I.R. No. 83-15

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-83-213
CO-83-214
CO-82-238

NEWARK TEACHERS UNION, LOCAL 481,
AFT, AFL-CIO and RICHARD ALEXANDER,
ROBERT L. PALUMBO & RAYMOND K. KIRSCHBAUM,

Charging Parties.

SYNOPSIS

A designee of the Commission denies the request of the Charging Parties for interim relief where the Respondent had certified tenure charges against the three individual Charging Parties, suspending them without pay. There were serious credibility questions involved, which militated against satisfaction by the Charging Parties of the substantial likelihood of success on the merits standard. Further, as to irreparable harm, monetary losses suffered by the individual Charging Parties could be remedied at the end of the case: City of Jersey City, P.E.R.C. No. 77-13, 2 NJPER 293 (1976). The rights of the Charging Party, Newark Teachers Union, were not impaired by the absence of the three individual Charging Parties from their schools where they function as building representatives since there are approximately 90 schools in the District and the Newark Teachers Union has over 5,000 members.

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Appearances:

For the Respondent
Louis C. Rosen, Esq.
Dwayne C. Vaughn, Esq.

For the Charging Parties
Tomar, Gelade, Kamensky, Klein, Smith & Lehmann, Esqs.
(Sidney H. Lehmann, Esq.)

INTERLOCUTORY DECISION AND ORDER

Essentially identical Unfair Practice Charges were filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 18, 1983 by the Newark Teachers Union, Local 481, AFT, AFL-CIO (hereinafter the "NTU") on behalf of Richard Alexander and Robert L. Palumbo (hereinafter "Alexander" or "Palumbo") in Docket Nos. CO-83-213 and CO-83-214, respectively, with requests for interim relief. The Charges alleged that the Newark Board of Education (hereinafter 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 Board, inter alia, on February 3, 1983 served copies of certain tenure charges on Alexander and Palumbo, advising them that a hearing would be held on February 24, 1983 where the Board would review the charges against them regarding excessive absences and excessive tardiness, which was alleged to be in retaliation for protected activities by Alexander and Palumbo on behalf of the NTU and in reprisal for the NTU having filed an Unfair Practice Charge on December 30, 1982 in Docket No. CO-83-159, which challenged

the Board's unilateral adoption of a program called the Attendance Improvement Program (AIP), and further, that Palumbo, as a building representative for the NTU, and Alexander as a member of the building committee, are active on behalf of the NTU at Broadway Jr. High School, and that their removal from the school would impair effective representation by the NTU, all of which is alleged to be a violation of N.J.S.A 34:13A-5.4(a)(1), (2), (3), (4) and (5) of the Act.[1/]

A further Unfair Practice Charge was filed with the Commission on March 8, 1983 by the NTU on behalf of Raymond K. Kirschbaum (hereinafter "Kirschbaum"), which alleged that the Board violated the Act when on February 18, 1983 it served Kirschbaum with a copy of tenure charges and advised him that a hearing would be held on March 8, 1983 where the Board would review the charges against him regarding execessive absences, and that Kirschbaum as the building representative at East Side High School has been active on behalf of the NTU for more than 13 years, where he has filed and prosecuted numerous grievances and has opposed the implementation by the Board of the AIP, supra, and that the Board, in filing tenure charges against Kirschbaum, has included absences in excess of 15 days per year when a 25-year employee in the school system such as Kirschbaum is entitled to 25 days of sick leave per year, all of which is in retaliation for the exercise by Kirschbaum of protected activities, and is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) through (5) of the Act, supra.

On February 18, 1983, on behalf of Alexander and Palumbo, Orders to Show Cause were executed by the Hearing Examiner and made returnable February 23, 1983.

1/ These Subsections prohibit public employers, their representative 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 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.

"(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act.

"(5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority majority representative."

By that date the Charging Parties had submitted exhibits on behalf of Alexander and Palumbo together with certifications and a supporting brief. Also, by that date the Board had submitted certifications and affidavits only without a supporting brief. Oral argument was heard by the Hearing Examiner.

Following oral argument the Hearing Examiner stated on the record that he would not restrain the Board from acting upon the tenure charges filed against Alexander and Palumbo, or from certifying the tenure charges to the Commissioner of Education. He further stated that because the Board was not to meet until the following day, February 24, 1983, it would be premature to consider the request of counsel for NTU that the Board be restrained from suspending Alexander or Palumbo without pay.

On February 25, 1983 the Hearing Examiner was advised by counsel for the parties that the Board took no action on the tenure charges against Alexander and Palumbo on February 24, 1983. Thus, the matter was held in abeyance by the Hearing Examiner pending any further action by the Board.

The Board on March 15, 1983 considered the tenure charges against Alexander, Palumbo and Kirschbaum and decided to certify the tenure charges to the Commissioner of Education, and further decided to suspend Alexander, Palumbo and Kirschbaum without pay, pending the disposition of the tenure charges by the Commissioner of Education.

At the request of counsel for the NTU a further hearing on its application for interim relief was scheduled and heard on March 22, 1983. The day prior thereto the Board filed a brief for the first time in opposition to the grant of interim relief on behalf of Alexander, Palumbo and Kirschbaum. Notwithstanding the late filing of the Board's brief, the Hearing Examiner, over the objection of counsel for the NTU, has considered the Board's brief together with the oral argument of counsel at the hearing.

As noted above, the Hearing Examiner declined at the first hearing on February 23, 1983 to restrain the Board from acting upon the tenure charges against Alexander

and Palumbo and from certifying the tenure charges, if so decided upon, to the Commissioner of Education. The Hearing Examiner was of the opinon that so to restrain the Board would be an unwarranted intrusion upon the Board's exercise of its inherent managerial prerogatives. As authority for this decision the Hearing Examiner cites Local 195 v. State, 88 N.J. 393, 404, 405 (1982), a case which, although dealing with the criteria for mandatory negotiatbility, plainly indicates that a "government's" managerial prerogative to determine policy may not be interfered with even though it may intimately affect the working conditions of employees.

Thus, the Board was free to act on the tenure charges against Alexander, Palumbo and Kirshbaum when it met on March 15, 1983. At that time it decided to certify tenure charges against all three individuals and to suspend them without pay.

Although appropriate to the issue of irreparable harm, it is here noted that N.J.S.A. 18A:6-14, as amended in 1971, provides that when tenure charges are certified to the Commissioner of Education, the Board may suspend the person against whom such charges are made with or without pay, but, if the determination of the charges by the Commissioner is not made within 120 calendar days, excluding all delays granted at the request of the person charged, then the full salary, except for the said 120 days, shall be paid to such person beginning on the 121st day until the Commissioner's determination is made. Thus, the adverse financial impact visited upon Alexander, Palumbo and Kirschbaum is limited to 120 days from the date of certification, March 15, 1983.

* * * *

The standards that the Commission has developed for evaluating the appropriateness for the grant of interim relief are similar to those applied by the courts when confronted with like applications. The test is twofold: a demonstration by the Charging Party of substantial likelihood of success on the merits as to the legal and factual allegations under Commission and court precedent, and the irreparable nature of the

harm that will occur if the requested relief is not granted: New Jersey Department of Law and Public Safety, I.R. No. 83-2, 8 NJPER 425 (1982) and Harrison Township, I.R. No. 83-3, 8 NJPER 462 (1982).

The Substantial Likelihood of Success Standard

Counsel for the Charging Parties would have the Hearing Examiner believe that there are no substantial issues of fact in the papers presented by the parties and, thus, a plenary hearing is unnecessary to decide the facts of the case. To take Palumbo, as an example, the Board, in the First Count of the tenure charges, regarding excessive absenteeism, alleges at least eight instances between 1979 and 1981 that Palumbo was "AWOL" (absent without leave). At the hearing on February 23, 1983 the Hearing Examiner received in evidence as Exhibit C-10 the written refutation of Palumbo to the AWOL charge. This serves to illustrate the Charging Parties' problem at the interim relief stage since plainly a plenary hearing would be necessary in order for the credibility resolutions to be made as to whether or not Palumbo was AWOL on eight occasions.[2/]

The essential allegations in the tenure charges regarding Kirschbaum involve excessive sick leave. Article X, Section 2(B) of the current collective negotiations agreement, which has been in the agreements between the parties at least back to the period covered by the tenure charges against Kirschbaum, September 1979, provides that:

> "Teachers with twenty-five (25) years' experience in the system shall receive ten (10) additional non-cumulative days per year (of sick leave) after accumulated leave has been exhausted."

The Board's personnel record for Kirschbaum (attached to its brief) indicates that Kirschbaum's teaching experience commenced February 1, 1957. Thus, Kirschbaum

2/ Although Alexander did not offer any written opposition to the allegations in his tenure charges to instances of being AWOL, there are at least 15 allegations of his having been absent AWOL between 1979 and 1981. It seems clear to the Hearing Examiner that Alexander would likewise seek to refute the correctness of the Board's allegation with respect to his being AWOL. A plenary hearing would clearly be necessary to resolve disputes between the Board and Alexander over the correctness of the Board's allegations in this regard.

had 25 years of experience as of February 1, 1982 and he was entitled to 25 days of sick leave thereafter. This calls into question the Third Count of the tenure charges against Kirschbaum, which alleges that in the school year 1981-82 he exceeded the maximum number of sick days by having taken 25 days where the Board states that he was only entitled to 15 days. It is, thus, arguable as to whether the Board is correct in alleging excessive absence by Kirschbaum for the 1981-82 school year. This, however, is a debatable point and is clearly not susceptible to being resolved on moving and opposing papers at the interim relief stage.

The Hearing Examiner here notes that counsel for the Charging Parties urged at the hearing on March 22, 1983 that the Board had violated the Order of Hearing Examiner Edmund G. Gerber in I.R. No. 83-14, which, inter alia, restrained the Board from deleting Article X, Section 2(B), supra, from the collective negotiations agreement. The argument was that by denying Kirschbaum 25 sick days per year as alleged in Third Count of the tenure charges against Kirschbaum the Board had, in effect, deleted Article X, Section 2(B) from the contract.

However, as noted previously, Kirschbaum was not entitled to the 25 days of sick leave until February 1, 1982 and the Board's tenure charges against Kirschbaum alleged as well excessive sick days taken in 1979-80 and 1980-81. A further factual complication is that at the hearing on March 22nd counsel for the Charging Parties argued that Kirschbaum had 30 years of service, which, if true, would impugn the entire Third Count of the tenure charges against Kirschbaum. Plainly, a dispute such as this cannot be resolved on the papers filed at the interim relief stage. A plenary hearing would clearly be necessary.

The Charging Parties have alleged that Alexander, Palumbo and Kirschbaum are key activists on behalf of the NTU, and that their having engaged in protected activities on behalf of NTU was the precipitating cause for the filing of the tenure

charges by the Board. The state of the law in New Jersey for determining alleged violations of Section 5.4(a)(1) and (3) is as set forth in the decision of the Appellate Division in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981) where the court adopted the analysis of the NLRB in Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980) and the United States Supreme Court in Mt. Healthy City School Distict Board of Education v. Doyle, 429 U.S. 274 (1977). In assessing employer conduct, the twofold test enuniciated was that 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 employer's decision to discipline, and that once this is established, the employer has the burden of demonstating that the same disciplinary action would have taken place even in the absence of protected activities. Properly applying such a test where, as here, credibility resolution is necessary, is hardly suited to the interim relief stage. Additionally, Section 5.4(a)(4) allegations are ill suited to resolution at the interim relief stage since a motivation determination is necessarily involved.

Finally, a further troubling aspect of this proceeding at the interim relief stage is the question as to whether or not the subject matter of the tenure charges, and the record tobe made in connection therewith, should be conducted solely by an Administrative Law Judge of OAL or by a Hearing Examiner of the Commission: Hinfey v. Matawan Regional Board of Education, 77 N.J. 514 (1978) and Hackensack v. Winner, 82 N.J. 1 (1980). The Chairman of the Commission and the Director of Unfair Practices, in the processing of these Unfair Practice Charges, may well be involved in deciding whether the Commissioner of Education or the Commission shall make the factual record in this case, from which the legal conclusions will be drawn under the respective statues, Title 34 and Title 18A.

The Hearing Examiner concludes that the Charging Parties have failed to demonstrate a substantial likelihood of success on the merits as to the factual and legal allegations in the Unfair Practice Charges.

The Irreparable Harm Standard

In its letter brief of March 29, 1983, which addresses the question of irreparable harm, counsel for the Charging Parties cites Article I, paragraph 19, of the New Jersey Constitution, the First and Fourteenth Amendments to the United States Constitution, decisions of the United States Supreme Court and other Federal courts thereunder and Section 5.3 of the Act as mandating the conclusion that the irreparable harm standard has been satisfied. Notwithstanding the authorities cited, the Hearing Examiner concludes that the irreparable harm standard has not been satisfied for the following reasons:

I

Alexander, Palumbo and Kirschbaum have been suspended without pay since March 15, 1983 and will not receive pay until at least the 121st day from that date, assuming that the Commissioner of Education has not made a determination by that time. This is in accordance with N.J.S.A. 18A:6-14, supra. In the City of Jersey City, P.E.R.C. No. 77-13, 2 NJPER 293 (1976), a case involving an increase by five hours in the work week of white collar employees without additional compensation, the Commission's designee, after initially determining that the substantial likelihood of success standard was not met, stated, in connection with the irreparable harm standard:

> "...it does not appear that the harm suffered by the increased hours will be irreparable. They will of course be required to work extra hours, apparently one per day, but that is remediable with money and interim relief will normally not be available to remedy a monetary wrong..." (2 NJPER at 294) (Emphasis supplied).

The above-stated proposition that irreparable harm is not suffered where a monetary remedy can be provided at the end of the case has been basic to the disposal of applications for interim relief by Commission designees except in cases involving the denial of negotiated salary increments during negotiations for a successor agreement, the denial of which would adversely alter the status quo: see Union County Regional Board of Education, P.E.R.C. No. 78-27, 4 NJPER 11, 13 (1977); City of Vineland, I.R. No. 81-1, 7 NJPER 324 (1981); State of New Jersey,

I.R. No. 82-2, 7 NJPER 532 (1981); (1981) and Jersey City Board of Education, I.R. No. 83-6, 8 NJPER 593, 594 (1982).

The Hearing Examiner notes that a Commission designee did grant interim relief to a medical resident by way of an interlocutory Order of reinstatement in College of Medicine & Dentistry of New Jersey, P.E.R.C. No. 81-138, 6 NJPER 258 (1980).[3/] Notwithstanding problems as to the substantial likelihood of success standard, credibility being involved, the designee attached considerably more weight to the irreparable harm that would be suffered by the resident if he was not reinstated pending the final Commission decision. The risk undertaken at the interim relief stage in a case such as CMDNJ, supra, is underscored by the fact that, following the plenary hearing, the Commission dismissed the unfair practice charge on the merits: P.E.R.C. No. 82-33, 7 NJPER 588 (1981), appeal pending App. Div. Docket No. A-997-81T3.

Thus, considering that the Hearing Examiner has previously concluded that there does not exist a substantial likelihood of success on the merits, it is further concluded that any monetary loss suffered by Alexander, Palumbo or Kirschbaum can be remedied by the Commission at the conclusion of the case, following a plenary hearing: City of Jersey City, supra.

II

The Charging Parties also argue, by way of irreparable harm, that the NTU, as a Charging Party in each case, has been deprived of having Alexander, Palumbo and Kirschbaum serve as Building Representatives on behalf of the NTU at their respective schools in the administration of the collective negotiations agreement. It is contended that the Respondent, in certifying tenure charges against these three individuals is restraining them in their right "...to speak out on behalf of the NTU, to represent that organization, and to exercise their freedom of association to join and assist that organization..." From a constitutional standpoint the Charging

3/ By agreement of the parties this Order was not implemented pending final action by the Commission.

Parties contend that the Board's action is "...state action prohibited by the First and Fourteenth Amendments" (See Letter Brief, March 29, 1983, p. 3).

In an effort to demonstrate the chilling effect of the removal of Kirschbaum as Building Representative at East Side High School, the Charging Parties submitted as Exhibit C-16 at the hearing on March 22, 1983 the affidavits of six teachers, who uniformly stated that on March 17, 1983 they were approached to take over Kirschbaum's position as Building Representative and refused because of fear that they would be retaliated against by the Respondent in the same manner as Kirschbaum. The Hearing Examiner finds the affidavits to be self-serving and hardly conclusive on the issue of whether or not the NTU can function and administer its agreement at the East Side High School. At this stage there is no way of realistically evaluating whether or not anyone of the six affiants is in jeopardy of having tenure charges certified against him/her by the Board, i.e., whether their fear of retaliation is grounded in fact.

Further, it is difficult to base a finding of irreparable harm to the NTU upon the fact that three of its representatives at two schools out of approximately 90 in the District have been removed. It is noted that the NTU has over 5,000 members from which to recruit representatives. It appears to the Hearing Examiner that neither the constitutional rights of Alexander, Palumbo, Kirschbaum or the NTU are being impaired during the pendency of these Unfair Practice Charges before the Commission.

Finally, with respect to the allegations regarding Kirschbaum's years of service and eligibility for early retirement, the Respondent correctly points out in its Letter Brief of April 5, 1983 that whether or not Kirschbaum seeks to retire early "...is speculative at best..." Clearly speculation cannot support a finding of irreparable harm.

* * * *

Based upon the foregoing, the Hearing Examiner enters the following:

ORDER

The request of the Charging Parties for interim relief during the pendency of the Unfair Practice Charges before the Commission is DENIED.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Alan R. Howe
Hearing Examiner

Dated: April 8, 1983
Newark, New Jersey