

H.E. NO. 89-14

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

In the Matter of

NORTH CALDWELL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-11

NORTH CALDWELL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission deny the Respondent's Motion for Summary Judgment, filed prior to the commencement of hearing, based upon the fact that the Respondent has failed to demonstrate that there are no genuine issues of material facts as to which a plenary hearing is required.

A Hearing Examiner's decision to deny a motion for summary judgment in an interlocutory decision as to which any appeal shall be by special permission directed to the Commission: N.J.A.C.
19:14-4.6.



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Appearances:

For the Respondent, Metzler Associates, James L. Rigassio,
Consultant

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak,
Esqs. (Paul L. Kleinbaum, of counsel)

HEARING EXAMINER'S INTERLOCUTORY
DECISION ON RESPONDENT'S MOTION
FOR SUMMARY JUDGMENT PRIOR TO HEARING

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 8, 1988, by the North Caldwell Education Association ("Charging Party" or "Association") alleging that the North Caldwell Board of Education ("Respondent" or "Board") has 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. ("Act"), in that on May 24, 1988, the Board transferred James Cancialosi from one school to another in retaliation for his activities on behalf of the Association;

Cancialosi has been the Association's Grievance Chairperson for approximately four years and has been an outspoken advocate on the Association's behalf and has also handled several grievances; that the reasons given to Cancialosi for his transfer i.e., "philosophical differences" and "teacher morale," are pretextual, all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.^{1/}

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 July 29, 1988. Pursuant to the Complaint and Notice of Hearing, a hearing was scheduled for September 27, 1988, in Newark, New Jersey. On August 10, 1988, the Respondent filed its Answer to the Complaint and on September 1, 1988, the Charging Party propounded interrogatories to the Respondent.^{2/}

On September 12, 1988, the Respondent filed with the Chairman of the Commission a Motion for Summary Judgment and for a Stay of Hearing and Response to Interrogatories together with a

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."

2/ There is no issue before the Hearing Examiner at this time regarding these interrogatories inasmuch as the Respondent answered the interrogatories under date of September 28, 1988.

supporting brief and two affidavits. On September 20th the Association filed an opposition memorandum and on the same date the Chairman of the Commission referred the Board's Motion for Summary Judgment and for a Stay of Hearing and Response to Interrogatories to the undersigned Hearing Examiner pursuant to N.J.A.C. 19:14-4.8. Thereafter, on September 26, 1988, the Board filed a belated reply to the Charging Party's papers in opposition.

The decision which follows is in accordance with N.J.A.C. 19:14-4.7 and is based upon the following:

1. The North Caldwell Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The North Caldwell Education Association is a employee representative within the meaning of the Act, as amended, and is subject to its provisions.

CONTESTED FACTS^{3/}

3. The Board's Superintendent, Sharon Clover, avers in an affidavit that she was personally involved in a plan to transfer teachers for the 1988-89 school year and that on May 24, 1988, she presented a plan for the transfer of seven teachers, one of which was Cancialosi. These recommendations by Clover were made after careful consideration and were not based on any union activity by

^{3/} The Respondent's position is that there exists no genuine issue as to any material fact. However, the affidavit of Cancialosi appears to raise such issues, infra.

Cancialosi, adding that she was not aware of any grievance activity by him.

4. John Venezia, an elementary school principal, avers that he participated in the determination of teacher transfers and recommended that Cancialosi, a sixth grade teacher, be assigned to teach the third grade at another school during the 1988-89 school year. Venezia averred further that he developed his recommendation with Clover and that he knew of no grievance activity of Cancialosi when he made his recommendation for his transfer. Further, Venezia was aware that Cancialosi filed a grievance on June 30, 1988, but this occurred after his recommendation to transfer Cancialosi.

5. Cancialosi avers, in his affidavit, that he has been the Grievance Chairperson for the Association since 1984 and that both Clover and Venezia have been aware of this fact. Further, during the 1987-88 school year, Cancialosi had discussed with Clover a dispute concerning the stipend for the Outdoor Education Program and he had also raised issues concerning improper job posting in September and October 1987. Cancialosi avers further that during the 1987-88 school year he had been told by Clover that he was "too outspoken" and that Venezia had said that he hoped that Cancialosi would not push the Outdoor Education Program stipend issue. Finally, when Cancialosi was transferred, Venezia's stated reasons for the transfer were "philosophical differences" and "teacher morale." No further justification was provided.

DISCUSSION AND ANALYSIS

A Motion for Summary Judgment is provided for in N.J.A.C. 19:14-4.8, which provides, in part, that: "Any motion in the nature of a motion for summary judgment may only be made subsequent to the issuance of the complaint and shall be filed with the chairman of the commission, who shall refer the motion to either the commission or the hearing examiner..." The Chairman has referred this matter to the undersigned Hearing Examiner for disposition.

N.J.A.C. 19:14-4.8(d) establishes the standard which the Commission utilizes in deciding whether or not to grant a motion for summary judgment, namely, that "...there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law..." in which case summary judgment may be granted and the requested relief ordered.

The Commission has, in many cases, followed the New Jersey Civil Practice Rules (R.4:46-2) and a leading decision of the New Jersey Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954) in deciding motions for summary judgment under N.J.A.C. 19:14-4.8. Both the Civil Practice Rules and Judson apply the same standard.

The Hearing Examiner is satisfied that the Respondent has failed to satisfy the above requisites for the granting of its Motion for Summary Judgment since there are plainly genuine issues as to material facts, which appear from the two affidavits of Respondent and the single affidavit of Cancialosi summarized above.

Based upon the record papers and the legal memoranda submitted by counsel in support of the respective positions, the Hearing Examiner hereby denies the Respondent Board's Motion for Summary Judgment for the following reasons:

Cancialosi avers that he has been the Grievance Chairperson for the Association since 1984 and that during the 1987-88 school year he had discussions with Clover and Venezia concerning a dispute over a stipend for the Outdoor Education Program and also concerning improper job posting on two occasions in September and October 1987. Further, Cancialosi avers that prior to notification of transfer he was told by Clover that he was "too outspoken" and by Venezia that he should not push the stipend issue.

Admittedly, these are only allegations or averments by Cancialosi and are not evidence that he engaged in such activity at this point in the proceeding. The Respondent Board has not denied these activities by Cancialosi and the Hearing Examiner has no way of knowing whether or not the testimony of the Board will credibly contradict these assertions.

When one looks at the affidavits of Venezia and Clover it is noted that their averments are limited to a disclaimer of any knowledge of grievance activity by Cancialosi, which does not meet the issue raised by Cancialosi, i.e., whether or not his advocacy of the issues of stipends for the Outdoor Education Program and alleged improper job posting played a role in the decision of the Respondent Board to transfer him at the conclusion of the 1987-88 school year.

The Board misses the point in arguing that Bridgewater^{4/} is applicable to this stage of the proceeding since Bridgewater provides an analytical framework for deciding whether or not the Charging Party has met either the "scintilla" and/or prima facie burden at the conclusion of its case or, on a whole record analysis at the end of the case, where both parties have been heard and have presented their evidence. Moreover, Middletown Tp. Bd. of Ed., P.E.R.C. No. 86-142, 12 NJPER 521 (¶17194 1986), aff'd App. Div. Dkt. No. A-5781-85T7 (1987) has no application in disposing of this motion since that decision was rendered upon a whole record.


There being nothing in the papers before the Hearing Examiner at this time which would indicate that the Charging Party cannot adduce prima facie evidence in its case in chief that the Respondent Board violated §§5.4(a)(1) and/or (3) of the Act, the Hearing Examiner must dismiss the Respondent's Motion for Summary Judgment.

INTERLOCUTORY ORDER

The Respondent Board having failed to demonstrate that there are no genuine issues as to any material facts on the basis of

^{4/} See Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984).

the record papers heretofore filed, the Respondent's Motion for Summary Judgment must be denied.



Alan R. Howe
Hearing Examiner

Dated: October 7, 1988
Trenton, New Jersey