but that Lanning's dismissal was not. He found that the Board failed to notify the employees about the meeting at which their terminations were voted upon, but concluded that the violation did not invalidate the action taken at that meeting. Finally, the judge found that the charging parties did not establish any contractual or statutory entitlement to severance benefits.

On February 11, 1991, the Board filed exceptions to those portions of the initial decision relating to Inglese's termination. The Board argues that: the 19 month delay between the record closing and the initial decision raises questions about whether any deference should be given to the judge's credibility determinations; the judge did not analyze factual and legal issues or address testimonial conflicts; Inglese's accusing his supervisor of lying to

employees at a meeting is not protected activity; hostility to protected rights was not shown, and the Board had ample justification for terminating Inglese.

The judge incorporated the parties' accounts of the facts. We incorporate them as well, but make these modifications and additions.

Inglese testified that he was hired in September 1982, but apparently it was September 1983.

In Inglese's November 1987 performance review, he was rated below average in attitude and following directions and average in all other categories. In his March 1988 performance review, Inglese was rated below average in dependability, attitude, job-performance, cooperation, and following directions and average in all other categories.

Inglese maintained that he gave the track coach his home phone number. Hahn testified that the coach told her that Inglese had not left his phone number or he would have called Inglese rather than Hahn. But Hahn admitted that her memorandum -- written three days after her conversation with the coach -- did not mention that conversation. Based on this record, we are not convinced that Inglese did not give his telephone number to the coach.

Regarding the failure to run a scheduled route, we detect no material conflict in testimony which the judge failed to address. He found that Inglese missed his scheduled route, but that he had "credibly explained" it. We accept that finding.

Regarding the return from the zoo field trip, we add that assistant supervisor Jacobs testified that he directed Inglese to return the children to school first, before going to the maintenance yard to drop off Jacobs, the mechanic and the tools (1T84-1T86; P-12).

The Board claims that the judge missed the sequence of events concerning the March meeting and distorted the facts. It claims that Hahn's memo was not aimed at Inglese's protected activity in filing a grievance or complaining about equalization of extra work. According to the Board, what upset Hahn was Inglese's accusing her of lying to the staff, an activity which the Board claims is not protected. We do not agree that the judge distorted the facts. In addition, the record supports a finding that Hahn was upset about more than just the accusation of lying. We will address her reaction to Inglese's protected activity when we analyze her conduct.

Allegations of anti-union discrimination are governed by In re Bridgewater Tp., 95 N.J. 235 (1984). The charging party must prove, by a preponderance of 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.

Inglese indisputably engaged in protected activity and the Board knew about it. He was Association president until January 1988 and interacted with Hahn in that role.

We must therefore examine whether the employer was hostile towards that protected activity. Before 1987, Inglese's evaluations were all outstanding in every category. After 1987, he received average and below-average scores. The change in his ratings, although coinciding with a change in evaluation forms, also coincided with an intensification of the dispute over the equalization of work assignments. Evidence of Hahn's hostility to Inglese's activity includes a March 16, 1988 memorandum in which Hahn threatened him with dismissal if he made any further

detrimental comments to drivers about her. Hahn herself explained that Inglese's termination was prompted by a relationship that deteriorated because of his activity on behalf of himself and other bus drivers, particularly over the equalization of work assignments.

Hahn denied that Inglese's grievances played any role in her decision to recommend his nonrenewal (2T74). But she added that besides not following directions and stranding the team, Inglese was "always trying to undermine me on any directions I gave the drivers. He was just constantly going out -- either going to the drivers and saying you shouldn't do this or that, or coming and telling me I didn't do a schedule right -- whatever I did, I was always wrong (2T74)." When asked how long he did this, she responded "there was a change after he became Association president (2T75)." Hahn resented Inglese's "stirring up other drivers." We conclude, therefore, that Hahn was hostile to Inglese's protected activity and that this hostility motivated Inglese's termination.

Under Bridgewater, we must next ask whether the Board proved that it would have terminated Inglese absent its hostility to protected rights. We do not believe that it would have. We agree with the judge's finding that the professed reasons for Inglese's termination were pretextual. Although Inglese's work record was not perfect, the Board failed to prove that it would have taken the same action had he not been a staunch advocate of employee rights. The judge found that Hahn's March 16 memorandum "clearly and bluntly demonstrates that her intent was to silence an employee perceived by her to be a trouble-maker, whom she saw as stirring up other drivers." We agree. Accordingly, we adopt his recommendation that

the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (3) and order Inglese reinstated with backpay, less any income earned since his dismissal.^{1/}

In the absence of exceptions, we dismiss the allegation that the Board unilaterally changed the terms or conditions of employment in violation of N.J.S.A. 34:13A-5.4(a)(1) and (5). The allegation that the Board violated its job security agreement involves a mere breach of contract claim. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The remaining issues in this consolidated matter will be decided by the Commissioner of Education.

ORDER

The Ewing Township 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 terminating Carl Inglese because of his activity on behalf of the Ewing Township Bus Drivers' Association and Board employees.

2. Discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to

^{1/} We dismiss the subsection 5.4(a)(4) allegation as unsupported.

them by the Act, particularly by terminating Carl Inglese because of his activity on behalf of the Association and on behalf of Board employees.

B. Take this action:


1. Offer to reinstate Carl Inglese to his position as a bus driver, with backpay less any income earned since his dismissal.

2. 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.

3. 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 are dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: Trenton, New Jersey
February 27, 1991
ISSUED: February 28, 1991



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 NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly by terminating Carl Inglese because of his activity on behalf of the Ewing Township Bus Drivers' Association and Board employees.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by terminating Carl Inglese because of his activity on behalf of the Association and on behalf of Board employees.

WE WILL offer to reinstate Carl Inglese to his position as a bus driver, with backpay less any income earned since his dismissal.

Docket No. CO-H-89-36

EWING TOWNSHIP BUS DRIVERS'
ASSOCIATION AND CARL INGLESE et al.

(Public Employer)

Dated: _____

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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372