P.E.R.C. NO. 2004-74

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LAKEHURST BOARD OF EDUCATION,

Charging Party,

-and- Docket No. CO-H-2002-154

LAKEHURST EDUCATION ASSOCIATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission finds that the Lakehurst Board of Education violated the New Jersey Employer-Employee Relations Act when its superintendent and principal took actions and made remarks that tended to interfere with the exercise of protected rights. The Commission orders the Board to cease and desist from interfering with employees in the exercise of their rights guaranteed by the Act, to not consider reprimands of Kathleen Toohey and Michael Loughran in any future employment, and to post a notice of its actions.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Sinn, Fitzsimmons, Cantoli, West & Pardes, attorneys (Kenneth B. Fitzsimmons, of counsel)

For the Charging Party, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Richard A. Friedman, of counsel)

DECISION

On November 30, 2001 and July 29, 2002, the Lakehurst Education Association filed an unfair practice charge and amended charge against the Lakehurst Board of Education. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3) and (5),[1/] when its Superintendent and

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1/ These provisions 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

(continued...)

Principal took actions and made remarks that discriminated against Association members in retaliation for their protected activity and tended to interfere with the exercise of protected rights.

On May 24, 2002, a Complaint and Notice of Hearing issued. On August 2, Hearing Examiner Arnold H. Zudick amended the Complaint pursuant to the charging party's request. The Board filed an Answer admitting certain facts, but denying that it violated the Act.

On October 9 and 10, 2002 and June 19, 2003, the Hearing Examiner conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On January 13, 2004, the Hearing Examiner issued his report and recommendations. H.E. No. 2004-10, 30 NJPER 15 (¶5 2004). He concluded that the Board violated 5.4a(1) through its agents when Superintendent Karl Calderone and Principal Eva Marie Raleigh made remarks to employees Barbara DiCicco and Pattie Loughran that intimidated and criticized them for engaging in

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1/ (...continued)
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."

protected conduct; and violated 5.4a(1) and (3) by reprimanding DiCicco and employee Larry Wenger and issuing a negative evaluation to employees Michael Loughran and Kathleen Toohey because of the filing and processing of a grievance. The Hearing Examiner recommended that the Board be ordered to cease and desist from its illegal conduct, withdraw the reprimand and negative evaluations, and post a notice of its violation. The Hearing Examiner recommended dismissing the remaining allegations.

On January 27, 2004, the Board filed four exceptions. On February 11, the Association filed an answering brief.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 4-34) with additions discussed later.

N.J.S.A. 34:13A-5.4a(1) makes it an unfair practice for a public employer to interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act. An employer violates this provision independently of any other violation if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. UMDNJ - Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

Gorman, Basic Text on Labor Law, at 132-34 (1976). The charging party need not prove an illegal motive. Hardin and Higgins, The Developing Labor Law at 82-84 (4th ed. 2001). This provision will also be violated derivatively when an employer violates another unfair practice provision.

N.J.S.A. 34:13A-5.4a(3) makes it an unfair practice for a public employer to discriminate against employees to encourage or discourage the exercise of protected rights. Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation of this provision will be found unless the charging party has proved, 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. Id. at 246.

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. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

Raleigh's Evaluations of DiCicco and Wenger

The Hearing Examiner concluded that 5.4a(1) and (3) were violated when Principal Raleigh placed an NI (Needs Improvement) rating in Barbara DiCicco and Larry Wenger's annual performance evaluations after the Board had ordered the removal of a related reprimand from their personnel files. The Board excepts to that conclusion.

Raleigh had issued reprimands to DiCicco and Wenger for failing to complete their social studies curriculum. The Association filed a grievance over the reprimands. While the grievance was pending, Raleigh issued the teachers' annual performance evaluations and left the "Planning and Preparation" section blank pending resolution of the grievance. The Board considered the grievance and decided to remove the reprimands

from the teachers' personnel files. We add to the Hearing Examiner's finding 11 Raleigh's uncontroverted testimony that before notifying the teachers of its removal of the reprimands, the Board met with Raleigh and knew that she was going to be placing an NI rating in the teacher's evaluations (3T155). According to Raleigh, the Board called its attorney and was assured that it was something she could do (3T192). The Board then notified the teachers of its removal of the reprimands and that it expected each staff member to follow all future directives. Raleigh subsequently issued revised evaluations with an NI rating in the "Planning and Preparation" section. The Hearing Examiner found that the issuance of the revised evaluations showed hostility to the successful processing of the grievance, sending a message that the filing and winning of a grievance could not prevent the principal from criticizing the teachers.

The Board argues that its decision to remove the reprimands from the teachers' personnel files did not preclude Raleigh from finalizing the annual performance evaluations. It asserts that if the initial grievance had been intended to address the evaluation rating, another grievance would or should have been filed. The Association responds that the revised rating is inconsistent with the outcome of the initial grievance and that

it would have been inappropriate to file a grievance because the contents of an evaluation cannot be the subject of binding arbitration.

The Hearing Examiner's findings of fact did not include the fact that the Board knew, at the time it removed the reprimands from the teachers' files, that Raleigh was going to issue a revised performance evaluation to each teacher with an NI rating. Given that testimony, we do not draw the inference that Raleigh's action was not consonant with the Board's decision to rescind the reprimands or with Raleigh's belief that the teachers' failure to complete the curriculum warranted the NI rating. Accordingly, the Association has not met its burden of proving that hostility to protected activity was a substantial or motivating factor in the decision to issue the revised evaluations. The teachers did not complete the curriculum and the Board was within its rights to comment on that fact in a performance evaluation. That the Board chose not to discipline the teachers over that same issue does not preclude the Board from commenting on it in an evaluation.

Calderone's Remark to DiCicco

The Hearing Examiner concluded that Superintendent Calderone characterized Barbara DiCicco as "passive aggressive" and concluded that this characterization tended to interfere with

DiCicco's right to support the Association. The Board excepts to that conclusion. The background to that issue follows.

DiCicco has been employed by the Board as a teacher for over 30 years and has held several positions with the Association, including grievance chairperson for the past eleven years. Calderone did not trust or like DiCicco because of this persistent Association activity.

On November 1, 2001, Calderone, Raleigh, two Board members, DiCicco, Wenger, Toohey and Michael Loughran met to discuss curriculum. At a certain point, Calderone stated that he wanted to discuss teacher "cooperation" and indicated that the teachers were not cooperating.

We add to finding 12 that Calderone gave the teachers examples of the uncooperative behavior. DiCicco and Wenger, the two fifth grade teachers involved in the curriculum issue the prior year, returned their schedules stating, "these schedules are not going to work, fix it." Calderone thought that given their years of experience, they could have handled the situation in a more collaborative, cooperative manner. Calderone also referred to a problem with parents complaining about snacks (3T253).[2/]

2/ Calderone also testified about three examples of the kind of behavior DiCicco engaged in that he believed fit his description of passive aggressive. One involved the alleged improper use of a serious illness form, another involved (continued...)

Loughran and Toohey perceived that they were being reprimanded. Their request to leave was granted. Calderone then began referring to DiCicco as "passive aggressive" and repeatedly asked her if she knew what the phrase meant.

The Hearing Examiner concluded that Calderone's remarks tended to interfere with and intimidate DiCicco for engaging in Association conduct. He further concluded that Calderone did not have a substantial business justification for making the remarks in the context of the November 1 meeting.

The Board asserts that Calderone's remarks dealt with DiCicco's performance as a teacher and not with any union activity. It argues that DiCicco's participation as a union member does not preclude the Superintendent from commenting on a behavior trait that interfered with her completion of an assignment.

The Association responds that the Board has not cited to any portion of the record that supports its assertion that Calderone was referring to DiCicco's performance as a teacher. It urges adoption of the Hearing Examiner's recommendation.

We decline to draw an inference that Calderone was motivated by animus toward DiCicco, and that because DiCicco knew that

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2/ (...continued)
refusing to leave the building during a fire drill, and the third involved her action on a Professional Development committee.

Calderone considered her a troublemaker, Calderone's comments tended to interfere with and coerce DiCicco for her Association activity.

Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), permits unions and employer to criticize each other for conduct they find objectionable. What Black Horse Pike prohibits is the employer's expressing its dissatisfaction with an employee's union conduct by exercising its power over the individual's employment conditions.

Unlike the union representative in Black Horse Pike, DiCicco did not suffer an adverse personnel action in response to her protected activity. We thus find no violation of 5.4a(3). In addition, the Association has not shown that Calderone's animus toward DiCicco was exclusively anti-union animus and that the passive aggressive description was referring to DiCicco's protected activity. Nor has the Association persuaded us that calling a teacher "passive aggressive" illegally tended to intimidate or coerce employees in exercising their right to support the Association. Unflattering descriptions, although unfortunate, are sometimes part of both the work and the labor relations environment. They are not, however, necessarily illegal. The passive aggressive remark was made in the context of Calderone's critique of teacher non-cooperation. The examples

of non-cooperation and alleged passive aggressive conduct that Calderone testified about did not involve protected activity. Under all these circumstances, we conclude that the remarks did not violate the Act.

Loughran and Toohey's Reprimands

The Board excepts to the Hearing Examiner's conclusion that reprimands issued to Michael Loughran and Kathleen Toohey violated 5.4a(1) and (3). It asserts that the letters were constructive evaluations, not reprimands.

The Association responds that the text of the letters belies the Board's assertion. In addition, it asserts that Principal Raleigh advised Loughran and Toohey that because two fifth grade teachers had filed a grievance challenging reprimands they had received for not completing their curriculum, Raleigh was going to put reprimands in Loughran and Toohey's files. The Association further responds that the reprimands independently violated 5.4a(1) because they had a tendency to dissuade union affiliation and support.

The Hearing Examiner found that Calderone would not have reprimanded Loughran and Toohey were it not for the Association grievance challenging the reprimands issued to the fifth grade teachers. Raleigh thought that Loughran and Toohey had done a good job in covering their curriculum, but she did not want to be

accused of unfairness in not criticizing them when the fifth grade grievance was processed. We find irrelevant the Board's argument that the letters were evaluations, not reprimands. Negative evaluations issued in response to protected activity are as prohibited as reprimands issued for the same activity. In this case, Loughran and Toohey suffered negative employment consequences because two other employees filed grievances. Even if Raleigh were not hostile to Loughran and Toohey, their punishment tended to interfere with the right to file and pursue grievances and lacked a legitimate business justification. Accordingly, we conclude that the Board independently violated 5.4a(1). In light of the identical remedy, we need not decide whether the action also violated 5.4a(3). We accept the Hearing Examiner's recommendation and order that the letters, already removed from the teachers' personnel files, not be considered in any future employment matters.

Raleigh's Criticism of Pattie Loughran

The Board excepts to the Hearing Examiner's conclusion that the Board violated 5.4a(1) when Principal Raleigh criticized Pattie Loughran for speaking to an NJEA representative about a matter raised in a professional development committee. Loughran called the NJEA representative because she was upset that Raleigh raised the issue of the teachers' obligation to complete the

curriculum at the time the curriculum grievance was pending. The Board asserts that the committee's Code of Ethics requires members to carry out discussion as equals within the committee, and that Raleigh had sufficient operational justification to discuss the matter with Loughran.

The Association responds that after Loughran contacted the NJEA about a directive of Raleigh's that made her uncomfortable, Raleigh responded that she had no right to call the NJEA and that Loughran was a "back stabber." The Association urges adoption of the Hearing Examiner's recommendation that this unjustified statement violated the Act.

We agree with the Hearing Examiner that Loughran had a right to seek assistance from her union, and that Raleigh's calling Loughran a "back stabber" for doing so tended to interfere with that right and lacked a legitimate business justification. Nothing in the Professional Development Meeting Norms and Code of Ethics precluded Loughran from consulting with a union representative about an employment issue that arose in the committee. And nothing in that document justified Raleigh's calling Loughran a "back stabber" for doing so. See State of New Jersey (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987).

Raleigh's and Calderone's Remarks to Pattie Loughran

The Hearing Examiner found that Principal Raleigh remarked to teacher Pattie Loughran that Association representatives Barbara DiCicco and Susan Tatlow were causing problems and using Loughran as a pawn. He concluded that Raleigh's remark tended to intimidate Loughran because by criticizing DiCicco and Tatlow for engaging in Association activity, Raleigh was ostensibly suggesting that Loughran refrain from similar conduct or also be perceived as causing problems. The Hearing Examiner also found that Superintendent Calderone told Loughran that DiCicco and Tatlow were using her and that she was choosing the wrong people. He concluded that Calderone's remarks violated 5.4a(1) for the same reason that Raleigh's remark violated that provision. Absent exceptions, we adopt his analysis and recommendation that these remarks violated 5.4a(1).

Absent Association exceptions, we also accept the Hearing Examiner's recommendation to dismiss the remaining allegations in the Complaint.

We conclude by noting that both parties could have chosen less adversarial ways to address their concerns. We hope that each party will reflect on all that has transpired and make a serious effort at bridging a gap in their relations that has existed too long and is too wide for the good of all concerned. See In re Hunterdon Cty., 116 N.J. 322, 337-339 (1989).

ORDER

The Lakehurst Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by the remarks of Superintendent Karl Calderone and Principal Eva Marie Raleigh to Pattie Loughran about Association representatives Barbara DiCicco and Susan Tatlow; Raleigh's reprimanding Michael Loughran and Kathleen Toohey; and Raleigh's criticizing Pattie Loughran for speaking to a union representative.

B. Take this action:

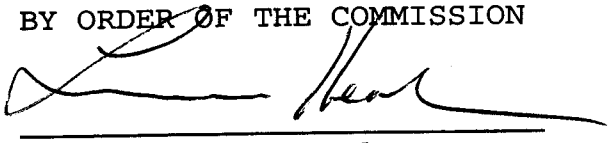
1. Do not consider the June 7, 2001 reprimands of employees Kathleen Toohey and Michael Loughran in any future employment matters.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION



Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Mastriani and Sandman voted in favor of this decision. None opposed.

DATED: May 3, 2004
Trenton, New Jersey
ISSUED: May 3, 2004

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by the remarks of Superintendent Karl Calderone and Principal Eva Marie Raleigh to Pattie Loughran about Association representatives Barbara DiCicco and Susan Tatlow; Raleigh's reprimanding Michael Loughran and Kathleen Toohey; and Raleigh's criticizing Pattie Loughran for speaking to a union representative.

WE WILL not consider the June 7, 2001 reprimands of employees Kathleen Toohey and Michael Loughran in any future employment matters.

CO-H-2002-154
Docket No.

LAKEHURST BOARD OF EDUCATION
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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