P.E.R.C. NO. 84-120

STATE OF NEW JERSEY
BEFORE THE PUBOIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIDGEFIELD PARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-83-271-120

RIDGEFIELD PARK EDUCATION ASSOCIATION - NJEA,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Ridgefield Park Board of Education committed a technical violation of subsection 5.4(a)(1) of the New Jersey Employer-Employee Relations Act when a supervisor, in an evaluation of a teacher, criticized that teacher, who was also an Association representative, for being quick to point out contractual guidelines. Given the Board's subsequent voluntary removal of the improper comment from the evaluation, the Commission determines that no further relief besides the finding of a technical violation is warranted. The Commission dismisses all other portions of the Complaint.

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Appearances:
For the Respondent, Aron & Salsberg, Esqs. (Stephen R. Fogarty, of Counsel)

For the Charging Party, Vincent E. Giordano, Field Representative, NJEA UniServ Regional Office

DECISION AND ORDER

On April 13, 1983, the Ridgefield Park Education Association ("Association") filed an unfair practice charge against the Ridgefield Park Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated subsections 5.4(a)(1), (2), (3), (4), and (7) [1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when a supervisor placed critical

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; (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; and (7) Violating any of the rules and regulations established by the commission."

comments in the evaluation of an Association Treasurer and negotiator, Joseph Tondi.

On June 30, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Board then filed an Answer denying that the comments in the evaluation were motivated by anti-union animus rather than legitimate observations and noting that it had already removed those paragraphs in the evaluation alleged to be objectionable.

On December 9, 1983, Hearing Examiner Arnold H. Zudick conducted a hearing. The Board and the Association stipulated certain facts and submitted certain joint exhibits. The Association then rested its case. The Board called the supervisor who prepared the disputed evaluation. Both parties filed post-hearing briefs.

On February 29, 1984, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-47, 10 NJPER ___ (¶_____ 1984) (copy attached). He recommended dismissal of the Complaint.

On March 13, 1984, the Association filed exceptions. It asserts that the Hearing Examiner erred in not finding that the following comment (paragraph 8) in the evaluation violated the Act:

> "You (Tondi) are eager to point out contractual guidelines at the slightest provocation, and yet you fail to recognize professional responsibilities and expectations."

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-8) are accurate. We adopt and incorporate them here.

Under all the circumstances of this case, we agree with the Association that paragraph 8 of Tondi's evaluation was technically objectionable under subsection 5.4(a)(1) of the Act, but we also agree with the Board that no relief besides the finding of a violation is appropriate.

We have repeatedly found that public employers violate subsection 5.4(a)(1) when their agents make statements threatening or implicating an employee's job status not because of that employee's job performance, but because of that employee's conduct as an employee representative. See In re Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981);[2/] In re Commercial Township Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), affirmed, App. Div. Docket No. A-1642-82T2 ("Commercial Township"); In re Middletown Township, P.E.R.C. No. 84-100, 10 NJPER ___ (¶_____ 1984) ("Middletown Township"). It is immaterial under subsection 5.4(a)(1) that such a statement does not actually coerce an employee or is not illegally motivated; it is the tendency of the employer's conduct to interfere with employee rights, not its result or motivation, which is at issue.[3/]

2/ Black Horse Pike also notes that public employer representatives and public employee representatives are within their rights to comment upon the activities or attitudes of each other which they believe are inconsistent with good labor relations. What the employer cannot do under our precedents is link that criticism to an employee's job performance by, for example, placing it in a job evaluation.

3/ Contrast cases in which an employee alleges that an employer has violated subsection 5.4(a)(3) by altering a term or condition of employment in order to discourage protected activity; in such cases, the charging party generally must prove that the employer was motivated by illegal considerations to act as it did. Compare generally pages 76-78 and pages 188-195 of The Developing Labor Law, (2nd Ed. 1983).

In the instant case, the Hearing Examiner initially found (p. 9) that paragraph 8 of the evaluation was technically objectionable on its face. We agree: this paragraph tends to suggest, in the context of measuring an employee's job performance, that Tondi should not have pointed out the contractual guideline on reporting time and should refrain from pointing out contractual guidelines in the future. We disagree, however, with the Hearing Examiner's ensuing analysis because it erroneously suggests that the Association had the burden under subsection 5.4(a)(1) to prove that anti-union animus motivated the objectionable comment and that Tondi was in fact intimidated or coerced. Regardless of its motivation or actual effect, the objectionable comment speaks for itself and could reasonably tend to intimidate an employee's right to point out contractual guidelines when appropriate. Nevertheless, we agree with the Hearing Examiner that the Board's subsequent voluntary removal of paragraph 8 from the evaluation makes the provision of any further relief besides the finding of a technical violation unnecessary and unwarranted. Middletown Township.

ORDER

For the foregoing reasons, the Commission finds a technical violation of N.J.S.A. 34:13A-5.4(a)(1), but declines to

order affirmative relief. All other portions of the Complaint are dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Newbaker abstained. Commissioner Graves was not present.

DATED: Trenton, New Jersey
April 12, 1984
ISSUED: April 13, 1984

H. E. No. 84-47

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ASSOCIATION - NJEA,

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SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Ridgefield Park Board of Education did not violate the New Jersey Employer-Employee Relations Act by placing certain critical comments in the evaluation of an Association official. The Hearing Examiner concluded that the comments related entirely to the employee's job performance and were not based upon the exercise of his protected rights.

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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For the Charging Party
Vincent E. Giordano, NJEA Uniserv Representative

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on April 13, 1983 by the Ridgefield Park Education Association-NJEA ("Association") alleging that the Ridgefield Park Board of Education ("Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Association has alleged that the Board, through supervisor Vincent Bernarducci, placed adverse comments in the evaluation of employee Joseph Tondi because of Tondi's exercise of protected activity, all of which was alleged to be in violation of N.J.S.A.

34:13A-5.4(a)(1), (2), (3), (4), and (7) of the Act. 1/

The Association further alleged that the Board had been engaged in a "union busting" program designed to interfere with Association members, and that Bernarducci's comments about Tondi were motivated by anti-union animus. The Association sought the removal of the complained of evaluation report and the posting of a notice. The Board denied that Bernarducci's comments were illegally motivated and asserted legitimate reasons for the evaluation, and it voluntarily agreed to excise certain comments from the evaluation.

It appearing that the allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 30, 1983. An Answer denying the Charge was filed on October 25, 1983. A hearing was then held in this matter on December 9, 1983, in Newark, New Jersey. 2/ The parties had the opportunity to examine

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; (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; (7) Violating any of the rules and regulations established by the commission."

2/ The hearing was originally scheduled herein by the Notice of Hearing for August 2 and 3, 1983. However, by letter dated July 7, 1983 the Hearing Examiner was advised of a joint request to postpone the hearing in hope of settling the matter. On October 11, 1983 the undersigned requested the status of the matter, and on October 14, the Association indicated that settlement could not be reached and it requested commencement of a hearing. The Board also responded on October 14, but it asked for more time to seek a settlement. On October 17, the undersigned rescheduled a hearing for December 9, 1983.

and cross-examine witnesses, present relevant evidence and argue orally. 3/ The Board filed a post-hearing brief received on January 26, 1984, and the Association filed a reply brief received on February 2, 1984.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the post-hearing briefs, 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. The Ridgefield Park Board of Education is a public employer within the meaning of the Act and is subject to its provisions, and is the employer of Joseph Tondi.

2. The Ridgefield Park Education Association is an employee representative within the meaning of the Act and is subject to its provisions.

3. Joseph Tondi has been employed by the Board as a teacher for thirteen years and he has been a member of the Association throughout his employment. For the past seven years Tondi has been the treasurer of the Association, and has also been a member of the negotiating team and the executive committee of the Association. (Transcript ("T") pp. 6-7).

3/ Although Mr. Tondi was present at the hearing, and although the Association had the opportunity to call witnesses, the Association waived its right to call any witnesses and it rested its case on the joint exhibits and stipulations which were admitted into evidence.

4. The parties stipulated that there exists, and has existed for the last year or two, a strained and unharmonious relationship between the Board and the Association. (T p. 7).

5. Vincent Bernarducci is employed by the Board as the English Department supervisor and as such he has had the responsibility to evaluate Tondi. Bernarducci evaluated Tondi in 1981 (Exhibit J-3) and 1982 (Exhibit J-4) and gave him good evaluations.

On March 22, 1983, Bernarducci prepared a mid-year evaluation of Tondi (Exhibit J-1 dated and signed on March 28, 1983) which contained several critical comments. Thereafter on April 13, 1983, the Association filed the instant Charge and alleged that those critical comments by Bernarducci in J-1 were unlawful. The comments complained of were set forth in the Charge as follows:

> Exhibit J-1
> Para. 5
>
> A relatively simple task was perceived as an arduous chore which required release time.
>
> Para. 6
> Your overreaction to my suggestions indicated to me that you personalize rather than respond professionally.
>
> Para. 7
> Again, when reminded of your lateness to school and first period class, you chose personalizing to professionalism.
>
> Para. 8
> You are eager to point out contractual guidelines at the slightest provocation, and yet you fail to recognize professional responsibilities and expectations.

Subsequent to the filing of the Charge Bernarducci was

notified by the superintendent of schools that the matter could be settled if the comments in paragraphs 7 and 8 of J-1 were deleted. 4/ (T pp. 31-32). Bernarducci thus agreed to delete those two comments and on May 11, 1983, he presented Tondi with a copy of that evaluation (Exhibit J-8) with the comments in paragraphs 7 and 8 deleted. Tondi, however, refused to sign J-8 and it was then placed in his personnel file in place of J-1.

On June 23, 1983, Tondi received his end of the year evaluation from Bernarducci (Exhibit J-5) which contained one criticism, the lack of an instructional delivery system. However, Bernarducci in J-5 also complimented Tondi on his improvement from criticisms set forth in J-1. He stated that:

> Earlier in the school year, I noted two major concerns related to your spirit of cooperation and your inability to put in perspective the most casual of suggestions.
>
> You have demonstrated improvement in both areas. End of the year reports have been cooperatively managed and emergencies have been put in proper perspective.

6. Bernarducci testified at the hearing and explained the reasons for his criticisms of Tondi in J-1. He indicated that his comment in paragraph 5 of J-1 was directed at Tondi's failure to prepare individual student improvement plans (ISIPS) within the required time. The evidence shows that a specific date had been set for receipt of the ISIPS but Tondi had not completed them in time and he asked to be released from class to complete the work. Bernarducci refused to give Tondi release time for such work, but

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4/ The undersigned credits Bernarducci's testimony that the Superintendent told him that the matter could be resolved if the comments in paragraphs 7 and 8 of the evaluation were deleted.

he did extend the time for receipt of the ISIPS, yet Tondi still had not completed the ISIPS by the new date. (T pp. 18-19). Although there was no evidence that other teachers were disciplined regarding ISIPS, the Association offered no evidence that other teachers submitted late ISIPS, or that other teachers requested and received release time to perform such work.

The evidence regarding Bernarducci's comment in paragraph 6 of J-1 shows that said comment was Bernarducci's assessment of Tondi's reaction to his (Bernarducci's) suggestions regarding Tondi's professionalism. Bernarducci testified that he told Tondi to stop interrupting him (Bernarducci) in his office regarding matters that were not urgent, particularly when he was meeting with other people. Bernarducci told Tondi that he would meet with him regarding such matters after school, during lunch, or during a professional period. (T p. 20). Tondi apparently reacted unprofessionally to Bernarducci's request, and thereafter ignored him at various times at the school. (T p. 21).

The facts show that Bernarducci's comments in paragraphs 7 and 8 of J-1 were made as a result of Tondi's late arrival to his classroom. Bernarducci testified that teachers were required to sign in by 8:15 a.m. and that classroom instruction began at 8:20 a.m. (T p. 21). However, he indicated that teachers were expected to be in--or in front of--their classrooms prior to 8:20 to supervise students as they arrived for class. (T p. 21). Bernarducci indicated that Tondi had on at least two occasions arrived to class after 8:20, and when Bernarducci told Tondi to arrive at his class "a reasonable time before the students get there," Tondi replied:

> According to the contract, I don't have to sign in until 8:15. What time do you want me there? (T p. 22).

Bernarducci replied:

> Well, you are not required to sign in before 8:15, of course, but if you choose to sign in at 8:15 it shouldn't take you any more than a minute to get to your classroom, so I would assume that you would be there no later than 8:16. (T p. 22).

Bernarducci testified, in particular, that his comment in paragraph 8 of J-1 was merely a recitation of what Tondi had said during their conversation about his (Tondi's) late arrival to class. The facts show that in addition to Tondi's statement cited above, that when Bernarducci told Tondi to be in front of his class prior to 8:20, Tondi:

> ...kept insisting that I [Bernarducci] put it in writing, he [Tondi] kep insisting that according to the contract, he doesn't have to sign in until 8:15 which I [Bernarducci] recognize. (T p. 30). 5/

7. Tondi was not the only teacher who received negative comments from Bernarducci regarding lateness. Bernarducci gave one teacher a memo in December 1982 criticizing his/her lateness to class and reminding him/her of his/her responsibility to arrive to class early enough to supervise students. (Exhibit R-2). In March 1983, Bernarducci evaluated a different teacher and noted his/her cronic lateness to class and termed such lateness as "excessively irresponsible and extremely unprofessional." (Exhibit R-1).

8. Despite the stipulation that the instant parties have had an unharmonious relationship, the Association did not

5/ Bernarducci's testimony with regard to the reasons for his comments in J-1 is fully credited. He seemed to have a good recall of the facts and of what was said, and no evidence was presented to contradict or rebutt his testimony.

establish that the Board has been engaged in a "union busting" program, nor did it present any evidence that Bernarducci was involved in such a program, or that he harbors "strong anti-union animus." In addition, there was no showing that Bernarducci's comments interfered with the administration of the Association (34:13A-5.4 (a)(2)); or that the Board took any action against Tondi because of the filing of this Charge or any other matter before the Commission (34:13A-5.4(a)(4)); or, that the Board violated any rules established by the Commission (34:13A-5.4(a)(7)).

Analysis

Having reviewed the entire record the undersigned finds that the Association failed to prove by a preponderance of the evidence that the Board, through Bernarducci's evaluation of Tondi, violated the Act. The burden in this case was on the Association to prove that Bernarducci's criticisms of Tondi, and the Board's actions relevant thereto, were based in whole, or in part, upon Tondi's participation in--or on behalf of--the Association, or upon the exercise of protected activity. The Association failed to meet that burden.

Bernarducci was the only witness to testify at the hearing and his testimony is fully credited. There was no evidence to contradict his testimony that Tondi was late in submitting his ISIPS, that Tondi had interrupted Bernarducci in his office and acted unprofessionally, that Tondi had been late for class, and that it was Tondi, in fact, who first stated that according to the contract he was not required to sign in before 8:15 a.m.

The undersigned finds that there was no evidence to show

that Bernarducci's criticism of Tondi in paragraphs 5, 6 and 7 of J-1 were in any way connected to his exercise of protected activity. In fact, the undersigned believes that those comments were made only in connection with legitimate business and educational considerations.

With regard to Bernarducci's comment in paragraph 8 of J-1, that comment on its face, absent any other facts, could, technically, be a violation of the Act because it could have been interpreted as intimidating Tondi in the exercise of his contractual rights. However, in the overall context of this case no violation was committed.

First, the undersigned notes that Bernarducci and the Board voluntarily excised the comments in paragraphs 7 and 8 of J-1 and reissued the evaluation without those comments (J-8) within a very short time after J-1 had been signed. Second, in just a month and a half after the Board issued J-8, Bernarducci issued Tondi's end of the year evaluation (J-5) and complimented him on his improvement apparently in the areas addressed by Bernarducci's comments in paragraphs 5 and 6 of J-1. 6/ Both of these actions mitigate against any finding that Bernarducci or the Board exhibited anti-union animus when paragraph 8 was placed in J-1.

Third, the actual comment in paragraph 8 of J-1 was merely Bernarducci's recollection of the conversation getween himself and Tondi. The first part of that comment, "You are eager to point out contractual guidelines...," was merely a restatement of Tondi's statement to Bernarducci that according to the contract he

6/ Although J-5 contained some critical comments, they were unrelated to the issues raised in J-1.

(Tondi) was not required to sign in until 8:15. That remark neither intimidated nor coerced Tondi because Bernarducci acknowledged to Tondi his right to sign in no earlier than 8:15. Bernarducci merely emphasized Tondi's responsibility to be at his classroom prior to 8:20 even if he signed in at 8:15. The second part of the relevant comment, "you fail to recognize professional responsibilities and expectations," relates directly to Tondi's failure to report to class prior to 8:20 to supervise students.

Fourth, assuming arguendo that the comment in paragraph 8 of J-1 was a violation and had not been withdrawn, the remedy herein might only have been the posting of a notice and the removal of that comment from the evaluation. The comments in paragraphs 5, 6, and 7 of J-1, however, were neither unlawfully motivated, nor coercive or intimidating on their face. Thus, there certainly would be no basis to require the removal of the revised evaluation, J-8, from Tondi's personnel file. Therefore, since the Board has already, and voluntarily, removed paragraph 8 (and 7) from the evaluation, the primary remedy herein has already been achieved, and the posting of a notice would be unnecessary, and would not further effectuate the purposes and polices of the Act.

Finally, the cases relied upon by the Association are either distinguishable or inapplicable here. This matter is neither a "dual motive" case requiring the applicaton of the standards established in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980), [7/] nor is it similar to In re Dover Bd.Ed., P.E.R.C.

7/ The Wright Line "motivating factor/business justification" standard was adopted in New Jersey. See Twp. of Bridgewater v. Bridgewater Public Works Assoc., ___ N.J. ___ (February 2, 1984); and, East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981).

No. 83-69, 9 NJPER 26 (¶14013 1982); In re Commercial Twp. Bd.Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982); or In re Black Horse Pike Reg. Bd.Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the cases relied upon by the Association, where employees were either threatened or poorly evaluated because of the exercise of protected activity. Rather, Bernarducci's comments in J-1 were related entirely to Tondi's performance as an employee, and were not based upon his exercise of protected activity. Consequently, the §5.4(a)(1) and (3) alleged violations of the Act should be dismissed.

In addition, the §5.4(a)(2), (4) and (7) alleged violations should be dismissed since insufficient facts were presented to prove that the Board interfered with the administration of the Association, that action was taken against Tondi because of the filing of the Charge, or, that any rules of the Commission were violated.

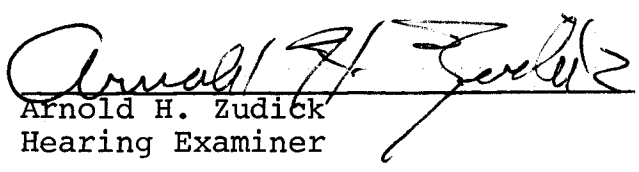
Accordingly, based upon the entire record and the above analysis, the Hearing Examiner makes the following:

Conclusions of Law

The Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4) and (7) by placing certain critical comments in the evaluation of employee Joseph Tondi.

Recommended Order

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



Arnold H. Zudick
Hearing Examiner

Dated: February 29, 1984
Trenton, New Jersey