

P.E.R.C. NO. 79-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF CAMDEN BOARD OF
EDUCATION,

Respondent,

Docket No. CI-79-6-21

-and-

LESTER FULLER,

Charging Party.

SYNOPSIS

The Commission adopts a Hearing Examiner's Recommended Report and Decision, agreeing that the Charging Party in this unfair practice matter failed to meet his burden of proof that he was discharged in retaliation for union activity. Proof of protected activity without more is insufficient to show an illegal motive on the part of an employer.

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Charging Party.

Appearances:

For the Respondent, Supnick, Mitnick &
Vogelson, Esqs. (M. Allan Vogelson, of Counsel)

For the Charging Party, Camden Regional Legal
Services (Michael Morris, of Counsel)

DECISION AND ORDER

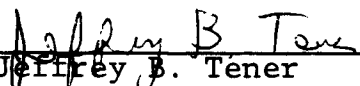
An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on August 11, 1978 by Lester Fuller alleging that the City of Camden Board of Education (the "Board") had terminated Fuller because of his activities for the Amalgamated Transit Union in violation of N.J.S.A. 34:13A-5.4(a)(3), part of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). A hearing was held before Commission Hearing Examiner Alan R. Howe who issue his Recommended Report and Decision on December 18, 1978. H.E. No. 79-27, 4 NJPER ____ (Par. ____ 1978).

The Hearing Examiner found that the Charging Party had failed to meet its burden of proof as required by N.J.A.C. 19:14-6.8 and recommended dismissal. Counsel for the Charging Party then resubmitted to the Commission the brief he had filed with Mr. Howe. This is not in accord with the procedure for taking exception to a Hearing Examiner's Report set forth in N.J.A.C. 19:14-7.3 and cannot be accepted. In any event, our own review of the record reveals a dearth of proof of anti-union animus and we therefore adopt the Hearing Examiner's Report for the reasons stated therein. Although the Charging Party was undoubtedly engaging in protected activity, that alone does not establish that his termination was wrongfully motivated. The Hearing Examiner discredited the only testimony that might support Fuller's claim and we will not reverse him on such a determination. The Charging Party's request for oral argument is denied. There was argument before the Hearing Examiner and we are satisfied that the record before us permits us to decide this matter without additional argument.

ORDER

For the reasons set forth and upon the entire record it is hereby ORDERED that the Complaint herein is dismissed.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Hipp and Parcels voted for this decision. None opposed. Commissioner Schwartz abstained. Commissioner Graves was not present.

DATED: Trenton, New Jersey

January 16, 1979

ISSUED: January 17, 1979

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

In the Matter of

CITY OF CAMDEN BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CI-79-6-21

LESTER FULLER,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices against the Board, which alleged that the Board had on February 15, 1978 terminated Lester Fuller on account of the engaging by Fuller in protected activities under the New Jersey Employer-Employee Relations Act.

The Hearing Examiner found that although Fuller had engaged in protected activities, complaining about working conditions on behalf of other school bus drivers, including himself, since September 13, 1977, he had failed to prove any anti-union animus on the part of the Board or any causal connection between his exercise of protected activities and his termination on February 15, 1978. The Board had offered evidence that it terminated Fuller and other full-time school bus drivers for budgetary reasons, a legitimate business consideration.

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.

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

In the Matter of

CITY OF CAMDEN BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CI-79-6-21

LESTER FULLER,

Charging Party.

Appearances:

For the City of Camden Board of Education
Supnick, Mitnick & Vogelsson, Esqs.
(M. Allan Vogelsson, Esq.)

For Lester Fuller
Camden Reg. Legal Services, Inc.
(Michael Morris, 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 11, 1978 by Lester Fuller (hereinafter the "Charging Party" or "Fuller") alleging that the City of Camden Board of Education (hereinafter the "Board" or the "Respondent") 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 Board had on or about February 15, 1978 terminated the Charging Party on account of activities exercised by him on behalf of the Amalgamated Transit Union, which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(3) of the Act. ^{1/}

1/ This Subsection prohibits employers, their representatives or agents from:
"(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 September 18, 1978. Pursuant to the Complaint and Notice of Hearing, hearings were held on November 2, and November 13, 1978 in Trenton, New Jersey at which time the parties were given an opportunity to examine witnesses and present relevant evidence. ^{2/} The Charging Party filed a post-hearing brief on December 15, 1978.

Unfair practice charges 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 brief of the Charging Party, 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 City of Camden Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Lester Fuller is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. Fuller was hired as a school bus driver in May 1977 and was terminated on February 15, 1978. At the time of his hire Fuller was paid \$5.00 per hour and in June 1977 this was converted to \$135.00 per week. In September hour and in June 1977 this was converted to \$7400.00 per year.

4. During the period of his employment Fuller was not covered by a collective negotiations agreement. However, during the first week of September 1977 Fuller and at least six other bus drivers signed authorization cards for the Amalgamated Transit Union for the purpose of having the Union represent them in collective negotiations.

5. The said authorization cards were forwarded to the Amalgamated Transit Union, which sent a letter requesting recognition to Mr. Anthony Gonski, the business administrator for the Board. When the said letter was received from the Union, Mr. Gonski turned it over to Robert Murray, Esq., Special Labor Counsel for the Board. There was no further contact with the Amalgamated Transit Union

2/ The hearing of November 13 concluded with possible further cross-examination of Respondent witness, Anthony Gonski, which was to take place on November 28. However, the hearing of November 28 was cancelled, the record was closed by exchange of correspondence and a briefing schedule was fixed. Oral argument was impliedly waived. On December 12 Counsel for Respondent advised that he did not desire to file a post-hearing brief.

of which Mr. Gonski was aware.

6. The Hearing Examiner finds as a fact that neither the Board nor its representatives were made aware of the names of any of the school bus drivers who signed authorization cards for the Amalgamated Transit Union.

7. On or about September 13, 1977, at the instance of Mr. Gonski and his administrative assistant, Hilliard Moore, a meeting was held with the school bus drivers, at which meeting a written statement of grievances over working conditions was presented on behalf of the drivers by Fuller (CP-2). The working conditions grievances enumerated in the said statement included complaints about safety, rates of pay and fringe benefits. These complaints regarding working conditions were discussed by all present, with Fuller as the spokesman for the bus drivers, at the meeting on September 13, 1977. There was no resolution reached with respect to the complaints by the bus drivers.

8. Fuller testified that sometime prior to September 1977 Gonski stated: "The person who complained the most would be the first one fired." No other witness for the Charging Party corroborated Fuller in his allegation that Gonski had made such a statement. Gonski and Moore denied that Gonski had made such a statement and the Hearing Examiner credits Gonski and Moore that no such statement was made.

9. Fuller testified without contradiction that during the months of September and October 1977 he made at least six telephone calls to Gonski and Moore regarding union representation and received the "same answer", namely, that the matter of union representation had been turned over to the Board's Special Labor Counsel.

10. Fuller was on leave of absence to injury from November 4, 1977 to January 31, 1978.

11. At a public meeting of the Board on January 30, 1978 Fuller made safety complaints regarding the school buses and complaints regarding overtime pay (CP-3).

12. During the months of November and December 1977, Gonski prepared a survey and report to the Board recommending that a contractor for school bus service would be more efficient. Gonski had taken over the responsibility for the school buses in September 1977 when the Board was using its own vehicles to provide school bus service and found the performance "very poor". The Board re-

ceives 100% reimbursement from the State of New Jersey if it contracts out school bus services while, on the other hand, if the Board provides its own "in house" school bus service it receives only 50% to 75% reimbursement from the State.

13. The Hearing Examiner finds that Fuller and other full-time bus drivers were terminated as of February 15, 1978 for legitimate business considerations by the Board, namely, budgetary reasons. The Board did elect to retain one full-time bus driver and this retention was based upon his seniority, the job being awarded to Kermit Coulbourne.

14. The Board has, since the termination of Fuller on February 15, 1978, hired additional bus drivers as a part-time basis. There was no evidence adduced that Fuller was not retained as either a full-time driver or a part-time driver on account of any anti-union animus of the Board or its representatives.

15. Gonski, during the relevant period in question, supervised between 253 and 258 employees of whom 252 were "unionized", that is, covered by collective negotiations agreement between the Board and other unions.

THE ISSUE

Did the Board violate Subsection (a)(3) of the Act when it terminated Fuller on February 15, 1978?

DISCUSSION AND ANALYSIS

The Board Did Not Violate The Act
When It Terminated Fuller On
February 15, 1978

The Commission in Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977) adopted the following standard in cases alleging a violation of Subsection (a)(3) of the Act:

"...A violation of N.J.S.A. 34:13A-5.4(a)(3) should be found if it is determined that a public employer's discriminatory acts were motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the effect of so encouraging or discouraging employees in the exercise of those rights.

"Application of this two-fold standard will normally involve a preliminary showing by the Charging Party of two essential elements. There must be proof that the employee was exercising the rights guaranteed to him by the Act, or that the employer believed said employee

was exercising such rights, and proof that the public employer had knowledge, either actual or implied, of such activity.

"...Discriminatory acts by employers, even if only partly motivated by an employee's union activities, or acts that would discourage exercise of such rights, would clearly tend to frustrate the express intent of the Act.

"Furthermore, the two-fold test upholds the employer's legitimate prerogative to discharge, suspend or refuse to promote employees for reasons unrelated to union activities. The employer may take such action for any cause or no cause at all as long as it is not retaliatory. It is the Charging Party that must prove its case by the preponderance of the evidence (citing N.J.A.C. 19:14-6.8)." (Emphasis supplied in part) (3 NJPER at 72)

See also, City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd. on other grounds, 162 N.J. Super. 1 (App. Div. 1978); pet. certif. granted, N.J. (1978).

In Haddonfield, supra, the Commission agreed with the Hearing Examiner in that case that the Charging Party had failed to meet its burden of proof by a preponderance of the evidence. So, too, must the Hearing Examiner conclude in the instant case.

The foregoing Findings of Fact demonstrate amply that Fuller was engaged in protected activities within the meaning of N.J.S.A. 34:13A-5.3^{3/} at least since September 13, 1977. It was on September 13 that Fuller appeared with other bus drivers in a meeting with Gonski and Moore at which Fuller presented a letter outlining grievances on working conditions. Thereafter, Fuller made at least six telephone calls to Gonski and Moore regarding union representation in the months of September and October. The response of Gonski and Moore to these telephone calls from Fuller was that the matter of union representation had been turned over to the Board's Special Labor Counsel, Robert Murray, Esq.

Fuller was not on the job from November 4, 1977 to January 31, 1978 due to injury. At a public meeting of the Board on January 30, 1978 Fuller

^{3/} "Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from such activity..."

made safety complaints regarding school buses and complaints regarding overtime pay (CP-3).

Thus, the Board and its representatives, Gonski and Moore, had actual knowledge that Fuller was exercising rights guaranteed to him by the Act, namely, complaints with respect to working conditions, ^{4/} all of which satisfies the Haddonfield two-prong test.

During the months of November and December 1977, when Fuller was on leave of absence due to injury, Gonski prepared a survey and report to the Board recommending that a contractor for school bus services would be more efficient. Since taking over the responsibility for school buses in September 1977 Gonski had found the performance of "in house" school bus service to be "very poor". It is noted that the Board receives a more favorable reimbursement from the State when it contracts out school bus service than when it provides school busing "in house", namely, 100% as opposed to 50% to 75%.

The Hearing Examiner finds and concludes that when the Board decided to terminate Fuller on February 15, 1978 it did so for legitimate business considerations, namely, budgetary reasons. Having so found, the Hearing Examiner is of the considered opinion that any protected activities in which Fuller was engaged prior to February 15, 1978 were totally unrelated to the decision of the Board through its representatives to terminate Fuller on February 15, 1978. Thus, under Haddonfield, supra, the employer, here the Board, took the action of termination of Fuller for reasons that were not retaliatory for any protected activities in which Fuller was engaged prior to February 15, 1978.

Although the Board has, since the termination of Fuller on February 15, 1978 hired additional bus drivers on a part-time basis, there was no evidence adduced that Fuller was not retained either as a full-time driver or a part-time driver on account of any anti-union animus of the Board or its representatives. ^{5/} It is true, that one full-time bus driver was retained, namely, Kermit Coulbourne, but this was on the basis of Coulbourne's seniority in relation to other bus drivers.

^{4/} See North Brunswick Township Board of Education, P.E.R.C. No. 79-14 (f.n. 16) (1978).

^{5/} As found in Finding of Fact No. 15, practically all of the employees supervised by Gonski are "unionized", which makes it highly improbable that Gonski was motivated by anti-union animus in his relations with Fuller.

* * * *

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

CONCLUSIONS OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(3) when it terminated Lester Fuller on February 15, 1978.

RECOMMENDED ORDER

The Respondent Board not having violated the Act, supra, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

DATED: December 18, 1978
Trenton, New Jersey