H.E. NO. 97-19

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

In the Matter of

ROCHELLE PARK BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-404

ROCHELLE PARK EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Beattie Padovano, attorneys
(Ralph J. Padovano, of counsel)

For the Charging Party, Bucceri & Pincus, attorneys
(Sheldon H. Pincus, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An unfair practice charge was filed with the Public Employment Relations Commission ("Commission"), on June 29, 1994, by the Rochelle Park Education Association ("Charging Party" or "Association"), alleging that the Rochelle Park Board of Education ("Respondent" or "Board"), has 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. ("Act"), in that the Board improperly withheld the annual salary increment of one of its teachers, Charles Paterno, for the 1994-1995 school year. The Association alleges that the Board's denial of the increment was

motivated by anti-union animus and thus violated subsections 5.4(a)(1), (3) and (4) of the Act.[1/]

A Complaint and Notice of Hearing (C-1) was issued on January 18, 1995.[2/] On January 27, 1995, the Board filed its Answer contending that the withholding of the increment was unrelated to the individual employee's protected activity. A hearing was held on May 17, 18, June 8 and July 20, 1995, at which time the parties examined witnesses, presented relevant evidence and argued orally. The Charging Party filed a post-hearing brief on or about September 27, 1995, and the Respondent filed a reply brief on October 19, 1995.[3/]

On the entire record, I make the following:

FINDINGS OF FACT

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. (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."

2/ "C" refers to Commission exhibits; "J" refers to joint exhibits; "CP" refers to Charging Party's exhibits; and "R" refers to Respondent's exhibits.

3/ The Charging Party chose not to file a reply brief in response to the Respondent's reply brief and requested that the record be closed.

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

2. The Rochelle Park Education Association is a public employee representative within the meaning of the Act and is subject to its provisions.

3. The Board and Association had a collective negotiations agreement (J-1) effective from 1993 to 1995. Article III is the grievance procedure.

4. Charles Paterno has been employed by the Board as a teacher since 1966 (1T10).[4/] During this time, Paterno also served as interim principal, vice president of the Association and negotiations chair. From 1990 to 1994, he was grievance chair and co-chair (1T80-1T81).

5. On October 22, 1991, Paterno filed a grievance concerning a volleyball stipend (CP-16; 1T82, 1T83-1T85) and on October 8, 1992, he filed a grievance seeking resolution of the Board's increase in student contact time (CP-15; 1T87). Paterno actively participated in resolving these grievances.

4/ "1T" refers to the transcript from May 17, 1995; "2T" refers to the transcript from May 18, 1995; "3T" refers to the transcript from June 8, 1995; and "4T" refers to the transcript from July 20, 1995, and they are referenced as follows: Paterno's employment since 1966, 1T10; vice president/negotiations chair 1T80; and Association's grievance chair 1T80 and 1T81.

6. Patricia Doloughty, the Board's superintendent, is one level of the grievance procedure, and, has denied or forwarded some of the grievances Paterno initiated (CP-15, CP-16, J-1).

7. Doloughty conducts annual teacher observations and evaluations. Doloughty conducted observations of Paterno on October 19, 1988; April 27, 1989; March 15, 1990 and March 18, 1991 (CP-24, CP-25, CP-20, and CP-21).

8. More recently, on February 17, 1994, Doloughty observed Paterno and on March 24, 1994, submitted her written evaluation (CP-2, CP-4). The evaluation form requires the superintendent to rate Paterno on 22 (twenty-two) criteria, divided into three categories: instructional strategies and teaching techniques; classroom organization and management; and professional relationships, achievements and traits (CP-4, pg. 1). Of the 22 (twenty-two) criteria, Doloughty rated Paterno as "needing improvement" in 9 (nine) and "unacceptable" in one (CP-4). Further, Doloughty wrote:

> Classroom instructional time needs to be used more effectively. A variety of learning activities need to be incorporated in math lessons which actively engage students in learning.
> (CP-4, pg. 2)

9. Doloughty's comments criticized Paterno's early release of students, his using instructional time for discussions unrelated to the subject; and recommended that he use preparation time for lesson planning and grading of assessments (CP-4). Performance

areas needing improvement were identified as: "classroom instructional time needs to be used more effectively; and a variety of learning activities need to be incorporated in math lessons which actively engage students in learning" (CP-4).

10. On April 8, 1994, Paterno received Doloughty's written evaluation and responded in writing, charging that the evaluation was a "gross misrepresentation of his professional abilities as an educator" (CP-4). Paterno notified Doloughty that he was invoking the grievance procedure (1T46-1T48).[5/] On April 15, 1994, the Association filed a grievance over the evaluation contending that Doloughty applied the observation/evaluation policy in unfair manner (CP-6).

11. On May 2, 1994, Doloughty sent Paterno a letter recommending to the Board that the "increment be withheld for the 1994-95 school year and salary remain the same as it is for 1993-94 school year" (CP-9). Paterno's pay status in the collective bargaining agreement was at "step 15 MA+ 30" on the teachers' salary guide (J-1).

12. On May 16, 1994, the Board notified Paterno by letter that an "action was taken to withhold the adjustment increment for 1994-95 school year and accordingly the remuneration for 1994-95 would be the same as 1993-94" (CP-12). The letter further states that the "action was taken for the reasons included in Mrs.

5/ Doloughty acknowledged Paterno notified her that he would file a grievance (4T40).

Doloughty's letter to Mr. Paterno of May 2, 1994" and found that "Mr. Paterno's actions create a safety hazard by locking classroom doors during a teaching session and making inappropriate comments to students regarding administrative personnel; and creating inappropriate educational atmosphere for the students." (CP-12)

13. On April 19, 1994, the superintendent denied Paterno's grievance, and it proceeded to the Board (CP-23).

Analysis

The Association contends that Paterno was evaluated negatively and denied his 1994-95 increment in retaliation for his having been active in filing and prosecuting grievances against the Board and superintendent, including the grievance he filed objecting to his bad evaluation. The Board denies that anti-union animus was a motive for its denial of Paterno's advancement on the salary guide in 1994-95 and asserts that it's decision was based on Paterno's last evaluation. I agree with the Board.

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, 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 does not present any evidence of a motive not illegal under our Act or if its explanation is 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.

The Court in Bridgewater found that the mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or substantial reason for the employer's actions. 95 N.J. at 242.

As to the first part of the Bridgewater test, it is undisputed that Paterno engaged in protected activity by initiating grievances, serving on the negotiating committee, serving as co-chair or chairperson of the grievance committee, and participating in the general functions of the Association. The Commission has held on many occasions that the filing of grievances is a protected activity. Pine Hill Board of Education, P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986).

It is also undisputed that the Board and superintendent were aware of Paterno's activities on the Association's behalf. The record contains many examples of Paterno's involvement in the filing of grievances as early as 1988, wherein there is direct correspondence between Paterno and Doloughty, and evidence that Doloughty evaluated Paterno during her term as Superintendent and Principal (CP-17; CP-19). Therefore, I find that the Association has established the elements of protected activity and knowledge.

The Association alleges that it was not until the grievance reached the Board level that Paterno was notified that his 1994-95 increment was going to be withheld. The Board argues that the evaluation of April 8, 1994, served as notice of the Superintendent's intention to withhold the increment. Subsequently, on June 24, 1994, the Association filed this charge.

The Association alleges that the Board did not decide to withhold Paterno's increment until after it learned about the April 15, 1995 grievance. Although it is true that the Superintendent knew of the grievance on or about April 8, 1995, on this fact alone, I do not infer hostility or retaliation. There are no other indicators that Doloughty was hostile to the Association or Paterno.

There is also a requirement in Bridgewater that the employer demonstrate hostility toward the exercise of the protected activity. Throughout this record there is no evidence of hostility nor anti-union behavior. Although the record was replete with letters from the superintendent and from interim superintendents

making reference to certain discussions or criticism of Paterno's classroom behavior and the overall effect of this behavior on the children, there is no evidence that the Board was hostile to Paterno in these observations and evaluations, nor did the Board criticize Paterno for any of his Association-related activities (CP-19, CP-17, CP-22, CP-21). The Association has not met its burden of proving, by a preponderance of the evidence, that the Board retaliated nor exercised any hostile behavior against Paterno for fulfilling his Association obligations.

Having found no evidence of hostility toward Paterno's protected activity, there can be no nexus between the hostility and the increment denial. Accordingly, I need not consider the evidence that the Board would have withheld Paterno's increment for a legitimate business reason. However, based on the evidence that was proffered, I would find that the Board based its decision on the performance evaluations.[6/] The record contains several evaluations of Paterno dating back to 1988. A consistent thread throughout these evaluations was that Paterno's teaching methods were "in need of improvement" with specific examples of inadequacies. For example, in CP-19, an evaluation dated March 24, 1993, the evaluation reads, in part:

6/ By making this finding, I do not judge whether the Board correctly evaluated Paterno, but merely that it based its decision on the record evaluations and not anti-union animus. Outside the issue of discrimination for protected activity or disciplinary increment withholding, the issue of whether the Board properly evaluated Paterno is a matter within the jurisdiction of the Commissioner of Education.

> Performance areas needing improvement: lesson plans; ...students are not to be sent to the office to have the secretaries xerox worksheets; ...students are not responsible for grading tests; ...instructional time must be used more effectively. Numerous discussions unrelated to the curriculum of the subject intended for an instructional period take place in your classroom and the following inappropriate classroom and student management occurrences must never occur again:
>
> A. Inappropriate discussions with students and/or classes related to personal matters.
>
> B. Behavioral management techniques which include humiliating or belittling students verbally and putting students in corners.

All of these evaluations demonstrate a consistent pattern in Paterno's teaching methods. It is apparent that the Board took steps to have Paterno modify certain teaching practices.

The Charging Party failed to present substantial evidence supporting the allegation that anti-union animus was a motivating force or a substantial reason for its withholding of Paterno's 1994-95 increment as required by N.J.S.A. 34:13A-5.4(a)(3) and (1), and Bridgewater.

Finally, no evidence was presented to support the allegation that the Board violated subsection 5.4(a)(4). No facts were proffered showing that Paterno had "signed or filed an affidavit petitioner complaint or given any information or testimony

under the Act." Accordingly, I recommend that the Commission dismiss that part of the charge.[7/]

Upon the entire record in this case, I make the following:

Conclusions of Law

1. The Rochelle Park Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1) or (3), when, on May 16, 1994, it decided to withhold Charles Paterno's 1994-95 increment.

2. The Board did not violate N.J.S.A. 34:13A-5.4(a)(4) in that Mr. Paterno was not discharged or otherwise discriminated against because he had signed or filed an affidavit, petition or complaint or given any information or testimony under this Act.

7/ The Association argues that its 5.4(a)(4) claim is colorable under the decision in Hunterdon Cty. and CWA, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), aff'd NJPER Supp.2d 189 (¶168 1988), 116 N.J. 322 (1989). I disagree. That case differs from this one factually; there, unlike here, employees had filed unfair practice charges and given testimony under the Act. Hunterdon does not apply to the circumstances of this case.

Recommendations

I recommend the Commission dismiss the charge in its entirety.

Lorraine H. Tesauro
Hearing Examiner

Dated: February 5, 1997
Trenton, New Jersey