P.E.R.C. NO. 93-113

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CHERRY HILL BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-H-92-89

ANDREW B. KORTON,

Charging Party.

NEW JERSEY EDUCATION ASSOCIATION,

Respondent,

-and- Docket No. CI-H-92-90

ANDREW B. KORTON,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission dismisses a Complaint based on unfair practice charges filed by Andrew B. Korton against the Cherry Hill Board of Education and the New Jersey Education Association. The charges alleged that the Board violated the Act by permitting an employee without a black seal license to bump Korton from his shift foreman position and that the Association violated the Act by failing to file a grievance or otherwise challenge the Board's action. In the absence of exceptions, the Chairman agreed with the Hearing Examiner that the charging party did not prove that the respondents violated the Act.

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Appearances:

For the Respondent Cherry Hill Board of Education, Davis, Reberkenny & Abramowitz, attorneys (William C. Davis, of counsel)

For the Respondent New Jersey Education Association, Selikoff & Cohen, attorneys (Steven R. Cohen, of counsel)

For the Charging Party, Andrew B. Korton, pro se

DECISION AND ORDER

On April 21 and June 23, 1992, Andrew B. Korton filed unfair practice charges and amended charges against the Cherry Hill Board of Education and the New Jersey Education Association. The

charges allege, in pertinent part,[1/] that 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), (2) and (3),[2/] by permitting an employee without a black seal license to bump Korton from his shift foreman position at the high school. The charges further allege, in pertinent part, that the Association violated subsections 5.4(b)(1) and (2),[3/] by failing to file a grievance or otherwise challenge the Board's action.

On November 6, 1992, a Complaint and Notice of Hearing issued. On January 14 and 20, 1993, Hearing Examiner Alan R. Howe conducted a hearing. The charging party introduced exhibits and testified on his behalf. He did not call any other witnesses. At

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1/ On September 15, 1992, the Director of Unfair Practices refused to issue a Complaint on a number of other allegations that are not in dispute here. D.U.P. No. 93-9, 18 NJPER 465 (¶23210 1992).

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."

3/ These subsections prohibit employee organizations, 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) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances."

the conclusion of his case-in-chief, the respondents moved to dismiss. The Hearing Examiner granted the Board's motion, but denied the Association's. The Association then rested and renewed its motion on the whole record. Relying on the residuum rule requiring some legally competent evidence to support each ultimate finding of fact, the Hearing Examiner then reconsidered and granted the motion. H.E. No. 93-18, 19 NJPER 171 (¶24088 1993).

The Hearing Examiner served his decision on the parties and informed them that exceptions were due by March 22, 1993. No party filed exceptions or requested an extension of time.

I have reviewed the record. I incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 5-8). Pursuant to authority granted to me by the full Commission in the absence of exceptions, I conclude that the charging party did not prove that the respondents violated the Act when he was bumped from his position at the high school.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: June 18, 1993
Trenton, New Jersey

H.E. NO. 93-18

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NEW JERSEY EDUCATION ASSOCIATION,

Respondent,

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ANDREW B. KORTON,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practices against the Respondent Board and the Respondent Association for want of any competent evidence that either violated the provisions of the New Jersey Employer-Employee Relations Act as alleged. The case was all to do about the Charging Party having been "bumped" under a lawful contract provision. It was his belief that the Board violated the act in allowing this to occur. As to the Respondent Association, the claim was that it failed to file a grievance on his behalf. However, there was no competent evidence to demonstrate that this occurred, the evidence being solely "double hearsay" and, thus, incompetent under the "residuum" rule.

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.

H.E. NO. 93-18

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Appearances:

For the Respondent Cherry Hill Board of Education
Davis, Reberkenny & Abramowitz, attorneys
(William C. Davis, of counsel)

For the Respondent New Jersey Education Association
Selikoff & Cohen, attorneys (Steven R. Cohen, of counsel)

For the Charging Party, Andrew B. Korton, Pro Se

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

Separate Unfair Practice Charges were filed with the Public Employment Relations Commission ("Commission") on April 21, 1992, and amended on June 23, 1992, by the Andrew B. Korton ("Charging Party" or "Korton") alleging that both the Cherry Hill Board of

Education ("Board") and the New Jersey Education Association ("Association") have 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").

Before the issuance of the Complaint and Notice of Hearing in this matter, the Director of Unfair Practices issued a decision on September 15, 1992 [D.U.P. No. 93-9, 18 NJPER 465 (¶23210 1992)], in which he limited the scope of the Unfair Practice Charges to be heard in this proceeding, namely, "...the allegations regarding Korton's being bumped in favor of an unqualified employee and the Association's failure to file a grievance over the bumping..." (18 NJPER at 467). The guidelines contained in this decision were the subject of colloquy between myself and the representatives of the parties at several stages of these proceedings (1 Tr 18, 21, 26, 29; 2 Tr 4-8).

Korton had alleged that the Board had violated Sections 5.4(a)(1), (2) and (3) of the Act. 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.[1/] (3) Discriminating in regard to hire or

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1/ The Director, in D.U.P. No. 93-9, supra, had concluded that this allegation failed to meet the Complaint issuance standard (at p. 9) and was therefore dismissed. [1 Tr 28, 29].

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," i.e., "job discrimination" when Thomas Houck ("Houck"), who did not possess a "black seal" license, was permitted to "bump" Korton from his position at the High School to the Brete Harte School.[2/]

Korton has also alleged that the Association violated Sections 5.4(b)(1) and (2)[3/] of the Act[4/] by its failure to have filed a grievance for "breach of union agreement" or even attempted to do so; the union (Association) made no attempt to represent him in "obtaining" his job back; the union president is on the Board payroll and accepts overtime without working; the union "allowed a seal for an unqualified union member" to bump him from his position, etc.

A Consolidated Complaint and Notice of Hearing was issued on November 6, 1992. Hearings were held on January 14 and January 20, 1993, in Trenton, New Jersey, at which time the Charging

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2/ The allegations of Korton beyond the facts previously stated are not before me in this proceeding.

3/ These subsections prohibit public employee organizations, 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) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances."

4/ The subsection (b)(2) allegation in the Complaint was dismissed by agreement at the hearing on January 14, 1993 (1 Tr 21-24).

Party only was given an opportunity to examine witnesses and present relevant evidence. The Charging Party was the sole witness on his own behalf and introduced certain documents in evidence. At the conclusion of the Charging Party's case on January 14th, each Respondent made a Motion to Dismiss on the record (1 Tr 121, 123). I reserved my decision on each Motion until January 20th (1 Tr 126).

At the second hearing on January 20th, I granted the Respondent Board's Motion to Dismiss (2 Tr 21-27). While I had initially denied the Respondent Association's Motion to Dismiss, based upon the "scintilla" standard in Dolson v. Anastasia, 55 N.J. 2 (1969)[2 Tr 18, 19], the legal posture of the Association's Motion to Dismiss was completely reversed after counsel for the Association rested and then renewed his Motion to Dismiss upon a "whole record." I then reconsidered and granted the Association's Motion to Dismiss because of the applicability of the residuum rule[5/] since the critical proofs of Korton were based upon hearsay evidence (2 Tr 28-33, 37).

Unfair Practice Charges having been filed with the Commission by Korton against the Board and the Association, and a hearing having been held as to the evidence adduced by Korton only against each party, and after consideration of the oral argument of the parties and upon the record made by the Charging Party only, I make the following:

5/ See Weston v. State of N.J., 60 N.J. 36, 51 (1972).

FINDINGS OF FACT

1. The Cherry Hill Board of Education is a public employer within the meaning of the Act, as amended, and the New Jersey Education Association is a public employee representative within the same act.

2. Andrew B. Korton is a public employee within the meaning of the Act.

3. In December 1989, Korton responded to an advertisement by the Board for the position of Shift Foreman, Grade 3 which required, among other things, that he have a current New Jersey Black Seal Boiler License (1 Tr 34, 36; CP-1; CP-4, 1 Tr 72-74). The posting of this vacancy by the Board was dated January 5, 1989, and Korton was hired based on the qualifications required for the job (1 Tr 35, 36; CP-1). Korton became a member of the Association and was governed by the collective negotiations agreement, effective July 1, 1990 through June 30, 1992 (J-1; 1 Tr 14, 36, 37).

4. Korton's job as Shift Foreman appeared, at first, to require him to administer disciplinary actions to lower grade employees but, on cross-examination, he acknowledged that he had never in fact imposed any discipline (1 Tr 37, 89).[6/]

5. On May 10, 1991, Korton was notified by George Frierson, Supervisor of Building and Grounds, that there was going

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6/ Further, Korton acknowledged that he had never had an argument or a confrontation with Gary Ricco, the President of the Local Association at the Board, infra. [1 Tr 48, 88, 89].

to be a reduction in force. Korton was aware that Houck, as a Grade 3, could "bump" him [pursuant to Article VI, "Seniority," ¶F(3), p. 11 of J-1]. [1 Tr 38-40].

6. This "bump" in fact occurred on May 14th when Thomas F. Redmond, a Board administrator, reassigned Houck to the Night Shift thereby displacing Korton. However, the notice to Houck from Redmond specifically waived the Black Seal Boiler License requirement on the condition that Houck "sit" for this license at the first opportunity, etc. [1 Tr 40-43; CP-2].

7. On May 14, 1991, Korton first contacted Paul Leahy, the Association's UniServ Representative to ask his advice on the filing of a grievance over the bumping situation. Leahy felt that Ricco should file a grievance. [1 Tr 48, 51-53, 99]. Korton next called James George, the Regional Coordinator, on May 16th, who reiterated the position of Leahy that Ricco should file the grievance (1 Tr 53, 54, 59, 99).

8. Next Korton spoke to Ricco at his shop in Central Administration. Ricco said that he would file a grievance for Korton. [1 Tr 55].

9. After two weeks had passed, Korton, not having heard from Ricco, asked his School Representative, Anthony Oto, to contact Ricco (1 Tr 55). When this was done, Ricco informed Oto that Korton had gone over his head and that he, Ricco, would not file a grievance on behalf of Korton. Oto told Korton what Ricco had

said. Following Oto's having told Korton of Ricco's statement, no grievance was ever filed. [1 Tr 55, 56].[7/]

10. Korton accepted the bumping by Houck and reported to the Brete Harte School as of July 1, 1991.[8/]

11. Article VI, "Seniority," of J-1 provides in Section F(3) that employees "considered for lay-off" shall be first considered "for filling any existing vacancy" in a like job title and grade and, if "no vacancy exists in the same grade level," then that employee may "displace" [bump] an employee with less seniority and so forth. [J-1, p. 11; 1 Tr 70, 71]. Korton testified with respect to his having been bumped by Houck, that Houck received "special consideration" as indicated in CP-2, supra (1 Tr 70, 71, 79-81).[9/]

12. The Board on May 14, 1991, changed the job description for "Shift Foreman," which, since July 1986, required the possession of a Black Seal Boiler License (CP-2 v. CP-4). This "Black Seal" requirement was affirmed in the January 5, 1989 Notice of Maintenance Vacancy (CP-1). However, the Board on May 14th waived

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7/ This is the "double hearsay" that resulted in the Association's ultimate Motion to Dismiss, infra (2 Tr 20, 21, 27, 32, 33).

8/ The instant case is not concerned with anything which occurred thereafter even though several of the post-July 1, 1991 events were inadvertently explored at the hearing (1 Tr 101-114).

9/ Korton was aware that, as a practical matter, only Houck could bump him (1 Tr 115, 116).

the Black Seal requirement for Houck, who was awarded the Shift Foreman position and bumped Korton to the Brete Harte School. [CP-5; 1 Tr 79-85].

13. Korton had no knowledge of how Houck came to bump him nor did he have any knowledge of the terms of the bump as set forth in CP-2 although he did have a copy of the contract. [J-1; 1 Tr 89, 90].

14. Korton, who has represented himself in some 10 to 20 legal actions, had read all of the provisions in the contract (J-1) except the Grievance Procedure, with which he was not familiar (1 Tr 91-94). This, he explained, was due to his opinion that it was the Association's obligation to file grievances on his behalf as a "fiduciary" and that was why he paid dues (1 Tr 94).

15. Neither Leahy, George or Ricco informed Korton that he had the right, as an employee, to file his own grievance (1 Tr 95). However, in June of 1991, Korton was told by Robert Masico, an engineer employed by the Board and a member of another union that the time limit for Korton's grievance filing had expired. [1 Tr 95-97].

16. Korton was told by an unnamed, dismissed custodian that he was bumped because of interference, restraint or coercion by the Board under the Act and that Ricco told this employee that "he would get me" (1 Tr 116-118). The dismissed custodian was not a supervisor (1 Tr 119). Further, no supervisor of the Board ever told Korton that he was being bumped because of Section 5.4(a)(1) rights under the Act (1 Tr 119).

ANALYSIS

I granted the Motion of each Respondent to dismiss on the record on January 20, 1993 (2 Tr 17-36). In the course of this ruling, I afforded Korton the benefit of all favorable inferences from the evidence that he adduced on January 14, 1993, in addition to the "scintilla" rule of Dolson v. Anastasia, 55 N.J. 2 (1969) and the guidelines contained in D.U.P. No. 93-9 (2 Tr 5-17).

* * * *

In considering the **Association's** Motion to Dismiss, I must first address the double "hearsay" aspect of Korton's proofs that the Association breached its duty of fair representation (DFR). This situation arises because Ricco initially told Korton that he would file a grievance on his behalf. Two weeks later Korton asked his School Representative, Anthony Oto, to contact Ricco as to whether his grievance had been filed. Oto did so and related to Korton that Ricco had told him that he, Korton, had gone over his head and that, therefore, Ricco would not file a grievance on Korton's behalf (1 Tr 55, 56; 2 Tr 16, 17). At this point, I decided that Dolson, supra, mandated the denial of the Association's Motion to Dismiss because, notwithstanding that the above testimonial evidence was based upon "double hearsay," and was otherwise objectionable, it constituted evidence "beyond a scintilla" and, thus, required denial of the Motion. [2 Tr 17-21].

At this point I granted the **Board's** Motion to Dismiss since there were no proofs by Korton that the Board had violated

Sections 5.4(a)(1) or (3) of the Act (2 Tr 21-27). I next discussed at some length the alleged Section 5.4(a)(3) violation by the Board vis-a-vis Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984).[10/] I assumed that Korton had engaged in the protected activity of seeking to file a grievance and, further, that this was known by the Board. However, I was then confronted with the fact that there was no proof whatever that the Board's representatives had manifested any anti-union animus or hostility toward Korton in connection with his having been "bumped" by Houck. [2 Tr 23-27]. See the cases of Lyndhurst Bd. of Ed., P.E.R.C. No. 87-139, 13 NJPER 482 (¶18177 1987), Southeast Morris County Municipal Utilities Authority, H.E. No. 89-9, 14 NJPER 591 (¶19251 1988) and City of Bayonne, H.E. No. 91-21, 17 NJPER 111 (¶22048 1991), where, in each instance, no evidence of animus or hostility was adduced.

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10/ The so-called Bridgewater test for analyzing alleged Section 5.4(a)(3) violations requires that, in assessing employer motivation: (1) The Charging Party must make a showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to terminate; and (2) once this is established, then the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (95 N.J. at 242). The Court further refined its test by adding that the protected activity engaged in must have been known by the employer and, also, it must be demonstrated that the employer was hostile towards the exercise of the protected activity, i.e., manifested anti-union animus (95 N.J. at 246).

The Association, having initially had its Motion to Dismiss denied on the basis of Dolson, supra,[11/] again renewed its Motion without offering any evidence on its behalf. The Association argued persuasively that I could make no finding of a violation of Section 5.4(b)(1) of the Act because now, based upon the "whole record," the "double hearsay" testimony of Korton vis-a-vis Oto and Ricco was legally inadmissible, i.e., it could not be used to support a finding or a conclusion of violation under the residuum rule: Weston, supra, and Colavita v. Hillsborough Tp. Bd. of Ed., App. Div. Dkt. No. A-4243-83T6 (1985). [2 Tr 28-33, 37].[12/]

* * * *

Upon the foregoing, and upon the testimony and documentary evidence adduced in this proceeding by the Charging Party only, I make the following:

CONCLUSIONS OF LAW

1. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (2) or (3) by the conduct of its representatives herein when Thomas Houck was permitted to exercise bumping rights under the parties' collective negotiations agreement which resulted

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11/ See 2 Tr 21.

12/ Because of the result that I have necessarily reached on the "whole record," DFR cases such as N.J. Turnpike Employees Union, Local No. 194, P.E.R.C. No. 80-38, 5 NJPER 412 (¶10215 1979); OPEIU Local No. 153, P.E.R.C. No. 84-60, 10 NJPER 12 (¶15007 1983); AFSCME Council No. 52, P.E.R.C. No. 88-6, 13 NJPER 640 (¶18240 1987) and AFSCME Council No. 52, P.E.R.C. No. 91-34, 16 NJPER 540 (¶21243 1990). -- have no present application to the case at bar.

in the Charging Party's having to report to the Brete Harte School on July 1, 1991. No anti-union animus was evident in the conduct of the Respondent Board's representatives.

2. The Respondent Association did not violate N.J.S.A. 34:13A-5.4(b)(1) or (2) since there was no competent evidence to demonstrate that it had breached its duty of fair representation (DFR) as to the Charging Party, "double hearsay" testimony having been the sole evidence adduced by the Charging Party.

RECOMMENDED ORDER

I recommend that the Commission **ORDER** that the Complaint be dismissed.

Alan R. Howe
Hearing Examiner

Dated: March 8, 1993
Trenton, New Jersey