

P.E.R.C. NO. 2010-24

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WALL TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2007-055

WALL TOWNSHIP INFORMATION  
TECHNOLOGY ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Wall Township Board of Education violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it terminated an employee who tried to grieve and evaluation and enlisted the Wall Township Information Technology Association's assistance to have the Board review the contents of the evaluation and to negotiate with the Board concerning the evaluation process. The Board asserted that since the employee was acting on her own behalf to challenge her evaluation, she was not engaged in protected activity. Based on a stipulated record, the Commission finds that the employee was engaged in protected activity; the employer was aware of the activity; and that she was terminated because of that activity.

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, Parker McCay, attorneys, (James F. Schwerin, of counsel and on the brief)

For the Charging Party, Selikoff & Cohen, attorneys  
(Steven R. Cohen, of counsel; Carol H. Alling, on the  
brief)

DECISION

On August 14, 2006, the Wall Township Information Technology Association filed an unfair practice charge against the Wall Township Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), and (3)<sup>1/</sup>, by terminating

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<sup>1/</sup> 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 guaranteed to them by this act." The Association's charge asserts that the violation of N.J.S.A. 34:13A-5.4a(1) is  
(continued...)

the employment of computer technician Bonnie Murphy in retaliation for her exercise of activities protected by the Act.

On November 7, 2008, a Complaint and Notice of Hearing issued. On November 18, the Board filed an Answer denying the material allegations and claiming that it terminated Murphy because of concerns about her job performance unrelated to any protected activities.

On April 7, 2009, the parties appeared before Hearing Examiner Stuart Reichman and agreed to stipulate the facts, waive a hearing examiner's report and recommended decision, and have the Commission issue a decision based on the stipulated facts and the parties' legal arguments. See N.J.A.C. 19:14-6.7.

Based upon the parties' stipulations, the allegations of the Complaint that were admitted by the Board in its Answer, and the exhibits the parties jointly entered into evidence, these facts comprise the entire record:

1. Respondent, Wall Township Board of Education, is a public employer within the meaning of the Act.
2. The Wall Township Information Technology Association, is a public employee representative within the meaning of the Act.
3. The Association is the majority representative of a collective negotiations unit of Board employees that includes

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1/ (...continued)  
both independent and derivative.

computer technicians, information systems manager, computer help desk/secretary to the director of technology, and manager of information services.

4. Bonnie Murphy was employed by the Board from July 1, 1999 until August 18, 2006 as a computer technician and was at all times relevant, an employee within the meaning of the Act.

5. On June 15, 2006, Murphy signed a "Tenured Employment Contract" providing that she would continue employment as a computer technician from July 1, 2006 through June 30, 2007.<sup>2/</sup>

6. Murphy's immediate supervisor, Director of Technology Jeff Janover, prepared an evaluation of her performance dated June 23, 2006. The document has 16 areas where the employee could be rated "Significant Strength, Satisfactory, Needs Improvement or Unsatisfactory." Murphy was rated Significant Strength in one, Satisfactory in ten, Needs Improvement in five, and Unsatisfactory in one. In a space for comments, Janover stated:

Ms. Murphy has experienced a number of setbacks during the school year. She continues to perform an admirable job servicing the district's computer equipment but has not demonstrated any ability to troubleshoot or service network equipment, server hardware, or any type of software issues. Ms Murphy is driven by the work order system, but when confronted with a

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<sup>2/</sup> In its Answer, the Board asserts that despite the title on the document, Murphy was not a tenured employee.

server-related, network, or software issue, she backs away from the challenge.

Ms. Murphy's ability to interact with staff members has deteriorated this past year. While there are times during which she interacts well with others, she often isolates herself with sarcastic language and standoffish actions. Her telephone voice mail greeting, for example, continually reminds her callers that she is "swamped" and that only "friendly" messages should be left.

It is imperative that Ms. Murphy correct the issues noted above. In a six-point professional improvement plan dated July 2, 2002, Ms. Murphy identified some of the above issues as requiring improvement. The six areas of improvement included network equipment troubleshooting, RGB cabling repair, communication, software troubleshooting, how-to-guide preparation, and dress code. While the dress code issue has not been of concern, the other five points have not been met.

7. On June 27, 2006, Murphy and Janover met and Murphy was given her annual evaluation and a memorandum from Janover. The memorandum provided: "As a result of your evaluation this year, please prepare a professional improvement plan to address . . . interpersonal communication skills, network and equipment skills and application and network software skills." The memorandum set July 14, 2006 as the deadline to submit the plan.

8. In a letter to Janover dated July 12, 2006, Murphy stated, "I am in complete disagreement with the evaluation given by you and a grievance shall follow."

9. In a letter to Janover, also dated July 12, 2006, New Jersey Education Association UniServ Representative Ronald R. Villano addressed Janover's directive that Murphy prepare a Professional Improvement Plan for the 2006-2007 school year:

Please be advised that [a Professional Improvement Plan] is not a requirement pursuant to statute or code. Ms. Murphy is not a teaching staff member.

If your intent is to have this as a term and condition of employment please advise the Wall Township Board of Education office so that it can be placed into negotiations as there is no contract executed between the Board and the Association.<sup>3/</sup>

10. On July 13, 2006, Janover responded to Villano. He asserted that whether called a "Professional Improvement Plan" or a "Corrective Action Plan," his interest and goal was to have Murphy improve her performance and that asking her to participate in such a process was within his purview as a supervisor.

Janover continued:

I am disappointed that Ms. Murphy does not recognize the benefits associated with developing a Corrective Action Plan considering the gravity of the issues identified on her review.

If Ms. Murphy is unwilling or unable to develop a Corrective Action Plan I will develop one for her based on those areas requiring improvement and identified on her annual review.

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<sup>3/</sup> The letter shows it was copied to the Superintendent of Schools and three others.

On July 14, Janover responded to Murphy. He wrote:

With regard to your memo indicating that you are in disagreement with the annual evaluation that you received on June 27, 2006, and that a grievance will follow, please be advised that your current conditions of employment do not include a grievance procedure. In any event, even if a grievance procedure existed, evaluations are not grievable, but may be rebutted. Such a rebuttal must be made within 10 days of the evaluation as was indicated to you during your evaluation meeting on June 27. As more than ten days has passed since that time, I will enter your memo as rebuttal to my evaluation, and will place it in your personnel file.

11. By letter dated July 17, 2006 to Superintendent Dr. James Habel, Villano requested a meeting with the Board's Personnel Committee to review Janover's evaluations of Murphy. The letter indicates that a copy was sent to Janover.

12. A July 19, 2006 memorandum from Janover to Murphy advised that, effective immediately, Murphy's employment was being terminated.<sup>4/</sup> It provided that Murphy would receive an additional 30 days' pay and directed her to return work equipment.

13. The Board ratified Janover's actions at its August 15, 2006 meeting.

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<sup>4/</sup> The memorandum does not show whether it was copied to Villano or any other Association representative or official. The Superintendent, Assistant Superintendent, Human Resources Coordinator and Payroll Coordinator were copied.

The Association asserts that hostility to protected activity is present because even though the Board had offered, and Murphy had accepted, an employment contract for the next school year, Janover terminated Murphy only after she threatened to grieve her evaluation. The Association points to the timing of Murphy's firing, just one week after the Association's letters to Janover protesting the requirement that Murphy, in particular, and the members of the negotiations unit in general, be required to prepare Professional Improvement Plans without that procedure having first been negotiated with the Association. The Association also points out that Murphy was fired without any response to Villano's request for a meeting about Murphy's evaluation.<sup>5/</sup>

The Board's sole defense is that since Murphy was acting on her own behalf to challenge her evaluation, she was not engaged in protected activity, and the unfair practice charge should therefore be dismissed.<sup>6/</sup>

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5/ The Association also cites Murphy's constitutional right as a public employee under Art I, ¶19 to make known to her employer her grievances and proposals through a chosen representative. We enforce statutory, not constitutional, rights.

6/ The Board does not elaborate on the defense asserted in its Answer that Murphy was terminated because of concerns about her job performance. Murphy's termination notice and the Board minutes of personnel actions approved, which are exhibits in evidence, merely reflect her termination. Neither exhibit states a reason for the termination.

(continued...)



In re Bridgewater Tp., 95 N.J. 235 (1984), articulates the standards for assessing allegations of retaliation for engaging in protected activity in violation of N.J.S.A. 34:13A-5.4a(3). 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 a pretext, there is sufficient basis for finding a violation without further analysis.

The Board has not offered any evidence that Murphy was terminated for some other legitimate business reason. Thus, this case focuses on whether she engaged in protected activity before she was terminated. Based on the stipulated record, we conclude that Murphy engaged in activity protected by the Act; that the Board, through its agents, was aware of that activity; and that she was terminated because of that activity.

The Board argues that neither the evaluation nor the directive to prepare a PIP was in response to protected activity. We agree. But Murphy's protected activity and termination occurred after issuance of the evaluation and the directive to prepare a PIP. She was terminated only after she indicated that she intended to file a grievance and only after Association representative Villano protested that a PIP is not a requirement for non-teachers and that the Board could raise the issue in negotiations. Timing is an important factor in assessing motivation and may give rise to an inference that a personnel action was taken in retaliation for protected activity. City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987).

Janover's response to Villano was that he would develop a PIP for Murphy. His response to Murphy was that she did not have a right to grieve, evaluations are not grievable, and that her rebuttal would be placed in her personnel file. Villano then requested a meeting with the Superintendent to review Murphy's evaluation and within two days, Murphy was terminated. We infer from this chronology that Murphy was terminated because of both her and her representative's protest over her evaluation and the requirement that she prepare a PIP. And we conclude that those protests were protected by the Act.

Essex Cty. College, P.E.R.C. No. 88-32, 13 NJPER 763 (¶18289 1987), a case the Board relies on, is distinguishable. There the

employee berated the college president in a private setting about not receiving her paycheck at the end of her workday. We stated that she was not acting on behalf of an employee organization; she did not act in concert with anyone; and her complaint was on behalf of herself individually and did not relate to enforcing a collective negotiations agreement or changing the working conditions of employees other than herself. Here, Murphy indicated that she intended to file a grievance, an activity protected by section 5.3 of the Act,<sup>7/</sup> and her Association representative was seeking to have the Board negotiate over the obligation to develop PIPs. Murphy's enlistment of Villano's help in the dispute over her evaluation and PIP was also protected by the Act. See Red Bank Reg. Ed. Ass'n v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122, 135 (1978) (N.J.S.A. 34:13A-5.3 guarantees each unit employee the right to have grievances presented through the majority representative).

The Board's reliance on State of New Jersey (Office of the Public Defender), P.E.R.C. No. 86-67, 12 NJPER 12 (¶17003 1985),

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7/ N.J.S.A. 34:13A-5.3 provides that "[p]ublic employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them, provided that such grievance and disciplinary review procedures shall be included in any agreement entered into between the public employer and the representative organization."

recon. den. P.E.R.C. No. 86-93, 12 NJPER 199 (¶17076 1986), aff'd NJPER Supp.2d 169 (¶148 App. Div. 1987), is also misplaced. In that case, the charging party failed to prove any protected activity, individual or concerted, with the exception of her concerns about her office's Christmas party. We agreed with the Hearing Examiner that her individual protests, complaints and grievances, besides those concerning the Christmas party, did not involve terms and conditions of employment and amounted at most to her personal opinions about how her section should be organized and the practice of law conducted. We also agreed with the Hearing Examiner that the charging party produced insufficient evidence, even taken most favorably, to establish that her firing was motivated by hostility towards her protests about the Christmas party or the other activity she alleged was protected rather than by her deficient work performance. Here, the timing of Murphy's termination suggests retaliation for the protests, not a legitimate response to her work performance. We thus conclude that the Board violated 5.4a(3), and, derivatively 5.4a(1), when it terminated her in retaliation for her protected activity. Any violation of 5.4a(3) necessarily interferes with employees in the exercise of their rights and thus derivatively violates subsection (a)(1) as well. Galloway Tp. Bd. of Ed., P.E.R.C. No. 77-3, 2 NJPER 254, dec. on recon., P.E.R.C. No. 77-18, 2 NJPER 295 (1976), aff'd 157 N.J. Super. 74 (App. Div.

1978). The appropriate remedy is reinstatement with back pay, interest and benefits retroactive to August 19, 2006, less any mitigation.

We do not find an independent violation of 5.4a(1). Such a violation occurs when an employer engages in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. New Jersey Sport and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 n.1 (¶10285 1979). If an employer, pursuant to the above standard, establishes such a justification, no unfair practice will be found under 5.4(a)(1) unless the charging party proves anti-union motivation for the employer's actions. The Association argues that Janover's July 14, 2006 letter tended to interfere with the protected right to file a grievance, and did not have a legitimate business justification. The letter asserts that Murphy is not covered by a grievance procedure; that even so, evaluations are not grievable, but may be rebutted; and that even though her rebuttal was untimely, it would be placed in her personnel file. This response does not tend to interfere with protected rights. The Board accepted her "grievance" as a rebuttal to her evaluation and placed it in her personnel file.

It was the termination that violated her rights under 5.4a(3) and we have remedied that violation.

ORDER

The Wall Township Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by terminating the employment of an employee who had attempted to file a grievance over an evaluation and had enlisted the Association's aid to have the Board review the contents of an evaluation and to negotiate with the Board concerning the evaluation process.

2. Discriminating in regard to the hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by terminating the employment of an employee who had attempted to file a grievance over an evaluation and had enlisted the Association's aid to have the Board review the contents of an evaluation and to negotiate with the Board concerning the evaluation process.

B. Take this action:

1. Offer to reinstate Bonnie Murphy to her position as a Computer Technician.

2. Make Bonnie Murphy whole for all salary and benefits due from August 19, 2006 to the present, less mitigation, with interest at the rate set by Court Rules.

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

4. Within 20 days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

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

ISSUED: October 29, 2009

Trenton, New Jersey

**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 terminating the employment of an employee who had attempted to file a grievance over an evaluation and had enlisted the Association's aid to have the Board review the contents of an evaluation and to negotiate with the Board concerning the evaluation process.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by terminating the employment of an employee who had enlisted the Association's aid to have the Board review the contents of an evaluation and to negotiate with the Board concerning the evaluation process.

WE WILL offer to reinstate Bonnie Murphy to her position as a Computer Technician.

WE WILL make Bonnie Murphy whole for all salary and benefits due from August 19, 2006 to the present, less mitigation, with interest at the rate set by Court Rules.

Docket No. CO-2007-055

WALL TOWNSHIP 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"