

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LAKWOOD BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-81-12-54

BERNICE GOLDBERG,

Charging Party.

SYNOPSIS

The Commission, in agreement with the recommended report and decision of its Hearing Examiner, dismisses an unfair practice complaint filed by Bernice Goldberg, an employee of the Lakewood Board of Education. The Commission finds that the Board of Education transfer of the charging party was not made in retaliation for the charging party's exercise of protected activity. Accordingly, the Commission finds that the Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) and the Complaint is dismissed in its entirety.

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Appearances:

For the Respondent, Sharkey & Sacks, Esqs.
(Richard K. Sacks, Esq.)

For the Charging Party, Gary L. Goldberg, Esq.

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on September 9, 1980, and amended on October 24, 1980 by Bernice Goldberg ("Charging Party" or "Goldberg") alleging that the Lakewood Board of Education (the "Respondent" or the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"). Respondent is alleged to have transferred Goldberg from one school to another because of Goldberg's union activity, which was intended to harass her for said activity and separate her from another union activist for the ultimate purpose of weakening and discouraging activity in the union. In the amendment to the charge, it is further alleged that the Board transferred Goldberg a second time on October 1, 1980 for having filed the unfair practice charge on September 9, 1980.^{1/} All of this conduct

1/ The first transfer was never implemented as the Charging Party was on sick leave due to surgery at the beginning of the 1980-81 school year. The second transfer was implemented upon her return to work.

was alleged to be a violation of N.J.S.A. 34:13A-5.4(a) (1), (2), (3) and (4) of the Act.^{2/}

It appearing that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 16, 1980. Pursuant to the Complaint and Notice of Hearing, a hearing was held on February 2, 1981 in Newark, New Jersey before Hearing Examiner Alan R. Howe at which time the parties were given an opportunity to examine witnesses and present relevant evidence. Post-hearing closing arguments were filed by February 13, 1981.

The Hearing Examiner issued his Recommended Report and Decision, H.E. No. 81-28, 7 NJPER ____ (¶ ____ 1981), on February 13, 1981.^{3/} He concluded that the Board did not violate the Act and recommended that the Commission dismiss the Complaint in its entirety. The Charging Party has filed exceptions to the Hearing Examiner's recommended dismissal.

Upon careful consideration of the entire record herein, the Commission adopts the findings of fact and conclusions of law rendered by the Hearing Examiner, substantially for the reasons

^{2/} 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 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."

^{3/} At the hearing the Hearing Examiner granted the Respondent's Motion to Dismiss the Subsection (a)(2) allegation on the ground that Goldberg as an individual did not have standing to allege such a violation. Borough of Shrewsbury, P.E.R.C. No. 79-42, 5 NJPER 45 (1979).

stated in his recommended decision.

In the first exception the Charging Party's attorney argues that he was improperly denied oral argument by the Hearing Examiner. Closing arguments were submitted to the Hearing Examiner in writing by both parties following the close of the hearing. The Charging Party alleges he was improperly denied a request for oral argument at the close of the hearing in an off the record discussion with the Hearing Examiner. The official transcript indicates that both parties waived oral argument at the close of the hearing. Without passing on the factual disparity, the Commission did contact the Charging Party's attorney to afford him an opportunity to argue before the full Commission, notwithstanding that no oral argument had been requested at this stage of the proceeding. He declined and requested that we consider the exception as written together with certain factual exceptions which had also been submitted. Having provided the Charging Party with ample opportunity to engage in oral argument before the full Commission, and having reviewed the record before the Hearing Examiner, we dismiss this exception.

The other exceptions dispute certain findings of fact. In the first factual exception the Charging Party argues the Hearing Examiner did not note corroboration by a second witness of the evidence that only two employees were under consideration for transfer and both were active in the union. The Charging Party argues that this is significant because the charge alleges that the transfer was intended to separate the two members of the union executive committee. The Hearing Examiner did make the finding that these were the two Title I aides who were being considered

for transfer. However, he dismissed the unfair practice complaint because he found that the Charging Party failed to meet her burden of proving by a preponderance of the evidence (N.J.A.C. 19:14-6.8) that the transfer was motivated by her exercise of rights protected by the Act or because she filed the initial unfair practice charge. The Hearing Examiner concluded that the Charging Party did not establish any nexus between the exercise of protected activity by Ms. Goldberg or the other aide and the transfer of the Charging Party.

The Charging Party also excepts to the fact that the Hearing Examiner's findings imply that more than one Title I aide was transferred for the 1980-81 school year. The Charging Party is correct that the record indicates that Ms. Goldberg was the only aide transferred for that year. However, the record reveals that Ms. Goldberg's transfer was not in isolation inasmuch as a number of other Title I personnel were transferred, and another Title I aide left the program. The Title I Director testified, without contradiction, that the reasons for these actions, including Ms. Goldberg's transfer, was a reduction in Title I funding and a desegregation plan which had the effect of re-assigning numerous students covered by the Title I program from the school in which Ms. Goldberg had worked to the one to which she was transferred. Additionally, the Charging Party herself acknowledged in cross examination that transfers of Title I aides in past years were not uncommon, that other than the transfer, she had no other basis for alleging that the Board had discriminated against her or any other aide for exercising protected rights, that

the Board had taken no retaliatory action against her or any other aide during the formation of the Association or in the negotiation of the contract and had negotiated in good faith.

Lastly, the Charging Party excepts to the Hearing Examiner's application of the standard for finding an (a)(3) violation by claiming that it established knowledge on the part of the Board of Goldberg's protected activity and Ms. Goldberg testified that after the transfer she ceased her activities on behalf of the Association. However, the Charging Party's exception misconstrues the meaning of the standards set forth in In re Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977). Those elements were set forth as certain essential matters which had to be established by a Charging Party to prove its case. The establishment of these essential minimum elements does not guarantee that a violation of N.J.S.A. 34:13A-5.4(a)(3) will be found, particularly when, as here, the employer comes forward with valid business justifications for the actions taken which are totally unrelated to the employee's protected activity. See e.g. In re North Warren Regional Board of Education, P.E.R.C. No. 79-9, 4 NJPER 417 (¶4183 1978).

The Hearing Examiner did find that Ms. Goldberg had been active in the Association and that the Board was aware of her activities. However, he also found, as indicated, that reduction in Title I funding, plus reassignments of pupils under a desegregation plan necessitated the transfer of Title I personnel. Under this factual record he correctly found the absence of any proof that the transfer was causally related to Ms. Goldberg's

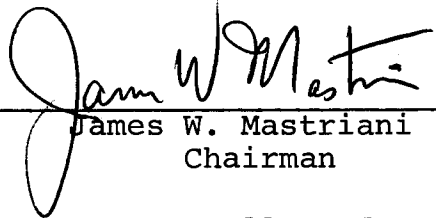
protected activity meant that the Charging Party had failed to prove that the Board was motivated even in part by anti-union animus.

Having reviewed the entire record in this matter, including the exceptions filed by the parties, we find the findings of fact and conclusion of law made by the Hearing Examiner are based upon substantial creditble evidence in the record and we hereby adopt them.

ORDER

The Complaint in this matter is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett, Parcels and Suskin voted for this decision. Commissioners Hipp and Newbaker abstained. Commissioner Graves was not present.

DATED: Trenton, New Jersey

June 9, 1981

ISSUED: June 10, 1981

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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LAKEWOOD BOARD OF EDUCATION,

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- and -

Docket No. CI-81-12-54

BERNICE GOLDBERG,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Board did not violate Subsections 5.4 (a)(1)-(4) of the New Jersey-Employer Relations Act when on and after July 1, 1980 it transferred the Charging Party from one school to another. The Charging Party had urged that the transfer was causally related to the exercise by her of activities on behalf of the Lakewood Aides Association such as organizing the Association, participating in collective negotiations and holding office in the Association. The Hearing Examiner concluded that the Charging Party had failed to prove by a preponderance of the evidence that the transfer occurred as a result of the exercise of her rights guaranteed by the Act.

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.

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Appearances:

For the Lakewood Board of Education
Sharkey & Sacks, Esqs.
(Richard K. Sacks, Esq).

For Bernice Goldberg
Gary L. Goldberg, Esq.

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on September 9, 1980, and amended on October 24, 1980, by Bernice Goldberg (hereinafter the "Charging Party" or "Goldberg") alleging that the Lakewood Board of Education (hereinafter the "Respondent" or 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 Respondent on July 1, 1980 transferred Goldberg from one school to another because of Goldberg's union activity, which was intended to harass her for said activity and separate her from another union activist for the ultimate purpose of weakening and discouraging activity in the union and, further, in that the Board transferred Goldberg a second time

on October 1, 1980 in retaliation for her having filed an Unfair Practice Charge on September 9, 1980, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (4) of the Act. ^{1/}

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 3, 1980. Pursuant to the Complaint and Notice of Hearing, a hearing was held on February 2, 1981 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence ^{2/} and argue orally. Oral argument was waived and the parties filed post-hearing memoranda by February 13, 1981.

An Unfair Practice Charge, as amended, 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 memoranda of the parties, 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/ These Subsections prohibit 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 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."
- 2/ At the hearing the Hearing Examiner granted the Respondent's Motion to Dismiss the Subsection (a)(2) allegation on the ground that Goldberg as an individual did not have standing to allege such a violation: Borough of Shrewsbury P.E.R.C. No. 79-42, 5 NJPER 45 (1979).

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

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

3. Goldberg has been employed by the Respondent as a Title I Aide, for nine years. Her assigned duties are to tutor in reading and math in grades 1-4. Goldberg's employment has been at the Ella G. Clarke School until July 1, 1980.

4. In 1978 Goldberg was among the employees who were active in organizing the Lakewood Aides Association (hereinafter the "Association"). Goldberg was elected to the office of Corresponding Secretary. She also served on the Executive Committee of the Association and was involved in the negotiations for a first collective negotiations agreement. ^{3/}

5. On July 1, 1980 Joseph Kohn, the Principal of the Clarke School, advised Goldberg that she was being transferred to the Clifton Avenue School. On the same date Cynthia Zaslow, the Director of the Title I Program, advised Goldberg that a transfer had to be made either of Goldberg or of Gwen Bushman, who had been a Title I Aide at the Clarke School for seven years and was the 1st Vice-President of the Association.

6. On July 2, 1980 Goldberg met with Kohn to find out the reason for her transfer. She was told that the decision had been made by Zaslow on the ground that there were an insufficient number of 2nd grade students in the Clarke School. Formal notice to Goldberg of the transfer to Clifton Avenue School was set forth in a letter to Goldberg from Zaslow dated August 18, 1980 (CP-2).

^{3/} This agreement was received in evidence as Exhibit J-1 and was effective during the term July 1, 1978 through June 30, 1980. The document indicates on the fourth page that as of the signing of the agreement Goldberg held the office of Corresponding Secretary.

7. Goldberg's transfer to the Clifton Avenue School never took place inasmuch as Goldberg was hospitalized for surgery at the beginning of the 1980-81 school year. Under date of October 1, 1980 Goldberg was advised by Zaslow that she was being transferred instead to the Spruce Street School (CP-1).

8. Goldberg reported to the Spruce Street School on November 17, 1980 and was immediately approached by Zaslow, who added as a reason for the transfer the fact that Goldberg was the only Aide who had never been transferred. Zaslow also made reference to Goldberg's having filed the instant Unfair Practice Charge. ^{4/}

9. While on the Negotiating Committee of the Association Goldberg attended three or four negotiations meetings. Goldberg acknowledged on cross-examination that no reprisals had ever been taken by the Board against any members of the Association nor had the Board ever discharged any Aide. She also acknowledged that others of the 17 Title I Aides had been transferred over the years.

10. Respondent's witnesses established that Title I funding had been reduced for the 1980-81 school year and that this fact, plus reassignments of pupils under a desegregation plan, made the transfer of both Teachers and Aides necessary. Exhibit R-1, a memo from Zaslow to the Superintendent, John Patrick, lists eight transfers of personnel for the 1980-81 school year and recites that: "Changes came about as a result of a cut in funding, staff resignations, and differences in pupil needs from building to building."

11. The Charging Party established through its witnesses that the Respondent had knowledge of Goldberg's activities on behalf of the Association, both as

^{4/} Goldberg testified that she has since become inactive in the Association because of her transfer first to the Clifton Avenue School and then to the Spruce Street School.

a member of the Negotiating Committee and as the Corresponding Secretary of the Association. The agreement (J-1) was widely distributed among personnel in the Respondent's administration.

THE ISSUE

Did the Respondent Board violate the Act when it twice transferred Bernice Goldberg, a Title I Aide, on and after July 1, 1980?

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate
The Act By Its Transfers of Bernice
Goldberg On and After July 1, 1980.

First, the Hearing Examiner finds and concludes that the Charging Party has failed to prove by a preponderance of the evidence that the Respondent Board violated Subsection (a) (4) of the Act by its decision on October 1, 1980 to transfer Goldberg to the Spruce Street School. The mere remark by Zaslow to Goldberg indicating knowledge that a Charge had been filed, does not, in and of itself, prove that the Respondent by making the transfer manifested discrimination against Goldberg because she filed an Unfair Practice Charge with the Commission on September 9, 1980.

Secondly, the Hearing Examiner finds and concludes that the Charging Party has failed to prove by preponderance of the evidence that the Board's conduct in twice transferring Goldberg was motivated in whole or in part by a desire to discourage Goldberg in the exercise of rights guaranteed to her by the Act: Haddonfield Borough of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977).^{5/} The Charging Party did preliminarily prove that she was exercising rights guaranteed to her by the Act and that the Respondent Board had actual or implied knowledge of such activity as required by Haddonfield, supra.

^{5/} Further, for such a violation to be found the actions of the public employer must be "discriminatory" and must have been committed with a "discriminatory motive"--see Cape May City Board of Education, P.E.R.C. No. 80-87, 6 NJPER 45, 46 (1980).

The problem with the Charging Party's proofs is that she has failed to establish a causal connection between the exercise of rights protected by the Act and the action of the Board in transferring her twice since July 1, 1980, first to the Clifton Avenue School and then to the Spruce Street School. The Hearing Examiner cannot speculate on the Board's motivation and must require that proof by a preponderance of the evidence be established that the two transfers were made because of the Goldberg's exercise of rights guaranteed by the Act.

It is noted that Goldberg acknowledged on cross-examination that other Title I Aides had been transferred and that at least one of these transfers had been made from the Clarke School to another school. She also acknowledged that no reprisals have been taken by the Board against any members of the Association since it was organized. Further, the Board has never terminated any Aide.

Thus, when all of the foregoing is distilled and added together the Hearing Examiner finds no basis for a finding a violation by the Respondent of Subsection (a) (3) of the Act. Further, there was no evidence adduced indicating an independent violation by the Board of Subsection (a)(1) of the Act.

Accordingly, the Hearing Examiner, based on all of the foregoing, must recommend dismissal of the instant Unfair Practice Charge, as amended.

* * * *

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) (1), (3) and (4) when it transferred Bernice Goldberg from the Ella G. Clarke School to the Clifton Avenue School and then to the Spruce Street School on and after July 1, 1980.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the complaint be dismissed in its entirety.

Dated: February 13, 1981
Trenton, New Jersey



Alan R. Howe
Hearing Examiner