

P.E.R.C. NO. 87-107

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FAIRVIEW BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-86-33-46

FAIRVIEW FEDERATION OF TEACHERS,
LOCAL 1116,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Fairview Federation of Teachers, Local 1116 against the Fairview Board of Education. The charge alleged the Board violated the New Jersey Employer-Employee Relations Act when it transferred Elizabeth Stefan from a sixth grade teaching position at the Lincoln School to a fifth grade teaching position at School #3, allegedly to discourage her protected activity as Local 1116's vice-president and negotiations chairperson. The Commission finds, however, that the transfer was not illegally motivated.

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Appearances:

For the Respondent, Dennis J. Oury, Esq.

For the Charging Party, Dwyer & Canellis, P.A.
(John J. Janasie, Esq. & Michael E. Buckley, Esq., of
counsel)

DECISION AND ORDER

On August 1, 1985, the Fairview Federation of Teachers, Local 1116 ("Local 1116") filed an unfair practice charge against the Fairview Board of Education ("Board"). The charge alleges that the Board violated subsection 5.4(a)(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it transferred Elizabeth Stefan from a sixth grade teaching

^{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."

position at the Lincoln School to a fifth grade teaching position at School #3, allegedly to discourage her protected activity as Local 1116's vice-president and negotiations chairperson.

On September 11, 1985, a Complaint and Notice of Hearing issued. The Board filed an Answer admitting that it transferred Stefan, but denying it did so to discourage her protected activity.

On October 28 and 29, 1985, Hearing Examiner David F. Corrigan conducted a hearing.^{2/} The parties examined witnesses and introduced exhibits. They waived oral argument and post-hearing briefs.

On October 9, 1986, the Hearing Examiner issued a report recommending the Complaint's dismissal. H.E. No. 87-23, 12 NJPER 799 (¶17304 1986) (copy attached). He concluded that the transfer was not motivated by hostility towards Stefan's protected activity.

On November 7, 1986, after receiving an extension, Local 1116 filed exceptions. It asserts that the Hearing Examiner erred in making certain findings of fact and in concluding that hostility towards Stefan's protected activity did not motivate her transfer.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-9) are generally accurate. We adopt and incorporate them here, with these modifications. We correct finding

^{2/} The parties initially believed that another date would be necessary for rebuttal testimony, but they later changed their minds.

no. 2 to state that Stefan was chairperson of the negotiations committee, not the grievance committee, for the past two years. We add to finding no. 4 that only the transfers to the compensatory education and perceptually-impaired positions were discussed with Stefan. Finally, we add to finding no. 8 the Superintendent's testimony that the compensatory education position was a "plum" because it was an easy position, involving few children, where almost anybody could succeed; he therefore believed it preferable to use a weaker teacher in this position rather than a strong academic teacher and disciplinarian like Stefan.^{3/}

Based on our review of the record, we conclude that the Hearing Examiner properly applied the standards of In re Bridgewater Tp., 95 N.J. 235 (1984) for determining whether a personnel action violates the Act. Stefan is prominently involved in contract negotiations and two pending grievances. However, Local 1116 has not established that hostility towards this protected activity motivated her transfer. In particular, Superintendent Margolin was the motivating force behind the transfer and he was not hostile towards her or her activity, current or past. While Board Member

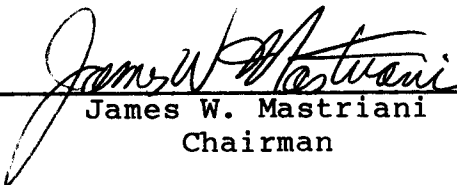
^{3/} We reject Local 1116's remaining exceptions concerning the findings of fact. We specifically accept finding no. 11's assessment, based in large part on a determination of Pizzichillo's credibility, of why Pizzichillo disliked Stefan. We likewise reject Local 1116's assertion that finding nos. 13 and 14 should be modified to state that Pizzichillo disliked Stefan because of her union activity and that the two pending grievances had an obvious negative influence on the Board.

Pizzichillo disliked Stefan, in part because of her role in the 1977 strike, he did not participate in the initial recommendation or caucus concerning Stefan's transfer.^{4/} Under all the circumstances of this case, then, we hold that the transfer was not illegally motivated, and we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson and Wenzler voted in favor of this decision. Commissioners Bertolino and Smith were opposed. Commissioner Reid abstained.

DATED: Trenton, New Jersey
March 23, 1987
ISSUED: March 24, 1987

^{4/} We believe the Hearing Examiner properly considered the testimony of Angela Penna, now principal, that Pizzichillo no longer harbored any animosity towards her because of the 1977 strike in which Stefan also participated.

H.E. NO. 87-23

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

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-and-

Docket No. CO-86-33-46

FAIRVIEW FEDERATION OF TEACHERS,
LOCAL 1116,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss a complaint based on an unfair practice charge the Fairview Federation of Teachers filed against the Fairview Board of Education. The charge alleged the Fairview Board of Education violated the New Jersey Employer-Employee Relations Act when it transferred Elizabeth Stefan, a teacher, in retaliation for her activities on behalf of the Fairview Federation of Teachers. The Hearing Examiner finds that the Federation of Teachers did not prove the allegations contained in the charge by a preponderance of the evidence.

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 Respondent, Dennis J. Oury, Esq.

For the Charging Party, Dwyer, Canellis & Bell, P.A.
(John J. Janasie, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On August 1, 1985, the Fairview Federation of Teachers, Local 1116 ("Local 1116") filed an unfair practice charge against the Fairview Board of Education. The charge alleges the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),^{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; and (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."

when it transferred Elizabeth A. Stefan, Vice-President of Local 1116 and Chairperson of the contract negotiations committee and former Local 1116 president, from 6th grade teacher at the Lincoln School to 5th grade teacher at School #3. This transfer was allegedly made "to interfere with Mrs. Stefan's exercise of the rights guaranteed under that Act and such actions also constitute discrimination against her as regards her terms and conditions of employment, in an attempt to discourage her from exercising her rights guaranteed to her under the Act."

On September 11, 1985, Edmund G. Gerber, Director of Unfair Practices, issued a Complaint and Notice of Hearing. On September 27, 1985, the Board filed its Answer. The Board admitted that it transferred Stefan, but denied it was because of her union activities.

On October 28 and 29, 1985,^{2/} I conducted hearings in Newark. The parties examined witnesses and introduced exhibits. At the conclusion of the October 29, 1985 hearing, the charging party indicated an intent to present rebuttal witnesses. I set a one-week deadline for such rebuttal. Finally, by letters dated June 26 and July 31, 1986 the parties agreed that another day of hearing was not necessary.^{3/}

The parties waived the filing of post-hearing briefs.

2/ Local 1116's application for interim relief was denied by Hearing Examiner Alan R. Howe on August 21, 1985.

3/ Following the October 29, 1985 hearing, I waited for a response from the parties. None was forthcoming so on January

Findings of Fact

1. The Fairview Board of Education ("Board") is a pre-kindergarten through 8th grade school district with the following three schools: the Lincoln School (pre-kindergarten through 8th grade), the No. 2 school (kindergarten through 5th grade) and the No. 3 school (kindergarten through 6th grade (1T24).^{4/}

2. Elizabeth A. Stefan has been, for the past 18 years, a teacher employed by the Board. For the past three years and until 1985 she taught 6th grade with 8th grade reading, at the Lincoln School (1T9). Ms. Stefan has been actively involved in the union for the past ten years. She has been president and vice-president of the local, negotiations chairperson and member of the grievance committee. For the past two years, she has been vice-president and chairperson of the grievance committee (1T21). The Board is aware of these activities (1T58).

3/ Footnote Continued From Previous Page

15, 1986, I requested that the parties advise on the status. Numerous letters were written and finally on August 4, 1986 the parties agreed that another hearing date would not be necessary. Rebuttal was limited to whether Frank Pizzichillo's child was taught by Elizabeth Stefan. See discussion, infra at pp. 7-8.

4/ 1T refers to October 28, 1985 transcript. 2T refers to October 29, 1985 transcript.

3. On June 13, 1985, the Board notified Stefan that she would continue to teach sixth grade at Lincoln for the 1985-86 school year (1T9). However, the Board had to fill two vacant positions: compensatory education and perceptually impaired classes. The Board sought to fill these vacancies with volunteers, but none were forthcoming. The compensatory education vacancy was caused by a teacher's decision not to return from a maternity leave (2T137). Charles Margolin, Superintendent of Schools became aware of this vacancy in early June 1985 and on June 13, 1985 posted a notice of vacancy on the teachers' bulletin board.^{5/}

4. Stefan was considered to be transferred to the perceptually impaired class (2T149). Stefan, on or about June 20, 1985, became aware of it and called Margolin (1T17). Margolin confirmed that she was a candidate, but said she was not the first choice. There was a conflict in testimony as to what occurred next. According to Stefan, she responded that she would prefer to teach the compensatory education class. Margolin said:

he laughed and he said to me on the phone...they would never give you a reward job. That's [comp.ed] considered a reward job. You get the punishment assignments. [1T18]

Margolin denied this conversation took place [2T150] and under the circumstances, I believe him. First, I do not believe

^{5/} He had earlier testified that he did not become aware of this vacancy until late June (2T137), but changed his mind on cross-examination when confronted with the notice of posting.

Stefan would have been interested in the compensatory education position at this time. In fact, she could have volunteered for it at the June 24, meeting with Principal Mule, but did not. Rather, it is apparent that she was only interested in the position as an alternative to a less favorable position, such as that of perceptually impaired or a different transfer. But Margolin had told her that she was not his first choice so it is unlikely that she was concerned about being assigned to this position. Stefan was a candidate for this position because she was one of the few teachers at the school who possessed the requisite certificate to qualify her to teach this position. Margolin knew she possessed this certificate, but also knew that she did not desire to teach this class and that few, if any, Board members were aware that she was qualified. Therefore, he did not communicate this to anyone as a favor to Stefan.

5. On June 25, 1985, the Board met, during a private caucus meeting,^{6/} to discuss how to fill the vacant compensatory education position.

Margolin suggested that the vacancy be filled with one of four teachers: Zakrzewski, Vecchione, Wellenkamp and Kozakiewicz (2T143). Margolin recommended that either Zakrzewski or Vecchione fill the vacancy (2T144).

6/ This meeting took place after the regular Board meeting. Margolin had told Wellenkamp, after that meeting and before caucus, that neither she nor Stefan would be transferred (2T142).

6. The Board decided that Vecchione should fill the vacancy (2T144). They did so because, in their view, Vecchione had been having trouble maintaining discipline in her 5th grade class and "would do the least harm" working in the smaller compensatory education class (2T144).

7. Margolin recommended Stefan to fill the vacancy created by the Vecchione at the No. 3 school (2T147). He did so because, according to his testimony on October 29, Stefan "was a strong disciplinarian" and "she was the best for the job" (2T149). Margolin had earlier stated, however, in an affidavit submitted in opposition to the application for interim relief, that Stefan "has a tendency to goof off and leave children unattended" (CP-3) and this was the reason she was not assigned to the compensatory education class.

8. There was a later conversation between Margolin and Stefan. After returning from vacation in early July, Stefan received notice that she had been transferred. She called Margolin and asked why. There was, again, a conflict between Margolin and Stefan as to what transpired next. Stefan testified to the following:

Margolin: because you're a strong teacher.

Stefan: I am tired of hearing that I'm always a strong teacher.

Margolin: Well, you are.

Stefan: Mr. Margolin, give me the real reason why I was transferred.

Margolin: (chuckling) I can't say. I can't tell
you...it will be used against me.
[1T27]

It is clear that a conversation took place (2T150). I am not, however, able to find that Margolin would chuckle and say that "I can't say...it will be used against me." Margolin did not seem to be the chuckling type at hearing. Rather, I believe that Stefan did volunteer for the compensatory education position, but was told it was too late (2T150). I also believe Margolin said "even if you had volunteered, you probably would not get the position because the Board regarded the compensatory education as a plum position." See CP-3. In fact, this is close to what Stefan testified to, although concerning an earlier date, concerning the reward v. punishment assignment. In effect, it was the same.

9. Article XIII(A) of the parties' contract provides:

Notice of any involuntary transfer or
reassignment shall be given to teachers as soon
as practicable, and except in cases of emergency
not later than June 10.

10. Frank Pizzichillo has been a member of the Board since 1972 (2T103). He is also a teacher at the North Bergen School System and is a member of the American Federation of Teachers (2T103). In the past, he was a member of the Board's negotiations committee (2T104).

11. Pizzichillo and Stefan do not like each other (2T107). Witnesses have described their relationship as "cool," "a personality clash" and "that Pizzichillo hated her" (2T5, 85). I find, however, that Pizzichillo's animosity towards Stefan is not

based on union animus. Rather, I believe it probably stems from personality disagreements as well as disagreements concerning Stefan's alleged actions taken against her daughter.^{7/} Mr. Pizzichillo may have been mistaken regarding Stefan's conduct towards his daughter and his views may be immature and even irrational. The essential point is this: Pizzichillo impressed me as caring deeply for his family and would not tolerate any perceived slight towards them. Stefan, according to Pizzichillo, slighted his daughter and he would never forget it. In contrast, Pizzichillo is a member of the same union as Stefan. Even though there was a strike in 1977 at Fairview, the weight of the testimony indicated that Pizzichillo harbors no animosity towards those who struck. While Pizzichillo may have blamed Stefan for the strike, I do not believe his present dislike is related to Stefan's union activities.

12. Pizzichillo was not the motivating force behind the Stefan transfer; Margolin was.

Margolin recommended Stefan's transfer to the Board at a caucus meeting on June 25, 1985 (2T76). Pizzichillo was not present at that meeting (2T41). The Board voted to transfer Stefan, as well as 11 other teachers at their June 28, 1985 meeting (2T52). Pizzichillo voted for the transfers (2T106).

7/ I recognize that Pizzichillo erroneously testified that his daughter was in Stefan's class. That was an honest mistake and the important point is that Stefan occasionally taught, as either a replacement or a team teacher, his daughter, Patty Ann.

13. After the transfers were made, efforts were made on behalf of Stefan by fellow teachers Diane Kvilesz and Joyce Wellenkamp to have the transfers rescinded. Patrick Caufield, a Board member told Kvilesz that Stefan's transfer could not be rescinded because of Pizzichillo's hatred of her.(2T5).^{8/}

14. Two grievances, which Stefan was involved with, were pending against the Board at the time of the transfer. The first involved the Board's assignment of teaching art to Stefan and Wellenkamp which allegedly deprived them of preparation time; the second involved the Board's requirement that Stefan, Wellenkamp and Demsky, all sixth grade teachers, remain in their classes while a specialist taught family living, which also allegedly deprived teachers of preparation time.

15. Stefan has been and is a good teacher. She remains in control of the classroom and her students consistently score well on standardized tests. Although there was some criticism of her team teaching methods, her written evaluations were, apart from this minor matter, quite good. Accordingly, I find that she is an excellent teacher, well-respected by her peers and supervisors and that there is no merit to Superintendent Margolin's statement that she has a tendency to goof off.

^{8/} Caufield denied this statement. I credit Kvilesz' testimony.

Discussion and Analysis

There is one issue presented in this case: was Stefan transferred in retaliation for her union activities? In re Bridgewater Tp., 95 N.J. 235 (1984) sets forth the standard to determine whether an employer has illegally discriminated against employees in retaliation against union activity:

the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. Transportation Management, supra, U.S., 103 S.Ct. at 2474, 76 L.Ed.2d at 675. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity. [Id. at 244]

Local 1116 has met the first two elements. Stefan engaged in protected activity and the Board stipulated that it was aware of such activity. This case turns on the final element: was the Board hostile to such activity? I do not believe the evidence demonstrates that they were. The chief thrust of the charging party's case was that Board member Pizzichillo was hostile towards Stefan. There is no question but that such hostility did exist and that there had been a past history of labor negotiations between Stefan and Pizzichillo which were difficult and even led to a strike in 1977. But Pizzichillo's dislike of Stefan was, I believe, more because of personal reasons than due to any anti-union animus on his part. I make this finding because of three factors: (1)

Pizzichillo convincingly testified to past disagreements concerning Stefan's dealings with his children; (2) Pizzichillo is a teacher in the same union in another school district and (3) another member who had been involved in the earlier strike, Angela Penna, testified that Pizzichillo no longer harbors any animosity towards her (2T236).

There is another important reason why I find that the transfer was not based on the Board's hostility towards her union activity: Margolin was the motivating force behind the transfer. The uncontradicted testimony is that Margolin recommended Stefan at the June 25, 1985 caucus meeting. There is no evidence from which I could find that Margolin had anti-union animus towards Stefan. To the contrary, he had sought to "protect" her by not transferring Stefan to the perceptually impaired opening: a position that she qualified for and which she had made known her disinterest. If he were truly interested in "punishing" Stefan, presumably he would have transferred her to a position that she did not want. In contrast to Margolin's involvement, Pizzichillo had no involvement in the initial decision to transfer Stefan. He was not present at the June 25, 1985 caucus. He did vote for the Stefan transfer, but also voted for the others. The most that the charging party established was that he was adamantly against reconsidering the Stefan transfer. This, however, for the reasons already stated, was not based on anti-union animus.

There are, however, certain troublesome aspects of the transfer decision which need be mentioned. The Board's reasons are

troubling. According to the Board, on the one hand, Stefan was a good strong teacher and a disciplinarian and that is why she was transferred to the 5th grade teaching position. Yet, in virtually the same breath, the Board contends that she has a tendency to goof off and needs closer supervision. That is why she was not placed in the compensatory education position. However, the person placed in the compensatory education position had, in the past, ignored the slower children and was to a strict disciplinarian. According to all the Board's witnesses, she was not a good teacher. One would expect the Board would take one of two routes: institute tenure proceedings to remove that teacher or work with her so that she could eliminate her deficiencies. According to Superintendent Margolin, the compensatory education position was a "plum." Yet, the Board decided to transfer a poor teacher to a plum position. Further, Superintendent Margolin advised Stefan, a good teacher, that the Board would never give her a plum position, implying that she would only receive punishment positions.^{9/}

Under our case law, I believe that the foregoing could be evidence that the stated reasons for the transfer were a sham and that the inference could be drawn that Stefan was transferred for anti-union reasons. I believe, however, that the record as a whole

^{9/} I have already credited Margolin's testimony that he did not state that she would only receive punishment assignments. Nevertheless, from his admissions that she would not receive "plum" positions, the implication can be made.

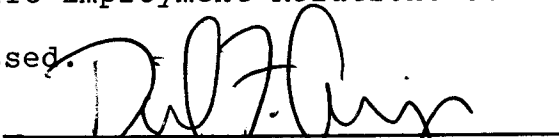
does not warrant such a conclusion. The Board's reasons may be subject to debate as to their educational wisdom, but I am satisfied that is why the transfers were or were not made. Further, while the Board, through Pizzichillo may not have "liked" Stefan, I cannot ascribe that dislike to anything protected by our Act. His views may be petty and vindictive, but there is nothing in the record that would connect it to protected activity. There were two grievances pending at the time of the transfer but there is nothing to indicate that the Board was hostile and sought to retaliate against such filings.

Conclusions of Law

The Board did not violate the New Jersey Employer-Employee Relations Act when it transferred Elizabeth Stefan.

Recommended Order

I recommend that the Public Employment Relations Commission order that the Complaint be dismissed.



David F. Corrigan
Hearing Examiner

DATED: October 9, 1986
Trenton, New Jersey