

P.E.R.C. NO. 91-37

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PRINCETON REGIONAL  
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-55

PRINCETON REGIONAL TEACHING  
ASSISTANTS ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, pursuant to authority granted by the full Commission in the absence of exceptions, dismisses a Complaint based on an unfair practice charge filed by the Princeton Regional Teaching Assistants Association against the Princeton Regional Board of Education. The Chairman finds that the Association has failed to show that protected conduct was a substantial or motivating factor in the layoff of an instructional aide.

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ASSISTANTS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Sills, Cummis, Zuckerman, Radin,  
Tischman, Epstein & Gross, attorneys  
(Frank D'Ambra, of counsel)

For the Charging Party, Wills, O'Neill & Mellk, attorneys  
(Arnold M. Mellk, of counsel)

DECISION AND ORDER

On August 25, 1989, the Princeton Regional Teaching Assistants Association filed an unfair practice charge against the Princeton Regional Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),<sup>1/</sup> by laying off an instructional aide in retaliation for her questioning her involuntary reassignment.

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<sup>1/</sup> 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."

On September 6, 1989, a Complaint and Notice of Hearing issued. On November 17, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties examined witnesses and introduced exhibits.<sup>2/</sup> They waived oral argument, but filed post-hearing briefs by February 22, 1990.

On September 5, 1990, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-6, 16 NJPER \_\_\_\_ (¶\_\_\_\_ 1990). She found that the Association failed to prove that the layoff was in retaliation for the complaint.

The Hearing Examiner served her decision on the parties and informed them that exceptions were due September 18, 1990. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-8) are accurate. I incorporate them here.

Pursuant to the authority granted to me by the full Commission in the absence of exceptions, I dismiss the Complaint. The Association has failed to show that protected conduct was a substantial or motivating factor in the layoff. See In re Bridgewater Tp., 95 N.J. 235 (1984).


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<sup>2/</sup> The Hearing Examiner permitted the Board to rely on an earlier statement of position as its Answer. The Board denied the allegation and claimed it abolished the aide's position as part of an overall reduction in force.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
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James W. Mastriani  
Chairman

DATED: Trenton, New Jersey  
October 15, 1990

H.E. NO. 91-6

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

In the Matter of

PRINCETON REGIONAL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-55

PRINCETON REGIONAL TEACHING ASSISTANTS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Princeton Regional Board of Education did not violate section 5.4(a) (1) and (3) of the New Jersey Employer-Employee Relations Act when it rified Teachers Aide Joan Katz after she complained about her added detention class assignment. The Hearing Examiner found that Charging Party failed to show that the Board's action in laying off Katz was in retaliation for her complaint or that the Board discriminated against her when it rified her along with seven other aides.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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

In the Matter of

PRINCETON REGIONAL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-55

PRINCETON REGIONAL TEACHING ASSISTANTS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent

Sills, Cummis, Zuckerman, Radin, Tischman,  
Epstein & Gross, Esqs.  
(Frank D'Ambra, of counsel)

For the Charging Party

Wills, O'Neill & Mellk, Esqs.  
(Arnold M. Mellk, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On August 25, 1989, Princeton Regional Teaching Assistants' Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission"). The Association alleges that the Princeton Regional Board of Education ("Board") violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., <sup>1/</sup> by

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<sup>1/</sup> 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.

terminating Joan Katz from her instructional aide position because she questioned her involuntary reassignment.

A Complaint and Notice of Hearing issued on September 6, 1989. On November 17, 1989, I conducted a hearing. At the hearing, I permitted the Board to rely on its pre-Complaint position statement as an Answer to the Complaint. The Board denied the unfair practice and asserted it abolished Katz's position as part of an overall reduction in force. It maintained that Katz's employment contract was not renewed because changing program needs made Katz's position unnecessary.

At the hearing, the parties examined witnesses and introduced exhibits.<sup>2/</sup> After an extension of time<sup>3/</sup>, both parties filed briefs by February 22, 1990.

Upon the entire record, I make the following:

FINDINGS OF FACT

1. Joan Katz worked for the Princeton Regional High School as an instructional aide (also called "teaching assistant") from 1984 through June, 1989. The Board hired Katz in November, 1984, as an instructional aide for the High School's alternative school program to work with emotionally disturbed students. The program was then constructed so that handicapped students attended both

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<sup>2/</sup> The transcript of the hearing will be referred to as "T-". Jointly submitted exhibits will be referred to as "J- "; the Association's exhibits will be referred to as "CP- ".

<sup>3/</sup> Receipt of the hearing transcript was delayed until January 2, 1990.

regular "mainstream" classes and a special class at which they received emotional support and one-to-one help in accomplishing their work. In 1985-86, the program was modified so it had its own curriculum and interpersonal communications were taught (T25).

2. In 1987, Katz took a leave of absence to travel in Europe. When Katz returned to the district in 1988, the program for handicapped students no longer consisted of the alternate school model. Marylou Huchet and Tom McMorrow, the special education teachers to whom Katz had previously been assigned, were now team teaching several classes outside special education, including specialized english classes for classified and non-classified students, communications, and video production. Although Katz continued to assist Huchet and McMorrow with students in other capacities, including working with students in the video production laboratory and communications department, she was primarily assigned clerical duties in the library and detention supervision. Katz received positive, laudatory evaluations from Principal John Sakala (J-5; T25-T29, T32, T69, T89).

3. Until January, 1989, the school store was open during students' lunch period and supervised by instructional aide Martique Branch. Sakala decided to open the school store during eighth period rather than at lunch time to permit Branch to take a lunch period. He decided to assign Branch supervision of the store during eighth period. A review of the aides' schedules revealed that Katz was assigned to monitor students in the computer lab and assist in



the video production studio during eighth period. Sakala decided that Katz could take over Branch's eighth period detention monitoring assignment to free Branch for the school store assignment (T42, T46, T75).

4. Connie Embley, a special education teacher and handicapped program coordinator, is responsible for scheduling the instructional aides in coordination with the needs of the special education teachers. She also acts as liason between the aides and the administration. Sakala asked Embley to advised Katz and Branch of their respective schedule changes. Embley did (T33-T34).

Sakala confirmed the reassignments by memorandum to Katz and Branch on January 24, 1989. His memo confirmed that the reassignment was so that Branch could operate the school during eighth period (J-2).

5. Aides routinely monitor the detention class. Although Katz had not previously complained about her detention monitoring assignments, she questioned Sakala about this added detention assignment. (T39-T40, T42). The collective agreement between the Board and the Teaching Assistants Association provides at Article 3 that the first step of the grievance procedure is for the employee to discuss a grievance first with his/her principal to try to resolve the matter informally. (J-1, p. 5).

Katz told Sakala she felt that the assignment was a waste of her time because she enjoyed being in the classroom and felt she was good at it. She asked if he could find another way to deal

with the problem. Sakala told her there was nothing he could do about it and "that is the way it is." She then spoke to her Association representative about not being given enough input into the reassignment (T34).

6. The Association representative discussed the matter with Sakala. She complained to him that he relied on Embley to notify Katz of the reassignment rather than discuss the reassignment with Katz personally. She pointed out that the contract requires a supervisor to get an employee's input concerning assignments.<sup>4/</sup> Sakala indicated he had not realized he violated the contract, but the assignment was necessary. The Association representative reported this back to Katz. No formal grievance was filed (T35, T46, T82).

7. In December, 1988, Sakala submitted his requested 1989-90 budget for the high school to the Board Secretary. That requested budget presumed the continuation of all existing positions for the coming school year. The Board Secretary/Business Administrator, Robert Rader, has primary responsibility to formulate the district budget. The Board determined that the district budget would have to be cut by \$1.4 million. Rader held a series of weekly meetings with all school administrators in January and February,

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<sup>4/</sup> Article 8B of the contract requires the employee's area of competence and other relevant factors to be considered in determining which employee to transfer or reassign. Article 8C requires a meeting between the employees and the "appropriate administrative person" before an aide is involuntarily reassigned (J-1,p. 14).

1989, to prioritize the budget and decide what cuts could be made. The high school budget had to be cut most extensively because high school enrollment was decreasing while elementary was increasing. As it became obvious that positions would have to be cut, instructional aides were discussed as one area that could be reduced. Faye Hunsinger, the Personnel Director, attended the discussions concerning staff reductions to advise the administrators when seniority affects employment. Seniority was not an issue in deciding which aides positions would be cut. The collective agreement with the Association permits a layoff by seniority groupings: that is, employees beginning employment through fifth-year employees are considered by the contract to have equal service for layoff purposes. The contract also provides that the administration may choose which employees are rified within a category for a partial RIF (J-1; T61, T62, T85).

8. Sakala wanted to make cuts where it would be least damaging to existing programs. Sakala decided to cut two full-time and one half-time aide positions to save one teaching position.<sup>5/</sup> Sakala discussed the possible elimination of Katz's position with the child study team and special education teacher Mrs. Huchet. He concluded that Katz' position reduction probably would not substantially affect the program, since the nature of the special education program Katz was hired for had changed significantly.

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<sup>5/</sup> Two full-time and one half-time aide positions are equalivnt for budget purposes to one full-time teaching position.

Sakala recommended to the Board that Katz's position, along with two others, be eliminated. The Board adopted the final budget on March 20. At the April 25 meeting, the Board voted to eliminate Katz's position because of changing program needs. Katz was informed in May, 1989, that her position had been eliminated and her contract would not be renewed for the coming school year (J-3; T85-86, T88, T89, T105)).

9. Katz had no other conversations with Sakala about her position until he informed her in May that her contract was not being renewed (T37). Sakala testified that after the conversation about the reassignment, it was difficult to talk to Katz because she did not respond to his greetings (T89-90). Katz acknowledged that she probably did not respond to his salutations in the hallways (T107).

10. Katz testified that Sakala later saw her in a school hallway, he "made a sarcastic remark about what I had done vis-a-vis the union." (T36). Katz further stated that the remark "made reference to nothing and did not address the issue." (T48) Sakala denied making any remark about her going to her Association representative. Since Katz had no more specific recollection of this remark, I cannot definitively find that it concerned her complaint to the Association representative, nor can I credit her characterization that the remark, even if made, was sarcastic in nature.

11. Eight of the district's instructional aides were rified in June, 1989. At the high school, in addition to Katz, Donna D'Amore was rified from her full-time aide position, and Tenita Howard was rified from her half-time aide position (J-4; T59, T60-61, T85).

According to J-4, <sup>6/</sup> a list of the eight rified aides prepared by Hunsinger, Tenita Howard had fewer years in the district than Katz. Howard was later rehired by the district for her half-time position. Katz was not rehired, and there are not plans to recreate her position (T90).

#### ANALYSIS

The Association contends that the Board failed to renew Katz's employment contract because of her complaint to her principal concerning the detention assignment.

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.

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<sup>6/</sup> I infer that this list of aides, together with hiring dates, was first prepared by Hunsinger for this hearing; length of service was not considered in the meetings with administrators to decide which positions to cut.

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.

Katz engaged in protected activity when she went to her principal to complain about the new assignment. Her right to informally grieve the assignment to the principal is guaranteed by the Act and by Article 3 of the parties' contract. Sakala, the person to whom she grieved, was the one who decided which aide positions would be eliminated. Therefore, the first and second parts of the Bridgewater test have been met.

However, the charging party has failed to show that the Board or its agents (Sakala) demonstrated any hostility towards Katz's exercise of her protected rights. I have already found as a fact that Katz's testimony about Sakala's so-called "sarcastic remark" cannot be credited. There is no evidence to establish that

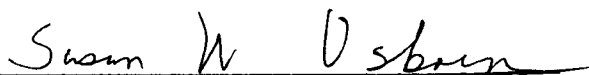
the Board's motive for eliminating Katz's position was in retaliation for Katz's grievance.

Further, I find that the Board would have eliminated Katz's position and rified her even if she had not grieved the additional detention assignment. First, Katz was not singled out to be rified; she was part of a district-wide layoff of eight instructional aides which was done for economic reasons. Second, it is clear that her position was targeted for elimination because the program for which it was created--special education aide in the alternate school model--was already abolished.

Therefore, based upon the record in this matter, I find that the charging party has not proven that Joan Katz was discriminated against because she exercised her right to grieve.

RECOMMENDED ORDER

I recommend that the Commission dismiss the Complaint.

  
Susan Wood Osborn  
Hearing Examiner

Dated: September 5, 1990  
Trenton, New Jersey