

P.E.R.C. NO. 2013-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2009-334

TRENTON EDUCATIONAL SECRETARIES
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts the Hearing Examiner's recommended decision in an unfair practice case filed by the Trenton Education Association against the Trenton Board of Education. That decision recommended the Commission find that the Trenton Board of Education did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it abolished an employee's secretarial position and transferred her to another position. The Commission rejects the exceptions filed by the Association, finding that the Hearing Examiner considered all of the evidence concerning anti-union animus, and that the Board established a legitimate operational reason for abolishing the secretarial position.

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 McKay, P.A., attorneys
(Elizabeth M. Garcia, of counsel)

For the Charging Party, Zazzali, Fagella, Nowak,
Kleinbaum & Freidman, attorneys (Jason Sokolowski, of
counsel)

DECISION

On March 23, 2009 and July 10, 2009 the Trenton Educational Secretaries Association filed an unfair practice charge and amended charge against the Trenton Board of Education. The charge, as amended, alleges that the Board violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1), (2), (3) and (5) of the Act when it abolished the secretarial position held by Ann Sciarrotta and transferred her to another position in retaliation for her exercise of activities protected by the Act.

On October 1, 2010, a Complaint and Notice of Hearing was issued on the 5.4(a) (1), (3) and ((5)^{1/} allegations. The Hearing Examiner conducted hearings on June 7, 2011 and October 6 during which the parties examined witnesses and introduced exhibits. The parties filed post-hearing briefs and on July 17, 2012, Hearing Examiner Patricia Taylor Todd issued her report and recommended decision. H.E. 2013-4, ___ NJPER ___ (§____). The Hearing Examiner found that the Board did not violate the Act and recommended that the Complaint be dismissed. We affirm that decision.

I. Findings of Fact

We adopt the Hearing Examiner's findings of fact except as noted below. H.E. at 3 - 12. An overview of the facts follows. Ann Sciarrotta has been employed by the Board as a secretary in various assignments for over forty years, beginning her employment in 1967. In 1994, she was assigned to the Accounting Department as an Administrative II Secretary. Sciarrotta has

^{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. . . . (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. . . . 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."

been an Association member since 1976, having held various Association positions until 2001, when she was elected Vice President, a position she has continuously held since that time. As Vice President, Sciarrotta has been involved in processing grievances, counseling employees concerning their rights under the collective negotiations agreement, and participating in collective negotiations with the Board.

On April 9, 2009, Sciarrotta was informed by written notice from the Board that her position was being abolished due to "budgetary constraints." A total of 200 positions, 42 of which were secretarial positions, were abolished in a reduction in force in 2009. Based on her seniority and applicable clauses of the parties' collective negotiations agreement, Sciarrotta selected an available administrative secretary position in the Medical Department where she is still employed. At the meeting in which the Board voted to abolish Sciarrotta's position, it also voted to create a Financial Analyst position.

Sciarrotta testified to various incidents which the Association asserts evidences hostility towards her protected activities. As relevant to this appeal, Sciarrotta testified that in November 2006, former Superintendent Rodney Lofton held a meeting during which Lofton stated that employees should ignore their union's advice and support the Board. Lofton was bent down towards Sciarrotta as he made that statement. As a result,

Sciarrotta contacted the Association's NJEA Representative Jim Loper, who drafted a letter to Lofton, claiming that Lofton's statement "borders on anti-union animus." Sciarrotta was summoned to Lofton's office, at which point Lofton allegedly asked Sciarrotta "is this the way you want to do business?"

Sciarrotta also testified that she approached Assistant Business Administrator Gerald Trueheart about allegedly assigning non-bargaining unit work to an Association member. Sciarrotta spoke with Trueheart about intermingling duties between separate units. Trueheart then informed Sciarrotta that she could no longer conduct union business during the work day. We reject part of the Hearing Examiner's finding of fact number 10, which found that it was unclear from Sciarrotta's testimony if Trueheart ever prevented Sciarrotta from actually doing so. Sciarrotta testified that she explained to Trueheart that she came in early, didn't take lunch and stayed late to conduct union business, and that Trueheart then said it was alright for her to continue doing so. Sciarrotta specifically testified that she was never actually prevented from conducting union business during the day. Sciarrotta met with Human Resources Manager Pam Howard in April 2008 concerning Trueheart's assignment of non-unit work to an Association member. The meeting was attended by Howard, Sciarrotta and Trueheart. At the meeting, Howard responded to Sciarrotta by stating that she did not want Association members

performing such work when other employees were already paid to perform such work. As a result of the meeting, Truehart ceased to assign non-bargaining unit work to the Association member.

Sciarrotta testified that she always had access to Truehart's calendar until sometime in March 2009. Sciarrotta spoke with a technician about regaining access to Truehart's calendar and was informed that Truehart could grant such access. Sciarrotta never requested that Truehart do so. We reject the part of the Hearing Examiner's finding of fact number 11 which found that it was unclear whether Trueheart was aware that Sciarrotta no longer had access to his calendar. Sciarrotta testified on cross-examination that once she informed Trueheart that she did not have access to his calendar, he asked her to contact Information Technology. She also testified that she was never informed by Trueheart or anyone from the Information Technology that her access had been restricted.

Howard has been the school business administrator/board secretary for over four years. Prior to that, Howard and Sciarrotta worked together in the Accounting Department. Howard testified that in 2009, approximately two hundred positions were abolished by the Board, including teachers, vice principals, secretaries, custodians, and security personnel. Howard testified that Truehart, who had been serving in his position for approximately one year, requested an abolishment of his

secretary's position in exchange for the addition of a fiscal analyst. According to Howard, Truehart reasoned that since the Board was under strict scrutiny because of accountability regulations and efficiency standards, a fiscal analyst would be helpful to analyze costs that had never before been analyzed. The accountability regulations, which were created by the State in 2008 and 2009, imposed efficiency standards on the Board, and the accounting department in particular, that had never been in place. This impacted the workload of the Accounting Department. Truehart created the job description for the fiscal analyst position, which was approved by the Board. Howard, along with Truehart, met with the superintendent and the assistant director of human resources concerning the proper way to draft the fiscal analyst job description. On May 4, 2009, the Board approved the fiscal analyst position and abolished the administrative II secretary position held by Sciarrotta. Howard testified that Sciarrotta is currently earning the same rate of pay she received prior to the abolishment of her position in the Accounting Department. Howard stated that the Board had a budget deficit of \$1.9 million in 2008/2009 and a surplus of \$3.4 million in 2009/2010, crediting the creation of the fiscal analyst position with aiding, in part, that improvement.

Sciarrotta testified that Howard stated to her secretary Patricia Harper that she would continue transferring Sciarrotta

around until Sciarrotta retired and that she would punch Harper in the face if she voted for Sciarrotta. Howard denied ever stating that she would punch Harper in the face or making a statement to Harper about transferring Sciarrotta around until Sciarrotta retired. Howard claimed that she and Sciarrotta had a great relationship and attended social functions together. We add that Sciarrotta testified on cross-examination that she never filed a grievance about either of these incidents.

Sciarrotta testified that Director of Special Services Andrew Morgan telephoned her on occasion, raised his voice to her, and told her not to interfere with the functions of his department. Sciarrotta also claimed that she once heard Morgan state that the Association will fight for its members even if the member is wrong. Sciarrotta stated that in 2009 she met with Morgan to discuss the alleged harassment of two secretaries that reported to him. Upon being confronted with such claims, Morgan became irate with Sciarrotta and the secretaries making such claims. Despite the meeting not being resolved to Sciarrotta's satisfaction, it is unclear if Sciarrotta pursued the secretaries' claims beyond the meeting with Morgan. On cross-examination, Sciarrotta claimed to have filed grievances on behalf of each secretary, but could not recall the outcome of either grievance.

During cross-examination, Sciarrotta claimed that she spoke with Morgan in January 2009 about secretaries being assigned non-unit work. Morgan allegedly became very angry and stated that if Sciarrotta did not negotiate with him, he would abolish secretarial positions. The Hearing Examiner did not credit this testimony since Sciarrotta testified to this interaction for the first time on cross-examination, it was not corroborated by any other evidence, and there was no documentary evidence submitted to support that the interaction occurred.

II. Parties Arguments

On August 3, 2012 the Association filed exceptions to the Hearing Examiner's report and recommended decision. It asserts that the Hearing Examiner failed to consider all of the competent evidence in finding that the Board was not hostile toward Sciarrotta's protected activities and that the financial analyst position was created for legitimate operational needs. The Board responds that the Hearing Examiner properly considered and weighed the evidence and found that the Board had legitimate operational needs in establishing the financial analyst position.

III. Analysis

The issue before us is whether the Hearing Examiner was correct in finding that the Board did not abolish Sciarrotta's position in retaliation for her protected activity. Under In re Tp. Of Bridgewater, 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 protected rights. Id. At 246. The Court in Bridgewater found that anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or substantial reason for the employer's actions. Id. at 242.

We reject the Association's exception that the Hearing Examiner neglected to consider all of the evidence concerning anti-union animus. The Association asserts that in response to Sciarrotta expressing concern about the assignment of non-unit work to an Association member, Trueheart initially sought to limit Sciarrotta's union activities and also advised her that people were inquiring about her union activities. However, Sciarrotta's own testimony reflects that once she informed Trueheart about the history of her being able to conduct union activities during the work day, he immediately acquiesced and informed her that she could continue to do so. Trueheart's initial unawareness about the history of when Sciarrotta was able to perform union duties does not rise to a level of anti-union

animus as evidenced by how quickly the issue was resolved. The Association also asserts that Sciarrotta's loss of access to Trueheart's calendar evidences his hostility toward her protected activities. However, Sciarrotta herself testified on cross-examination that once she informed Trueheart that she did not have access to his calendar, he asked her to contact Information Technology. She also testified that she was never informed by Trueheart or anyone from the Information Technology that her access had been restricted.

The Association also asserts that the Hearing Examiner failed to consider the incidents that occurred with Patricia Lucas, former superintendant Rodney Lofton, Jayne Howard and Andrew Morgan. The Hearing Examiner addressed each of these incidents in her report and found that even if she were to find Sciarrotta's testimony as credible regarding these incidents, none of those individuals made the decision to abolish her position. We agree and find that even if any of these incidents were evidence of anti-union animus, we would nonetheless still dismiss the complaint because the Board established that it had a legitimate operational reason for abolishing Sciarrotta's position. We add that regarding Sciarrotta's assertions about the 2009 incident with Morgan, she could not recall the outcome of the grievance. We also note that regarding Sciarrotta's assertions about Howard, she was Trueheart's supervisor and

instructed him to allow Sciarrotta to conduct union business during the day as long as work flow was not interrupted. Howard also instructed Trueheart not to assign work to a secretary more properly performed by another title. Sciarrotta, a seasoned union official, did not file grievances about either of the incidents she testified to regarding Howard.

We also reject the Association's second exception which asserts that the Hearing Examiner erred in finding that legitimate operational needs existed for the Board to create a financial analyst position. The record supports that the financial analyst position was created for legitimate operational needs - - primarily in response to State accountability regulations which imposed new efficiency standards. Howard testified that the position was instrumental in reducing the Board's budget deficit and creating a surplus. We also note that no secretarial position has existed in the business office since Sciarrotta's position was abolished. While the Association asserts that the financial analyst was hired at a salary higher than Sciarrotta, the Board established that it had a legitimate business need to create the financial analyst position, regardless of whether Sciarrotta's position was abolished. While Sciarrotta's position was the only secretarial position abolished from the central administration building that year, a total of

200 positions, 42 of which were secretarial positions, were abolished in a reduction in force that year.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau and Wall voted in favor of this decision. Commissioner Jones voted against this decision. Commissioners Eskilson and Voos were not present.

ISSUED: March 21, 2013

Trenton, New Jersey