

H.E. NO. 2002-6

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

In the Matter of

WOODBINE BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-H-98-440 and
CO-H-99-61

WOODBINE EDUCATION ASSOCIATION
and BARBARA CISSONE,

Charging Party.

Appearances:

For the Respondent
Cassetta, Taylor, Whalen and Hybbeneth
(William J. Yanonis, Consultant)

For the Charging Party
Waltman, Reilly & Rogovoy, attorneys
(Ned P. Rogovoy, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 2, 1998, the Woodbine Education Association (WEA) and Danelle Connolly filed an unfair practice charge against the Woodbine Board of Education (Board), CO-98-440, alleging the Board violated 5.4a(1) and (3)^{1/} of the New Jersey Employer-Employee

^{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. (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."

Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). On August 26, 1998, the WEA and Barbara Cissone filed an unfair practice charge against the Board, CO-99-61, (C-1)^{2/} alleging the Board violated 5.4a(1) and (3) of the Act.

On September 14 and 30, 1999, the Director of Unfair Practices issued a Consolidated Complaint and Notice of Hearing, only with respect to the following two allegations:

1. CO-98-440 - the allegation that on March 18, 1998, the Board allegedly notified Danelle Connolly that her child study team position would be reduced to two days per week as the result of a reduction in force. The WEA alleges that this action was discriminatory and taken for anti-union reasons; and

2. CO-99-61 - the allegation that effective June 18, 1998, Barbara Cissone was not appointed to Supervisor of Special Education Services because of animus towards her protected activity.

The other allegations in CO-98-440 and CO-99-61 were dismissed by the Director pursuant to D.U.P. No. 2000-7 (C-3) and D.U.P. No. 2000-6 (C-2), respectively.

By letter of October 7, 1999, the Board indicated that it wanted its June 28, 1998 letter to the Commission (C-5) to serve as its Answer to the allegation in CO-98-440, and that it wanted its

^{2/} "C" refers to Commission exhibits received into evidence at the hearing in the instant matter. "CP" and "R" refer to Charging Party's exhibits and Respondent's exhibits, respectively, received into evidence at the hearing. The transcript of the two successive days of hearing is referred to as 1T and 2T, respectively.

October 6, 1998 letter to the Commission (C-4) to serve as its Answer to the allegation in CO-99-61 (1T7-1T8). Specifically, the Board denied that Connolly's position was reduced due to discriminatory and anti-union reasons and further denied that Cissone was not appointed to Supervisor of Special Education Services because of animus towards her protected activity. Rather, the Board claims it took its actions based on legitimate business reasons.

A hearing was held on February 15 and March 7, 2000. At the March 7, 2000 hearing, the WEA withdrew CO-98-440. Accordingly, I struck from the record all testimony and exhibits related to that charge (2T2-2T4).

The Board filed a post hearing brief by August 1, 2000.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. Barbara Cissone was employed by the Woodbine Board of Education during the 1996-1997 school year as a learning disabilities teacher and part-time special education teacher. Her title(s) were represented by the WEA. During the 1997-1998 school year, Cissone became employed by the Board as the Supervisor of Special Education Services, a supervisory position (1T65, 1T81-1T82, 2T9, 2T27: C-4). Accordingly, her responsibilities during that school year differed from those in the previous school year and her supervisory title was not represented by the WEA (2T22: C-4).

Cissone's Protected Activity

2. During the 1997-1998 school year, Cissone and the elementary school principal, Steve Hensil, attempted to form a collective negotiations unit entitled the Woodbine Principal and Supervisor's Association (WPSA). The unit included only Cissone and Hensil (1T85). In October 1997, Cissone and Hensil met with Superintendent Roseanne Cialella, Business Manager Teresa Mold and the Board Personnel Committee regarding the proposed unit and its recognition. Mold told Hensil and Cissone to create a name for the unit. Board President Kim Schalek and the Personnel Committee further told them that once the Board and the WEA reached an agreement, the Board would then negotiate with them (1T85-1T86, 1T133-1T134).

Nevertheless, at the October 1997 meeting, Hensil's benefits, as included in his individual contract for the prior year, were discussed; this included his stipend, his benefits, and his placement on the salary guide. Hensil was offered a stipend for his additional duties as principal. The Board also asked Cissone if she would accept receiving her current benefits plus a \$2000 stipend for serving as Supervisor of Special Education Services. Hensil had received that amount the prior year while serving in that capacity (1T134-1T135, 1T137-1T139, 1T160-1T168, 2T20, 2T52).

The Board also agreed to pay WPSA dues for Hensil and Cissone. Personnel Committee Chairperson Mrs. Feliciano asked Hensil and Cissone if they agreed with the terms offered by the

Board. Both expressed their agreement. Mold left the meeting believing the parties had an agreement. Board representatives told Cissone and Hensil to put the agreed-upon terms in writing and submit them to the Board, along with any other terms or conditions they wanted. Hensil and Cissone were also told that if they wished, they could submit to the Board their own agreement which contained the same benefits as the teachers' agreement. According to Cialella, there was no discussion of having another meeting. The WPSA never submitted any further agreement or proposals to the Board (1T134-1T135, 1T137-1T139, 1T160-1T168, 2T10, 2T52).

In October or November 1997, the Board, as reflected in its meeting minutes, recognized the WPSA. Specifically, the Board recognized Hensil, Principal of the Woodbine Elementary School and Cissone, Supervisor of Special Education Services, as members of the WPSA (2T4-2T5).

The teacher's agreement was settled in January 1998. In February 1998, the WPSA wrote a letter to Schalek asking that negotiations commence. The WPSA did not receive a response. The WPSA did not discuss with the superintendent or any Board member the fact that they did not receive a response. The WPSA assumed the Board did not receive the letter - thus they wrote a second letter in March 1998 to Schalek and Feliciano restating their previous request to commence negotiations (1T85-1T87, 1T92-1T94, 1T118-1T119, 2T13-2T14; CP-1, CP-2). The letter noted that the February 1998 letter may not have been addressed to the appropriate Board members

and also requested written confirmation that the Personnel Committee recognizes the WPSA and its name "Woodbine Principal's and Supervisors Association." Finally, the WPSA asked the Board to establish a schedule for bargaining (2T18-2T20; CP-1). Again, the WPSA did not receive a response and, again, Cissone and Hensil did not discuss the matter with any Board member because they believed they had to negotiate with the Board's negotiating team (1T86-1T87).

Cialella never received a copy of CP-1 or CP-2 and never knew of their existence at the time they were sent, even though she is responsible for administering the agreement for the District (1T169-1T170, 2T13-2T15). Cialella recognized CP-1 and CP-2 as requests to bargain, but believed that since everybody was so satisfied with what was accomplished at the October 1997 meeting that there was no need for further bargaining because there were no outstanding issues (2T16, 2T20, 2T24-2T25, 2T54). In fact, Cialella claims Hensil and Cissone stated "We are totally satisfied and the agreement is fair" (2T54-2T55). I credit that testimony.

In Cialella's experience, labor relations and negotiations had been conducted differently with respect to the WEA. The WEA president would send a letter to Board labor consultant William Yanonis, with a copy to Cialella, requesting that the Board meet with the WEA to negotiate. The Board would then respond timely. There have also been instances where after receiving a response from the Board, the WEA simply dropped an issue it had previously pursued (1T174-1T181; R-6, R-7).

In the spring 1998, Hensil approached Cialella and told her he wanted to schedule a negotiations meeting. A meeting was then held in September 1998 in Cialella's library office. However, no negotiations took place because Hensil indicated that he was there representing himself only, not the WPSA. Yanonis explained that it would be an unfair practice for him to negotiate under those circumstances (1T71-1T73, 2T21-2T22, 2T53-2T54).

Cissone's 1997-1998 Evaluation

4. In January 1997, Cissone received an evaluation from Cialella for the 1996-1997 school year containing 17 items regarding her non-supervisory title of learning disabilities teacher consultant containing 17 items. Cissone received an "excellent" rating on all 17 items; "outstanding" was the highest rating (1T100-1T101, 2T27; CP-4). In March or April 1998, Cissone received her evaluation from Cialella for the 1997-1998 school year in her supervisory title of supervisor of special education services. Cissone had been performing more responsibilities that year and her evaluation was not as good as the one the prior year. The evaluation indicated that Cissone had not performed her job to the best of her ability (1T101, 1T158; CP-6).

For example, on the first item listed in that evaluation, Cialella made the comment that Cissone "needs improvement" with respect to the job requirements that she conduct "special education meetings as required, eligibility conferences and individual IEP

conferences." Cialella and Cissone had had several discussions in September-October 1997 regarding her unsatisfactory performance as a supervisor. Specifically, Cialella had begun to notice that certain state mandated reports were not timely filed. When Cialella asked Cissone questions regarding her lack of performing her supervisory duties Cissone simply would respond that she continued to do the same things she had done the previous year when she served in a non-supervisory capacity and did not perform certain required duties. Cissone also claimed that Connolly was responsible for the duties, not herself. However, Connolly had filed a grievance during the 1997-1998 school year claiming that she should receive the stipend that Cissone had received for performing the duties of Supervisor of Special Education Services because she, and not Cissone, had performed the duties (1T159-1T163, 2T29-2T32; CP-6).

Cialella gave Cissone the less than satisfactory rating throughout the evaluation because she did not satisfactorily perform the duties required (1T161-1T163; CP-6). In particular, she received a less than satisfactory rating with regard to her duties as a supervisor (1T159-1T163, 2T29; CP-6).

Cissone became very distressed by the 1997-1998 evaluation because she believed part of the evaluation included activities that no longer existed in the District and believed that she had been evaluated on an old job description which no longer applied. This frustrated Cissone, considering she had received a glowing evaluation from Cialella the prior school year (1T87-1T88; CP-6).

However, she declined to meet and discuss the evaluation with Cialella because she did not have to (1T122-1T123).

5. Cissone wrote a rebuttal to her 1997-1998 evaluation. She listed every item on her evaluation, along with each comment by Cialella. Then she commented in the rebuttal on the items that she thought Cialella evaluated unfairly (1T87; 1T106-1T113; CP-6).

Cialella did not respond promptly to Cissone's rebuttal; thus Cissone sent the rebuttal to all Board members. Board member Michael Johnson thereafter approached Cissone about the evaluation. The two later met in Cissone's office and discussed the evaluation. Subsequently, Johnson, along with Yanonis, approached Cissone; Johnson told her he could not negotiate with her privately - that she had to negotiate with the Board (1T89-1T90).

6. On July 1, 1998, Cialella sent Cissone back her rebuttal and a clean copy of her evaluation, along with a letter requesting that Cissone write her rebuttal in the proper format - on a separate piece of paper. Cialella explained she would then attach the rebuttal to her evaluation and include it in her personnel file. Cialella also informed Cissone that it was inappropriate for her to have sent a 14 page rebuttal to the Board president and herself and that Cissone should follow the procedure regarding evaluations (2T38-2T44; CP-7).

Cialella also asked Cissone to send her a copy of an alleged tape Cissone made of a May 22, 1998 conference. Cialella believed Cissone had taped the meeting because she had included

actual quotes from it in a memo she had sent to Cialella. Cialella did not have a problem with Cissone taping the meeting; she simply thought she should have been supplied a copy of the tape of the meeting, as it was a formal proceeding (2T38-2T45; CP-6).

Cissone sent Cialella a July 15, 1998 response to Cialella's July 1, 1998 correspondence. Cissone indicated that she had complied with Cialella's request and enclosed her rebuttal on a separate piece of paper. She also stated that she could not find any District procedures with respect to evaluations and thus concluded there were none and also stated that she had not made a tape of the May 22, 1998 meeting. Cialella then immediately placed the rebuttal in Cissone's personnel file (2T46-2T48; CP-8).

7. In March-April 1998, prior to receiving her 1997-1998 evaluation, Cissone saw an advertisement in the teacher's room for a special education supervisory position requiring a principal's certificate. Cissone holds a supervisor's certificate but not a principal's certificate and thus, surmised she was no longer qualified for the supervisory position. An individual with a principal's certificate was in fact hired for the 1998-1999 school year (1T83-1T85, 1T88).

Cialella did not reappoint Cissone to a supervisory capacity because, based on her professional observations and evaluations of Cissone, she did not believe Cissone was an effective supervisor and because she had had an emotional outburst during the 1997-1998 school year which resulted in the Board requiring her to

have a psychiatric evaluation. Cialella did not believe Cissone was the best person for the supervisor position and thus returned her to the position of learning disabilities teacher consultant - the same position Cissone held when Cialella started with the District. Cissone's benefits and salary were not reduced upon returning to her prior position; however, she lost the supervisory stipend (1T164-1T166; 2T31-2T32).

ANALYSIS

The Board did not violate 5.4a(3) of the Act
when it failed to reappoint Cissone

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, 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 an illegal motive has been proven and if the employer has not presented 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 proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

In this case, I find there is insufficient direct evidence that the Board failed to reappoint Cissone based on anti-union animus. Consequently, I must look at the circumstantial evidence to determine whether the Act was violated.

I find that the Charging Party proved the first two Bridgewater elements - that Cissone engaged in protected activity and the employer knew of this -- since Cissone attempted to form the WPSA and negotiate with the employer. However, the Charging Party failed to prove that the Board was hostile toward the exercise of Cissone's protected activity.

I do not believe the Board's inaction with respect to the WPSA's bargaining requests, CP-1 and CP-2, proves hostility. Roseanne Cialella, the individual who made the decision not to re-appoint Cissone, was not even aware of their existence at the

time they were sent. Further, as far as she knew, there was nothing left for the Board and the WPSA to bargain over. (See Finding No. 2.)

While the Charging Party claims that the Board failed to reappoint Cissone to the position of Supervisor of Special Education Services because of its animus towards Cissone's protected activity, I find the record shows that the Board chose not to reappoint her because of her poor performance in that supervisory position. Cialella had met with Cissone several times throughout the 1997-1998 school year beginning in September 1997 regarding her unsatisfactory performance as a supervisor. When Cialella would question Cissone regarding her failure to perform her supervisory duties Cissone would simply respond that she was doing what she had done the previous year as a non-supervisor and that Connolly was responsible for the duties. In fact, during the 1997-1998 school year, Connolly had filed a grievance claiming that she should receive the stipend that Cissone received for performing the duties of Supervisor of Special Education Services because she, and not Cissone, had performed the duties.

Cissone's 1997-1998 evaluation is full of unsatisfactory ratings and comments by Cialella. Throughout the evaluation, Cialella notes how Cissone simply failed to satisfactorily perform or even perform at all her supervisory responsibilities. While Cissone may have had an excellent evaluation the prior year, that evaluation was given in her capacity as learning disabilities

teacher consultant - a non-supervisory position which did not require the same supervisory duties required as supervisor of special education services. Cissone's protected activity had nothing to do with her non-reappointment. The Board simply preferred not to reappoint her because of her poor performance as a supervisor. Absent an illegal motive, the Board had the managerial prerogative to appoint Cissone to her prior position of learning disabilities teacher consultant rather than reappoint her to the supervisory position. See City of Millville, P.E.R.C. No. 98-99, 29 NJPER 120 (¶29061 1998)

Based on the above, I find that the Board did not violate 5.4a(3) and derivatively 5.4a(1) of the Act. It did not act out of hostility towards Cissone's protected activity.

CONCLUSIONS OF LAW

The Board did not violate 5.4a(3) or, derivatively a(1) of the Act by failing to reappoint Cissone to a supervisory position.

RECOMMENDED ORDER

I recommend that the Commission **ORDER** that the Complaint be dismissed.

Dated: October 31, 2001
Trenton, New Jersey

Regina A. Muccifori
Hearing Examiner