P.E.R.C. NO. 2008-57

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

KEARNY BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-2006-027

ANN TAYLOR et al.,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Kearny Board of Education based on an unfair practice charge filed by Ann Taylor and other individuals employed by the Board. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it changed the charging parties' status from full-time to part-time, thus effectively eliminating their eligibility for sick and medical benefits, in retaliation for their filing a representation petition seeking to organize full-time aides. The Commission finds that the timing of the reduction in hours, coming after voter rejection of the budget and the mandate to cut the budget, does not support a finding of hostility. The Commission also finds that the Board proved that it would have reduced the aides' hours even absent any hostility and that the Board proved by a preponderance of the evidence that the reduction in hours was motivated by the budget defeat and the immediate need to cut the budget.

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, Genova, Burns & Vernoia (Joseph M. Hannon, of counsel)

For the Charging Parties, Bucceri & Pincus (Gregory Syrek, of counsel)

DECISION

On January 4, 2006, Ann Taylor and other individuals[1/] filed an unfair practice charge against the Kearny Board of Education. The charge alleges that the Board violated 5.4a(1), (3) and (4) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:134A-1 et seq.,[2/] when it changed the charging parties' status

1/ Charging parties are Ann Taylor, Mary Bartiromo, Patricia Edwards, Dianne Foray, Dolores Leadbeater, Veronica Green, Linda Renshaw and Nancy Rowe.

2/ 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 . . . (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

(continued...)

from full-time to part-time, thus effectively eliminating their eligibility for sick and medical benefits, in retaliation for their filing a representation petition seeking to organize full-time aides.

On November 2, 2007, Hearing Examiner Wendy Young recommended dismissing the Complaint. H.E. No. 2008-3, 33 NJPER 303 (¶115 2007). The charging parties filed exceptions to the Hearing Examiner's decision and on February 28, 2008, we remanded the matter to the Hearing Examiner for consideration of additional evidence initially excluded as hearsay. P.E.R.C. No. 2008-44, 34 NJPER 40 (¶10 2008). On March 14, the Hearing Examiner issued a supplemental report again recommending the dismissal of the Complaint. H.E. 2008-7, 34 NJPER 64 (¶34 2008). The charging parties filed exceptions and the Board filed an answering brief. After consideration of charging parties' exceptions and the Board's response, we find that the Board would have reduced the aides' hours even absent any possible hostility to their organizing efforts. We therefore dismiss the Complaint.

The charging parties argue that the Hearing Examiner erred when she did not find that the Board retaliated against the charging parties for their organizing activity and when she found

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2/ (...continued)
guaranteed to them by this act . . . [and] (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

that the Board's actions were financially motivated. The Board urges adoption of the Hearing Examiner's recommendation. It argues that the Hearing Examiner properly found that the budget reductions were proper in light of its goal to prevent any cuts to classroom teachers and established education programs.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 3-19 and supplemental H.E. at 2-3). An overview follows.

The Board employed the charging parties as full-time aides. On January 12, 2004, the charging parties filed a representation petition with the agency seeking to establish the Kearny Teachers' Aides Association as the negotiations representative of a unit of all full-time aides. On August 6, the Director of Representation sent the parties a letter stating that a representation election would be ordered. The Board objected to the unit, contending that it was too narrow and must include the part-time aides. On October 18, the charging parties submitted applications for health insurance coverage to the Board. On December 16, the Commission dismissed the representation petition because the proposed unit was too narrow. Kearny Bd. of Ed., P.E.R.C. No. 2005-42, 30 NJPER 504 (¶171 2004). On January 1, 2005, the charging parties received health insurance coverage. The Board's total cost for the full-time aides' health coverage was $120,000 annually.

On April 19, 2005, the voters defeated the school budget. The Town Council then passed a resolution reducing the budget by $810,000. The Board accepted the reduced budget and began analyzing where it could reduce costs. The Board's priority was to reduce the budget without losing classroom teachers. Included in the budget analysis was the reduction of the hours of the full-time aides to part-time and the $120,000 savings in health benefits costs that would result. The Board made other staffing and program cuts as well, but none that sacrificed teaching time.

On June 17, 2005, the charging parties received letters thanking them for their service and stating that they would be retained on the active list for the 2005-2006 school year. On July 7, the Board reduced the charging parties' hours from full-time to part-time effective September 2005. On July 28, the Board notified the aides of their reduction in hours. As a result of the reduction in hours, the charging parties' health insurance coverage was terminated. This unfair practice charge ensued.

Under In re Bridgewater Tp., 95 N.J. 235 (1984), no violation 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.

We first consider whether the charging parties proved by a preponderance of the evidence that their organizing motivated the employer's decision to reduce the aides' hours from full-time to part-time. The charging parties engaged in protected activity when they sought representation and health benefits. The Board was aware of the representation petition as it filed papers with

the agency objecting to the unit. The Hearing Examiner found that the charging parties did not prove that filing the petition motivated the Board's decision.

In their exceptions, the charging parties argue that the Hearing Examiner improperly rejected their contention that the Board reduced their employment status from full-time to part-time because of their efforts to form a union. The charging parties contend that hostility is evidenced by the Board's long-standing disregard for the full-time aides and their requests to discuss issues of salary and benefits; hostile statements made by the Board President and Business Administrator; the Board's failure to discuss the reduction-in-hours with the aides prior to taking action; the lack of notice to the aides about their reduction-in-hours; and the timing of the events.

We have reviewed the evidence and agree with the Hearing Examiner that the timing of the reduction-in-hours, coming after voter rejection of the budget and the mandate to cut the budget, do not support a finding of hostility. There is no evidence in the record that the Board discussed, or even considered, reducing the aides' work hours before the April 2005 budget defeat. As for the lack of notice to the aides, without more, we will not infer that a July 28 notice to aides sent 20 days after the Board acted to reduce their hours suggests that the Board was hostile to the aides' protected activity. We also agree with the Hearing

Examiner that even if some Board members were hostile to the organizing effort and the aides' attempt to get health benefits, the Board proved that it would have reduced the aides' work hours even absent that hostility.

The charging parties also argue that the economic evidence establishes that the aides' hours did not have to be reduced for the Board to meet its budget shortfall. The Board responds that the charging parties are incorrectly finding a savings of $110,000 in the World Language Program that came from not using the surplus to expand the program, and that it was unable to achieve all of its reductions prior to the 2005-2006 school year since the Board minutes reflect that an additional $120,000 in cuts were still required during the course of that school year.

We will not speculate as to the importance or sequence of the budget cuts made by the Board. In addition, the record supports the Board's characterization of the evidence about the cuts. Thus, we agree with the Hearing Examiner that the record supports the conclusion that the Board proved by a preponderance of the evidence that the reduction in aides' hours was motivated by the budget defeat and the immediate need to cut $810,000 from the budget. There were 18 months between the filing of the representation petition and the reduction-in-hours. The budget cuts immediately followed the budget defeat and the Town Council's reduction of the budget. Since the Board proved that

the aides' hours were reduced to meet its need to cut the budget, we find that it did not violate the Act. Bridgewater. We accept the Hearing Examiner's recommendation that the Complaint be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chairman Henderson, Commissioners Branigan, Fuller and Watkins voted in favor of this decision. None opposed. Commissioners Buchanan and Joanis were not present.

ISSUED: April 24, 2008

Trenton, New Jersey