

H.E. No. 2006-4

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

In the Matter of

EAST WINDSOR REGIONAL
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2004-233

EAST WINDSOR EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants the Respondent's Motion to Dismiss the Complaint at the conclusion of the Charging Party's case. The Hearing Examiner finds that the Board president's critical comments made to the Association president immediately before a Board meeting, as well as the Board president's e-mail criticizing her, did not violate 5.4a(1) of the Act. The Association president was not engaged in any protected activity but rather was criticized because of her conduct as the chair of an employee search committee for a new superintendent.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommended 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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy, attorneys, (Mark Blunda, of counsel)

For the Charging Party, Bergman and Barrett, attorneys, (Michael Barrett, of counsel)

HEARING EXAMINER'S DECISION ON MOTION TO DISMISS

On February 6, 2004, the East Windsor Education Association/NJEA (EWEA or Association) filed an unfair practice charge against the East Windsor Regional Board of Education (Board). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1), (2) and (7),^{1/} when on October 28, 2003, Board President Bruce

^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (7) Violating any of the rules and regulations established by the commission."

Ettman launched into a tirade against Association President Jan Amenhauser in front of Board and Association members, accusing her of lying about a superintendent candidate. The Association claims the Board further violated the Act when Ettman, two days later, sent an e-mail to Board and Association members commenting about Amenhauser's alleged transgressions and calling for the Association to take action against her. The Association asserts that union animus was the reason for Ettman's actions and said actions demonstrate that the Board was hostile towards the Association and, particularly, its president, for exercising protected rights.

A Complaint and Notice of Hearing issued on July 13, 2004 (C-1)^{2/}. On August 6, 2004, the Board filed an Answer, denying it violated the Act, and setting forth several affirmative defenses (C-2). In particular, the Board claims the Complaint fails to state a claim against the Board; that the Charging Party did not engage in any protected rights; that the Board did not interfere with the formation, existence, or administration of the Association; that the expression of views and opinions that contain no threat or reprisal do not constitute an unfair labor practice; that Ettman's expression of his views and opinions is

^{2/} "C" refers to Commission exhibits; "CP" refers to Charging Party exhibits and "R" refers to Respondent exhibits received into evidence at the hearing in the instant matter. Transcripts of the successive days of hearing are referred to as "1T" and "2T."

not an act of the Board; and that the Complaint is barred by Amenhauser's own bad faith conduct.

A hearing was held on October 5 and October 12, 2004. At the conclusion of the Charging Party's case on October 12, 2004, the Board moved to dismiss the Complaint.

Granting every favorable inference to the Charging Party, I accept these facts as true for purposes of this motion:

FINDINGS OF FACT

1. The East Windsor Education Association represents the district's teaching staff. Jan Amenhauser has been a teacher in the district for the past 17 years and is currently assigned to the Rogers School. She is also EWEA president and has served in that capacity for the past three years (1T23, 1T79-1T80). Pat Laudati is the Association's treasurer and has served in that capacity for the past seven years (2T4). As Association President, Amenhauser was involved in the last round of collective negotiations between the Board and the Association, which resulted in the parties reaching an agreement for the 2003-2006 contract even before the old one expired (1T83-1T84).

2. Earlier in Amenhauser's term as Association President, Dr. Witmer served as Board Superintendent. Amenhauser believed that the atmosphere in the East Windsor School District suffered under the Witmer administration. Specifically, the creativity and communication that had frequently existed between teachers and the principal started to diminish (1T24-1T25, 2T5).

The Association tried to foster change by encouraging individuals to run for seats on the Board. The Association also interviewed Board candidates and endorsed certain ones, including current Board President Bruce Ettman. Further, the Association informed the Board that it believed Witmer's "top down" administrative style was hampering the educational process and resulted in staff leaving (1T25-1T29, 1T81-1T83).

3. Once it became clear that Witmer was leaving and a new superintendent was to be hired, the Board sought to repair the relationship between the administration and the staff. It decided to invite the teachers, as "stakeholders", to participate in the selection process for a new superintendent (1T29-1T30, 1T85-1T86, 1T181-1T182). It invited parents, students, administrators and support staff to form selection committees as well (1T29-1T30, 1T85-1T86, 1T181-1T182). Board President Ettman was the Board's "point man" in the process while Amenhauser was the "point person" for the teachers committee (1T182).

The Board also hired a national search firm, particularly consultant Bea Gordon, to conduct the search for a new superintendent. Gordon met several times with district teachers to learn their concerns regarding potential superintendent candidates (1T29-1T33, 1T147-1T148, 2T6).

4. The Board invited the teachers to form a committee to participate in the selection process for the new superintendent (1T29-1T33, 1T147-1T148, 2T6). The Board's invitation to

participate was directed to the teachers, not the Association (1T85, 1T185, 2T5-2T6, 2T42-2T43, 2T62, 2T65, 2T87; R-1, R-2, R-3). The Board wanted the committee to consist of a broad spectrum of teachers with varying experience, abilities and backgrounds; it also wanted teachers from each of the district schools, if possible (1T32-1T33, 1T86, 2T6, 2T62, 2T102; R-1). By October 5, 2003 e-mail, entitled "Teacher Committee for CSA Search", Ettman directly requested Amenhauser's help in forming the teachers committee and selecting a chair. He also explained how the committee would work (1T86; R-2). Specifically, Ettman wrote to Amenhauser:

Jan,

We need a Committee representing a cross-section of the teaching staff to provide input to the Board regarding the CSA Search. The Committee will meet with 3 or 4 finalists to be selected by the Board at specified times. Following is a summary of the process and of the criteria for the Committee.

Process

The Committee (12-15 teachers) will develop (with assistance from our consultant) questions to ask the candidate. Each interview will be 'scripted' to ensure that the same information is being elicited from the [sic] each candidate. The Committee will take notes as to how each candidate measures up to pre-determined qualifications for the new CSA (to be developed before the interview process with consultant). After the interview process, the Committee will meet (very shortly after interview) to discuss how each candidate satisfies or does not satisfy each criterion. The Chair will then provide the comments to the consultant to provide to the Board as part of its final evaluation.

The teachers then formed a 16-member committee and appointed Amenhauser as the chairperson (1T33-1T34, 1T86-1T87, 2T6-2T8, 2T102). Association Treasurer Laudati, teacher Mary Ellen Burns and Association Executive Board Representative Terry Tupliszewski were among the committee's members (2T4, 2T20, 2T101-2T102; CP-5, R-2). Thereafter, through cordial and professional e-mails, Amenhauser and Ettman communicated about the progress and content of the teacher committee (1T95-1T98; R-2, R-3).

The other stakeholders the Board had invited to participate in the process also formed their own committees. Thus, there was a parents committee, a support staff committee, and a student committee. Each committee was to conduct its own separate interview of each superintendent candidate (1T30, 1T35, 1T89, 2T12).

5. Consultant Bea Gordon met with the teachers committee prior to the start of the process. She told the committee that the Board's ground rule was that the various committees were not to conduct any independent background investigations of the candidates; she explained that such investigations could potentially harm candidates who were still in their present jobs, because their employers may discover that they were searching for new employment (1T90-1T91, 2T13, 2T54-2T55).

Thereafter, Gordon held another meeting, this time with all the committee chairs, to formulate the interview questions for the candidates. Amenhauser could not attend this meeting, but

Laudati attended in her place (1T35-1T36, 1T87-1T90, 2T8-10; R-1).

Gordon explained that the questions for each interview were to be formulated and decided upon prior to the actual interview (1T35-1T36). Gordon indicated that it would not be a free-flowing interview with each candidate; rather, each committee would ask pre-approved questions. The group discussed items that they wanted to ask the candidates. Gordon explained that she would distill the information and formulate the questions; each committee chair would then receive a copy of the approved questions (2T10-2T11).

At the meeting, Gordon also explained to the chairs that the Board had certain ground rules that it expected the committees to follow throughout the process. First, each chair would receive the approved questions for the candidate and these questions would then be forwarded to each candidate prior to the interview. Each committee would then meet separately with each candidate and ask their approved questions (1T35-1T36, 1T87, 1T183-1T184, 1T189, 2T8-2T13; R-1).

The candidate would then respond and could ask questions in return. Gordon would be in the room during this questioning process. At the conclusion of the interview, the committee would then meet privately to discuss the candidate. Next, the committee would finalize its written evaluation of the candidate

and deliver it in a sealed envelope to Gordon, who would then deliver it to the Board (1T88-1T89, 1T92, 2T12, 2T114; R-1).

Gordon further specifically advised that the various committees would not be permitted to share their information regarding the interview process, including what questions were asked, what the committee discussed, and what the committee eventually wrote about the candidate in its evaluation (1T89-1T90, 1T92, 1T192, 2T12-2T13). Laudati later told Amenhauser what had transpired at the meeting and particularly informed her of the ground rules (1T88, 2T14). As chair, Amenhauser agreed that the committee would be bound by these ground rules (1T92).

6. By October 26, 2003, the Board had narrowed the field of potential superintendent candidates to three finalists (1T36-1T37, 2T15). As announced in the newspaper, one of the finalists was Dr. Cheryl Simone. Simone's interview was scheduled for Tuesday, October 28, 2003 (1T37, 2T15; CP-1).

On October 26, 2003, the Sunday night prior to the scheduled Simone interview, Amenhauser received a call from Association building representative and officer, Paula Small, about a Princeton Packet Online article involving Simone. Small told Amenhauser that the article indicated that members of the community where Simone was currently employed had filed a petition asking that Simone not be rehired and cited communication as a problem (1T37, 1T40-1T41, 1T98, 1T184, 2T65; CP-1). Amenhauser felt this was "deja vu", because at the time

of Superintendent Witmer's hiring, there had been a published article containing damaging information about him and it was unclear whether the Board considered it in its decision to hire him (1T39, 1T41).

Amenhauser became concerned. She told Small that she needed to see the article. The two decided to meet the next morning before school so that Amehauser could review the article (1T37, 2T15).

7. After her telephone conversation with Small, Amehauser immediately called fellow teacher committee members Tupliszewski and Laudati, and informed them of the article. Amehauser asked them if she should share the article with others (2T15, 2T22, 2T49, 2T65, 2T112). Laudati said "absolutely" and suggested Amehauser make sure Board President Ettman knew about it. Amehauser stressed that she had not seen the article and that she would definitely verify that there was such an article before she went any further (1T40, 2T15, 2T22, 2T49, 2T91). Amehauser also told Laudati that she intended to pass the information on to Bob Oberle, chair of the parents' committee (2T16, 2T90). Laudati and Amehauser also discussed how it would be appropriate for all committee chairs to have the article (2T49-2T51, 2T90-2T91).

8. The next morning, October 27, 2003, Amehauser received a copy of the May 28, 2003 article from Small. The article indicated that 180 residents in South Hunterdon had signed a

petition opposing the renewal of Superintendent Simone's contract. It specifically stated, ". . . school district officials acknowledged a communication problem exists with the residents in its three sending districts." (CP-1). The article also stated that voters in the three sending districts had voted down the budget and municipal officials had recommended that the Board do a better job of keeping residents informed (1T115, 1T187-1T188; CP-1).

The pair then discussed the article and how they felt it was important the Board knew of it (1T41-1T44; CP-1). Amenhauser believed it was her committee's responsibility to make sure information about the candidates came out (1T42, 1T112-1T113, 1T186).

9. Amenhauser then went back to Rogers School. There in the front office, she spotted a PTO member, Sandy Alexander. Amenhauser asked her if she was on the parents' search committee (1T42, 1T45, 1T101-1T103). Alexander replied that she was. Amenhauser explained that she had an article about one of the finalists that she wanted to share with the parents committee. Amenhauser told Alexander that the article indicated there were concerns by parents about communication problems with finalist Simone, and that several parents had signed a petition that she not be rehired. Alexander then loudly blurted out to Amenhauser "you mean she was fired" (1T45-1T46, 1T101-1T103). Mrs. Penngear,

a parent of a district student who was standing behind Amenhauser, overheard it (1T45-1T46, 1T103-1T104).

Amenhauser explained that Simone was not fired; rather, a petition was presented that she not be rehired. Amenhauser further indicated that she intended to tell Ettman about the article and that it was important information that all committees should know about (1T146). Amenhauser specifically stated that she was going to inform parent committee chair Robert Oberle about it (1T46-1T48, 1T103).

10. Later that day, Amenhauser also informed Marilyn Goldfarb, a school secretary and a friend of the support staff committee chair, along with Robert Dias, Rogers school principal and member of the administrators search committee, about the article (1T105-1T110). Further, Alexander subsequently told the PTO President Cathy Signorin about it (1T123-1T124).

Amenhauser also e-mailed Ettman that day about the article and then faxed him it (1T49-1T51, 1T99; CP-3). In her e-mail to Ettman, Amenhauser referred to the article as "very damaging" and explained that she had already shared the article with other committees. By October 27, 2003 e-mail, Ettman responded to Amenhauser, expressing concern that Amenhauser may be jumping to a conclusion about Simone and suggested to Amenhauser, "Perhaps the better way to deal with this information is to inquire of her as to what the problems may have been." (1T127, 2T57; CP-3).

That same evening, Amenhauser also relayed the content of the article to Oberle by e-mail (1T105-1T111; CP-2). Further, she shared the article with the 16 other members of the teachers committee and discussed it with them at a meeting that day (1T100-1T101; CP-3).

11. Amenhauser did not believe that her communications about the article violated the Board's established ground rules (1T111). Amenhauser felt this published information should be shared, so that all committees would be on the same page (1T192-1T193).

12. Further, after learning of the article, Amenhauser called the president of the South Hunterdon Education Association and asked about Simone's employment status there. That individual informed her that Simone probably would not have been rehired, but that she had instead resigned. Amenhauser also called the Princeton Education Association, where Simone had worked previously, and learned that Simone had not been rehired there either (1T117-1T119). Amenhauser also shared this information with other members of the teachers committee (1T117-1T118).

Amenhauser also did not believe these calls violated the Board ground rule prohibiting independent background investigations of the candidates. She felt that once the identities of the three finalists for the superintendent's position were made public, there was no longer a chance of these

finalists losing their current jobs; thus the ground rule was no longer necessary. Therefore, Amenhauser believed her actions could not constitute a violation of Board ground rules (1T92, 1T119-1T122, 1T191, 2T13, 2T54; R-1).

13. The teachers committee conducted its interview of Simone on October 28, 2003 between 4 and 5 p.m. (1T112, 1T125). At this point, Amenhauser and Laudati had grave concerns about Simone because of the Packet article (2T35-2T36, 2T57, 2T91-2T92). The committee members discussed the article prior to their interview of Simone (2T92-2T94). Amenhauser told them that Ettman had informed her that they could ask about the article, suggesting that this was the better way to inquire about any prior problems regarding Simone (2T94; CP-3).

However, the committee felt uncomfortable about doing this. Although Gordon specifically informed the committee that after asking the approved questions, they could ask anything else they wanted, in fact, the committee did not ask Simone about the Packet article, or the reason for her resignation from South Hunterdon, or about any communication problems (1T127-1T129, 2T18, 2T63).

14. At the end of their interview, the teachers committee met privately and discussed Simone. They then presented their written, sealed evaluation to Gordon. In the evaluation, the teachers noted how they knew Simone was not being rehired in South Hunterdon and had previously not been rehired in Princeton

(1T149-1T150). The committee also questioned Simone's ability to successfully manage a district the size of East Windsor.

However, they did also note some good points about Simone and according to the committee, there was really nothing unfavorable in the evaluation (1T148-1T150, 2T33-2T34, 2T116-2T117).

During their post-interview discussion and also after submitting their sealed evaluation to Gordon, the teachers committee discussed sharing information and discussing the candidates with the other committees. They hoped to meet and confer with the other committees prior to the final written findings being submitted to the Board. Further, they wanted the chairs of all the committees to meet with the Board and share their findings on the candidates (1T51-1T54, 2T18-2T23, 2T63, 2T103-2T104).

The teachers committee had previously requested this of the Board, but this request was denied by both Ettman and Gordon. The committee, particularly Amenhauser, was told that this was not the process; rather, the process was that individual committees were to conduct their own interviews and then give their separate individual assessment to Gordon. However, the teacher committee still was not satisfied. Thus, the teachers committee, particularly Amenhauser, decided to approach the Board about the issue again that evening, before the 7 p.m. Board meeting (1T133-1T138, 2T18, 2T20-2T21, 2T34, 2T63, 2T66).

15. The Board interview of Simone was the only item on the agenda for the October 28 closed session Board meeting. Before the start of the closed session meeting, the usual public session was to be held. The teachers committee members felt that they had a right to say whatever they wanted at this public session, including their opinions and comments on the search process^{3/} (1T51-1T54, 1T129-1T131, 1T141, 2T67).

The teachers committee knew that the Board members would be having dinner in the library prior to the start of the Board's public session. Committee members Amenhauser, Burns, Laudati and Tupliszewski decided to go in and inform the Board members of their desire to change the ground rules and have the different committees chairs meet with the Board to share their findings on the candidates (1T51-1T56, 1T65, 1T131, 1T147, 2T17-2T18, 2T20-2T21, 2T63, 2T113).

16. Amenhauser, Laudati and Tupliszewski found Ettman, the other Board members, the Board secretary and Gordon eating in the library. After waiting for them to finish eating, Amenhauser approached Ettman. Amenhauser testified that she "professionally and calmly" explained to Ettman that the teachers committee wanted to enhance communication between the different committees. As soon as Amenhauser mentioned the word "communication", Ettman

^{3/} It is unclear whether they intended to address the Board in public session or talk to Board members before the public session started.

grew red in the face and slammed down his briefcase. Amenhauser testified that Ettman got very loud and "went on a tirade" telling Amenhauser that she was "communicating too much." Ettman indicated he was very upset that Amenhauser had said Simone had been fired. He explained that she could not do that to a candidate because it is slander and a misrepresentation of her character. He told her that she had been destroying bridges, not building them. Ettman also suggested that Amenhauser step down as chair of the teacher committee (1T51-1T61, 1T132-1T133, 1T138-1T141, 1T165, 1T194, 2T24-2T29, 2T105-2T107). The parties stipulated that Board member Robert Lavery specifically heard Ettman tell Amenhauser that she should step down as chair of the teacher committee (2T122).

Amenhauser and Laudati heard everything Ettman said and were stunned by Ettman's conduct. Amenhauser felt personally attacked by this unpleasant confrontation with him. Amenhauser noticed that some Board members had placed their hands on their heads during this confrontation. Amenhauser was flabbergasted and did not respond to Ettman's suggestion that she step down as committee chair (1T140-1T142, 1T194-1T195, 2T25-2T29 2T68-2T70, 2T106).

17. Amenhauser and her fellow committee members then left the room. They had a discussion and agreed Amenhauser would not step down (1T141, 1T152-1T153, 1T176). Amenhauser later e-mailed Ettman as well as the other Board members, as follows:

Bruce,

This is to let you know that I respectively decline your personal directive to resign as the chair of the teacher committee. Furthermore, I did not appreciate your personal attack in a public forum based on misinformation that you received from a parent.

If you would like to discuss this further in a less inflammatory fashion than you chose this evening, I am available at your convenience.

Sincerely,
Jan Amenhauser
(CP-4)

Ettman thereafter sent an October 30, 2003 e-mail, CP-5, to the three other committee members who were with Amenhauser that evening in the library, Laudati, Burns and Tupliszewski, stating in pertinent part:

Pat, Terri, Mary-ellen,
. . . I am sorry that you came to discuss a very real concern but were forced to defer it as a result of the other events that took place Tuesday. In reality, I am glad you were there so that you can understand how significant Jan's transgressions were - both professionally and personally. (If I missed any other teacher who was there, please forward this to him or her as I only remember seeing you three). I will discuss that later, but first, please let me explain why there will not be a general session of committees to discuss the evaluations. . . .

The Board carefully reviewed the credentials of many prospective candidates. Our primary criteria for a new CSA were (a) a healer, (b) builder of teamwork and collegiality, (c) educational leadership, (d) promoter of creativity. We presumed that re-creating a sense of amity and mutual respect was a common interest which would lead directly to improved student achievement. We believe the

3 finalists can all do this, and asked all constituencies to help us decide who will be our next leader.

Then, someone found an otherwise innocuous and relatively uninformative newspaper article and gave it [to] Jan. The article spoke of a petition against Dr. Simone in South Hunterdon that complained of a "lack of communication". With that article, I received an email from Jan that was steeped in negativity and suspicion. She immediately presumed that the consultant missed a major, publicised [sic] conflict. She presumed that we hid something and that this Board may actually choose someone who would lead us back to the dark ages. There was an implicit presumption that we did not inquire into the circumstances of the candidates' wanting to leave their former positions. It was, frankly, an insultingly negative email that was out of line. Plus she shared her presumptuous negativity with the other Committee chairs, thereby tainting their evaluation of the candidate. . . .

Then I learned (and confirmed) that Jan told at least one or two parents at GNR that Dr. Simone had been fired from South Hunterdon. In all candor, there is no legitimate reason for her to have done this. First, she had absolutely no information about the circumstances of Dr. Simone's departure from which she could infer (let alone publicize) that she was fired. If she did investigate the matter, she lied to the parents, because Dr. Simone was not fired. Spreading unsupportable rumors about a candidate is outrageous. I have no alternative but to believe that it was an effort to sabotage Dr. Simone's candidacy by smearing her reputation even before anyone met her. Jan's actions could have the effect of scuttling a candidacy, and destroying the process of selecting someone that meets all constituents' criteria. It would put Dr. Simone behind the 8-ball if she were chosen - based solely [sic] on Jan's wrong presumption about what happened in South Hunterdon.

As you know, I do not lose my temper easily. But her conduct in this regard is positively indefensible. It was unprofessional and irresponsible. It reopened old wounds. Why did she have an immediate, knee-jerk reaction of negativity and distrust? I now wonder if all the talk about wanting to work together in a participatory fashion was a fraud. Surely, Jan's conduct ran counter to any legitimate claim of trying to work together in an atmosphere of mutual trust. We should not be further insulted by lame efforts to try to sanitize what Jan did. She unilaterally and intentionally damaged the process that we so carefully constructed for the good of the District.

I feel personally betrayed by her conduct. As the Bd member who participated in the "bad old days", I stuck my neck out to move us in the positive direction in which we were headed (until Tuesday). I do not take credit for our positive momentum. It required all of us -- without our great Board, without the efforts of the teachers and other staff and (yes) buy-in from Central Administration, we would not have progressed. One person should not be permitted to jeopardize the efforts of so many others.

I am glad you were there on Tuesday night so that you have a sense of the deep wound her irresponsible behavior caused. I have far too much respect for the teachers of this District (and teachers in general) to believe that the entire committee was involved in the decision to try to sandbag the selection process along with Jan. I cannot believe that if this matter were discussed beforehand, the teachers in general would have concluded that it was in the best interest of the process or the District to spread false and defamatory rumors about potentially the next CS of our district. I am sure you do not want to move backwards.

I apologize for the blood-letting. But I want you to know that I really haven't lost faith in the teachers. You are great, and are

[sic] the rest of us ride on your backs. But Jan betrayed a trust - and I cannot allow her an opportunity to do that twice. Just as I was able to separate my friendships with people from my assessment of how this District needed to be managed, I implore you to have an open mind about what happened. Please consider whether Jan's actions are really in the teachers' best interests, and act accordingly.

I beg you to retain an open mind and to allow us to look forward together to reach where this District should be. Let us not let anyone - on any side - jettison the efforts we have made together. I genuinely hope that you (with others) are able to take necessary action to ensure that the outrageous type of conduct that created this problem not recur as we move forward.

Thank you for staying with me this long. Please pass this on to whomever you believe is interested. . . .

Ettman also copied Amenhauser, Board Secretary David Shafter and all Board members on the e-mail (1T66-1T72, 1T152, 1T195-1T196, 2T29-2T30, 2T71-2T77, 2T89; CP-5).

18. Amenhauser described her reaction to CP-5 as follows:

I was shocked. I knew this was a serious attack on our Association. We basically were being told that your president is not acting in your interest and why is she doing this. I knew then I should talk to [UniServ Representative] Tim Ryan at NJEA, because I felt this was serious. That the Board had - well, Bruce Ettman had in representing the Board was telling us what we should be doing as our Association and how we should be conducting our business, and I thought this was a serious concern.
(1T73)

Amenhauser, however, acknowledged that when Ettman spoke to her on October 28, 2003, he was expressing his dissatisfaction with her conduct as chairperson of a committee of teachers that had been created by the Board (1T180-1T181).

Laudati, Tupliszewski and Burns were also shocked and upset by CP-5. Laudati and Tupliszewski believed that in CP-5, Ettman was suggesting that they intervene and have Amehauser removed as teacher committee chair and they believe that Ettman could also have been suggesting that they should attempt to have Amehauser removed as Association president (1T74, 2T39-2T41, 2T108-2T109). However, neither the teachers' selection committee nor the Association considered removing Amehauser (2T31, 2T38-2T42, 2T109-2T110).

18. Ettman next sent a November 5, 2003 e-mail to Amehauser entitled "let's talk", asking Amehauser to discuss their October 28, 2003 confrontation (1T156; R-8). Amehauser did not respond in writing to Ettman's e-mail (1T157, 2T77).

Amehauser later encountered Ettman at a subsequent Board meeting. There, Ettman approached Amehauser alone and again asked to talk. Amehauser replied that they had had the opportunity to talk before and that now Ettman would have to speak to her attorney (1T75-1T76, 1T158-1T159, 1T195).

19. Neither Amehauser, Tupliszewski nor Laudati have suffered any transfers or other adverse employment actions since the October 28, 2003 incident (1T80, 1T178-1T179, 2T87, 2T120).

Also, neither Amenhauser nor Laudati have been the subject of any recall effort regarding their Association positions. Further, both continue to communicate with the Board on issues of concern (1T81, 2T87). Moreover, since the October 2003 incident, Amenhauser continued to serve as chair of the teacher committee and Ettman continued to recognize her as such (1T150-1T152; R-4). In addition, she continues to attend Board meetings as an Association representative and is recognized by the new Superintendent, Dr. Bolandi, as well as Ettman, as the leader of the Association (1T80-1T81, 2T87; R-4). Finally, since her October 28, 2003 encounter with Ettman, no Board representative has communicated in any fashion that Amenhauser would consider inappropriate (1T176).

ANALYSIS

The Board argues that the charging party has not proven any fact that would support a finding of a violation of the Act. Therefore, it argues, the Association's charge should be dismissed.

In New Jersey Turnpike Auth., P.E.R.C. No. 79-81, 5 NJPER 197 (1979), the Commission set forth the standards for determining whether to grant a motion to dismiss:

[T]he Commission utilizes the standard set forth by the New Jersey Supreme Court in Dolson v. Anastasia, 55 N.J. 2 (1959). Therein the Court declared that when ruling on a motion for involuntary dismissal the trial court "is not concerned with the worth, nature or extent (beyond a scintilla) of the evidence, but only with its existence, viewed most favorably to the

party opposing the motion" (emphasis added). [Id. at 198]

The test is whether "the evidence, together with the legitimate inferences therefrom, could sustain a judgment in...favor" of the party opposing the motion, i.e., if, accepting as true all the evidence which supports the position of the party defending against the motion and affording him the benefit of all inferences which can reasonably and legitimately be deduced therefrom, reasonable minds could differ, the motion must be denied. [55 N.J. at 5]

See also Essex Cty. Educational Services Comm'n, P.E.R.C. No. 86-68, 12 NJPER 13 (¶17004 1985).

The Board requests that I grant its Motion to Dismiss the complaint on the basis that the evidence presented does not establish a violation of the Act. In particular, it claims that: 1) Amenhauser was not engaged in protected activity; 2) there is insufficient evidence that the Board engaged in the complained-of conduct; 3) no adverse action was taken by the Board; 4) the Board has a constitutional right to express its views and opinions, absent any threats or promises; 5) there is insufficient evidence of interference or domination of the Association; and 6) there is no evidence that the Board was motivated by union animus.

Based on my review of the evidence and viewing it most favorably to the charging party, I conclude that the Board's motion to dismiss should be granted and that the complaint should be dismissed.

Section 5.3 of the Act gives public employees the right to join, form and assist an employee organization and negotiate

collectively with their employer. An employer violates 5.4a(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. N.J. Dept. Of Human Services, P.E.R.C. No. 2001-52, 27 NJPER 177 (¶32057 2001); Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). However, an employer may express opinions about union behavior so long as the statements are not coercive. Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). We balance the employer's right to free speech with the employees' rights to be free from coercion, restraint or interference in the exercise of protected activities. Mercer Cty., P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985).

The Association charges that Board President Ettman's "attack" on Amenhauser at the October 28, 2003 Board meeting, and his subsequent e-mail (CP-5), tended to interfere with Amenhauser's and other Association members' rights under the Act. I find there is no evidence to support that allegation. Specifically, I find that Amenhauser was not engaged in protected activity with respect to the October 28, 2003 encounter with Ettman and his subsequent e-mail, CP-5, which form the basis of the charge. Rather, Amenhauser was simply acting on behalf of the district's teachers, not the

Association, when she spoke with Ettman that evening in the library.

The Board, in its discretion, had decided to invite teachers, as well as other "stakeholders", specifically, parents, support staff and students, to participate in the selection process for the new superintendent. The Board's invitation to the teachers, R-1, was entitled "Teacher committee for CSA Search" and sought a 12 to 15-member committee of a cross-section of the teaching staff to provide input to the Board with respect to the selection of a new superintendent. The Board's invitation was directed to teachers, not the Association. Amenhauser was subsequently selected as chair of this teacher committee. When Amenhauser approached the Board in the library on October 28, 2003, she was not there to negotiate over employees' terms and conditions of employment or to discuss or process a grievance or advocate on behalf of employee rights. She was not engaging in any conduct protected by the Act at that time. Thus, when Ettman engaged in his allegedly unlawful encounter with Amenhauser on October 28, 2003, it was in regard to her position as teacher committee chair, not Association president. Therefore, I find that Ettman's outburst on October 28, 2003 and the subsequent e-mail, CP-5, did not tend to interfere with employees' rights under the Act.^{4/}

^{4/} I reject the Board's argument that Ettman's actions were not actions of the Board. Ettman was acting within the scope of his authority with regard to his October 28, 2003 exchange
(continued...)

Even if Amenhauser had been in the role of Association President when she approached Ettman in the library on October 28, 2003, I find Ettman had the right under the Act to make remarks to Amenhauser and to send his October 30, 2003 follow-up e-mail, CP-5, to her three fellow committee members. See In Black Horse Pike Reg. Bd. of Ed., the Commission explained:

A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal.
[Id. at 503]

In Ridgefield Park Bd. of Ed., P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984), the Commission dismissed a Complaint alleging that a principal's statements to the union vice-president suggesting that she resign from an Advisory Council position because of a conflict of interest with her role as grievance chairperson violated the Act. Focusing upon the circumstances of the case, the Commission said:

Under all the circumstances of this case, we agree with the Hearing Examiner that the principal's comments at the Advisory Council meeting did not violate subsections 5.4(a)(1), (2), or (3) of the Act. The principal's comments were within the sphere of permissible

4/ (...continued)
with Amenhauser and his follow-up e-mail, CP-5. See City of Somers Point, H.E. No. 2003-8; Commercial Township Bd. of Ed., P.E.R.C. No. 83-25, NJPER 550 (¶13253 1982).

criticism and discussion under Black Horse Pike. The principal did not threaten any employees, change any terms and conditions of employment, or seek to undermine the exclusive representative status of the Association. His exchange with the vice-president/grievance chairperson was brief, non-coercive, and a match between equals which ended as soon as she parried his comment; since then, these two individuals and the Advisory Council have worked together smoothly and effectively. Under all these circumstances, we dismiss the Complaint. [Id. at 438]

Here, Ettman's comments were within the sphere of permissible criticism and discussion under Black Horse Pike and Ridgefield Park. He did not threaten any employees, change any employee's terms and conditions of employment, or seek to undermine the exclusive representative status of the Association.

His October 28, 2003 exchange with Amenhauser was brief and between equals. Ettman simply gave his opinion on her activities as chair of the teacher committee, a committee which was formed based upon the gracious invitation and at the discretion of the Board. The selection of a new superintendent was important to the teachers, but was a serious responsibility for the Board. The Board had a legitimate concern about conduct that might jeopardize the process. Ettman felt Amenhauser had violated the Board's established ground rules for the process, which the Board viewed as crucial to preserving its integrity and confidentiality. He was commenting about this in both his October 28, 2003 exchange with Amenhauser and in his October 30, 2003 e-mail, CP-5, to Tupliszewski, Laudati and Burns. Since these two exchanges, Ettman

has amicably and professionally tried to discuss the matter with Amenhauser and move on. While the Association asserts that through CP-5, Ettman was attempting to tell the Association how to conduct its business, particularly by calling for the overthrow of Amenhauser as Association president, there is simply no evidence that Ettman suggested Amenhauser should be removed from her position as Association president. It was her actions as part of the selection committee that Ettman was angry about. Ettman continued to recognize Amenhauser as chair of the teacher committee, and as Association President, and has since worked together smoothly with her.

Under these circumstances, I find that the charging party has failed to show any facts or evidence supporting an a 5.4a(1), (2) or (7) violation of the Act,^{5/} with regard to Board President Ettman's October 28, 2003 exchange with Amenhauser, and his follow-up e-mail, CP-5.

CONCLUSION

Based on the above facts and analysis, I conclude that the Association's 5.4a(1), (2) and (7) allegations must be dismissed. The charging party has failed to adduce even a scintilla of evidence in support of its claim that the Board violated the Act with regard to Board President Bruce Ettman's October 28, 2003

^{5/} Indeed, I note that the charging party has not set forth which rule or regulation of the Commission that was allegedly violated in support of its section (a)(7) allegation.

verbal exchange with teacher committee chair Jan Amenhauser and his follow-up e-mail, CP-5, to her three fellow committee members.

Accordingly, based on the foregoing, I make the following:

RECOMMENDED ORDER

Upon the entire record adduced by the Charging Party, I conclude that the respondent did not violate N.J.S.A. 34:13a-5.4a(1), (2) and (7) and hereby grant respondent's motion to dismiss. The complaint is, therefore, dismissed.



Susan Wood Osborn
Hearing Examiner

DATED: Trenton, New Jersey
September 29, 2005

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by October 12, 2005.