H.E. NO. 2008-7

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

In the Matter of

KEARNY BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-2006-027

ANN TAYLOR, et al.

Charging Parties.

SYNOPSIS

On remand, a hearing examiner again recommends dismissal of charge alleging that the employer reduced the hours of work of charging parties in retaliation for their organizing effort and attempts to get health benefits. The hearing examiner credited two statements, by the Board President and Business Administrator, as party admissions, but found the Board was motivated to act because of the voter referendum defeating its budget not because of the organizing effort or the attempt to get health benefits not out of underlying hostility. She determined that the Board's explanation for its actions was not pretextual. In addition, even if the statement by the Business Administrator suggested hostility and a dual motive analysis was applied, the hearing examiner concluded that the Board would have reduced the aides' hours of work in any event in order to meet the budget goal of saving $810,000 without reducing classroom teacher positions or increasing the staff/student ratio.

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Appearances:

For the Respondent, Genova, Burns & Vernoia, attorneys (Joseph M. Hannon, of counsel)

For the Charging Parties, Bucceri & Pincus, attorneys (Gregory Syrek, of counsel)

HEARING EXAMINER'S SUPPLEMENTAL REPORT AND RECOMMENDED DECISION

On November 2, 2007, I issued a Hearing Examiner's Report and Recommended Decision in the above matter, Kearny Board of Education, H.E. No.2008-3, 33 NJPER 303 (¶115 2007), recommending dismissal of the underlying unfair practice charge. On February 28, 2008, the Commission issued a decision, Kearny Board of Education, P.E.R.C. No. 2008-44, __ NJPER __ (¶_____ 2008), remanding this matter to me to make additional findings of fact and issue a supplemental report.

Charging Parties alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it changed the Charging Parties' status from full-time

to part-time, thus eliminating their eligibility for medical benefits, in retaliation for their filing a representation petition seeking to organize a negotiations unit of full-time aides.

In its decision, the Commission rejected my determination that certain testimony about alleged statements was inadmissible hearsay. The Commission concluded that the statements, if made, were admissible under N.J.R.E. 803(b) as party admissions. The Commission explained that the statements at issue were allegedly made by the Board president and the business administrator as agents and representatives of the Board and concerning matters within the scope of the agency or employment of the president and business administrator, namely discussions about a pay scale and health benefits.

I have reexamined the testimony about the two statements as directed and make the following additional:

FINDINGS OF FACT

1. In the spring of 2004, Charging Party Patricia Edwards telephoned the Mayor's office to discuss a personal matter (T71-T73). Board President Mary Torres answered the phone in her capacity as the "boss of the Mayor's aide" (T71).

After discussing her personal issue, Edwards then asked Torres if anything was being considered about the pay scale/pay increase for full-time aides (T71). Edwards had previously

addressed the Board at a meeting about this issue and was told at that time that the Board would look into it (T69).

Torres responded to Edwards that "she felt that she was stabbed in the back" (T71).

The following colloquy occurred on direct examination:

> Q. Did she say anything beyond that?
> A. No.
> Q. What was your understanding as to the reason why she said that?
> A. My understanding was - possibly my belief was that we were asking for a pay increase and also we were trying to form a union.
> Q. Did Ms. Torres say anything else in connection - did Mary Torres say anything else during the course of this conversation?
> A. No, no. (T71-T72).

I credit Edwards' testimony that a conversation occurred between she and Torres and that Torres made the statement Edwards attributes to her.

2. At the end of June 2005, Business Administrator Gaulton called Charging Party Ann Taylor into his office to discuss the issue of health benefits for the full-time aides (T59-T60). Taylor testified that Gaulton told her that "there were certain Board members who were irate, that [the full-time aides] were pursuing a bid to become a union and take our medical benefits and they would prefer not to have to deal with this at all, if that was possible" (T62-T63).

I credit Taylor that this conversation occurred and that Gaulton made this statement to her.

ANALYSIS

In my decision I recommended that the complaint be dismissed because under Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), I found no hostility to Charging Parties' protected activity. In particular, I rejected Charging Parties' arguments that the Board's opposition to the conduct of a representation election, in and of itself, and the timing of the Board's decision to reduce the aides' hours of work supported hostility. I reaffirm my decision as to these two contentions.

Charging Parties, however, also argued that two statements - one by Board President Torres and one by Business Administrator Gaulton - supported evidence of hostility to Charging Parties' organizing efforts and attempts to get health benefits. I now analyze whether the two statements support hostility toward the organizing effort or the attempts to get health benefits and consider how these additional findings factor into the application of the tests under Bridgewater.

First, as to the statement Charging Party Edwards attributed to Board President Torres - that she felt she was being stabbed in the back - although I credit that Torres made this statement, I draw no inference of hostility from it. The statement, as described by Edwards, lacks context, and it cannot be discerned what Torres meant by the comment. By using the phrase "possibly my belief was . . ." in describing her understanding of Torres'

comment, namely that Torres was referring to the organizing effort and the request for a pay increase, Edwards herself appears to be guessing as to what Torres meant. In particular, since there is no reference in the conversation to the organizing effort, there is no basis for Edwards' understanding that Torres' comment referred to that effort.

As to Edwards' understanding or belief that Torres' statement referred to Edwards' request for a pay increase for the aides, I draw no particular inference of hostility to that request from Torres' response. There is a disconnect between Torres' "stabbed-in-the-back" comment and Edwards' query as to whether anything was being considered about the pay scale, as if part of the conversation was missing. For instance, it is unclear who Torres felt was stabbing her in the back - e.g. Edwards herself, the aides or another Board member - and why she felt she was being stabbed in the back. Thus, I draw no particular inference in regard to hostility and give no weight to Torres' statement.

As to Gaulton's June 2005 statement to Taylor that certain Board members were irate over the organizing effort and the aides' attempt to get health benefits, by June 2005 the organizing effort was over by some six months. The Commission had determined on December 16, 2004 that the petitioned-for unit was inappropriate and dismissed the petition (J-4). Also, the

Board had approved Charging Parties' request for health benefits which they were provided effective January 1, 2005. Nevertheless, Gaulton's statement to Taylor suggests that, at some point in time, some Board members were opposed to the organizing effort and Charging Parties' attempt to get health benefits. It is impossible, however, from this testimony to determine whether the majority of the Board was opposed or whether a couple of Board members were so inclined.

Under Bridgewater, a violation is found only if Charging Parties prove by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. If an illegal motive is proven, and if the employer has not presented any evidence of a motive not illegal under our Act or its explanation is rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Bridgewater.

Here, the Board presented ample evidence that the April 2005 defeat of the Board's budget for 2005-2006 motivated their decision to change Charging Parties' status to part-time, thus saving $120,000 in health benefits costs. This motive is not illegal. There was no evidence in the record that the issue of reducing the aides' hours of work was discussed, suggested or considered prior to the April budget defeat and the Town Council's mandate to the Board to shave $810,000 from its budget.

Indeed, health benefits for the aides were included in the original 2005-2006 budget that was considered and rejected by the voters in the April referendum. There is also no evidence that the savings from the aides' health benefits were unnecessary to meet the new budget projections set by the Town Council. I found that the Board's explanation for its actions, therefore, was not a pretext by the Board for underlying hostility against the aides for their organizing effort.

Indeed, Gaulton's June 2005 conversation with Taylor bolsters the conclusion that the Board would not have reduced the hours of work but for the budget crisis. Gaulton told Taylor that the Board would prefer not to have to deal with "this" at all, if it were possible. Since the organizing effort was over months before this statement was made and the Board had given the full-time aides health benefits as of January 2005, it is reasonable for me to infer that "this" meant the issue of reducing their hours and eliminating health benefits. The fact that they were reluctant to do so supports the conclusion that hostility was not the motivating factor in the Board's decision.

Nevertheless, even if the evidence supported that the Board acted partially because of hostility to the 2004 organizing effort and attempt to get health benefits, where the record demonstrates that motives unlawful under our Act and other motives contributed to an adverse personnel action - a dual

motive case - the employer will not have violated the Act if it can prove, by a preponderance of evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242.

The record demonstrates by a preponderance of the evidence that even if some Board members were hostile to the organizing effort and the aides' attempt to get health benefits, the Board would have reduced the aides' hours of work regardless of the organizing effort and their attempt to get health benefits because of the budget defeat. By reducing the aides from full-time to part-time status, the Board realized $120,000 in savings from the Charging Parties' health benefits, a sizable chunk of the overall $810,000 it needed to recapture to meet its revised budget goals. This savings together with other cost saving measures helped the Board meet its budget goals without compromising its stated priorities of not eliminating classroom-teacher positions and maintaining the staff/student ratio. I reviewed this issue extensively in my original decision. Therefore, the Board's actions did not violate the Act.

For the foregoing reasons and the reasons set forth in my original decision, I renew my recommendation that the Complaint be dismissed.

Wendy L. Young
Hearing Examiner

DATED: March 14, 2008
Trenton, New Jersey

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 March 25, 2008.