P.E.R.C. NO. 87-139

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LYNDHURST BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-87-93-45

LYNDHURST CUSTODIAL AND
MAINTENANCE ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission in the absence of exceptions, dismisses a Complaint based on an unfair practice charge the Lyndhurst Custodial and Maintenance Association filed against the Lyndhurst Board of Education. The charge alleged the Board violated the New Jersey Employer-Employee Relations Act when it did not renew two custodians' employment contracts allegedly in retaliation for their Association activities. The Chairman, in agreement with a Commission Hearing Examiner and noting the absence of exceptions, finds that the Association did not present evidence that the Board was hostile to the custodians' Association activities.

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LYNDHURST CUSTODIAL AND
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Charging Party.

Appearances:

For the Respondent, Cecchi & Politan, Esqs.
(Antonio Inacio, of counsel)

For the Charging Party, Zazzali, Zazzali & Kroll, Esqs.
(Kenneth I. Nowak, of counsel)

DECISION AND ORDER

On October 6, 1986, the Lyndhurst Custodial and Maintenance Association ("Association") filed an unfair practice charge against the Lyndhurst Board of Education ("Board"). The charge alleges 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),(3) and (5),[1/] when it did not renew two custodians' employment

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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;

Footnote Continued on Next Page

contracts allegedly in retaliation for their Association activities.

On October 9, 1986, a Complaint and Notice of Hearing issued.

On October 20, 1986, the Board filed its Answer. It asserts it refused to renew the contracts for "legitimate business reasons and not in retaliation for the alleged union activities."

On March 11, 1987, Hearing Examiner Alan R. Howe conducted a hearing. The Association presented two witnesses and both parties introduced their agreement. At the conclusion of the Association's case, the Board moved to dismiss the Complaint.

On March 25, 1987, the Hearing Examiner issued his report granting the Board's motion. H.E. No. 87-56, 13 NJPER ___ (¶_____ 1987). He concluded that the Association had presented no evidence that the Board was hostile to the custodians' protected activities or that it did not negotiate in good faith.

The Hearing Examiner served his report on the parties and advised them that exceptions were due by April 7, 1987. No exceptions were filed.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-8) are accurate. I adopt and incorporate

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1/ Footnote Continued From Previous Page

and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

them here. Acting pursuant to authority delegated to me by the full Commission in the absence of exceptions, I dismiss the Complaint.[2/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

DATED: Trenton, New Jersey
May 18, 1987
ISSUED: May 19, 1987

2/ I note that the issue of whether the Board violated the contract's seniority provisions in laying off these employees is being submitted to binding arbitration. Lyndhurst Bd. of Ed., P.E.R.C. No. 87-111, 13 NJPER ___ (¶____ 1987).

H.E. NO. 87-56

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

In the Matter of

LYNDHURST BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-87-93-45

LYNDHURST CUSTODIAL AND MAINTENANCE ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner, in granting a Motion to Dismiss at the conclusion of the Charging Party's case, recommends that the Commission find that the Respondent Board did not violate §§5.4(a)(1), (3) or (5) of the New Jersey Employer-Employee Relations Act when the Respondent failed to renew the employment contracts of a custodian and a bus driver for the 1986-87 school year. Admittedly, the two individuals involved were officers and/or representatives of the Charging Party and had engaged in the processing of grievances and participation in collective negotiations. However, the Charging Party failed to adduce any evidence that the Respondent was hostile toward these employees in the exercise of their admitted protected activities nor was there any proof adduced of anti-union animus.

Under N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979) the Charging Party must adduce at least a "scintilla" of evidence to support its contentions. In this case there was not even a "scintilla" of evidence adduced by the Charging Party that the Respondent Board was hostile to the Association or to the two individuals who were not renewed for employment. Also, as to the allegation that the Respondent violated §§5.4(a)(1) and (5) of the Act, the Hearing Examiner found that there was no manifestation of "bad faith" on the part of the Respondent in collective negotiations. The mere fact that the negotiations were protracted, spanning some eleven months, was not deemed an indication of bad faith.

A Hearing Examiner's decision to dismiss is not a final administrative determination of the Public Employment Relations Commission. The Charging Party has ten (10) days from the date of the decision to request review by the Commission or else the case is closed.

H.E. NO. 87-56

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

In the Matter of

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Respondent,

-and-

Docket No. CO-87-93-45

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Appearances:

For the Respondent
Cecchi & Politan, Esqs.
(Antonio Inacio, Esq.)

For the Charging Party
Zazzali, Zazzali & Kroll, Esqs.
(Kenneth I. Nowak, Esq.)

HEARING EXAMINER'S DECISION AND ORDER
ON RESPONDENT'S MOTION TO DISMISS

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on October 6, 1986, by the Lyndhurst Custodial and Maintenance Association (hereinafter the "Charging Party" or the "Association") alleging that the Lyndhurst Board of Education (hereinafter the "Respondent" or the "Board") has 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. (hereinafter the "Act"), in that

in April 1986, the Respondent sent notices of non-renewal to four custodians, two of whom were union officers and members of the negotiating team with whom the Respondent was then negotiating; the contract negotiations were considerably longer in duration than any other contract negotiations between the parties; and the Respondent refused to renew the contracts for the four custodians in retaliation for their union activities as unlawful intimidation in the bargaining process; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 9, 1986. Pursuant to the Complaint and Notice of Hearing, a hearing was held on March 11, 1987,[2/] in Newark, New Jersey, at

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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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ The reason for the delay in the holding of the hearing was the request for several adjournments by the parties due to problems that the Charging Party was having in obtaining answers to interrogatories propounded by the Charging Party to the Respondent.

which time the Charging Party was given an opportunity to examine witnesses and present relevant evidence. At the conclusion of the Charging Party's case, the Respondent made a Motion to Dismiss on the record and the Hearing Examiner, after hearing oral argument, granted the Motion on the record as to the allegations that the Respondent had violated §5.4(a)(3) of the Act. Decision was reserved until March 12th as to whether or not the Motion to Dismiss should also be granted with respect to the §§5.4(a)(1) and (5) allegations in the Complaint. In a telephone conference with counsel for the parties on March 12, 1987, the Hearing Examiner advised counsel that he was also granting the Respondent's Motion to Dismiss as to the §§5.4(a)(1) and (5) allegations in the Complaint.[3/]

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and upon the record made by the Charging Party only, and after consideration of the oral argument of the parties both at the hearing on March 11, 1987 and during the telephone conference on March 12, 1987, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

3/ It was agreed at the hearing on March 11th that a written decision would issue in due course.

Upon the record made by the Charging Party only,[4/] the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Lyndhurst Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Lyndhurst Custodial and Maintenance Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Bruce Frain was employed by the Respondent from 1981 through May 30, 1986, as a custodian. From 1983 to May 30, 1986, Frain was both the Vice-President of the Association and a member of its Negotiating Committee. In these latter two capacities Frain processed grievances, both formal and informal, and participated in the negotiation of three collective agreements.

4. Frain was never disciplined by the Respondent and his evaluations were good to excellent. Also, Frain received an increment each year of his employment with the Respondent.

5. There were 21 custodians employed by the Respondent in 1986 and all of them received notices of non-renewal on or about April 27, 1986. On either May 12 or May 13, 1986, the Respondent

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4/ The Charging Party offered as witnesses, Bruce Frain, a custodian, who was non-renewed as of May 30, 1986, and Charles Warczakowski, a bus driver, who was not renewed at about the same time as Frain. Also, the Charging Party offered in evidence certain documents, infra.

sent out notices of renewal to 17 of the 21 custodians referred to previously; Frain did not receive a renewal notice.

6. Frain testified that the reason for his non-renewal was "financial difficulties" and that no other reason was ever given. After mid-May individuals were hired to take the place of the four custodians, including Frain, whose contracts were not renewed. Frain testified that he had more seniority than any of the other custodians who were retained for the next school year. Frain also testified that seniority had always played a role in transfers and bumping.

7. As noted above, Frain was on the Association's Negotiating Committee for the negotiation of three agreements, two of which were offered in evidence, namely, the July 1, 1984 through June 30, 1985 agreement (J-1) and the July 1, 1985 through June 30, 1987 Memorandum of Agreement, dated May 19, 1986 (J-2).[5/]

8. In collective negotiations with the Respondent, the Association has been represented by its President, William Troescher, Frain as Vice-President and Charles Warczakowski, the Association's Shop Steward, infra.

5/ Although Art. XVII, §G (J-1, p. 29) provides that "current seniority" shall afford the basis for reductions in force, it was agreed by counsel at the hearing that the Hearing Examiner was not to consider this in adjudicating the instant case since the parties are involved in a dispute before the Commission over the arbitrability of this provision of J-1. Thus, no further consideration will be given to Art. XVII, §G.

9. Frain testified that negotiations for the agreements prior to J-2, supra, were fairly easy. Negotiations for J-2 commenced in June 1985 and, after five sessions between July 16 and November 14, 1985, the Association filed a Notice of Impasse with the Commission on December 6, 1985 (CP-1). Frain had attended all five negotiations sessions.

10. Thomas Hartigan was designated as a mediator in the parties' negotiations sometime between December 1985 and February 1986. According to Frain he held one session, at which time the status of the negotiations was that the Board had offered 7% across the board. However, unlike past negotiations, the Board wanted $10,000 to be divided among four maintenance men in the Association's collective negotiations unit. In the past, the lump amount of money offered by the Board had been divided equally among the members of the Association's unit.[6/]

11. Mediator Hartigan having failed to obtain a settlement, a fact finder was appointed and on the only day that he met with the parties, May 19, 1986, the Memorandum of Agreement (J-2, supra) was executed and those signing for the Association were Troescher, Frain, Warczakowski and Mark Press, a representative of

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6/ According to Frain, the maintenance men involved had asked to negotiate on their own but the Association's President had refused this request. Also, Frain testified that the Association registered no objection with the Board that it was conducting individual negotiations with the four maintenance men.

the NJEA. As reference to J-2 indicates, there were across-the-board percentages agreed upon for the two-year period of the successor agreement; binding arbitration was provided and there were modifications in the retirement provision of the agreement. Otherwise, the prior agreement (J-1) was to remain in full force and effect. Significantly, there is no indication whatever that the maintenance men received any special consideration.

12. Although Frain testified that the notices of non-renewal, supra, occurred in or around the conclusion of the negotiations resulting in J-2, he testified further that he was not aware that the Association had had any problems in obtaining new officers after his non-renewal at the end of May 1986.

13. On cross-examination Frain acknowledged that 20 members of the Association are still employed, and among those is Troescher, who is still President of the Association. Also, Frain acknowledged that the Lyndhurst Education Association had been in negotiations for a year for a successor agreement and that the organization representing the Board's secretaries had been in negotiations for a successor agreement for eight months.7/

14. Charles Warczakowski was hired in October 1982 as a bus driver and remained in the Board's employ until June 1986. His

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7/ The purpose of these questions by counsel for the Respondent was to rebut the contention of the Charging Party that the Board manifested bad faith and was dilatory in its conduct in its negotiations with the Association, the negotiations having spanned eleven months from June 1985 to May 1986.

evaluations were "excellent" and he was never disciplined nor was a salary increment ever withheld by the Board. His notice of non-renewal came in April 1986 and the reason stated was "lack of funds."

15. Warczakowski was elected the Association's Shop Steward in 1983 and remained in that position until his non-renewal in April 1986. He processed grievances as Shop Steward and was also on the Negotiating Committee for the agreements which resulted in J-1 and J-2, supra. He testified that the negotiations leading up to J-1 were "easy" but that the negotiations, which resulted in J-2 "were difficult" and "downhill all the way." Warczakowski's testimony basically confirmed the testimony of Frain, supra, as to what happened in the negotiations in 1986 after Mediator Hartigan arrived. He also concurred with Frain on the events of May 19, 1986, when the fact finder was present and the contract was settled and J-2 was executed.

16. The Association introduced through Warczakowski Exh. CP-2, which was prepared by Warczakowski and which contains a list of seven employees in the unit whom he maintained were hired after him. Warczakowski also testified that seniority had always prevailed and that Michael Tullo, a former Board Secretary, had told him and other bus drivers that seniority "came first."

17. On cross-examination Warczakowski testified that he was never told that membership in the Association was a problem and that he was aware that 58 individuals received notices of non-renewal, including teachers and Tullo.

DISCUSSION AND ANALYSIS

The Applicable Standard On a Motion To Dismiss.

The Commission in N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979) restated the standard that it utilizes on a motion to dismiss at the conclusion of the Charging Party's case, namely, the same standards used by the New Jersey Supreme Court: Dolson v. Anastasia, 55 N.J. 2 (1969). The Commission noted that the courts are not concerned with the worth, nature or extent, beyond a scintilla, of the evidence, but only with its existence viewed most favorably to the party opposing the motion. While the process does not involve the actual weighing of the evidence, some consideration of the worth of the evidence presented may be necessary. Thus, if evidence "beyond a scintilla" exists in the proofs adduced by the Charging Party, the motion to dismiss must be denied.

Additionally, there is involved in the instant case the necessity to include in the above analysis the decision by the New Jersey Supreme Court in Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) since the thrust of the Association's charge, dealing with the non-renewals of Frain and Warczakowski, centers on the allegation that the Respondent Board violated §§5.4(a)(1) and (3) of the Act.

In Bridgewater, the Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) in "dual motive" cases where the following

requisites are utilized in assessing employer motivation: (1) The Charging Party must make a prima facie 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 in Bridgewater further refined the above test by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity, i.e., manifested anti-union animus (95 N.J. at 246).

The Respondent Board's Motion To Dismiss Is Granted Since The Charging Party Has Failed To Adduce Even A Scintilla Of Evidence As To Hostility That §§5.4(a)(1) And (3) Of The Act Were Violated When Frain And Warczakowski Were Not Renewed At The End Of The 1985-86 School Year.

Leaving aside the "scintilla" and the Bridgewater tests for a moment, the Hearing Examiner notes preliminarily that an employer may legally discharge an employee for any cause whatsoever so long as its motivation is not interference with rights protected under the Act, either our Act or the NLRA: NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666, 669 (1st Cir. 1979). Similarly, an employer can fire an employee for good, bad, or no reason at all, so long as the purpose is not to interfere with union activities: NLRB v. Loy Foods Stores, Inc., 697 F.2d 798, 801 (7th Cir. 1983).

The Hearing Examiner is persuaded that when the testimony and the documentary evidence adduced by the Charging Party is viewed most favorably to it, the Charging Party has established only that (1) Frain and Warczakowski were engaged in the exercise of protected activities, respectively, as Vice-President and Shop Steward on behalf of the Association in the grievance procedure and collective negotiations and (2) that the Respondent knew of their exercise of these protected activities. However, the Charging Party has failed to adduce any evidence whatever that the Respondent Board was hostile to or manifested anti-union animus toward Frain and Warczakowski in their exercise of protected activities. Thus, only two of the three requisites enunciated in Bridgewater for establishing a prima facie case have been met by the Charging Party, i.e., the Charging Party has failed to adduce even a "scintilla" of evidence that the Respondent Board was "hostile" to the exercise of protected activities by Frain and Warczakowski.

When the Hearing Examiner asked counsel for the Association exactly what the manifestations of hostility were toward Frain and Warczakowski, the reply was that they were disciplined by having been terminated and that this established the requisite hostility. This the Hearing Examiner refused to accept since in any "(a)(3)" situation the Charging Party would necessarily prevail by virtue of having established that a termination or, in this case, a non-renewal, had taken place. In other words, as the Hearing Examiner perceives the law as to hostility and animus, and the

required proof thereof, there must be independent evidence of such hostility or animus. Here, unlike many other cases where (a)(3) violations of the Act have been found, there is no independent evidence or hostility of animus. In the case at bar there was no evidence adduced of any employer statements through its representatives, indicating that the Respondent Board was hostile to the exercise of protected activities by Frain and Warczakowski. This being the fact, the Hearing Examiner cannot conclude that the Charging Party adduced even a "scintilla" of evidence that the Respondent Board manifested hostility toward Frain and Warczakowski in the exercise of their known protected activity.

The Charging Party having failed to adduce even a "scintilla" of evidence of hostility or animus toward the exercise by Frain and Warczakowski of their protected activities as Vice-President and Shop Steward of the Association, respectively, the Hearing Examiner must conclude that the allegations that the Respondent Board violated §§5.4(a)(1) and (3) of the Act be dismissed.

The Respondent Board's Motion To Dismiss Is Also Granted As To Allegations That It Violated §§5.4(a)(1) And (5) Of The Act By Its Conduct During Collective Negotiations.

The Association alleges in its Unfair Practice Charge, inter alia, that "The contract negotiations were considerably longer in duration than any other contract negotiations between this Board and a union..." and that "The Board then refused to renew the

contracts of these custodians in retaliation for their union activities and as unlawful intimidation in the bargaining process..." (C-1).

When one analyzes the above-quoted allegations from the Unfair Practice Charge, it is clear that the Charging Party is enmeshing in the negotiations aspect of the Charge the fact that certain custodians were not renewed in alleged retaliation for the union activities. The "(a)(3)" aspect of this case has been disposed of by the Hearing Examiner in his determination, supra, that the Respondent Board did not violate §§5.4(a)(1) and (3) of the Act.

First, as to the allegation that the contract negotiations were "considerably longer in duration" than prior negotiations between this Board and "a union," the Hearing Examiner refers to the evidence adduced through Frain on cross-examination that the negotiations involving the teachers had endured for a year and those for the secretaries had spanned eight months. Plainly, the duration of the negotiations process cannot, absent unusual circumstances, be probative on the issue of whether or not a public employer has engaged in "bad faith" negotiations. In the instant case the teachers' negotiations continued for some twelve months and those of the secretaries appear to have proceeded for some eight months. The Hearing Examiner takes administrative notice of the fact that negotiations in the public sector of this State have frequently been of prolonged duration, often exceeding a year or more. This has

occurred in such areas as municipalities and their police and fire departments and with school boards and their teachers, secretaries, custodians, bus drivers and others. Thus, the mere fact that negotiations "drag out" does not per se indicate that one party or the other has engaged in "bad faith" negotiations.

Secondly, the Charging Party also argues that when the Board proposed in the negotiations for J-2 that the sum of $10,000 be allocated for the four maintenance men, bad faith was manifested. However, the record is barren as to what transpired between the Board's having taken this position and the consummation of the Memorandum of Agreement of May 19, 1986 (J-2) where there is no indication of any separate or special treatment for the maintenance men. The agreement appears to provide only for across-the-board salary increases for all employees in the unit for the years 1985-1986 and 1986-1987. The Hearing Examiner would be speculating in the extreme if he was to draw any conclusion of illegality on the part of the Respondent Board in its negotiations with the Association regarding the Board's having at one point proposed the sum of $10,000 for the maintenance men.

Finally, in connection with the §§5.4(a)(1) and (5) allegation in the Unfair Practice Charge, the Hearing Examiner is asked to find that there was intimidation by the Respondent Board toward Frain and Warczakowski during negotiations. Again, the Hearing Examiner can find no evidence, even a "scintilla," to support such a contention.

* * * *

Accordingly, upon the foregoing, and upon the testimony and documentary evidence adduced in this proceeding by the Charging Party only, the Hearing Examiner makes the following:

ORDER

Upon the entire record adduced by the Charging Party, the Hearing Examiner concludes that the Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (5) and hereby grants the Respondent Board's Motion to Dismiss. The Complaint is, therefore, dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: March 25, 1987
Trenton, New Jersey