

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ROBERT DIMINO and KENILWORTH
EDUCATION ASSOCIATION,

Charging Parties,

-and-

Docket No. CO-84-40-94

KENILWORTH BOARD OF EDUCATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that Robert Dimino and the Kenilworth Education Association filed against the Kenilworth Board of Education. The charge had alleged that the Board violated the New Jersey Employer-Employee Relations Act when it laid off Dimino pursuant to a reduction in force, but the Commission finds that the allegations of the charge have not been proved by a preponderance of the evidence.

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Respondent.

Appearances:

For Charging Party Dimino, Robert Dimino, Pro Se ^{1/}

For the Respondent, Murray and Granello, Esquires
(James P. Granello, Of Counsel)

DECISION AND ORDER

On August 12, 1983, Robert Dimino and the Kenilworth Education Association ("Association") filed an unfair practice charge against the Kenilworth Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated subsections 5.4(a)(1) and (3) ^{2/} of the New Jersey Employer-Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when it allegedly subjected Dimino to harassment, reduced his work hours by one-seventh for the 1982-83 school year,

^{1/} At the hearing, the law firm of Zazzali, Zazzali & Kroll (Paul L. Kleinbaum, Esquire) represented both charging parties. After the issuance of the Hearing Examiner's report, Dimino filed exceptions, but the Association did not. The Association's attorney filed a letter stating that he no longer represented Dimino and had no objection to his litigating his appeal pro se.

^{2/} This subsection prohibits 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; and (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."

and laid him off for the 1983-84 school year. The charge further alleged that the Board discriminated against Dimino in retaliation for his activities as Association president during the 1980-81 and 1981-82 school years.

On February 17, 1984, the Administrator of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. The Board filed an Answer denying that it harassed Dimino, but admitting that it reduced his work hours for school year 1982-83 and laid him off for school year 1983-84. The Board asserted that the reduction and layoff resulted from declining enrollment and were based on seniority. It also alleged that the charge was untimely.

On May 22 and 23, 1984, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On July 11, 1984, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-2, 10 NJPER ____ (¶ ____ 1984) (copy attached). He found that the Board's personnel actions were not motivated by anti-union animus, but rather resulted from declining enrollment and were based upon seniority. He recommended dismissal of the Complaint.

On July 26, 1984, after receiving an extension of time, Dimino filed exceptions. He contends that the Hearing Examiner erred in making certain findings of fact; in stressing that the layoff occurred when Dimino was no longer Association president and that Dimino did not file an unfair practice charge when his work hours for the 1982-83 school year were reduced; and in

finding that Dimino's seniority rights were not violated.

On July 30, 1984, the Board filed a response supporting the Hearing Examiner's report.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-5) are accurate with the following modification.^{3/}

N.J.S.A. 34:13A-5.4(c) states that no Complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was prevented from timely filing such charge. Pursuant to this section, we will not consider whether the Board violated the Act when it allegedly harassed Dimino during the 1980-81 and 1981-82 school years and when it reduced his work hours during the 1982-83 school year. Those portions of the Complaint are dismissed.

We agree with the Hearing Examiner that the Board did not violate the Act when it laid off Dimino effective June 30, 1983. Applying the standards set forth in Bridgewater Township v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), we specifically hold that Dimino has not proved by a preponderance of the evidence that his activity as Association president during the 1980-81 and 1981-82 school years was a substantial or motivating


^{3/} Finding of fact No. 4 should be modified to reflect that Dimino also taught gifted and talented students. We specifically accept finding of fact No. 6 and the Hearing Examiner's conclusion that Dimino's evaluations were not significantly more negative after he became Association president. We further accept finding of fact No. 10 concerning the Board's reasons for the reduction in force and use of the seniority list. Finally, we agree with the Hearing Examiner (finding No. 12) that evidence concerning courses taught by other teachers after Dimino's layoff was not particularly probative.

factor in his layoff effective June 30, 1983,^{4/} and that, in any event, the Board has proved by a preponderance of the evidence that it would have laid off Dimino because of declining enrollment and his lack of seniority.^{5/}

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Newbaker abstained. Commissioner Graves was not present.

DATED: Trenton, New Jersey
August 15, 1984
ISSUED: August 16, 1984

4/ We agree with Dimino that his failure to file a timely unfair practice charge concerning the 1982-83 reduction in work hours and the time gap between his activity as Association president and the layoff do not, standing alone, compel dismissal of the Complaint. Nevertheless, the charging party has the burden of proving that his protected activity affirmatively contributed to the personnel action in question and Dimino failed to meet that requirement.

5/ We note Dimino's assertion that he had sufficient seniority to entitle him at least to a part-time teaching schedule. We have found that the Board acted in good faith in calculating Dimino's seniority rights and was not penalizing him for his protected activity. Any further consideration of whether Dimino's seniority rights were in fact properly calculated is for the Commissioner of Education, not us. We note that Dimino filed, but later withdrew, a petition with the Commissioner.

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

In the Matter of

KENILWORTH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-40-94

KENILWORTH EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Subsections(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it RIFFED Robert J. Dimino, a past President of the Association effective June 30, 1983. The Charging Party alleged that Dimino was active on behalf of the Association as its President from June 1980 through June 1982. However, the Hearing Examiner found that Dimino's protected activities were not a substantial or a motivating factor in the Board's decision to RIF him in April 1983. The Hearing Examiner concluded that the exercise by Dimino of protected activities was too remote in time to the event of the RIF in April 1983. Further, the Board established a legitimate business justification in its decision to RIF Dimino inasmuch as it followed the seniority list of April 1, 1983.

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.

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Appearances:

For the Respondent

Murray & Granello, Esqs.

(James P. Granello, Esq.)

For the Charging Party

Zazzali, Zazzali & Kroll, Esqs.

(Paul L. Kleinbaum, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on August 12, 1983 by the Kenilworth Education Association (hereinafter the "Charging Party" or the "Association") alleging that the Kenilworth Board Education (hereinafter the "Respondent" or the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent RIFFED Robert J. Dimino, a recent past President of the Association, effective June 30, 1983 on the basis of seniority, which termination the Charging Party alleges was as a result of Dimino's activities as President of the Association between June 1980 and June 1982, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act. ^{1/}

1/ 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."

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on February 17, 1984. Pursuant to the Complaint and Notice of Hearing, hearings were held on May 22 and 23, 1984 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by July 9, 1984.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Kenilworth Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Kenilworth Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. Robert J. Dimino is a public employee within the meaning of the Act, as amended, and is subject to its provisions.
4. Dimino was hired as a seventh and eighth grade teacher at the Harding School (K-8) as of September 1, 1972. Dimino was certified as a secondary school teacher of English in June 1970 (J-2). At the Harding School Dimino taught English, reading, literature and journalism.
5. Dimino was never active in the Association prior to June 1980. At that time he was elected President of the Association and continued in that position until June 1982. As President of the Association, Dimino was Chairman of the Negotiations Committee and was active in negotiating two collective negotiations

agreements. The negotiations for the 1981-82 agreement commenced in November 1980. There were problems in negotiations, in that the Board was adamant in not granting any of the Association's demands. The Association appealed to public opinion, i.e., the Parent Teachers Association and the press. There was picketing of the Harding School, Board meetings and the home of the President of the Board in January 1982 in an effort to break a negotiations stalemate. The 1981-82 contract was concluded on February 8, 1982.

6. Dimino was never disciplined nor denied an increment. There was offered in evidence all of the evaluations of Dimino, commencing November 28, 1972 and concluding with his last evaluation of March 14, 1983 (CP-1 and CP-2). The Charging Party contends that Dimino's evaluations showed a change for the worse after he became President of the Association in June 1980. The Hearing Examiner finds that a comparison of the evaluations before and after Dimino became President of the Association is inconclusive as to whether or not the evaluations became more negative after Dimino became President. For example, compare the evaluation of May 15, 1979 (CP-1L) with the evaluation of January 1981 (CP-2A) - - they are practically identical. Thereafter, on the next evaluation dated June 16, 1981 (CP-2B) and subsequent evaluations through March 14, 1983 (CP-2D) the evaluations are essentially satisfactory. There is no dispute between the parties that Dimino was never denied an increment based on his evaluations or any other factors. It is noted that the Respondent objected to the introduction of the evaluations as irrelevant since Dimino's performance as a teacher was not and never has been an issue in the Board's decision to RIF Dimino as of June 30, 1983.

7. As noted above, Dimino became President of the Association in June 1980. Approximately one year later, in June 1981, a series of memos were exchanged between Dimino, his Principal, Frederick Rica, and the Superintendent, Anthony V. Richel. (See Exhibits CP-3 through CP-28). The last memo, CP-28, was dated April 2, 1982 and was directed to Dimino from Rica. It is the Charging Party's contention that

this flurry of memos evidenced harassment of Dimino by the administration during the second year of Dimino's term as President. An examination of the content of the memos and letters indicates that they dealt with classroom matters and in no way involved Association activities or the performance of Dimino's duties as President. The Hearing Examiner finds as a fact that the memos, which originated from Rica and Richel to Dimino, do not constitute evidence of harassment of Dimino in his capacity as President of the Association.

8. There was also offered in evidence by the Charging Party documentation regarding five grievances, either filed by Dimino or under his auspices between February 10, 1981 and May 10, 1982 (CP-29 through CP-35). None of these grievances ever went to arbitration but were either settled or withdrawn by the Association prior thereto. Dimino never filed any grievance after ceasing to be President of the Association in June 1982.

9. Under date of April 13, 1982 Dimino was informed by Superintendent Richel that the Board had decided on April 12th that his teaching schedule was to be reduced from seven periods to six periods per day for the 1982-83 school year and that his salary would be adjusted accordingly (J-3). Dimino neither filed a grievance nor an Unfair Practice Charge regarding this action of the Board.

10. In addition to Dimino's reduction for 1982-83, one full-time Language Arts position was eliminated (Mrs. Shanahan), Industrial Arts was reduced from five days to four days per week (John Kumpf) and Home Economics was also reduced from five days to four days per week (Mrs. Marshall). Principal Rica testified credibly that this was due to declining enrollment as evidenced by a chart introduced by the Board, indicating enrollment by grade from 1969 through 1984 (R-2). Exhibit R-1, the official seniority list as of March 9, 1982, indicates that Shanahan was the least senior Language Arts teacher and, thus, the Board followed seniority in RIFFING her for the 1982-83 school year.

11. On March 14, 1983 the Board adopted a resolution RIFFING two positions,

commencing with the 1983-84 school year (R-4). The RIF was to include one fifth grade position and one sixth-seventh's English position. Since Dimino was junior on the Language Arts seniority list as of April 1, 1983 (R-3), he was informed on April 12, 1983 by the Superintendent that his position was being eliminated as a result of decreased enrollment at the Harding School (J-5). It is noted that Dimino had been alerted to this possibility at a meeting with the Superintendent and an N.J.E.A. Representative on January 11, 1983 (J-4).

12. The Hearing Examiner rejects as not probative the effort of the Charging Party to demonstrate that other teachers who were retained for the 1983-84 school year have taught the subject matter of Dimino's courses, which, according to the Charging Party would indicate that the RIF of Dimino was a subterfuge by the Board.

13. Contemporaneous with the filing of the instant Unfair Practice Charge on August 12, 1983, Dimino filed a Petition with the Commissioner of Education, claiming that he was laid off from his employment due to a reduction-in-force in violation of his tenure seniority rights. That Petition was withdrawn on January 12, 1984 at Dimino's request and no hearings were held in connection therewith. The matter was not reopened within the 90-day limitation period on actions filed with the Commissioner of Education.

THE ISSUE

Did the Respondent Board violate Subsections(a)(1) and (3) of the Act when it RIFFED Robert J. Dimino, a recent past President of the Association, effective June 30, 1983?

DISCUSSION AND ANALYSIS

The Respondent Board Did Not
Violate Subsections(a)(1) And
(3) Of The Act When It RIFFED
Dimino, Effective June 30, 1983

In order for the Charging Party to prevail it must prove by a preponderance of the evidence that it has met the "causation test" enunciated by the New Jersey Supreme Court in Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235

(1984), which adopted the analysis of the NLRB in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980), which, in turn, was adopted by the United States Supreme Court in NLRB v. Transportation Mgt. Corp., ___ U.S. ___, 113 LRRM 2857 (1983).

The "test" involves the following requisites in assessing employer motivation:

(1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the Respondent's decision to RIF and; (2) once this is established, the Respondent has the burden of demonstrating that the same action would have taken place even in the absence of protected activity: Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977).

The Hearing Examiner finds and concludes that the Charging Party's proofs fall short of making a prima facie showing sufficient to support an inference that Dimino's protected activities as President of the Association were a substantial or a motivating factor in the Board's decision to RIF his position in April 1983. The problem with the Charging Party's case is that it shows only that Dimino was active on behalf of the Association in his capacity as President between June 1980 and June 1982. There was no protected activity engaged in by Dimino after June 1982. Thus, the Charging Party's proofs as to protected activity being a substantial or a motivating factor in the Board's decision to RIF him in April 1983 suffer from remoteness in time: See New Jersey Sports & Exposition Authority, H.E. No. 84-48, 10 NJPER 200, 201 (1984), aff'd. P.E.R.C. No. 84-150, 10 NJPER (June 26, 1984).

In connection with the remoteness in time aspect of the proofs in this matter, the Hearing Examiner notes that on April 13, 1982, while Dimino was still President, he was informed by the Superintendent that the Board had decided on April 12th to reduce his teaching schedule from seven periods to six periods per day for the 1982-83 school year with a corresponding adjustment downward in salary. Dimino neither filed a grievance nor an Unfair Practice Charge regarding this action of the Board. Plainly, if Dimino's engaging in protected activities during the 1981-82 school year as

President of the Association was a motivating factor in the Board's decision to reduce his teaching schedule, then logically some action would have been taken by Dimino or the Association on his behalf, namely, the filing of an Unfair Practice Charge with the Commission. Since this was not done the Hearing Examiner can only conclude that the Association and Dimino did not deem the Board's action of April 12, 1982 as having been motivated by Dimino's exercise of protected activities in or around that time.

Further, the Board's action in reducing Dimino's teaching schedule for the 1982-83 school year occurred at the same time that one full-time Language Arts position was eliminated (Mrs. Shanahan), and Industrial Arts was reduced from five days to four days per week (John Kumpf) and Home Economics was reduced from five days to four days per week (Mrs. Marshall). The Board demonstrated that this collateral action in reducing teaching schedules was due to declining enrollment at the Harding School. Further, the Board demonstrated that it followed seniority when it RIFFED Shanahan for the 1982-83 school year. (See Finding of Fact No. 10, supra).

It is noted further that Dimino engaged in no protected activities during the 1982-83 school year. He was during this year no longer the President of the Association, nor, based on this record, was he the holder of any other office in the Association. He also filed no grievances during the 1982-83 school year.

On January 11, 1983 Dimino was alerted to the possibility of his being RIFFED at a meeting with the Superintendent and an N.J.E.A. Representative (J-4). On March 14, 1983 the Board adopted a resolution RIFFING two positions, commencing with the 1983-84 school year (R-4). The RIF was to include one fifth grade position and one sixth-seventh's English position. The Board, following seniority, advised Dimino that since he was junior on the Language Arts seniority list as of April 1, 1983, his position was being eliminated as a result of decreased enrollment at the Harding School (J-5). There is not a scintilla of evidence that the Board's action in April 1983 was motivated by, or retaliation for, Dimino's exercise of protected activities between

June 1980 and June 1982.^{2/} The Hearing Examiner has rejected as not probative the efforts of the Charging Party to demonstrate that other teachers, who were retained for 1983-84 school year, have taught the subject matter of Dimino's courses. The Hearing Examiner finds no subterfuge on the part of the Board in this regard.

If the Hearing Examiner had been persuaded that Dimino's exercise of protected activity, particularly in the 1981-82 school year, the second year of his term as President, was a substantial or a motivating factor in the Board's decision to RIF him in April 1983, then some detailed discussion of Dimino's activities during the 1981-82 school year vis-a-vis the Principal and the Superintendent would have been warranted. However, as noted above, the Hearing Examiner has concluded that on the basis of remoteness in time, these activities of Dimino in 1981-82 had nothing whatsoever to do with the Board's action to RIF him in April 1983. It has already been noted that neither Dimino or the Association elected to file an Unfair Practice Charge when Dimino's teaching schedule was reduced in April 1982 while he was still President.

Accordingly, the Hearing Examiner must recommend dismissal of the Subsection(a) (1) and (3) allegations in the Complaint.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it RIFFED Robert J. Dimino, a recent past President of the Association, effective June 30, 1983, on the basis of seniority.

2/ Even if the Hearing Examiner was to assume that the first part of the Bridgewater test, supra, was satisfied, the Board has met its burden of showing that the RIF would have occurred even in the absence of protected activity inasmuch as the Board followed the seniority list of April 1, 1983. (See Finding of Fact No. 11, supra.)

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: July 11, 1984
Trenton, New Jersey