P.E.R.C. NO. 2022-30

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BRANCHBURG TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2018-071

BRANCHBURG TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, David B. Rubin, P.C., attorneys (David B. Rubin, of counsel)

For the Charging Party, Bergman & Barrett, attorneys (Michael T. Barrett, of counsel)

DECISION

This case is before the Commission on exceptions filed by the Branchburg Township Education Association (Association) to a Hearing Examiner's Report and Recommended Decision granting the Branchburg Township Board of Education's (Board) motion for summary judgment on the Association's unfair practice charge. The charge and amended charge, filed on September 6 and 12, 2017, respectively, allege that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(2) and (3), when, in an effort to hinder or discourage her union activities as Association President, it treated Rhonda A. Sherbin unfairly and disparately by holding her to different and higher performance standards than

her colleagues during the 2016-17 school year, particularly in her March 6, 2017 performance observations and her June 30, 2017 summative evaluation; that disparate treatment resulted in the imposition of a corrective action plan (CAP) in June 2017 for Sherbin for the 2017-18 school year. On April 2, 2018, the Acting Director of Unfair Practices issued a Complaint and Notice of Hearing on the N.J.S.A. 34:13A-5.4a(3) claim.[1/] Also on April 2, the Board filed an Answer denying the allegations.

On July 27, 2021, the Board filed a motion for summary judgment, together with a brief, exhibits, and the joint certification of Superintendent Rebecca Gensel (Gensel) and Whiton School Principal Danielle Shober (Shober). On September 22, the Association filed its opposition to the motion for summary judgment, together with a brief and the certification of Sherbin. On October 6, the Board filed a reply brief and the supplemental certification of Shober. On November 22, following the Hearing Examiner's request, the Board filed copies of Sherbin's 2017-18 CAP, performance report, and results.[2/]

1/ This provision prohibit public employers, their representatives, or agents, from: "(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."

2/ The certification of the Board's counsel authenticating these documents mistakenly describes them as CAP documents for the 2016-17 school year. The attached documents are for (continued...)

On December 7, 2021, the Hearing Examiner issued his decision granting the Board's motion for summary judgment and dismissing the Complaint. The Hearing Examiner found that the Association's 5.4a(3) claim must fail because "the Association has failed to sufficiently establish, demonstrate, and/or plead a nexus between Sherbin's protected activity and adverse employment action - and that the Board has established that the adverse employment action would have taken place absent the protected activity." (H.E. at 44). Specifically, the Hearing Examiner found that the Association had not established that Sherbin engaged in protected activity or suffered an adverse employment action, and even if it did, "[t]he record demonstrates that Sherbin's observation(s), evaluation, and CAP were fully-anticipated and completed in a time/manner consistent with the ordinary course of business; that they would have taken place absent any known/unknown protected activity." (H.E. at 39, 43). On December 16, 2021, the Association filed exceptions to the Hearing Examiner's decision. On December 21, the Board filed a brief in opposition to exceptions.

STANDARD OF REVIEW

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. See N.J.A.C.

2/ (...continued)
the 2017-18 evaluation cycle, and the record indicates that Sherbin had a CAP for 2017-18 but not 2016-17.

19:14-8.1(a). The standard we apply in reviewing a Hearing Examiner's decision and recommended order is set forth in part in N.J.S.A. 52:14B-10(c). In the context of a motion for summary judgment, the relevant part of the statute provides:

> The head of the agency, upon a review of the record submitted by the [hearing examiner], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . ., the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. . . . In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954). N.J.A.C. 19:14-4.8(e) provides:

> If it appears from the pleadings, together with the briefs, affidavits and other documents filed that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

In determining whether there exists a "genuine issue" of material fact that precludes summary judgment, we must "consider whether

the competent evidential materials presented, when viewed in the light most favorable to the non-moving party, are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party." Brill, 142 N.J. at 540. We "must grant all the favorable inferences to the non-movant." Id. at 536. The summary judgment procedure is not to be used as a substitute for a plenary trial. Baer v. Sorbello, 177 N.J. Super. 183 (App. Div. 1981), certif. denied, 87 N.J. 388 (1981). Summary judgment "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DeMedio, 275 N.J. Super. 488, 495 (App. Div. 1995).

SUMMARY OF FACTS

We have reviewed the Hearing Examiner's Findings of Fact and find that they are supported by the record. We accordingly adopt and incorporate the Hearing Examiner's Findings of Fact. (H.E. at 4-21). We summarize the pertinent facts as follows.

Sherbin has been employed by the Board as a teacher since 1998. From 2011-2020, Sherbin was an instructional support teacher at the Whiton School. Sherbin also served as Association President during the 2016-17 school year. After becoming Association President, Sherbin filed a grievance against the Board on behalf of bus drivers regarding an issue that was overlooked for many years. During the 2016-17 school year, the Board conducted four classroom observations of Sherbin on:

October 26, 2016; January 27, 2017; February 15, 2017; and March 6, 2017. Three different evaluators conducted the observations (Shober conducted the first and last observations). The teacher evaluation system utilized by the Board requires teachers to be observed and evaluated under seven different standards as either Highly Effective, Effective, Partially Effective, or Ineffective. When one or more standards are rated Ineffective or two or more are rated Partially Effective, the Board develops a CAP to focus on improving the teacher's performance in those areas during the following school year.

On June 30, 2017, the Board issued Sherbin's annual summative evaluation for the 2016-17 school year. She was rated Partially Effective under the Professional Knowledge and Instructional Delivery standards, which resulted in a CAP for the following year. Gensel and Shober certify that Sherbin's Partially Effective ratings were based on comments registered by the three evaluators in their classroom observation reports. Sherbin certifies that her 2016-17 observation report was not done authentically or ethically and that it (and her resulting CAP) was triggered by her becoming Association President and filing the bus driver grievance.

Sherbin received all Effective or Highly Effective ratings in her 2014-15 and 2015-16 summative evaluations. Sherbin previously received two Partially Effective ratings in her 2013-

14 summative evaluation, which led to a CAP for 2014-15 that she successfully completed. Sherbin certifies that her 2013-14 Partially Ineffective ratings and resulting CAP were also retaliation for her actions as a union representative, as she was involved in a successful grievance that year over missing teacher prep time that went to arbitration and cost the district thousands of dollars.[3/] Gensel and Shober certify that at no time has Sherbin's union activity negatively impacted their ratings of her teaching performance. Sherbin again received two Partially Effective ratings in her summative evaluation for the most recently completed school year (2020-21). Neither party specifically addressed whether Sherbin received any Partially Effective ratings during the years between the 2016-17 summative evaluation at issue in this charge and the 2020-21 evaluation.

ARGUMENTS

The Association excepts to the Hearing Examiner's legal conclusion to dismiss the charge through summary judgment. It argues that the parties' certifications contain disputed issues of material fact concerning whether the Partially Ineffective

3/ Sherbin's discussion of the Board's alleged anti-union animus concerning her 2013-14 evaluation was offered in retort to the Board's statement that her 2016-17 evaluation was not the only time she received Partially Effective ratings. We do not understand it as a basis for an unfair practice claim as to the 2013-14 evaluation; we concur with the Hearing Examiner that any unfair practice claim preceding March 6, 2017 is outside of the six month statute of limitations and untimely. N.J.S.A. 34:13A-5.4(c).

ratings in Sherbin's 2016-17 summative evaluation were motivated by hostility towards her advocacy as Association President. The Association contends that a review of evaluation scores leading up to the 2016-17 summative evaluation reveals a significant drop and that, while there may be reasonable and educationally sound reasons for the change, the alleged retaliatory reasons for these irregularities should be determined in a full hearing.

The Board asserts that summary judgment is appropriate because the Association has not presented evidence of an adverse employment action or proof of retaliatory intent for Sherbin's evaluation ratings. It notes that at no time did Sherbin suffer any diminution in salary, tenure rights, or seniority. The Board argues that Sherbin's observations were conducted by numerous evaluators and that the Hearing Examiner was right to consider the implausibility that they all conspired together to manipulate her evaluation. It contends that the Association has provided no support for its allegation that Sherbin was rated more harshly than others. The Board asserts there is no evidence of hostility towards Sherbin's union activities and that she cannot be insulated from evaluation and placement on a CAP simply because she was the Association President.

ANALYSIS

Allegations of anti-union discrimination under N.J.S.A. 34:13A-5.4a(3) are governed by In re Bridgewater Tp., 95 N.J.

235, 240-245 (1984). Bridgewater established that the charging party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. If the employer did not present any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct.

We concur with the Hearing Examiner's determination that a negative evaluation by itself, without a nexus to protected activity, does not rise to the level of an adverse employment action that is an essential element of a 5.4a(3) claim. (H.E. at 35). While the Commission and its Hearing Examiners have considered allegations of decreased evaluation ratings in retaliation for protected union conduct, it has usually been in

conjunction with adverse employment actions that resulted from the illegally motivated evaluations. See, e.g., Collingswood Bd. of Ed., P.E.R.C. No. 86-50, 11 NJPER 694 (¶16240 1985) (loss of raise due to tainted evaluation scores); LEAP Academy, H.E. No. 2008-5, 34 NJPER 27 (¶9 2007) (non-renewal due to tainted evaluations). In Irvington Bd. of Ed., H.E. No. 2015-7, 41 NJPER 302 (¶99 2015), a Hearing Examiner found that a negative teacher evaluation, even though it did not lead to an adverse action such as termination or loss of salary, was issued in retaliation for protected conduct. However, in contrast to this case, the allegations in Irvington involved multiple retaliatory changes in employment conditions of several union representatives, as well as specific examples of the principal's statements and actions that supported an inference of anti-union hostility.

In this case, Sherbin did not suffer any adverse employment actions as a result of her two Partially Effective ratings in 2016-17. The record indicates that Sherbin has previously (2013-14) and subsequently received (2020-21) two Partially Effective ratings (out of seven categories) on her summative evaluation. Thus, in three of the last eight completed school years, Sherbin has received two Partially Effective ratings on her summative evaluation. This record does not support an inference that her 2016-17 evaluation was unusual or inconsistent with her ratings in other years. There was no significant decrease or large

fluctuation in her overall ratings - she went from a composite score of 2.87 in 2013-2014, to 3.2 in 2014-15, 3.34 in 2015-16, and 2.72 in 2016-17. (H.E. at 16-19).

Furthermore, the Association has submitted nothing more than the bare allegation of a general temporal proximity between a grievance Sherbin filed as Association President at some unspecified time during the 2016-17 school year and the fact that she ultimately received some Partially Effective ratings in her summative evaluation that year. The Association has not provided any details regarding the timing of the filing of that grievance or any subsequent activity related to that grievance. It has not submitted anything to demonstrate any particular actions involving that grievance vis-a-vis the timing of Sherbin's three observations during the 2016-17 school year. We concur with the Hearing Examiner's analysis that, while timing is an important factor in determining whether anti-union hostility can be inferred, only where the personnel action is unanticipated and is taken at a time or in a manner inconsistent with the ordinary course of business does that inference arise. (H.E. at 40-41). Here, the Board performed classroom observations and evaluations to comply with the TEACHNJ statute and regulations; there is no allegation of any irregularity such as the timing or number of observations or in the evaluators chosen to observe Sherbin. Compare LEAP Academy, supra (evaluation was found retaliatory due

to "curiously accelerated evaluation scenario" consisting of multiple, suddenly, poor evaluations during tenure evaluation year that were conducted by superintendent who was openly hostile to teacher's concurrent union organizing activity).

Nor does Sherbin's role as Association President during the 2016-17 school year automatically create a nexus between protected union activity and subsequent employer action. Warren County Prosecutor's Office, P.E.R.C. No 2000-88, 26 NJPER 223 (¶31091 2000) ("Merely because an employee is a 'union activist' and is thereafter terminated is not, without more, sufficient to show that there is a nexus between the union activity and the removal. To suggest that nexus automatically exists is to infer that those who participate in union activity are entitled to greater protection than any other employee.") The Association has provided scant details about the nature of the bus driver grievance Sherbin filed in 2016-17. The Association has submitted no evidence of grievance activity involving the bus driver grievance, or that the activity occurred prior to and in proximity to her observations. Furthermore, the Association has not submitted evidence that any of the three different evaluators had any knowledge of protected activity, and/or that any of them were hostile to that activity.

For the foregoing reasons, we affirm the Hearing Examiner's decision based on the absence of any evidence of a nexus between

the Partially Effective performance ratings in the 2016-17 school year and protected activity. Therefore, the Board's motion for summary judgment is granted, and the complaint is dismissed.

ORDER

The Branchburg Township Board of Education's motion for summary judgment is granted. The complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Ford, Jones, Papero and Voos voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

ISSUED: January 27, 2022

Trenton, New Jersey