H.E. NO. 89-22

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

In the Matter of

CRANFORD TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-89-104

CRANFORD ADMINISTRATIVE AND
SUPERVISORY ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner issues an interlocutory decision, denying the motion of the Respondent Board to dismiss the Unfair Practice Charge on the ground that there are genuine issues of material fact, which must be resolved at a plenary hearing. The gravamen of the Unfair Practice Charge was that a teacher, who was the President of the Association, was denied an increment in retaliation for his exercise of protected activities as President of the Association.

The Respondent had argued that the Commission lacked jurisdiction because the case involved the withholding of an increment and that the Commissioner of Education had exclusive jurisdiction. However, the Hearing Examiner resolved the jurisdictional issue on the basis of several cases, including Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434 (¶17161 1986).

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Charging Party.

Appearances:

For the Respondent, Weinberg & Kaplow, Esqs.
(Irwin Weinberg, of Counsel)

For the Charging Party, Wayne J. Oppito, Esq.

HEARING EXAMINER'S INTERLOCUTORY DECISION
ON RESPONDENT'S MOTION TO DISMISS
AND/OR MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 13, 1988, by the Cranford Administrative and Supervisory Association ("Charging Party" or "Association") alleging that the Cranford Township 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 Robert Seyfarth, a Principal at the High School and the President of the Association, received his annual

evaluation from the Superintendent on April 7, 1987, which was positive and, therefore, Seyfarth was recommended for a salary increment for the next year; on or about October 23, 1987, the Superintendent, Robert Paul, received a grievance and on November 6, 1987, he met with Seyfarth to discuss the matter; during the November 6th meeting the Superintendent was hostile to Seyfarth because of his role as Association President and he threatened to withhold Seyfarth's salary increment for the next year; for the remainder of the 1987-88 school year the Superintendent continued his hostility toward Seyfarth and on May 31, 1988, Seyfarth received his annual evaluation in which the Superintendent recommended the withholding of his increment; on June 1, 1988, the Superintendent accused Seyfarth of being responsible for the October 1987 grievance, adding that he should have stopped it; on June 13th Seyfarth met with the Superintendent about his increment, at which meeting the Superintendent indicated that Seyfarth's problem was that he "wears two hats"; and finally on June 13, 1988, the Board withheld Seyfarth's increment for the 1988-89 school year; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (7) 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. (2) Dominating or interfering with the formation, existence or administration of

Footnote Continued on Next Page

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 December 19, 1988. Pursuant to the Complaint and Notice of Hearing, hearing dates were originally scheduled for March 29, 30 and 31, 1989, but were, at the request of the parties rescheduled to April 18, 19 and 24, 1989. The Respondent filed its Answer on January 12, 1989.

Prior to the issuance of the Complaint in this matter on December 19, 1988, the Respondent had filed a Motion to Dismiss on the December 12, 1988, and the Charging Party responded on December 16, 1988. The disposition of the Respondent's Motion to Dismiss was referred to the undersigned Hearing Examiner contemporaneous with the issuance of the Complaint.

The Respondent's Motion to Dismiss is hereby decided in accordance with N.J.A.C. 19:14-4.7:

INTERIM FINDINGS OF FACT[2/]

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

1/ Footnote Continued From Previous Page

any employee organization. (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. (6) Refusing to reduce a negotiated agreement to writing and to sign such agreement. (7) Violating any of the rules and regulations established by the commission."

2/ Based upon the pleadings and the moving and responding papers.

2. The Cranford Administrative and Supervisory Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Robert Seyfarth is a public employee within the meaning of the Act, as amended, and is subject to its provisions. Seyfarth is employed as a Principal at the Cranford High School and, also, is the President of the Association.

4. On April 7, 1987, Seyfarth received an annual evaluation from Robert Paul, the Superintendent, which was positive and, therefore, Seyfarth was recommended for a salary increment for the 1987-88 school year.

5. On October 23, 1987, the Superintendent received a grievance from the Assistant Principal of the High School and on November 6, 1987, the Superintendent met with Seyfarth.

6. During the meeting between the Superintendent and Seyfarth on November 6, 1987, the Charging Party alleges that the Superintendent threatened to withhold Seyfarth's increment for the 1988-89 school year.[3/]

7. On May 31, 1988, Seyfarth received his annual evaluation in which the Superintendent recommended the withholding of his salary increment for the next year.

3/ The Respondent has not admitted this allegation but has pleaded "insufficient knowledge." The Hearing Examiner must treat this allegation as true under the rules and the law, infra, governing the disposition of Motions to Dismiss/Summary Judgment.

8. The Charging Party alleges that two meetings between the Superintendent and Seyfarth occurred on June 1 and June 13, 1988, where the withholding of Seyfarth's increment was discussed.

9. At a meeting of the Board on June 13, 1988, it voted to withhold Seyfarth's increment for the 1988-89 school year.

DISCUSSION AND ANALYSIS

The Board in its moving papers seeks a Motion to Dismiss. A motion to dismiss is governed by N.J.A.C. 19:14-4.7, which provides only that if the motion is granted by the Hearing Examiner before the filing of his Recommended Report and Decision, then the Charging Party may obtain review by the Commission, provided the request for such review is filed within ten days of the order of dismissal. This rule does not, however, provide guidance as to the standard to be applied by the Hearing Examiner in determining whether to grant or deny the motion to dismiss.

However, the Hearing Examiner is unable to perceive any significant difference between the standard for disposing of a motion to dismiss and that of a motion for summary judgment, which is provided for N.J.A.C. 19:14-4.8. This rule provides in Section (a) 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..." Thus, it appears to the Hearing Examiner that he may treat the Respondent's Motion to Dismiss as a motion for summary

judgment even though it was not filed with the Chairman and referred to the undersigned pursuant to this Rule and, further, even though the Motion was filed prior to the issuance of the instant Complaint.

N.J.A.C. 19:14-4.8(b) 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.

But summary judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against the movant, and the summary judgment procedure may not to be used as a substitute for a plenary trial: State of N.J. (Human Services), P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988), citing Baer v. Sorbello, 177 N.J. Super. 182, 185 (App Div. 1981); Essex Cty. Ed. Services Comm'n., 9 NJPER 19 (¶14009 1982).

The Hearing Examiner is persuaded that the Respondent's Motion to Dismiss must be denied. This denial follows from the

conclusion of the undersigned that the pleadings appear to raise genuine issues of material facts and that the Board is not entitled to judgment as a matter of law for the following reasons:

First, there can be no doubt at this stage of the history of the Commission's exercise of jurisdiction that it "...possesses the authority to order that a party found to have violated the Act make the affected employees whole for their actual losses sustained by reason of the commission of an unfair practice in violation of N.J.S.A. 34:13A-5.4(a)...": Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Assn. of Ed. Secys., 78 N.J. 1, 16 (1978). This judicial recognition of the Commission's remedial authority derived from Sec. 5.4(c) of our Act,[4/] which was construed by the Court in Galloway as providing that the power to order that an employee be made whole is necessarily subsumed within the broad remedial authority that the Legislature has entrusted to the Commission (78 N.J. at 8, 9).[5/]

4/ This section provides, in part, that the Commission is empowered to issue "...an order requiring such party to cease and desist from such unfair practice and to take such reasonable affirmative action as will effectuate the policies of this Act...."

5/ The Hearing Examiner can perceive no relevance to the Respondent's citation of Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Assn., 79 N.J. 311 (1979). In that case the Supreme Court held only that private parties to a public sector collective negotiations agreement could not submit to binding arbitration the withholding of a teacher's salary increment. The Court did, however, approve of submitting the issue to advisory (nonbinding) arbitration since this would neither interfere with the exercise of a board of education's managerial prerogative nor infringe upon the Commissioner of Education's duty under the Education Law (see 79 N.J. at 322, 323, 326).

Secondly, the Hearing Examiner cannot accept the contention of the Respondent that the Commission's jurisdiction to adjudicate a case such as this is foreclosed by reason of the Supreme Court's decision in City of Hackensack v. Winner, 82 N.J. 1 (1980). The Court in Winner sought to eliminate overlapping adjudications by administrative agencies seeking to exercise their own statutory jurisdiction. Since the Winner decision the Commission has had many instances where parties sought a "predominant interest" determination through the administrative law judges assigned to the Office of Administrative Law. The Commission has in appropriate cases followed the adjudication of the ALJ as to predominant interest with some cases being decided by the Commission and others being decided by the Commissioner of Education, Civil Service or now the Department of Personnel. No party in this case has sought a predominant interest determination. Thus, at least at this point, there exists no bar to the exercise by the Commission through its Hearing Examiner of jurisdiction of the subject matter of the instant Unfair Practice Charge.

Thirdly, the Hearing Examiner is not breaking any new ground in denying this Motion to Dismiss since the Commission has decided at least two unfair practice cases which involved the denial of an increment where no separate petition was filed with the Commissioner of Education. Thus, in Ridgefield Park Bd. of Ed., P.E.R.C. No. 85-93, 11 NJPER 202 (¶16083 1985) the Commission held that the board had unlawfully withheld a teacher's annual increment

where the evidence demonstrated that the board acted in retaliation against the teacher's protected activities. The affected teacher had received positive evaluations in past years and then suddenly received negative evaluations involving the same classroom subject matter. Application of the Bridgewater[6/] analysis demonstrated that the board would not have withheld the teacher's increment in the absence of his protected activity.

One year later in Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434 (¶17161 1986) the Commission ordered the restoration of a teacher's salary increment with interest [as was done in Ridgefield Park] where the facts demonstrated that under the Bridgewater analysis, a teacher's salary increment was withheld because of her filing a grievance.

Finally, the case of Manchester Reg. H.S. Bd. of Ed., P.E.R.C. No. 88-17, 13 NJPER 715 (¶18267 1987), cited by the Respondent, involved the filing of tenure charges and the withholding of an increment where a petition was filed with the Commissioner of Education as to the withholding of the increment. In Manchester, unlike the instant case, not only was a petition filed with the Commissioner of Education but after the association sought to consolidate the increment withholding petition, the tenure charges and the unfair practice charges, the board took issue, contending that the Commissioner had the predominant interest and

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6/ Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984).

that all matters should be heard before him. The Chairman of our Commission referred all of the motions to an ALJ for a predominant interest determination. After considerable "back and forth," the ALJ conducted the fact-finding hearings. The decision of the ALJ went to the Commissioner of Education and his decision was followed by an appeal to the State Board of Education. When our Commission eventually received the matter for review of the decision of the ALJ on all three issues, it concluded that the board did not violate our Act when it withheld the increment, and that although a closer question, the Commission decided that when the board filed its tenure charges it likewise did not violate the Act. Thus, the complaint was dismissed.

It is obvious that Manchester illustrates perfectly the course that the case above might have taken but did not. Accordingly, under Ridgefield Park and Pine Hill, supra, the Hearing Examiner is fully satisfied that he has jurisdiction to proceed to hearing and adjudication of the instant Unfair Practice Charge.

* * * *

Based upon the foregoing record papers and the above-discussed legal precedent, the Hearing Examiner makes the following:

INTERLOCUTORY ORDER

The Respondent Board's Motion to Dismiss is DENIED, and it is;

FURTHER ORDERED that the plenary hearing scheduled for April 18, 19 and 24, 1989, is confirmed.

Alan R. Howe
Hearing Examiner

Dated: February 3, 1989
Trenton, New Jersey

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION

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February 3, 1988

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Re: Cranford Tp. Bd/Ed
-and-
Cranford Adm. & Sup'v Assn
Docket No. CO-H-89-104

Gentlemen:

Enclosed herewith is my Interlocutory Decision on Respondent's Motion to Dismiss and/or Motion for Summary Judgment. I have denied the motion of Mr. Weinberg. As the last page indicates, I have confirmed the hearing dates for April.

Very truly yours,

Alan R. Howe
Hearing Examiner

/ab
Enc.