

P.E.R.C. NO. 90-89

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MOORESTOWN TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CI-H-89-53

GERALDINE B. WING,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Geraldine B. Wing against the Moorestown Township Board of Education. The charge alleges that the Township violated the New Jersey Employer-Employee Relations Act by paying Wing only one stipend for her duties as coordinator of cooperative marketing education and coordinator of cooperative office education in retaliation for her pursuing a claim for two stipends the previous year. Applying In re Bridgewater Tp., 95 N.J. 235, 244 (1984), the Commission finds no evidence that protected activity motivated any retaliatory conduct.

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Appearances:

For the Respondent, Moss, Powers, Kugler & Lezenby,
attorneys (Edgar E. Moss, of counsel)

For the Charging Party, Selikoff & Cohen, attorneys
(Joel S. Selikoff, of counsel, Charles H. Goldstein, on the
brief)

DECISION AND ORDER

On December 23, 1988, Geraldine B. Wing filed an unfair practice charge against the Moorestown Township Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),^{1/} by paying her only one stipend for her duties as coordinator of cooperative marketing

^{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." 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."

education and coordinator of cooperative office education in retaliation for her pursuing a claim for two stipends the previous year.

On February 23, 1989, a Complaint and Notice of Hearing issued. On February 27, the Board filed an Answer admitting paying two stipends for the 1987-88 school year due to a clerical error, but denying that it violated the Act when it paid only one stipend for the 1988-89 school year.

On June 20, 1989, Hearing Examiner Joyce M. Klein conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On October 30, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 90-21, 16 NJPER 679 (¶20276 1990). She found that the double stipend for the 1987-88 school year was due to a clerical error and that the Board did not violate the Act when it corrected the error the following year.

On December 7, 1989, Wing filed exceptions. She contends that the Hearing Examiner erred in: crediting the assistant superintendent for personnel; finding that the number of students participating in a program is a factor used to determine the amount of a stipend, and concluding that she had not proven retaliation.

On December 28, 1989, the Board filed a reply. It contends that the Hearing Examiner correctly credited the assistant superintendent's testimony and found no anti-union animus.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 2-8) are correct. We incorporate them here.^{2/}

Cases alleging retaliation for engaging in protected activity are governed by In re Bridgewater Tp., 95 N.J. 235, 244 (1984).^{3/} Applying Bridgewater, we find no evidence that protected activity motivated any retaliatory conduct.

Due to a clerical error, 1987-88 contracts with Wing provided for two stipends rather than one. Wing actively pursued payment of two stipends that year.

2/ We specifically adopt her finding regarding the relationship between the number of students and a stipend. The Moorestown Education Association's president testified that the number of participating students did not determine a stipend, but that it was part of the formula (T60).

3/ 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 the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. On occasion, 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

The assistant superintendent recognized the weakness of the Board's position that it did not have to pay two stipends under the separate contracts. But that recognition does not prove hostility to protected rights. Rather it reflects an acknowledgement that the Board might be bound by its error.

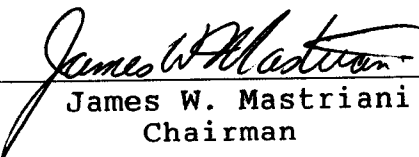
The assistant superintendent and Wing's principal told her there had been a clerical error and that she was trying to rip off the District.^{4/} But those statements do not imply hostility to protected rights. Instead they reflect the Board's position that Wing was entitled to only one stipend.

Absent any other proof of anti-union animus, we find that the Board's action did not violate subsections 5.4(a)(1) or (3).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained from consideration.

DATED: Trenton, New Jersey
April 25, 1990
ISSUED: April 26, 1990

^{4/} The Hearing Examiner credited the charging party's testimony that her principal had told her that if she pursued her claim, the Board would issue only one stipend the next year. That testimony was un rebutted but sheds little light on the Board's motives since the Board apparently had no intention of paying two stipends the following year.

H.E. NO. 90-21

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

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-and-

Docket No. CI-H-89-53

GERALDINE B. WING,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Moorestown Township Board of Education did not violate subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it gave Geraldine Wing a single stipend for her duties as Coordinator of Cooperative Office Education and Coordinator of Marketing Education for 1988-89. The Hearing Examiner finds the Board was not motivated by anti-union animus and it paid Wing a double stipend in the prior year due to a clerical error.

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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For the Respondent, Moss, Powers, Kugler & Lezenby, Esqs.
(Edgar E. Moss, of counsel)

For the Charging Party, Selikoff & Cohen, Esqs.
(JoAnne E. Milner, of counsel, Charles H. Goldstein on
the brief)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 23, 1988, Geraldine Wing ("Charging Party")
filed an unfair practice charge with the Public Employment Relations
Commission alleging that the Moorestown Township Board of Education
("Board") violated subsections 5.4(a)(1) and (3) of the New Jersey
Employer-Employee Relations Act., N.J.S.A. 34:13A-1 et seq.
("Act"),^{1/} when it provided her with a single stipend for

^{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."

performing the duties of two positions, Coordinator of Cooperative Marketing Education and Coordinator of Cooperative Office Education, for the 1988-89 school year.

On February 23, 1989, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On February 27, 1989, the Board filed an Answer admitting that it paid Wing a single stipend for both positions, but denying that it violated the Act. The Board asserts that it paid Wing two stipends in the 1987-88 school year due to a clerical error.

I conducted a hearing on June 20, 1989. The parties examined witnesses, introduced exhibits and filed post-hearing briefs by September 13, 1989.

Based upon the entire record, I make the following:

Findings of Fact

1. The Board of Education of Moorestown Township employs Geraldine Wing as a business teacher in its high school. Wing was initially appointed the coordinator of Marketing Education ("ME") for the 1981-82 school year (T17).^{2/} ME is a work-study program which places students in retailing positions. Wing provides classroom instruction and monitors students on the job. She visits their work places to monitor their wages and working conditions (T34). Since the students do not work during school hours, Wing

^{2/} The transcript of the June 20, 1989 hearing, will be cited as T. Joint exhibits are cited as J. Charging party's exhibits are cited as CP and the Respondent's exhibits are cited as R.

must visit their work places after school hours and in the evenings. Wing has also coordinated the Cooperative Office Education ("COE") program. The COE program places students in office jobs (T35). The coordinator positions require different classroom instruction, forms, reports and certifications. Coordinators teach fewer classes and receive release time before the end of the school day to visit student work places (T85).

2. After Wing was appointed ME coordinator, she asked Michael Pilenza, President of the Moorestown Education Association ("Association"), why the coordinator of Cooperative Industrial Education ("CIE") received a stipend and the ME coordinator did not (T74). Pilenza explained that the contract between the Board and the Association included a stipend for CIE, but not for ME. He said the Association would have to negotiate for an ME stipend.^{3/} Pilenza suggested Wing write a letter requesting a stipend. She did so and was paid a stipend for the ME coordinator position for the 1981-82 school year.

3. Wing was laid off due to a reduction-in-force (RIF) in 1982 and was rehired in January 1985 (T18). Wing served as COE coordinator for the remainder of the 1984-85 school year and received a stipend (T19; R-1). As COE coordinator, she supervised one work study student and taught three and one half classes.

^{3/} Mr. Patton, the CIE coordinator, received a stipend because he prevailed in a grievance or unfair practice charge proceeding. At that time, other coordinators were not interested in pursuing a stipend (T69).

Patton, who also received a stipend as the CIE coordinator supervised 22 work-study students (R-1). Nick Cuzzimano taught four classes and supervised 15 students as the ME coordinator. He did not receive a stipend in 1985-86 (T81; R-1).^{4/}

4. No students were enrolled in the COE program in 1986-87, so the COE coordinator position was not filled (T81). Wing taught three classes and supervised 13 work-study students in the ME program in 1986-87 (T81; R-1). In that same year, Patton supervised 22 students as the CIE coordinator and taught four classes (R-1). Both Patton and Wing received a stipend.

In 1987-88, Wing taught three and one half classes and coordinated both the COE and ME programs, supervising a total of ten work-study students.^{5/} Patton also supervised ten work-study students and taught three classes as the CIE coordinator in 1987-88 (R-1). Patton received one stipend and Wing received a stipend for coordinating the COE program and a stipend for coordinating the ME program in 1987-88.

5. Board meeting minutes recommended Wing as the COE coordinator and ME coordinator for 1987-88. The secretary to Kenneth Ellis, the assistant superintendent for personnel, prepared

^{4/} Cuzzimano also served as ME coordinator for 1983-84 and 1984-85. Department chairperson Lynn Matthews coordinated the COE program from 1982 through the 1984-85 school year. They never received stipends (T81).

^{5/} Wing began the school year by supervising eleven work study students, but one dropped out.

Wing's contracts for the Board Secretary's signature. Ellis's secretary read the minutes of the meeting where the Board recommended Wing as coordinator of COE and ME. She prepared and sent a contract for each position (T82). Ellis usually checks employment contracts before they are sent to the Board Secretary and the employee (T94).^{6/} Ellis's secretary brought Wing's contracts to his attention only after Wing and the Board Secretary had signed the contracts (T95, J-2, J-3).

Ellis discussed the clerical error with Association negotiators (T83). Ellis did not attempt to discuss or advise Wing of the clerical error until she called him in December 1987 (T95-T96).

^{6/} Wing argues that I should not credit Ellis's testimony because he was confused about the administration of the CIE programs and because he did not know what a resolution was. But, I do not see how Ellis's ignorance of the substantive difference between CIE-1 and CIE-2 bears on his credibility. Ellis is the assistant superintendent for personnel. His job does not necessarily require knowledge of the substance and format of each program and class offered by the Board. Wing also argues that Ellis's testimony should not be credited because he did not directly answer questions concerning whether the Board approved Wing's appointment to both positions. Wing's counsel asked whether the Board adopted a resolution appointing Wing. Ellis testified that the Board adopted the Superintendent's recommendation in the Board minutes. Wing's counsel and Ellis then engaged in a confusing discussion of the difference, if any, between a formal resolution and the recommendation adopted by the Board (T92-94). Ellis was confused by the questions and asked for clarification. I find both the questions and answers confusing. I do not find that Ellis was evasive or contradicted himself. His testimony was not otherwise disputed or contradicted. I credit it.

Stipends are usually paid in two payments, one around Christmas time and one at the end of the school year (T21). When Wing did not receive payment for two stipends in December, 1987, she initially called Linda Seite in the payroll office (T23). Seite referred her to Ellis. Ellis explained the clerical error and told Wing that the single payment was correct (T23, T97). Wing told Ellis that she had two contracts and was paid for one (T23). Ellis told Wing that she was not entitled to two stipends and that she was trying to rip off the District (T23). Wing then discussed the contracts with her principal, Mr. Fyffe. Fyffe reiterated what Ellis said and told her that if she pursued the issue, next year the Board would issue only one stipend for the two programs (T24).^{7/} Fyffe's statement was made shortly before Wing was tenured (T30).

After Wing's conversation with Fyffe, she contacted Pilenza, the Association representative and Dr. Steffy, the superintendent. In separate discussions, she related her conversations with Ellis and Fyffe to them. Pilenza told Wing that Fyffe was difficult to deal with and that he would discuss the matter with Ellis and Steffy (T52). Ellis explained to Pilenza that the two contracts resulted from a clerical error (T53, T63). Pilenza asked Ellis to pay both stipends. Ellis admitted that the Board was legally obligated by the contracts for each position to pay Wing a double stipend. He told Pilenza that he could not

^{7/} Wing's testimony concerning this conversation is not disputed. I credit it.

approve payment of two stipends and Pilenza would have to discuss it with Steffy (T55). When Pilenza discussed it with Steffy, she also explained that it was a clerical error (T55, T63). Pilenza convinced Steffy that both contracts were legally binding and she approved the double stipend to avoid legal proceedings (T56).

6. Wing was appointed COE coordinator and ME coordinator again for the 1988-89 school year. She supervised a total of 19 work-study students in the two programs (R-1). Patton coordinated the CIE program and supervised 18 work-study students (R-1). Both taught three classes and received one stipend.

7. Wing was assigned coordinator for both the COE and ME programs for the 1988-89 school year at a \$1337 stipend. Wing accepted both programs but wrote on the contract:

It is my desire to accept the above-mentioned responsibilities. However, I am entitled to a separate stipend for each program as I so received during the school year 1987-88. It is my belief that I have been denied two stipends in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3).
(J-4).

In the Fall of 1988, Wing approached Pilenza and showed him the contract assigning her a single stipend for both positions (T56). Pilenza advised Wing that past practice was to pay her the double stipend and he would speak with Ellis. Pilenza also told Wing the issue would be put on the negotiations table and finally resolved (T56-T57).

Pilenza then spoke with Ellis who explained to Pilenza that Patton, who receives a single stipend, supervises 20 work-study

students and Wing, supervises 19. Ellis explained that it was not logical to pay Wing double the amount that Patton received (T56-T57). Ellis and Pilenza agreed to resolve the issue for future years at negotiations. Though Ellis did not believe Wing was entitled to the second stipend, he agreed to recommend it to the new superintendent Dr. Germanario because Steffy had acquiesced the previous year (T58). Pilenza subsequently met with Germanario and learned that Germanario and Ellis discussed the matter and that the Board would not pay the double stipend (T59). Germanario and Ellis believed that a clerical error in one year did not set a precedent, so they were not required to pay the second stipend (T59).

8. Wing has also received stipends as school store advisor (T26-27, CP-1, CP-2). The school store advisor duties are performed during the school day (T26). Stipends that are covered by the agreement between the Board and the Association provide stipends to each program. (T49). The number of students participating in a program is factored into the formula used to determine the amount of the stipend (T60).

Analysis

Wing asserts that the Board refused to pay her a stipend for each coordinator position because she complained about its failure to pay her stipends for both coordinator positions during the 1987-1988 school year. The Board asserts that it never intended to pay Wing two stipends. It claims that it paid Wing a double stipend in 1987-88 because it was legally obligated to due to a clerical error.

Whether an employer illegally discriminates in retaliation for protected activity requires a charging party prove that protected activity was a substantial or motivating factor for the employment action, In re Bridgewater Tp., 95 N.J. 235, 244 (1984). Ordinarily, the charging party must show it engaged in protected activity, the employer knew about the activity and was hostile toward the exercise of protected rights. If the charging party proves that hostility toward exercise of protected rights was a substantial or motivating factor in the employer's action, the burden shifts to the employer to show the action would have occurred absent protected activity. The employer's affirmative defenses 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 action.

Wing complained when she received only one stipend for two coordinator positions during the 1987-1988 school year. She discussed her complaint with Fyffe and Ellis and consulted the Association president. Pilenza approached Ellis and Steffy on Wing's behalf. Wing's actions were protected under the Act and Fyffe, Ellis and Steffy knew about her complaints. Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶19259 1986).

Wing must also prove that the Board's hostility towards her complaints motivated its decision to pay her a single stipend for the 1988-89 school year. In December 1987, Wing complained to Ellis about receiving one stipend. Ellis explained the Board's clerical

error and told her that she was trying to rip off the District. When Wing approached Fyffe, he also complained that she was trying to rip off the District. Fyffe added that if she pursued the issue she would receive a single stipend for both programs the following year.

Fyffe's threat ultimately came true, but Ellis, not Fyffe is responsible for writing employment contracts. There is no evidence that Ellis issued a single contract for the COE and ME coordinator positions in the 1988-89 school year because Wing complained the previous year. Ellis's comment that Wing was trying to rip off the District could be interpreted as hostility toward Wing because she complained about her stipend. Or, Ellis's comment could be a statement of his belief that if Wing received two stipends, she would be over-compensated. The latter interpretation of Ellis's comment is most plausible since the two contracts providing the double stipend in 1987-88 were issued erroneously.

After Wing complained that her 1988-89 employment contract provided only one stipend, Ellis agreed to recommend that the Board pay her a double stipend for 1988-89 and negotiate with the Association over future stipends. If Ellis was motivated by hostility to give Wing a single stipend in 1988-89, it is not likely he would have agreed to recommend payment of the double stipend to settle the matter.

Though Ellis made the initial decision to give Wing an employment contract providing one stipend for both programs, he also

agreed to recommend the superintendent reverse that decision after Wing complained. Additionally, Germanario, who was not involved in the initial dispute during 1987-88, made the final decision.

For these reasons, I find that Wing has not proven that the Board was substantially motivated by animus to award Wing a single stipend for both positions for 1988-89.

Even if I interpreted Ellis's and Fyffe's comments to show that hostility was a motivating factor in the Board's decision to give Wing one stipend for the 1988-1989 school year, I find that the Board had a legitimate business reason to do so.

The Board does not have a consistent practice of paying stipends to employees with coordinator positions. As CIE coordinator, Patton began receiving annual stipends only as the result of a legal proceeding. Cuzzimano and Matthews, who never complained or requested stipends, never received them. Wing received stipends only after she complained. Except for 1987-88 school year when Wing received two stipends, no coordinator received more than a single stipend.

Additionally, Wing and Patton supervise similar numbers of students in work study programs. Though Wing supervised two work study programs during the 1987-88 school year, she supervised the same number of students as Patton. Both had reduced teaching loads. During the 1988-89 school year, Patton and Wing each taught three classes and Wing supervised one student more than Patton.

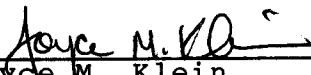
I find that the Board legitimately considered the number of work study students supervised by both Wing and Patton and determined that they should receive similar stipends. The Board discussed the clerical error with Wing and Pilenza from the beginning. When Pilenza approached Ellis in 1988, Ellis agreed to recommend paying Wing the double stipend for 1988-1989. Germanario, the new superintendent who was not involved the previous year, decided against it.

Wing's initial receipt of two stipends resulted from a clerical error. The Board paid the double stipend in 1987-88 because it was contractually obligated to do so. By paying a double stipend once, the Board did not assume the obligation to pay Wing a double stipend each year that she coordinated two work study programs.

For these reasons, I find that the Board gave Wing a single stipend as Coordinator of ME and COE in 1988-1989 because it believed that the positions together, compared to Patton's position, were worth only one stipend. I do not find the Board gave Wing one stipend because of her earlier complaints.

Recommended Order

I recommend that the Complaint be dismissed.



Joyce M. Klein
Hearing Examiner

DATED: October 30, 1989
Trenton, New Jersey