

H.E. NO. 97-21

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

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-95-153

EAST ORANGE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that a Complaint filed by the East Orange Education Association against the East Orange Board of Education be dismissed. She finds that the Association did not prove an (a)(3) violation under Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), as it failed to prove the Board knew of the Association President's protected activity, and, even assuming the Board knew of the protected activity, the Board was not hostile towards it.

Further, she finds the Association did not show (a)(1) and (a)(5) violations, as the Board did not unilaterally change a term and condition of employment. Rather, the Board simply issued a temporary directive, in an emergency situation, that no one be allowed in the school.

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. If no exceptions are filed, the recommended decision shall 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.

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Appearances:

For the Respondent, Love and Randall, attorneys
(Melvin C. Randall, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,
attorneys (Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 7, 1994, the East Orange Education Association filed an unfair practice charge (C-1)^{1/} with the Public Employment Relations Commission against the East Orange Board of Education. The Association 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), (3) and

^{1/} "C" refers to the Commission exhibit and "R" refers to Respondent's exhibit received into evidence at the September 19, 1996 hearing. The transcript of the hearing is referred to as "T".

(5)^{2/} by refusing to allow Association President Jacqueline Greadington into Lincoln Elementary School to meet with a teacher who was experiencing a problem. The Association claims that the school principal gave specific instructions to not allow Greadington into the building despite her position as Association representative.

A Complaint and Notice of Hearing was issued on June 22, 1995 (C-1).

A hearing was held on September 19, 1996. The Board and the Association filed post-hearing briefs by January 23, 1997 and the Board filed a reply brief by February 7, 1997. Based upon the record in this case, I make the following:

FINDINGS OF FACT

1. Jacqueline Greadington has been employed by the Board for twenty-one years. She had been employed as a teacher, until June 1994, when she was released from her teaching duties to serve as full time Association President (T6, T18).

^{2/} 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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2. On the morning of October 14, 1994, Board Superintendent Dr. John Howard, Jr. visited Lincoln Elementary School to meet with a teacher who had been transferred to find out why parents were upset with him and Barbara Glover, the school principal, about the transfer (T39-T40, T45). The parents had told Howard that they had talked with the teacher and she had told them of her dissatisfaction with the transfer (T40).

Howard met with the teacher in three places: the coat closet, the hallway and the teacher's lounge. Glover was present throughout the meeting, as was another teacher during the time the meeting took place in the teacher's room (T41-T42, T49).

3. While in the building, two parents confronted Howard in an unpleasant way about the transferred teacher. The confrontation became so unruly and unpleasant that Howard asked them to leave the building (T37, T63, T65-T66). The unruliness continued, so Howard gave a directive to have the police escort the parents out of the building (T66-T67). Police officers were both inside and outside the school (T37, T47-T48).

Because of the situation involving the parents and the police, around 9:00 a.m. to 9:15 a.m., Principal Glover gave instructions to her three office staff, including secretary Gail Harrington, not to allow anyone in the building (T47-T49, T59, T61). Glover did not give any instruction specifically directed at Greadington's access to the building (T38, T47, T63-T64).

4. At approximately 9:25 a.m. on October 14, 1994, Greadington received a phone call at her office from the school nurse at Lincoln Elementary School (T7-T8). The nurse told Greadington that she should come to the school immediately, as she could hear Howard yelling at a teacher in the hallway (T9). There is no evidence, however, that the affected teacher requested Greadington's aid that day.

Greadington then drove to the school. She arrived there approximately 9:45 a.m. and noticed four police cars and some policemen outside (T9-T10, T21). She had never observed police outside of the school before, but never asked the police, or someone at the school, why the police were there (T21-T22, T32).

5. She buzzed to get in the school and announced who she was, but was told over the buzzer by Harrington that she could not come in (T10, T22, T60). Greadington stood there and waited. While she stood there, Harrington came to the door to escort a sick child to a parent. No one else was allowed in (T24, T67-T68).

While Harrington was at the door, Greadington engaged her in a conversation. According to Greadington, she again asked Harrington to allow her into the building and Harrington told her that Glover did not want her there. Greadington then tried to introduce herself, but Harrington interrupted and said "I know who you are, you can't come into the building." (T10, T25). Greadington had been at Lincoln Elementary School before and had never been denied access (T12, T17-T19).

Harrington acknowledges the conversation with Greadington. However, according to Harrington, Greadington introduced herself to which she responded "I know who you are. However, no one is allowed into the building, at this time." (T68).

I credit Harrington's version. It is consistent with Glover's testimony that she issued a directive earlier that no one be allowed in the school and that no specific directive was issued at Greadington (T47). Moreover, Greadington never heard Glover give a directive to keep her out of the building (T34).

6. Greadington stood outside and waited approximately 15 minutes (T12, T26). During that time, she saw more parents come with children and saw Harrington open the door to receive children. She tried again to get into the building but was again rebuffed by Harrington (T13, T26). While waiting, she heard "talk" that parents had become upset because of the movement of a teacher from one class to another (T33).

7. Greadington then went across the street to a pay phone to call the N.J.E.A. UniServ Office for advice. On her way there, she saw Superintendent Howard and Principal Glover (T14, T26-T27, T32). She did not ask Glover why she was not allowed in the building (T32). Howard and Glover saw Greadington outside of the building, but were not aware that Greadington had tried unsuccessfully to gain access to the building (T47, T55, T59).

8. At around 10:00 a.m., Greadington spoke to Pamela Klesch, the UniServ Representative assigned to the Association. Greadington told Klesch about the call from the nurse and how she had been barred from the school (T14, T55-T56).

Klesch told Greadington that she would try to reach Dr. Kenneth King, the Board's Assistant Superintendent and Director of Personnel, to discuss the situation and that she would call Greadington back (T15, T57). Klesch could not reach King and so informed Greadington a few minutes later. Klesch told her to go back to the school and try to get in again (T57).

9. Greadington returned to the school where the police still were and was allowed into the building at 10:05 a.m. (T15-T16, T62, R-1). She went to the main office and asked to see Glover. Glover's secretary returned 15 minutes later and told her Glover was unavailable (T16). Glover, however, had told her secretary that Greadington could meet with the teacher in the teacher's room (T47). Greadington then went to the teacher's room where she talked to the Association representative for the school. The representative was upset so Greadington decided to talk to her later (T17).

ANALYSIS

The (a)(3) Allegation

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the

standard for determining whether an employer's action violates subsection 5.4(a)(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proved and if the employer has not presented 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. Conflicting proofs concerning the employer's motives are for us to resolve.

Here, I find that the Association has not met its burden under Bridgewater. As Association President, Greadington clearly engaged in protected activity when she went to Lincoln Elementary School on October 14, 1994 to investigate the situation involving the teacher who was experiencing a problem. However, the remaining elements of Bridgewater--that the Board knew of this protected activity and was hostile towards it--have not been shown.

The individual who issued the directive that morning, Principal Grover, was not even aware that Greadington had come to the school to investigate the situation. She saw Greadington outside of the school later that day, but did not know why she was there (T38, T45, T46, T59). Glover only found out about Greadington's protected activity later (T46). Therefore, the Association has not proven the Board had knowledge of the specific protected activity. State of New Jersey (Department of Human Services), P.E.R.C. No. 96-20, 21 NJPER 352 (¶26218 1995).

However, even assuming the Board knew of Greadington's protected activity, it was not hostile towards it. Greadington was denied access pursuant to Glover's directive that no one be allowed into the building. No specific directive was issued towards Greadington or the Association (T38, T47, T63-T64). There was no evidence that anyone other than school children were allowed into the building during the critical time, and no evidence that Greadington was discriminated against because she engaged in protected activity.

Therefore, based on the above, I find that the Board did not violate §5.4(a)(3) of the Act.

The (a)(5) Allegation

The unilateral alteration of an existing term and condition of employment during the term of an agreement constitutes an unfair practice. New Brunswick Bd. of Ed. See e.g. New Brunswick Board of Education, P.E.R.C. No. 78-47, 4 NJPER 84 (1978), aff'd App. Div. Docket No. A-2450-77 (1979).

Here, the Association argues that a term and condition of employment was unilaterally altered by the Board when it denied Greadington access to the school on October 14, 1994. However, I disagree.

The Board did not change a term and condition of employment, as it did not change its Association access policy. Rather, it simply, in good faith, addressed what it perceived as an emergency that day by issuing a temporary directive that no one be allowed in the school.

The directive was not issued at the Association. In fact, the Superintendent and the Principal did not even know that Greadington had tried to gain access to the school. The Board's good faith is further evidenced by the fact that once the emergency was over, Greadington was immediately allowed in the school to talk to the teacher. Thus, Greadington's access to the school was not denied, but was simply delayed for approximately 20

minutes. This delay was de minimus. See e.g., Middlesex County Board of Social Services, P.E.R.C. No. 87-41, 12 NJPER 804, (¶17307 1986), aff'g. H.E. No. 87-13, 12 NJPER 681 (¶17258 1986). Under the above circumstances, I do not find that the Board unilaterally changed a term and condition of employment and, therefore, I find that the Board did not violate §5.4(a)(5) and, derivatively, (a)(1) of the Act.

In its post-hearing brief the Association disputed whether an emergency existed, and claimed that the parties collective negotiations agreement authorized access to the building that day. Those arguments, however, are insufficient to support a violation of the Act.

I find the Superintendent believed in good faith that an emergency existed, as evidenced by the fact he called the police, and thus the Board was justified in temporarily preventing access to the school. It is the Board's prerogative, indeed its obligation, to maintain order and efficiency in the school and provide for the safety and well-being of the student body. In re Byram Township Board of Education, 152 N.J.Super. 12, 24-25 (App. Div. 1977).

Finally, the Association did not allege that the Board repudiated the parties' agreement. If the Association believes the Board breached the agreement it should have sought redress through the grievance procedure. N.J. Department of Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1994). In any

event, the agreement was not submitted into evidence and therefore is not part of the record before me.

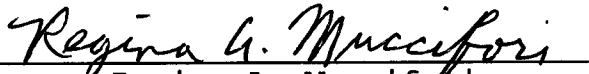
Accordingly, I make the following:

Conclusion of Law

The Board did not violate the Act on October 14, 1994 when Association President Greadington was denied access to Lincoln Elementary School for a period of approximately 20 minutes.

Recommendation

I recommend the complaint be dismissed.


Regina A. Muccifori
Hearing Examiner

Dated: February 11, 1997
Trenton, New Jersey