

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

In the Matter of

WOODSTOWN-PILESGROVE REGIONAL
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-79-201-60

WALTER DRISCOLL and WOODSTOWN-
PILESGROVE REGIONAL EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner, ruling upon motions submitted by the parties to an unfair practice hearing, (a) denies the Respondent Board's motion for summary judgment, finding that there are genuine issues of material fact to be decided herein; (b) grants a motion to hold in abeyance the instant unfair practice hearing pending the completion of a litigation on a related matter currently before an administrative law judge of the Commissioner of Education; and (c) denies Charging Parties' motion to compel depositions at this time.

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Appearances:

For the Respondent
Jordan and Jordan, Esqs.
(John D. Jordan, Esq.)

For the Charging Party
Joel S. Selikoff, P.A.

HEARING EXAMINER'S DECISION AND ORDER

On February 6, 1979, the Woodstown-Pilesgrove Regional Education Association (the "Association") and Walter Driscoll (together the "Charging Parties") filed an unfair practice charge, Docket No. CO-79-201, with the Public Employment Relations Commission (the "Commission") against the Woodstown-Pilesgrove Regional Board of Education (the "Board"). Subsequently, on April 11, 1979, the Charging Parties filed an amended charge with the Commission alleging that the 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. (the "Act"). ^{1/} The charge was processed in accordance with the Commission's Rules, and it appearing to the Director of

^{1/} More specifically, the Association asserted that the actions of the Board were violative of N.J.S.A. 34:13A-5.4(a)(1) and (3). These subsections prohibit employers, their representatives, and 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."

Unfair Practices that the allegations, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 26, 1979.

It is alleged in the Charge that Driscoll has been a guidance counsellor employed by the Board and that the Association has been the exclusive negotiating representative of a unit of all non-supervisory certified professional employees of the Board. The Charging Party alleges that Driscoll exercised his protected rights on January 22, 1979 by filing a grievance. On January 24, 1979, the Board suspended Driscoll from employment; on February 26, 1979, the Board certified tenure charges against Driscoll to the Commissioner of Education. The Charging Party contends that the suspension and certification of tenure charges were undertaken by the Board in retaliation for Driscoll's having exercised his rights guaranteed under the Act.

The Board admits that Driscoll was employed as a guidance counsellor, that Driscoll filed a grievance on January 22, 197, that Driscoll was suspended on January 24, 1979 and that tenure charges were certified to the Commissioner of Education in February, 1979. However, the Board denies that it suspended Driscoll and certified tenure charges to the Commissioner of Education in retaliation for Driscoll's exercise of rights guaranteed under the Act.

On May 2, 1979, a prehearing conference of the parties was conducted by the undersigned. Thereafter, on May 7, 1979, pursuant to N.J.A.C. 19:14-6.3(a)(5) and (12), the Charging Party submitted to the undersigned a Motion to Compel Depositions; the Board submitted its reply thereto on May 21, 1979; the Charging Party submitted a rebuttal on June 4, 1979.

On May 29, 1979, pursuant to N.J.A.C. 19:14-4.8, the Board submitted to the Chairman of the Commission a Motion for Summary Judgment or Alternatively to Defer Jurisdiction. On June 6, 1979, the Charging Party submitted a reply brief. On June 13, 1979, the Chairman referred the Motion for Summary Judgment and the Motion to Defer Jurisdiction to the undersigned for initial ruling.^{2/} Accordingly, the undersigned shall treat the above-indicated motions in the following order: (1) Motion for Summary Judgment, (2) the Motion to Defer Jurisdiction and (3) the Motion to Compel Depositions.

^{2/} See N.J.A.C. 19:14-4.8 and 6.1 et seq.

(1) The Motion for Summary Judgment

It is alleged in the Charge that the Board suspended Driscoll and certified tenure charges against him in retaliation for Driscoll's having exercised rights protected under the Act -- the filing of a grievance. The Board denies this allegation and contends that Driscoll was suspended -- pursuant to N.J.A.C. 18A:25-6 -- for the "falsification of reports and information" and for "permitting unauthorized students to observe the private records of other students."

In its brief, the Board states that summary judgment "would be granted where no genuine issue of material fact appears and the movant is entitled to relief as a matter of law." Contending that there is no evidence herein of an improper motive and that there is thus no issue of material fact, the Board argues for summary judgment.

The Charging Party contends that genuine issues of material fact do indeed exist herein -- i.e. whether Driscoll's suspension and the Board's certification of tenure charges against him were motivated wholly or partially by the filing of the grievance by Driscoll on January 22, 1979. The Association argues that the Board's submissions do not refute the existence of genuine issues of material fact herein.

N.J.A.C. 19:14-4.8(d) states:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant ... is entitled to its requested relief as a matter of law, the motion ... for summary judgment may be granted ...

In accordance with the foregoing rule provision, summary judgment may only be granted where there are no genuine issues of material fact to be decided. ^{3/} The documentation submitted in support of and in opposition to the instant summary judgment motion present conflicting claims concerning the central factor in this case -- was the Board's motivation for bringing tenure charges against Driscoll proper or improper under the Act? Accordingly, the Board's Motion for Summary Judgment is denied.

3/ In re Hamilton Twp. Board of Education, P.E.R.C. No. 77-34, 3 NJPER 69 (1977).

(2) The Motion to Defer Jurisdiction

The Board urges that in the event summary judgment is not granted, the Commission should defer further processing herein until the tenure charges are heard by the Commissioner of Education. The Board cites Hinfev v. Matawan Reg. Board of Education, 77 N.J. 504^{4/} wherein the New Jersey Supreme Court stated that administrative agencies with conflicting jurisdictions should defer their proceedings to the agency with the most expertise over the matter.

The Board argues that the voluminous tenure charges involved herein concern the various interworkings of a high school -- matters which are more within the expertise of the Commissioner of Education than the Public Employment Relations Commission. The Board also notes that considering the nature of the issues involved in both proceedings, it is apparent that the Commissioner of Education has more expertise to deal with the overall situation. Further, the Board claims that the Charging Party's complaint herein is of lesser significance than the tenure charges.

The Charging Party contends that a Deferral of Jurisdiction to the Commissioner of Education is not warranted in this matter. The Charging Party states that the Charge herein sets forth an unfair practice issue, and inasmuch as the Commission has primary jurisdiction over unfair practice matters, resolution of this charge should be handled by the Commission. Further, the Charging Party claims that the unfair practice charge has nothing to do with the merits of the tenure charges against Driscoll.

In Hackensack v. Winner, 162 N.J. Super. 1,^{5/} one party brought separate but related actions before two administrative agencies -- an unfair practice charge before the Public Employment Relations Commission and an action before the Civil Service Commission. The Court concluded, inter alia, that,

An unfair labor practice issue, as a matter of primary jurisdiction, should normally be determined by PERC even though PERC and Civil Service have concurrent jurisdiction with respect to that issue, when it involves the rights of promotion, or the like, of Civil Service employees. We think that the "exclusive power" provision of N.J.S.A. 34:13A-5.4(c) may evince such legislative intent.^{6/}

^{5/} Hackensack v. Winner, 162 N.J. Super. 1 (App. Div. 1978), petition for certification granted 78 N.J. 404, appeal pending, Supreme Court Docket No. 15,201.

^{6/} Id. at 32.

In Hackensack, supra, the Appellate Division further stated that principles such as res judicata and collateral estoppel apply not only to parties in the courts, but also in administrative tribunals and agency hearings.

In In re Cape May City Board of Education, P.E.R.C. No. 79-37, ^{7/} one charging party/petitioner brought actions in two forums, each of which evolved out of the same set of facts -- an unfair practice charge was filed with PERC and an action was filed before the Commissioner of Education. The remedies sought before each forum were similar. Upon motion by the respondent board of education, this agency refused to defer its proceedings in favor of the Commissioner of Education's case, finding instead that the facts of the matter placed it squarely and primarily within the Commission's jurisdiction. The Appellate Division upheld the Commission's decision. ^{8/}

In Hinfey v. Matawan Reg. Board of Education, supra, the New Jersey Supreme Court ruled upon several issues concerning concurrent jurisdiction of administrative agencies. In Hinfey, complaints were filed with the Division of Civil Rights alleging, inter alia, sex discrimination in the courses and curriculum of the Matawan Regional Board of Education. A motion was made to dismiss the complaint on the ground that the Division lacked jurisdiction over claims alleging discrimination in public school curricula -- and that such jurisdiction reposed in the Commissioner of Education. After several intermediate decisions were issued, the Supreme Court granted certiorari. The Court concluded as follows:

In general there is a salutary disposition on the part of the courts to construe generously the discretionary powers of administrative agencies to accord maximum flexibility in achieving statutory goals. Particularly is this so with agencies which are charged with governmental responsibility in sensitive and complex areas of great social and human import and vested with a wide range of regulatory tools encompassing investigative, educative, prosecutorial, adjudicative and rule-making powers ...

There is no reason, absent an occlusive statutory bar for an administrative agency to be obtuse to the

^{7/} In re Cape May City Board of Education, P.E.R.C. No. 79-37, NJPER (1979).

^{8/} In re Cape May City Board of Education, P.E.R.C. No. 79-39, NJPER (1979); leave to appeal granted, Docket No. AM-339-78; motion to stay PERC proceeding denied, motion no. M-2010-78.

genuine concerns of other administrative agencies which possess concurrent jurisdiction over the same subject matter. This is especially so where the controversy is multidimensional and legitimately touches the competence of more than one agency. In that context, administrative agencies should never be encouraged to engage in internecine struggles for jurisdictional hegemony ...

Such considerations make it quite evident that principles of comity and deference to sibling agencies are part of the fundamental responsibility of administrative tribunals charged with overseeing complex and manifold activities that are also the appropriate statutory concern of other governmental bodies. This is a corollary application of the broader principle that where a court has concurrent discretionary jurisdiction with another court or an administrative agency, the decision to exercise jurisdiction vel non should be fully responsive to the competence, expertise and status of the other tribunal.

Comity and deference to cognate tribunals are designed to assure that a controversy, or its most critical facets, will be resolved by the forum or body which, on a comparative scale, is in the best position by virtue of its statutory status, administrative competence and regulatory expertise to adjudicate the matter. (emphasis added; citations omitted) ^{9/}

It is clear that what has been alleged by the Charging Party herein, if true, would constitute a violation of the New Jersey Employer-Employee Relations Act. It follows then that the Commission has jurisdiction over the instant matter. ^{10/} Accordingly, to the extent that the motion requests a deferral of jurisdiction to another agency of the unfair practice issues raised by the charge, the undersigned is constrained to deny such request. ^{11/}

However, to the extent that the motion requests that this unfair practice proceeding be held in abeyance pending the completion of the tenure litigation before the Commissioner of Education, other considerations are brought to bear.

The essence of this case, as set forth in the submissions of the parties to date, is as follows: (1) an allegation by the Charging Party that the Board

^{9/} Hinfey v. Matawan Reg. Board of Education, *supra*, n. 3 at 530.

^{10/} See N.J.S.A. 34:13A-5.3 and 5.4. See also In re Lakewood Board of Education, P.E.R.C. No. 77-73, 3 NJPER 313 (1977); and In re Cape May City Board of Education, *supra*, n. 8.

^{11/} See N.J.S.A. 34:13A-5.4. Hackensack v. Winner, *supra*, n. 4.

brought its tenure action against Driscoll in retaliation for his engaging in protected activity, (2) that such conduct constitutes an unfair practice violation over which the Commission has jurisdiction; hence the instant matter should proceed forthwith; (3) denial by the Board of any retaliatory motive against Driscoll for his engaging in protected activity; and (4) a rationale presented by the Board for the institution of the suspension and tenure charges. What is presented in this motion is the question of whether this agency should hold in abeyance the instant unfair practice proceedings pending the litigation before the Commissioner of Education of certain factual issues common to both the instant unfair practice proceeding and the matter before the Commissioner of Education. Among the Board's submissions before the undersigned are two documents which were prepared in support of the tenure charges brought before the Commissioner of Education. ^{12/} Thus, it now becomes apparent that part of the Board's case in the instant unfair practice proceeding appears to be the very matters and issues which it (the Board) has brought before the Commissioner of Education. The two matters are indeed related -- though the legal issues are different, part of the factual allegations before the Commissioner of Education are coincidental with part of the factual allegations in the unfair practice matter. From the submissions before the undersigned, it appears that there will be a substantial area of factual overlap between that which will be litigated before this agency and that to be litigated before the Commissioner of Education. The area of factual overlap appears to consist of matters and issues which are central to the Commissioner of Education's case and which are but one part of the case before the undersigned. Accordingly, consistent with the Supreme Court's conclusions in Hinfey, in an effort to assure that those issues having to do with "the various interworkings of a high school" are resolved by the forum which, on a comparative scale, is in the best position to adjudicate them, the undersigned hereby grants the Board's motion to defer the processing of the instant unfair practice matter until the completion of the factual litigation before the administrative law judge ("ALJ") of the Commissioner of Education. Thereupon, the undersigned will entertain motions from either of the parties herein to recommence the instant unfair practice hearing. ^{13/}

^{12/} One document is entitled "Statement of Charges Pursuant to N.J.S.A. 18A:6-11"; the other is entitled "Statement of Evidence Affidavit," which sets forth the factual allegations in support of the above-referenced charges.

^{13/} It is anticipated that the factual record which would be made before the undersigned in this matter will go beyond that record made before the Commissioner of Education to other facts and issues. Accordingly, once the unfair practice hearing has commenced, the parties may seek to introduce appropriate portions of the record made before the Commissioner of Education's ALJ.

(3) The Motion to Compel Depositions

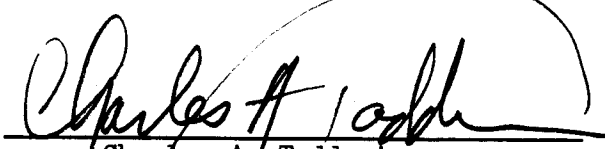
In view of the foregoing ruling holding the processing of the instant matter in abeyance until the completion of the litigation before the Commissioner of Education's ALJ, the undersigned is disinclined to order depositions at this time.

The undersigned notes that part or all of the information sought by these depositions may be brought forth in the pending tenure litigation. Thus, granting depositions at this time may ultimately prove to be wasteful of the parties' and witnesses' time and resources. ll/

Accordingly, the Motion to Compel Depositions is denied.

Order

For the foregoing reasons, the Motion made by the Respondent Woodstown-Pilesgrove Regional Board of Education for summary judgment dismissing the Complaint is hereby denied. The motion made by the Respondent Board to defer the processing of the instant unfair practice charge until the completion of the related litigation before the Commissioner of Education's ALJ is granted. Accordingly, the hearing in the above-captioned matter shall be held in abeyance pending the completion of the related litigation (In the Matter of Woodstown-Pilesgrove Regional Board of Education v. Walter Driscoll) before an ALJ of the Commissioner of Education. The motion to compel depositions made by the Woodstown-Pilesgrove Regional Education Association and Walter Driscoll, the Charging Parties herein, is denied at this time.


Charles A. Tadduni
Hearing Examiner

DATED: September 25, 1979
Trenton, New Jersey

ll/ The undersigned notes that if the information sought by the Charging Party is not elicited during the tenure litigation before the Commissioner of Education's ALJ, upon motion by the Charging Party, the undersigned will reconsider the Charging Party's motion for depositions at that time.

The parties should also note that in the event the litigation before the Commissioner of Education's ALJ undergoes some protracted delay, upon motion of the Charging Party, the undersigned will reconsider the advisability of granting depositions at that time, even if prior to the completion of the litigation before the Commissioner of Education's ALJ.