

P.E.R.C. NO. 84-135

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLESEX COUNTY VOCATIONAL AND
TECHNICAL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-83-17-85

JOANNE LYNCH,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, adopting a Hearing Examiner's recommendation, holds that the Middlesex County Vocational and Technical Board of Education did not violate the New Jersey Employer-Employee Relations Act when it promoted one employee to step 4, general secretary, and refused to promote another employee who had unsuccessfully campaigned to organize the Board's secretaries. No exceptions to the Hearing Examiner's report were filed.

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Charging Party.

Appearances:

For the Respondent, Borrus, Goldin & Foley, Esqs.
(Jack Borrus of counsel)

For the Charging Party, Schneider, Cohen & Solomon, Esqs.
(Bruce D. Leder of counsel)

DECISION AND ORDER

On September 14, 1982, Joanne Lynch filed an unfair practice charge against the Middlesex County Vocational and Technical Board of Education ("Board") with the Public Employment Relations Commission. The charge, as amended on September 20, 1982 and February 22, 1983, alleges that the Board violated subsections 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 promoted a

^{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."

clerk/typist to step 4, general secretary, two steps above Lynch. The charge specifically asserts that the Board made this promotion to punish Lynch for her involvement in an unsuccessful campaign to organize the Board's secretaries.

On April 26, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On July 13, July 21, and September 19, 1983, Hearing Examiner Joan Kane Josephson conducted a hearing. ^{2/} The parties examined witnesses and presented exhibits. Both parties submitted post-hearing briefs.

On February 23, 1984, the Hearing Examiner issued his report and recommended decision, H.E. No. 84-45, 10 NJPER ____ (¶ ____ 1984) (copy attached). Applying the standards set forth in Township of Bridgewater and Bridgewater Public Works Assoc., 95 N.J. 235 (1984), he found that Lynch had not proved that her organizing efforts were a motivating factor behind the other employee's promotion and that the Board had proved that the promotion in question would have occurred even in the absence of Lynch's organizing.

The Hearing Examiner served his report on the parties and informed them that exceptions, if any, were due on or before March 7, 1984. Neither party filed exceptions or requested an extension of time.

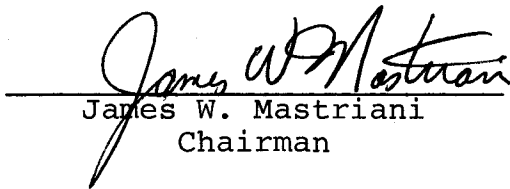
^{2/} On October 17, 1983, Joan Kane Josephson left the employ of the Commission and Mark A. Rosenbaum was designated to issue a report and recommended decision pursuant to N.J.A.C. 19:14-6.4.

We have reviewed the record. The Hearing Examiner's findings of fact (pp 2-5) are accurate. We adopt and incorporate them here. Based on these findings of fact, we agree with the Hearing Examiner's conclusions that Lynch did not prove that her organizing efforts were a substantial or motivating factor in the promotion and that the Board, in any event, did prove that the promotion would have occurred even absent her organizing efforts.^{3/} Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Suskin and Butch voted for this decision. Commissioners Hipp and Graves voted against this decision. Commissioner Newbaker abstained.

DATED: Trenton, New Jersey
May 30, 1984
ISSUED: June 1, 1984

^{3/} At the hearing, but not in the charge, Lynch alleged that the Board had violated her right as an individual to process a grievance. Assuming that this allegation was fairly and fully litigated and that this allegation, if proved, would have violated the New Jersey Employer-Employee Relations Act, we agree with the Hearing Examiner that Lynch did not prove this allegation by a preponderance of the evidence.

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

In the Matter of

MIDDLESEX COUNTY VOCATIONAL AND
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Respondent,

-and-

DOCKET NO. CI-83-17-85

JOANNE LYNCH,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner recommends that the Commission dismiss charges that the Middlesex County Vocational and Technical Board of Education discriminated against Joanne Lynch in retaliation for her exercise of protected activity through its preferential promotion practices with respect to another employee. The Hearing Examiner finds that the Charging Party did not meet her burden of proving that her protected activity was a motivating factor in the Board's personnel action. The Hearing Examiner also finds that even if the Charging Party met that burden, the Board proved by a preponderance of the evidence that the personnel action would have taken place in the absence of such protected activity.

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. 84-45

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

In the Matter of

MIDDLESEX COUNTY VOCATIONAL AND
TECHNICAL BOARD OF EDUCATION,

Respondent,

-and-

DOCKET NO. CI-83-17-85

JOANNE LYNCH,

Charging Party.

Appearances:

For the Respondent
Borrus, Goldin & Foley, Esqs.
(Jack Borrus of Counsel)

For the Charging Party
Schneider, Cohen & Solomon, Esqs.
(Bruce Leder of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On September 14, 1982, and as amended on September 20, 1982 and February 22, 1983, Joanne Lynch ("Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the Middlesex County Vocational and Technical Board of Education ("Respondent") committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Party asserted that the Respondent discriminated against the Charging Party in retaliation for her exercise of protected activity under the Act through its preferential promotion practices with respect to another employee,

allegedly in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3). ^{1/}

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 by the Director of Unfair Practices on April 26, 1983. Pursuant to the Director's order, hearings were held before Joan Kane Josephson on July 13, July 21 and September 19, 1983. At the hearings, the parties were given opportunities to examine and cross-examine witnesses, present relevant evidence and argue orally. On October 17, 1983, Joan Kane Josephson left the employ of the Commission and the Commission caused the designation of the undersigned to issue a Report and Recommendations on the record as made, pursuant to N.J.A.C. 19:14-6.4. The record was completed upon submission of briefs by both parties, the last of which was received on January 30, 1984.

Upon the entire record the Hearing Examiner finds that:

1. Middlesex County Vocational and Technical Board of Education is a public employer within the meaning of the Act and is subject to its provisions.
2. The Charging Party, Joanne Lynch, is a public employee within the meaning of the Act.

^{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."

3. An Unfair Practice Charge having been filed with the Commission alleging that the Respondent has engaged in unfair practices within the meaning of the Act, questions concerning alleged violations of the Act exist and are appropriately before the undersigned for determination.

4. The Charging Party has been employed by the Respondent since the Fall of 1977. She was hired as a Clerk/Typist at step one of the salary guide, and advanced one step on the guide each year until the 1980-1981 school year, when she was promoted to General Secretary at step one of that salary guide. In subsequent years, Charging Party has advanced one step on the salary guide each year.

5. During the 1978-79 school year, the Charging Party became active in a campaign to organize the Respondent's secretarial employees. As President of the organization (Middlesex County Vocational and Technical Office Personnel Association) seeking to represent those employees, the Charging Party contacted employees and conducted meetings over a period of several months (Transcript of July 13, 1983, hereafter "T-I," at pp. 9-13). The campaign did not result in recognition or certification of a union for Respondent's secretarial employees. By letter of May 15, 1979, Charging Party resigned as President of the Middlesex County Vocational and Technical Office Personnel Association (Exhibit R-1), and did not engage in protected activity subsequent to her resignation (T-I at p. 53).

6. The alleged unfair practice occurred in July, 1982, when the Board appointed Judith Vajo as General Secretary in the

Guidance Office at Piscataway Vocational High School, and established her salary at Step 4 of the salary guide (Exhibit J-2), or \$10,104 per annum. Like the Charging Party, Vajo was first employed by the Respondent in the Fall of 1977 as a step one Clerk/Typist and advanced one step on the salary guide each year until her promotion to General Secretary. Vajo had not been active in the organizing campaign in 1978-79, but did sign a card on behalf of the union (Transcript of July 21, 1983, hereafter "T-II," at pp. 72-74).

7. On August 24, 1982, the Charging Party wrote the Board Superintendent to apprise him of the fact that Vajo was earning more than the Charging Party for the same title, notwithstanding the fact that the Charging Party already held the title for two years. She requested that the Board elevate her to the sixth step of the General Secretary guide to place her two steps ahead of Vajo (Exhibit CP-2). Toward this end, Charging Party met with her Building Principal, the Board's Assistant Superintendent and Superintendent of Schools prior to the next Board meeting (T-I at pp. 26-29; T-II at p. 180). The Building Principal also wrote a letter bringing the matter to the attention of the Board (Exhibit CP-1).

8. The Board considered the Charging Party's request at its next regular meeting and referred the matter to its Personnel Committee (T-I at pp. 96-97). The Charging Party's husband attended the Board meeting, and declined to discuss the matter with Board members: "I was there for only one reason, and that was to make sure that it was entered into the minutes." (T-I at p. 92).

9. On September 14, 1982, the Charging Party filed an Unfair Practice Charge with the Commission. Upon learning of the Charge, the Board referred the entire matter to its attorney and the Personnel Committee did not further consider the matter (Transcript of September 19, 1983, hereafter "T-III," at pp. 137-138).

ANALYSIS

In Township of Bridgewater and Bridgewater Public Works Association, ___ N.J. ___ (February 2, 1984), the New Jersey Supreme Court established standards for determining whether an employer's motivation makes a personnel action illegal under our statute. ^{2/} The Charging Party must first establish that protected activity was a substantial, i.e., a motivating factor in the employer's adverse action. If the Charging Party meets this burden, the employer will be found to have violated subsection 5.4(a)(3) of the Act unless it can establish by a preponderance of the evidence that the personnel action would have taken place even in the absence of the Charging Party's protected activity. Of course, should the Charging Party fail to meet its initial burden, the complaint must be dismissed. Fair Lawn Board of Education and Raymond Grosiak, P.E.R.C. No 84-46, 9 NJPER 665 (¶ 14288 1983).

^{2/} In so ruling, the Court adopted the standards of the United States Supreme Court in Mount Healthy City Bd/Ed v. Doyle, 429 U.S. 274 (1977) and the National Labor Relations Board in Wright Line, Inc., 251 NLRB No. 159, 105 LRRM 1169 (1980). See also, NLRB v. Transportation Management Corp., ___ U.S. ___, 113 LRRM 2857 (1983), where the U.S. Supreme Court approved the NLRB's adoption of Mount Healthy standards in Wright Line.

Preliminarily, the undersigned rejects the Respondent's claim that the charge should be dismissed because the operative facts occurred well beyond the Commission's six month statute of limitations (N.J.S.A. 34:13A-5.4(c)). It is true that the Charging Party's protected activity and attendant evidence of anti-union animus, offered to establish a motivating factor in the employer's adverse personnel action, occurred more than six months beyond the filing of the charge. However, the personnel action alleged to violate the Act is the operative event that must occur within six months of the filing of the charge. In the instant matter, the allegedly discriminatory event was the promotion of Vajo in July, 1982, and the September 14, 1982 filing by the Charging Party is clearly timely. Of course, the passage of time between the protected activity and the operative event is a relevant factor in determining whether the protected activity motivated the Respondent to effect the adverse personnel action.

Turning to the merits of the charge, the undersigned finds that the Charging Party engaged in protected activity during 1978-79, and that the Respondent was aware of the Charging Party's role as President of an organization seeking to represent Respondent's clerical employees (T-II at pp. 103-104; T-III at p. 57). Notwithstanding the lapse of time between Charging Party's exercise of protected activity and the allegedly discriminating event (i.e., the hiring of Vajo as a sixth step General Secretary), the Charging Party asserts that her protected activity was a motivating factor in the Respondent's

personnel action. To establish the nexus between the protected activity in 1978-79 and the adverse personnel action in July, 1982, Charging Party cites two examples of the Respondent's anti-union animus:

1. An agent of the Respondent called Charging Party a "troublemaker" during the 1978-79 school year because she was President of the clerical union (T-I at p. 13).

2. Agents of the Respondent objected to the listing of Charging Party as a local organization president on a New Jersey Education Association calendar in the Fall of 1982 (T-I at pp. 32-35, 99-105; Exhibit CP-4).

With respect to both of the above allegations, the Board contests the Charging Party's version of the events and their impacts. The record reveals that two Respondent agents denied the occurrence of the "troublemaker" incident (T-II at p. 104; T-III at pp. 130-131). With respect to the NJEA calendar, Respondent witnesses testified that they did not object to her appearance in the NJEA calendar, but merely inquired as to whether or not a clerical organization was still in existence (T-II at pp. 126-127; T-III at pp. 133-136).

Without opportunities to discern the demeanors of the various witnesses, it is difficult for the undersigned to determine the credibility of each witness to the above incidents. On paper, the witnesses appear equally credible on both direct and cross-examination. The Charging Party's testimony on the "troublemaker" incident

was not corroborated by any other witness, while an additional witness did corroborate testimony on the "calendar" incident. Rebuttal testimony on both incidents by the Board Superintendent was corroborated by additional witnesses.

When alleging a violation of N.J.S.A. 34:13A-5.4(a)(3), the Charging Party bears the burden of proving conduct by the Respondent which supports an inference that the Charging Party's protected activity was a motivating factor in the adverse personnel action. Bridgewater, supra. To determine whether or not the Charging Party has met its burden, the undersigned must consider several factors. As noted above, Charging Party's ability to meet this burden is encumbered by the significant time lapse between the exercise of her protected activity and the allegedly discriminating event. Moreover, the event itself, i.e., the promotion of a third party to a step four General Secretary position for which the Charging Party did not even apply, does not, on its face, evidence anti-union animus by the Respondent with respect to the Charging Party. Given the above factors, and the sharply divided and equally credible testimony concerning Respondent's conduct in the "troublemaker" and "calendar" incidents, the undersigned concludes that the Charging Party has not established that her protected activity was a motivating factor in the Respondent's promotion of Vajo. Accordingly, the undersigned recommends that the Complaint should be dismissed with respect to the alleged violation of N.J.S.A. 34:13A-5.4(a)(3) and any derivative violation of subsection (a)(1).

Assuming arguendo that the Charging Party did prove that her protected activity was a motivating factor in the promotion of a third party to a higher step on the General Secretary guide, the undersigned finds that the Respondent has established that the promotion would have taken place even in the absence of the Charging Party's protected activity. The Respondent demonstrated that its decision to promote Vajo to a step four General Secretary was supported by the following wholly legitimate reasons:

1. Vajo was the sole applicant for the General Secretary vacancy in the Guidance Office at Piscataway Vocational High School. Charging Party did not apply for the position, notwithstanding the fact that a notice of vacancy was posted at her school (T-II at p. 12, and 116; Exhibit R-6). Charging Party was aware of the vacancy (T-I at p. 78).

2. Vajo had worked in the Guidance Office at the time of her application and was enthusiastically recommended by all three Guidance Counselors for the position (T-I at p. 130; T-II at pp. 56-57; Exhibit R-8).

3. In her interview with the Board's Assistant Superintendent, Vajo indicated that she would not accept the General Secretary position unless it would constitute a raise over her anticipated 1982-83 salary as a step six Clerk/Typist (T-II at p. 69; T-III at pp. 44-52).

4. Vajo would have made \$9,568 in 1982-83 as a step six Clerk/Typist (T-III at p. 46; Exhibit R-9). In order for the General

Secretary position to constitute a raise in pay for Vajo, she had to become at least a step three General Secretary in 1982-83 at a rate of \$9,595 (Exhibit R-9). Thus, as a step three General Secretary, Vajo would have received an annual raise of \$27 over what her compensation would have been as a step six Clerk/Typist.

5. While Vajo testified that she would have accepted employment as a step three General Secretary (T-II at p. 88), the Assistant Superintendent testified that they gave her a bigger raise because of concerns about keeping Vajo as an employee and maintaining continuity in the office (T-III at p. 49).

6. Vajo's appointment as a step four General Secretary constituted a raise of \$536 over what she would have earned as a step six Clerk/Typist.

7. The Guidance Office General Secretary position, although on the same salary guide as all General Secretary positions, was traditionally a better paid position than other General Secretary positions (T-I at pp. 27-28).

8. The Board's "Handbook for Secretarial and Clerical Personnel" provided for negotiation of starting salary levels for new employees and new positions (Exhibit J-1, pp. 9-10). ^{5/}

^{5/} Charging Party conceded that while she was familiar with the handbook, she did not attempt to negotiate a higher step placement when she was promoted to General Secretary in 1980-81 (T-I at pp. 59-60). This testimony was corroborated by the Board Superintendent (T-III at pp. 130 and 156). While the Charging Party maintains that she should have been placed higher on the Clerk/Typist guide when originally hired by the Board due to her previous experience, this concern is totally unrelated to, indeed (Continued)

In the context of the circumstances listed above, the undersigned concludes that the Respondent's promotion of Vajo to a step four General Secretary position would have taken place even in the absence of Charging Party's protected activity. Respondent needed to fill an important position for which Vajo was the sole applicant, and Vajo would not take the position in the absence of a raise. While it is true that Vajo would have received a raise if she was promoted to a step three General Secretary, and that Vajo testified that she would have accepted a step three General Secretary position (T-II at p. 88), the Respondent's rationale for promoting Vajo to step four seems eminently reasonable. ^{6/} The undersigned concludes that, whether or not the Charging Party carried her burden on the alleged violations of subsections (a) (3) and derivatively (a) (1), the Board demonstrated that its disputed action would have taken place. Accordingly, the undersigned recommends that the Commission dismiss the complaint with respect to the alleged violations.

- 5/ (Continued) preceeded, any protected activity by the Charging Party. Moreover, Vajo, too, had prior experience but originally started at step one of the Clerk/Typist guide (T-II at p. 75).
- 6/ Indeed, if Vajo was promoted to step three, she would have been making the same salary as Charging Party. In that event, Charging Party could still have argued that the Board was treating her unfairly, since Charging Party had two more years experience as a General Secretary. Under these facts, as well as the actual circumstances, the Board's only prudent choice was to give Vajo a raise with her promotion, notwithstanding any comparison to Charging Party.

In addition to the above allegations, Charging Party alleges that the Respondent violated her right to process a grievance, as granted by the New Jersey Constitution at Article I, paragraph 19:

Persons in public employment shall have the right to organize, present to and make known to the State, or any of its political subdivisions or agencies, their grievances of their own choosing.

The Charging Party argues that when Respondent ceased the processing of her grievance subsequent to receipt of the Unfair Practice Charge, it violated the above Constitutional provision. Through this conduct, the Charging Party alleges, the Respondent interfered with, restrained and/or coerced the Charging Party, an independent violation of N.J.S.A. 34:13A-5.4(a)(1).

While the Charging Party did not specifically plead this violation in its Unfair Practice Charge, the undersigned is satisfied that the issue has been fully and fairly litigated and is appropriately before the undersigned for determination. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Docket No. A-1642-82T2 (12/8/83). ^{7/}

The Constitutional provision cited by the Charging Party is clearly intended to protect public employees in the presentation of grievances. This provision is reiterated and buttressed by language subsequently adopted by the Legislature in the Act at Section 5.3:

^{7/} Indeed, the Respondent itself introduced evidence of its rationale for suspending the processing of the grievance by its Personnel Committee (T-III at pp. 136-138).

"When no majority representative has been selected as the bargaining agent for the unit of which an individual employee is a part, he may present his own grievance either personally or through an appropriate representative of an organization of which he is a member and have such grievance adjusted." The New Jersey Supreme Court has held that the above provision of the Act and Article I, paragraph 19 of the New Jersey Constitution protect consistent individual rights. Red Bank Reg. Ed. Assn. v. Red Bank Reg. High School Bd. of Ed., 78 N.J. 122, 136 (1978).

While the undersigned believes that a public employer who violates the precepts of Article I, paragraph 19 of the Constitution and Section 5.3 of the Act could be found to have violated Section 5.4(a)(1) of the Act,^{8/} the Charging Party has not proven such a violation in the instant matter. The record reveals that the Respondent did allow the presentation of the Charging Party's grievance before the entire Board at the first possible opportunity, and expeditiously referred the matter to its Personnel Committee. Before the Personnel Committee could act, the Charging Party filed her Unfair Practice Charge with the Commission, whereupon the Board referred the entire matter to its legal counsel (T-III at pp. 136-138). Under the facts presented, the undersigned finds that the Respondent did not violate either the letter or the spirit of cited provisions of the Constitution or the Act. Thus, the Respondent's treatment of the Charging Party's grievance did not violate Section 5.4(a)(1) of the Act.

8/ The undersigned is not aware of any analagous Commission caselaw.

RECOMMENDED ORDER

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



Mark A. Rosenbaum
Hearing Examiner

DATED: February 23, 1984
Trenton, New Jersey