

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAPE MAY CITY BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-79-58-26

CAPE MAY CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Commission denies a request for special permission to appeal an interlocutory decision of the Hearing Examiner to the full Commission. The key issue in the unfair practice complaint is whether two non-tenured teachers were not renewed because of their support of the Education Association. A petition based upon the same series of events had also been filed by the teachers with the Commissioner of Education and the Board had made a motion to the PERC Hearing Examiner that he stay the unfair practice hearing until the hearing in the Department of Education was completed. The Hearing Examiner denied the motion, whereupon the Respondent sought special permission to appeal the interlocutory ruling to the full Commission pursuant to N.J.A.C. 19:14-4.6(b).

The Chairman recognized the plight of the Board in possibly having to litigate the validity of the same factual allegations in two forums, in the absence of a choice of forums by the Charging Party, and noted that the Board's similar motion to the Commissioner of Education's Hearing Examiner had also been denied. However, as the key issue of anti-union animus as the motivation for the non-renewal fell directly within the exclusive jurisdictions conferred upon PERC by subsection 5.4(c) of the Act (N.J.S.A. 34:13A-5.4(c)), the question did not warrant the delay inherent in an interlocutory appeal to the full Commission. He further recognized that the Board was interested in taking steps to resolve the jurisdictional question and therefore his denial of special permission to appeal would expedite the exhaustion of administrative steps which would permit a judicial resolution of the question.

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Appearances

For the Respondent, Pachman, Aron & Till, Esqs.
(Mr. Martin R. Pachman, Of Counsel)

For the Charging Party, Greenberg & Mellk, Esqs.
(Mr. William S. Greenberg, Of Counsel)

DECISION ON REQUEST FOR
SPECIAL PERMISSION TO APPEAL

An Unfair Practice Charge was filed with the Public Employment Relations Commission on September 11, 1978 by the Cape May City Education Association (the "Association") alleging that the Cape May City Board of Education (the "Board") had violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The charge was processed in accordance with the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 16, 1978. The first day of hearing was held on December 5, 1978 before Commission Hearing Examiner Robert T. Snyder.

The charge alleges that two non-tenured teachers,

Susan Kornacki and Ellen Bringhurst, were questioned by the school Principal as to whether their "loyalty" lay with the Board or with the "teachers union" and on other matters relating to their activities in support of the Association. Shortly thereafter, both teachers received their annual evaluations, which were uniformly good except in two areas, "cooperation" and "conduct", in which they received low ratings. It is alleged that the only reasons for the adverse ratings in these two areas were their activities in support of the Association, including apparently their reaction to the Principal's questioning of their activities. Subsequently, based upon this evaluation and the Principal's adverse recommendation, also an outgrowth of these evaluations, these two teachers were not offered contracts for the next school year and their employment with the Board has now been terminated.^{1/} The Association maintains that this entire course of conduct culminating in the termination of these two teachers violates the Act in several respects and constitutes unfair practices.^{2/}

^{1/} Cape May City is a small school district and the Administrative Principal is the chief administrator of the district.

^{2/} Specifically, the Association charges violation of subsections (1), (2) and (3) of N.J.S.A. 34:13A-5.4(a) which prohibits 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."

The issue presented in this application does not relate to the validity of these allegations but rather raises a procedural question involving a possible conflict in the jurisdiction of this Commission with that of the Department of Education. In addition to filing the instant charge, a petition has been filed with the Commissioner of Education which also challenges the two teachers' non-renewal. At this point in time, apparently two days of hearing has been held before each agency. At the December 5, 1978 hearing before PERC's Hearing Examiner, counsel for the Board made an oral motion that further proceedings in the unfair practice case be stayed pending the outcome of the concurrent proceeding before the Commissioner of Education.^{3/} This motion was denied, also orally, by the Hearing Examiner.^{4/}

By letter dated December 11, 1978, the attorney for the Board requested special permission to appeal the Hearing Examiner's denial of the stay to the Commission. Pursuant to Commission Rules, such requests are directed to the Chairman. N.J.A.C. 19:14-4.6(b). The Chairman, as the only full time member and the chief executive officer, (N.J.S.A. 34:13A-5.2), has been delegated the responsibility to pass upon requests to appeal interlocutory rulings

^{3/} T. Vol 1, Pg. 2-18 to pg. 7-8.

^{4/} T. Vol. 1, pg. 24-8 to 28-25. In the transcript there was some discussion of this being a preliminary ruling which might be modified if a subseauent motion were made in writing to the Hearing Examiner. However, no such expanded presentation was made. Rather, the instant application was made to the under- signed.

of hearing examiners to the full Commission.^{5/} If the request is granted by the Chairman, it goes to the full Commission for review.

In the instant case the Chairman, upon receipt of the Board's request, wrote to counsel for the Association providing an opportunity to respond. That response having been received, it is now appropriate to rule upon the application.^{6/}

In its request the Board states that on December 11, 1978, the same day it prepared this application, it had also made a motion to the Commissioner of Education's Hearing Examiner that the proceeding in that forum be stayed pending the outcome of the PERC unfair practice case. That motion was denied by that Hearing Examiner, leaving the Board in the position of having to litigate what it maintains are the same issues in two forums. As stated in the Board's own application:

^{5/} N.J.S.A. 34:13A-6(f) permits the Commission to delegate one of its members or an officer of the Commission to act on its behalf in carrying out any duty and may delegate any powers possessed by the Commission necessary to discharge that duty.

N.J.A.C. 19:14-6(a) provides that all motions, rulings and orders of Commission hearing examiners shall become part of the record and shall be considered by the Commission when it reviews the entire case prior to issuing its decision are not to be appealed directly to the Commission on a piecemeal basis. However, N.J.A.C. 19:14-6(b) provides an exception to this general rule by permitting requests for special permission to appeal interlocutory rulings and sets forth the procedure to be followed.

If a ruling on a motion were to finally dispose of the matter, other provisions of the rule provide for direct review by the Commission.

^{6/} The Association's responding papers were mailed on December 22, 1978, but unfortunately were returned to their attorney due to a postal problem. They were, therefore, not received by the Commission until January 3, 1979.

The Board specifically takes no position regarding jurisdiction of this matter. Our sole position is that the Supreme Court has mandated that it not proceed simultaneously in two forums.

This Commission is sympathetic to the plight of the Board. An examination of the unfair practice charge, which now constitutes the complaint, and the petition filed with the Department of Education, indicates that the factual allegations in both are nearly a word for word duplication. Both are a multi-paragraph recitation of the allegations summarized earlier in this decision. Both relate the prior favorable evaluations of the two teachers as to their professional competence and performance; the interviews with their Principal in which they were questioned as to their "loyalty" and their participation and position on certain issues in dispute between the Board and the Association; the subsequent chronology of the Board's actions in not renewing their contracts based upon the evaluation and recommendation of the Principal; and the allegation that the true reason for the unsatisfactory evaluation and non-renewal was to punish them for their support of the Association. In its answer the Board admits the fact that interviews, evaluations, and Board meetings took place on the dates alleged but denies all allegations as to the content of the interviews relating to Association activities, loyalty to the Board and the reasons for the teachers' non-renewals. It therefore appears that, regardless of the legal theories argued, the same factual issues will have to be resolved in both forums. The Commission fully appreciates that such duplication should be avoided if at all possible.

The Supreme Court of New Jersey has recently addressed the problem of the potential overlap of jurisdiction between separate

administrative agencies and the need to avoid having the same facts litigated in two forums. In Hinfey v. Matawan Regional Board of Education, 77 N.J. 514 (1978) the Supreme Court states:

Comity and deference to cognate tribunals are designed to assure that a controversy, or its most critical facets will be resolved by the forum or body which on a comparative scale, is in the best position by virtue of its statutory status, administrative competence and regulatory expertise to adjudicate the matter. These precepts prudently applied serve as well to circumvent collisions between administrative agencies occupying similar areas and to avoid conflicts in agency decisions over the same subject matter.

77 N.J. at 532.

In an effort to meet the mandate of this decision the undersigned has written to the Commissioner of Education, copies to the parties, bringing to his attention the fact that hearings had been commenced before both agencies in this issue.^{7/} The Commissioner has recently responded that due to the fact that matters similar to those raised in the petition before the Department have been passed upon in petitions over a long period of years, and the petitioner having elected to file with the Department, the matter should continue to final determination in that forum.^{8/}

At this point in time counsel for the two teachers has not

^{7/} By letter dated December 7, 1978 the undersigned wrote advising of the pendency of both matters. On December 18, 1978, a second letter was sent, copies to the parties, advising the Commissioner that the Board had made the two motions for stays, and that the within motion had been filed. It indicated that while it was preferred that the attorneys for the two parties choose one forum in which to litigate the factual questions, it did not appear that they would do so; therefore the undersigned was prepared to rule upon the motion.

^{8/} This letter was dated December 20, 1978. The Commission appreciates the dilemma that the Commissioner faces, as the petition does allege violations of Title 18A.

elected to proceed in only one forum,^{9/} and it appears that the matter is going forward in both agencies. Thus it is necessary to rule upon the Board's motion herein. As indicated earlier the gravamen of the unfair practice charge and, it appears, the petition, is that these two teachers received adverse evaluations and were not rehired in retaliation for their active support of the Education Association. The Association in its response to this motion concedes that the key factual element is the anti-union animus of the Board and that this issue is also raised before the Commissioner.^{10/} It also recognizes that given PERC's jurisdiction over unfair practices, the Commissioner of Education may choose to stay the whole proceeding before the Department pending the adjudication of the anti-union animus before PERC.^{11/}

^{9/} The same attorney represents the teachers in both forums. The Commission fully understands that the charging party is making different legal arguments before the Commissioner than it is before PERC. It is also understandable that the charging party would attempt to file in each forum which might have the authority to remedy the alleged wrong. However, it would be preferable that where the same attorney represents the parties in each forum that counsel select the one which it deems most appropriate given the key elements alleged to constitute the illegal conduct and to litigate at least the factual matters there.

^{10/} The Association also argues that even absent anti-union animus the decision to terminate these teachers was arbitrary and capricious and that the statement of reasons provided pursuant to Title 18A was deficient.

^{11/} This letter response was not prepared until after the Commissioner had written his letter referred to earlier. Additionally, it does not appear that counsel for the parties received copies of the Commissioner's letter. No further response from the Department of Education has been received to date, though counsel for the charging party did send a copy of its letter in response to the Commissioner and the Department's Hearing Examiner.

N.J.S.A. 34:13A-5.4(c) delegates to PERC the "exclusive power" to prevent anyone from engaging in unfair practices. This Commission was given this express power in response to the Supreme Court's admonition to the Legislature that if it intended that PERC should hear such questions, it should so provide in clear and explicit language. Burlington County Evergreen Park Mental Hospital v. Cooper, 56 N.J. 579 (1970). The Legislature did so provide in 1974 when it enacted Chapter 123, P.L. of 1974 and added Section 5.4 to the Act. This was intended to provide one forum, PERC, for the resolution of all issues involving public sector labor relations and the rights of employees under the Act. Englewood Bd. of Ed. v. Englewood Teachers Ass'n, 135 N.J. Super. 120 (App. Div. 1975); Bd. of Ed. of Plainfield v. Plainfield Ed. Ass'n, 149 N.J. Super. 521 (App. Div. 1976); Township of Montclair v. P.B.A. Patrolmen's Benevolent Ass'n v. Montclair, 70 N.J. 130 (1976); Galloway Twp. Bd. of Ed. v. Galloway Twp. Ed. Ass'n., 78 N.J. 1 (1978). The critical factual allegations of this case, both before this Commission and the Department of Education, raise questions of discriminatory conduct motivated by anti-union animus.^{12/}

Under the authority conferred on the Chairman by N.J.A.C. 19:14-4.6(b) special permission to appeal interlocutory rulings

^{12/} In City of Hackensack v. Winner, 162 N.J. Super. 1 (App. Div. 1978) (cert. granted N.J. (1978) on the question of agency jurisdiction) the Appellate Division suggests that even where the factual allegations raise possible violations of more than one statutory scheme, where the key elements are unfair practice allegations PERC should adjudicate the facts. The other agency should defer its proceedings and then utilize the PERC findings of fact to resolve any remaining issues where appropriate. 162 N.J. Super. at 32.

should only be granted sparingly. In the instant case the undersigned, while reluctant to engage in a contest over jurisdiction with a companion agency, has examined the pleadings filed with both forums and has no doubt that this matter should proceed before PERC. Under such circumstances, it would not be appropriate to refer the Hearing Examiner's interlocutory ruling to the full Commission. Additionally, and perhaps more importantly in this case, it is imperative that the jurisdictional controversy be resolved quickly. The Board in its request concludes by stating:

We would appreciate an immediate response to this application so that we may move to seek judicial relief in the event relief is not afforded by your agency.

A decision by the undersigned will expedite this resolution by completing the administrative processing of this interlocutory ruling.^{13/} For all the reasons expressed above, the undersigned believes that PERC is the appropriate forum in which to litigate the factual questions presented by this matter, and that the hearing of the within complaint before PERC should not be stayed pending the completion of the hearing on the similar factual issues before the Department of Education. Therefore, the request for special permission to appeal

^{13/} Again, the undersigned believes that this controversy could be avoided by having the charging party select the one forum which it believes has jurisdiction over the key elements in the case and indicating its desire to proceed there exclusively or at least initially.

the ruling of the Commission's Hearing Examiner Robert T. Snyder is denied.



Jeffrey B. Tener
Chairman

DATED: Trenton, New Jersey
January 8, 1979