H.E. No. 77-19

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

In the Matter of

MIDDLESEX BOARD OF EDUCATION,

Respondent in Docket No. CO-77-23-57,

Charging Party in Docket No. CE-77-1-58,

-and-

MIDDLESEX EDUCATION ASSOCIATION,

Charging Party in Docket No. CO-77-23-57,

Respondent in Docket No. CE-77-1-58.

SYNOPSIS

A Commission Hearing Examiner recommends the dismissal of two complaints filed in consolidated unfair practice proceedings. The first Charging Party, Middlesex Education Association, employee representative of teachers in the Middlesex Public Schools, alleged that the Middlesex Board of Education had discriminated against Barry L. Holliday, a high school teacher in its employ, by failing to reappoint him as Assistant Football Coach because he was grieving the Board's recent action in freezing his salary for the next school year. The second Charging Party, the Middlesex Board of Education, alleged that the Association had committed an unfair practice by sending a threatening mailgram to all Board members the night before they met to act on a resolution to freeze Mr. Holliday's salary.

The Hearing Examiner finds that the Association failed to prove by a preponderance of the evidence that anti-union animus was one of the motivating factors in the Board's decision not to reappoint Mr. Holliday to a coaching position.

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 conclusions of law.

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Appearances:

For the Middlesex Board of Education,
Edward J. Johnson, Jr.
Stanley C. Gerrard, Consultant

For the Middlesex Education Association,
Rothbard, Harris & Oxfeld
(Sanford R. Oxfeld)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

The Middlesex Education Association (the "Association"), employee representative of the teachers employed by the Middlesex Board of Education (the "Board"), filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") on August 6, 1976, alleging that the Board had committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act (the "Act") [1/] by its action in

1/ It is specifically alleged that the Board violated N.J.S.A. 34:13A-5.4 (a)(1), (2) and (3). These subsections provide that an employer, its representatives or agents are prohibited 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."

denying Barry L. Holliday, a high school teacher in its employ, reappointment to the extracurricular post of Assistant Football Coach because Mr. Holliday had a grievance pending against the Board on another matter.

The Middlesex Board of Education filed an Unfair Practice Charge with the Commission on August 17, 1976, alleging that the Association had committed an unfair practice within the meaning of the Act [2/] by its action in sending threatening mailgrams to Board members the night before the Board considered a resolution to freeze Mr. Holliday's salary for the ensuing school year.

It appearing that the allegations of the charges, if true, might constitute unfair practices within the meaning of the Act, two Complaints and Notices of Hearing were issued on November 18, 1976, along with an Order Consolidating Cases, and a hearing was held before the undersigned on January 4, 1977.[3/]

Barry L. Holliday has been a Physical Education and Health teacher at Middlesex High School for approximately seven years, and from the fall of 1972 through the 1975-76 school year he also served as Assistant Football

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2/ It is specifically alleged that the Association violated N.J.S.A. 34:13A-5.4 (b)(1), (2) and (3). These subsections provide that employee organizations, their representatives or agents are prohibited from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

"(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances.

"(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

3/ All parties were given an opportunity to examine witnesses, to present evidence and to argue orally. All parties filed post-hearing memoranda of law by January 28, 1977. Upon the entire record in this proceeding, I find that the Board is a public employer within the meaning of the Act and is subject to its provisions and that the Association is an employee representative within the meaning of the Act and is subject to its provisions. Unfair Practice Charges having been filed with the Commission alleging that the respective parties have engaged or are engaging in unfair practices within the meaning of the Act, as amended, questions concerning alleged violations of the Act exist and these matters are appropriately before the Commission for determination.

Coach. This extracurricular position carried with it extra compensation for the last few years.

On December 1, 1975, Holliday met with his building principal, Robert E. Vosbrinck, and requested a five-day leave of absence from December 15 through December 19 for a honeymoon. He planned to take the first two days off as personal days permitted by contract and requested the latter three off without pay. Vosbrinck granted the first two days off but denied the request for the other three. The Superintendent of Schools, Dr. Virginia L. Brinson, also met with Holliday. She affirmed Vosbrinck's decision.

Holliday took off the two personal days which had been granted, but also took off the next three days. He apparently arranged for a substitute teacher himself for the three days and did not inform the administration of his intention to be absent from school during that period.

For this action, Holliday was reprimanded by his principal and later informed by the Superintendent that as a disciplinary measure she was recommending to the Board of Education that he be rehired as a teacher for the following year at the same salary, without the increment he would normally have received.

Before the Board acted on the Superintendent's recommendation, Holliday was afforded an informal hearing to present his case to the Board, at which he was represented by William J. Mulligan, Grievance Chairman of the Middlesex Education Association. Subsequently, the Board acted favorably on Brinson's recommendation, and Holliday instituted grievance procedures within two weeks of notification of the Board's decision.

His request for reversal of the Board's decision was denied at the first three levels of the grievance procedure. Holliday then requested the appointment of an arbitrator. At the time of the hearing in this matter the grievance had not yet been resolved.

Holliday had apparently expressed an interest in coaching when he was interviewed with the previous high school principal for his teaching position. That principal notified him when an opening occurred and he was subsequently appointed as one of several assistant football coaches. He was reappointed, almost automatically, for the next three seasons.

In May, 1976, all of the extracurricular positions available for the next school year were posted and interested teachers were invited to apply. Holliday and five other teachers applied for the five Assistant Football Coach positions. Four of the coaches were reappointed but another teacher, a Mr. Clark, was appointed to the position Holliday had previously held.

The Board was to meet on the evening of April 13, 1976 to consider the Superintendent's recommendation that Holliday not be given a salary increment for the following school year. Late on the evening of April 12, James L. Alouf, as President of the Middlesex Education Association, sent a mailgram to each of the nine members of the Board, which read as follows:

> "Please be advised that the MEA will hold the Board of Education collectively and individually responsible for any action which may adversely affect Mr. Holliday's salary for the ensuing year." 4/

Barry Holliday was the Association's only witness with regard to its charge. He testified that he had never before had to go through a formal application process in order to be reappointed to the coaching position. After submitting his coaching application for the 1976-77 school year in May, he had a short meeting with his principal, during which they discussed the previous year's football team and some of the problems with the football program for first-year students. He was not told at that time that he might not be reappointed. Nor had he been informed previously by anyone that he would not be reappointed as a coach. He claimed that the Head Coach, Paul Murphy, had recommended him for the position; that he was the only one of seven Physical Education teachers in the high school now without a coaching position, and that such position was denied to him because he was grieving the Board's action in freezing his salary.

Vosbrinck and Brinson then testified regarding the procedures used for the selection of teachers to fill extracurricular positions, and the reasons Holliday was not reappointed as a coach. Both admitted that all extracurricular openings had not been posted in the past. Brinson testified that she directed that all such positions in the school district should be posted for the 1976-77 school year for the following reasons: The Board's

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4/ Exhibit B-2.

three-year contract with the Association which became effective September 1, 1975, required such posting so that all interested teachers could apply and be considered for the jobs. And also, she was concerned about some recent court decisions and wanted to make it clear that such positions were separate from teaching duties and were not part of the tenure that might be established by any teacher. 5/

The notice posted with the list of available openings was dated May 13, 1976, less than two weeks after Holliday initiated grievance procedures against the Board for freezing his salary. But no other evidence was presented linking these two events. It should be noted that the procedure applied to all schools in the district. Of those teachers who applied for reappointment to extracurricular positions, Holliday and two others were not reappointed. The other two teachers had chaired departments for one year and "over ten" years, respectively, but were denied reappointment because other teachers were thought to be "better qualified." 6/

The high school principal discussed the various applicants for the football coaching positions with the Superintendent. He did not recommend Holliday but, in his place, recommended Clark. The Superintendent accepted his recommendation and so, subsequently, did the Board.

Both Vosbrinck and Brinson testified that the main reason Holliday was not recommended for reappointment as a coach was concern over the possibility of a recurrence of his back problem, which could cause him to lose considerable classroom time. Holliday slipped a disc in football practice in September, 1975 and lost four days of school and practice. The problem flared up in early January, 1976 and he was out of school for the rest of January and the early part of February.

Both Vosbrinck and Brinson testified that they were aware of Clark's impressive football background, and Vosbrinck thought him better qualified. Both claimed to be unaware of Holliday's prior football honors, and unaware that Murphy wanted him to continue on the coaching staff.

On cross-examination, Vosbrinck and Brinson admitted knowing that Clark had missed a considerable amount of time during the previous year as

5/ Transcript, p. 76.

6/ Transcript, p. 79.

well and that he had needed surgery. Both claimed they did not think Clark had been out as long as Holliday and they distinguished between the two because Holliday's absence was the direct result of an injury sustained during football practice, while Clark's absence was apparently not related to any physical injury. Vosbrinck, as a former Physical Education teacher and coach, believed that if Holliday continued to coach there was a real possibility he would injure his back again.

From their testimony, it was clear to the undersigned that neither Vosbrinck nor Brinson had done a very thorough job in researching the comparative qualifications of Holliday and Clark for the coaching positions. Neither had they checked carefully into the medical conditions of the two applicants and the effect coaching might have on their health and their ability to fulfill their teaching responsibilities. But it is not for the undersigned to determine whether the Board's reasons for its decision were good, sufficient, appropriate, etc. Rather the undersigned must determine whether in discriminating among its employees, that is in selecting Clark over Holliday, there was an intent to encourage or discourage employees in the exercise of rights guaranteed to them by the Act. I am satisfied that the Board made its decision here on the basis of which teacher was more qualified and the submission of the grievance was not one of the factors in their decision. See In the Matter of N.J. College of Medicine and Dentistry, P.E.R.C. No. 76-46, 2 NJPER 219 (1976) and In the Matter of Haddonfield Board of Education, P.E.R.C. No. 77-36, 2 NJPER 365 (1976).

Josephine Tarulli, President of the Board, and James Alouf, President of the Association, testified in regard to the Board's charge that the mailgram sent to Board members was a threat and, therefore, an unfair labor practice under N.J.S.A. 34:13A-5.4(b)(2). 1/ Tarulli testified she had considered the mailgram as a personal threat to her and her family, as an indication of reprisals that might be taken against her business, and as a blatant attempt to wrongfully influence her vote regarding the freezing of Holliday's salary.

Alouf countered Tarulli's testimony by explaining he sent the mailgrams in a spirit of fair play, intending to inform Board members of

1/ The Board's original Charge claimed violations of §(b)(1), (2) and (3), but no evidence was introduced regarding §(b)(1) and (3), and its post-hearing memorandum of law indicated the Board was claiming a violation of only §(b)(2).

their legal responsibilities and of the Association's intent to exercise its legal rights in the event that the Board voted to freeze Holliday's salary.

Tarulli admitted that the "threat" had not been carried out in any way against any Board member, except that the Association had exercised its legal rights through grievance procedures. If it later sued the Board, or individual Board members, Tarulli admitted, the Board carried insurance to protect members from personal loss.

The undersigned found incredible Tarulli's characterization of the Board member's reaction to the mailgram. 8/ The mailgram may have had ominous connotations to the Board members but it cannot be construed to be an actual threat to do anything which might constitute an unfair practice. In fact, the mailgram on its face is no more than a simple statement, admittedly well-timed, of the Association's intent to do what it had every legal right to do and I find it was not intended to be coercive. 9/

The Hearing Examiner, therefore, finds that although Holliday was engaged in protected union activities, of which the Board was aware, the Association failed to prove by a preponderance of the evidence that the Board's action in not reappointing Holliday to a coaching position was discriminatory and motivated at least in part by anti-union animus due to his pursuit of a grievance against the Board. 10/ I, therefore, find that the Board has not violated §(a)(3) of the Act. Further, no evidence was introduced concerning alleged violations of §(a)(1) and (2).

8/ The Hearing Examiner notes that the mailgrams were sent April 12, 1976, and the Board filed its Unfair Practice Charge on August 17, 1976. The Association had filed an Unfair Practice Charge eleven days earlier, just two weeks after notification of the action upon which it was based. The timing of the Board's Charge was a factor in the Hearing Examiner's conclusion that Tarulli's characterization was not credible.

9/ It should be noted that §(b)(2), on which the Board's Charge is based, is directed specifically at the coercion of "...a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances." (Emphasis added). The Association, in sending the mailgram, was in no way concerned with the selection of an employer representative.

10/ See In the Matter of Haddonfield, supra, as well as In the Matter of the City of Hackensack, 2 NJPER 232 (1977).

The Hearing Examiner also finds that the Board failed to produce credible evidence that the mailgram was intended to be coercive. I, therefore, find that the Association has not violated §(b)(2) of the Act. 11/ Further, no evidence was introduced concerning alleged violations of §(b)(1) and (3).

RECOMMENDED ORDER

Accordingly, for the reasons set forth, it is recommended that the charges in these matters be dismissed in their entirety.

Edmund G. Gerber
Hearing Examiner

DATED: June 15, 1977
Trenton, New Jersey

11/ See footnote 9.