

P.E.R.C. NO. 2013-75

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIDGEFIELD BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2011-494

RIDGEFIELD TEACHING ASSISTANTS
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts the Hearing Examiner's recommended decision in an unfair practice case filed by the Ridgefield Teaching Assistants Association against the Ridgefield Board of Education. That decision recommended the Commission find that the Ridgefield Board of Education did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it did not rehire four teaching assistants (who were Association officials) after a reduction in force. The Commission rejects the Association's exceptions, holding that the Hearing Examiner gave reasoned explanations for her credibility determinations, and her findings of fact were tightly tied to witness testimony and supported by precise citations to the record.

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, Ferrara, Turitz, Harraka and
Goldberg, P.C., (William Rupp, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys
(Sanford R. Oxfeld, of counsel)

DECISION

On June 28, October 3 and December 9, 2011, the Ridgefield Teaching Assistants Association (Association) filed an unfair practice charge and amended charges against the Ridgefield Board of Education (Board) alleging that the Board violated 5.4a(1), (2), (3), (4) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)^{1/}, when it did not

^{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...)

rehire four teaching assistants^{2/} after a "Reduction in Force" ("RIF") in January and May 2011, who were Association officials. The Association maintains that these actions were taken against Association President Francis Ganci, Building Representative Dolores Bickford and Association Membership Chairperson Theresa Calautti because of their union activities. Additionally, the Association asserts that the Board's actions have stripped the Association of all of its officers, thus chilling the atmosphere for support and participation in the Association.

The Association seeks: an Order to have Ganci, Bickford and Calautti rehired and made whole by the Board; an Order requiring the Board to honor an alleged verbal agreement that the Association employees be returned to work in order of seniority; and for the Board to post the appropriate notice.

A Complaint and Notice of Hearing was issued by the Director of Unfair Practices on the charge and first amended charge on

1/ (...continued)
exercise of the rights guaranteed to them by this act; (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; (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 Association withdrew all allegations regarding one of the four teaching assistants on the third hearing day.

November 22 and 29, 2011. On December 12, Hearing Examiner Wendy Young amended the Complaint to conform to the second amended charge. The Board filed its Answers on December 2 and 19, 2011.

Hearings were held on February 6, 7, and 8, 2012. Both parties filed post-hearing briefs by April 27, 2012, and post-hearing reply briefs by May 8, 2012.

On July 11, 2012, the Hearing Examiner issued her report and recommended that the Commission dismiss the Complaint. H.E. No. 2013-1, 39 NJPER 116 (¶40 2012).

On August 2, 2012, after an extension, the Association filed Exceptions to the Report and Recommendations of the Hearing Examiner, and on August 17, after an extension, the Board filed a brief in opposition.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 5-42) are accurate. We adopt and incorporate the Hearing Examiner's comprehensive findings of facts and summarize the facts that are relevant to this appeal as follows. The Board's special education school budget had been reduced and the Board was required to RIF five teaching assistants to make up the shortfall. In December 2010, the Board's Superintendent, Dr. Robert Jack, instructed the Director of Special Services, Patricia Drimones, to meet with her three

consociates,^{3/} Peter Noonan, Steven Kahn, and Dr. Laurie Densen, and recommend the five teacher assistants to be RIF'd effective January 2011. The only guideline Jack gave the team was for them to keep the best employees; no particular employees were mentioned. Calautti was one the five selected and the only Association officer to be RIF'd at that time.

Later in January 2011 it was determined that the Board would be facing further budget constraints for the following school year. The Board ultimately decided to eliminate all 86 full-time teaching assistant positions and create 172 part-time positions. Thereafter, in pertinent part, the Board's Attorney, Stanley Turitz, Esq., and New Jersey Education Association Uniserv Representative Norman Danzig discussed the possibility of modifying the collective negotiations agreement (CNA) to provide for single medical insurance coverage in exchange for restoration of 78 full-time teacher assistants. The issue of whether the 78 would be chosen by seniority was discussed by Turitz and Danzig; Turitz said that he would make that recommendation to the Board. The Board, however, rejected the seniority provision and a modification agreement was reduced to writing and signed by the

^{3/} Consociate is a term created by the Board to refer to a supervisory position within the special education program. The consociates are members of the Ridgefield Education Association, that represents teachers.

Board President, Board Business Administrator/Board Secretary and the Association's President, Fran Ganci.^{4/}

After the modification agreement was approved by the Board, Jack tasked Drimones and her consociates, Noonan, Kahn and Densen to find the most versatile and flexible teacher assistants to fill the 78 positions. The team met and made their recommendations which were accepted by the Board; eight teaching assistants were not rehired: Fran Ganci, Dolores Bickford, Roberta Genaro, James Briety, Jesse Essbach, Maria Manalis, Dorothy Shaffer and Jeanne Zappel. Manalis and Briety were later rehired in September and October 2011 respectively.

^{4/} The modification agreement provided in pertinent part: "Article 16 is omitted effective July 1, 2011. In the event the Board creates any additional full-time teaching assistant positions during the period of June 9, 2011 through June 30, 2011, those employees who received non-renewal notices and whose positions were affected by the Board action taken on May 12, 2011 abolishing full-time teaching assistant positions, shall be given priority in filling such new vacancies as set forth in and subject to the limitations specified in Article 16 without the requirement for posting by the Board notwithstanding the provisions of Article 12, paragraphs 4 and 8 and provided further that such eligible employees execute and return their individual contracts not later than eight (8) calendar days for the Board taking action in making the appointments."

The Association has filed exceptions^{5/} to the Hearing Examiner's findings of fact regarding the motives of the Board for not re-hiring Calautti, Ganci and Bickford; that rehiring should have been based on seniority as per the conversations between Turitz and Danzig; that two of the Association's previous officers who were RIF'd and then had renounced their positions were rehired; that other employees who were initially not rehired were later hired while three other Association officers were not rehired;^{6/} and that Drimones had told Bickford, on or about July 1, 2011, that she could not apply for potential re-employment as

5/ N.J.A.C. 19:14-7.3(b) provides: "Each exception shall specify each question of procedure, fact, law, or policy to which exception is taken; identify that part of the report and recommended decision to which objection is made; designate by precise page citation the portions of the record relied on; state the grounds for the exception; and include the citation of authorities unless set forth in a supporting brief. Any exception which is not specifically urged shall be deemed to have been waived. Any exception which fails to comply with these requirements may be disregarded. If a transcript of the proceedings is ordered for the purposes of filing exceptions to a recommended decision, the ordering party shall have the reporter service file a copy of the transcript with the Commission for inclusion in the record."

6/ On September 29, 2011, Ms. Iliana Beitez filed a representation petition, seeking to decertify the Association as the majority representative of the teaching assistants. On November 22, 2011, the Director of Representation issued D.R. No. 2012-6 and ordered that the unfair practice charge in the matter before the Hearing Examiner block the processing of the decertification petition.

a teaching assistant because there was a civil action suit with the Board.

The Board asks that the Hearing Examiner's findings and recommendations be adopted by the Commission.

We begin with the standard we apply in reviewing the Hearing Examiner's findings of fact. We cannot review these findings de novo. Instead, our review is guided and constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c). Under that statute, we may not reject or modify any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence. See also New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due fact-finder's "feel of the case" based on seeing and hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004).

Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Warren Hill Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 2005 N.J. Super. Unpub. LEXIS 78, 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609

(2006); Trenton Bd. of Ed., P.E.R.C. No. 79-70, 5 NJPER 185 (¶10101 1979); City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980); Hudson Cty., P.E.R.C. No. 79-48, 4 NJPER 87 (¶4041 1978).

The Hearing Examiner made comprehensive findings of facts. We have carefully reviewed the record to see if it supports her findings. As a rule, the Hearing Examiner's findings were tightly tied to the testimony of the witnesses and were supported by precise citations to the record. Further, when she found that the testimony of the lay witnesses was inconsistent or implausible, the Hearing Examiner gave reasoned explanations as to why she was crediting one witness and discrediting another. We therefore adopt and incorporate all of her findings of fact. Absent any compelling contrary evidence, we expressly adopt her factual findings based on her credibility determinations and her reasonable inferences flowing from those determinations.

In light of our acceptance of the Hearing Examiner's finding of facts, we now turn to the analysis of those facts and their application to the law. In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984)^{7/}, the New Jersey Supreme Court set forth the standard for determining whether an employer's

7/ Bridgewater (which adopted the Wright Line test from National Labor Relations Board in Wright Line, Inc., 251 N.L.R.B. 1083 (1980)) is the only legal authority cited by the Association.

action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, 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.

We find that there is no direct evidence in the record that the Board was hostile to the protected activity of the Association or its members. There is also no circumstantial evidence that the Board was hostile to the protected activity of the Association or its members. In both RIFs, the Board and Jack delegated authority to Drimones and the three consociates to determine who were the best qualified employees to remain employed with the Board. The recommendations of the team were accepted by Jack and the Board.

We will first address the reasons why Calautti, Ganci and Bickford were RIF'd. The Hearing Examiner cited to the record and addressed in detail the reasons that Calautti was RIF'd in findings of fact 18 through 22. The record reflects that Calautti had issues that made it difficult to work with her. For example, teachers asked that she not be assigned to their

classrooms, she had trouble getting along with co-workers, a parent had complained about Calautti being too harsh with her son, and she had physical limitations that interfered with her ability to participate in field trips and fire drills. Concerns about Calautti were documented in her observation report (CP - 14). The Hearing Examiner credited Densen's testimony as compelling and specific regarding Calautti's limitations and complaints. The Hearing Examiner did not credit Calautti's testimony regarding her ability to participate. Additionally, Calautti was RIF'd in January 2011 along with four other employees. Only the teacher assistants who were part of the May 2011 RIF were referenced in the modification agreement to be given priority to be rehired.

Second, the Hearing Examiner detailed the reasons that Ganci was RIF'd in finding of fact 43. Ganci essentially had medical issues that precluded her from coming to work which required other teacher assistants to be assigned in her absence. During the 2010-2011 school year, she had used all of her sick leave time, which was approximately 55 days, two personal days and one and a half unpaid sick days. The prior year she had used 24 sick days. Ganci was out on sick leave starting April 26, 2011; as the team met to evaluate the employees, they received a doctor's note on May 26, 2011 that indicated that Ganci would not be able to return to work until further notice (CP-5). Additionally,

Ganci testified that from April 26, 2011 through December 31, 2011, she was unable to perform the duties of a teaching assistant and that she had qualified for disability payments covering the period of July 1, 2011 through December 31, 2011. Although neither Ganci nor her doctor was contacted by the team after receipt of the doctor's note, the team believed that she was unable to return to work and had heard rumors that she was retiring, and used those facts as the reason that she should not be rehired. There is no evidence in the record that her role as the Association's President played any role in the decision.

Third, the Hearing Examiner detailed the reasons that Bickford was RIF'd in finding of fact 44. Bickford was not rehired because she had had conflicts with other teaching assistants and teachers which necessitated her reassignment three times during the 2010-2011 school year (R-8), and because she had left work in the middle of the work day four to six times for medical reasons which required other teacher assistants to be assigned.

Regarding the allegation that Drimones had told Bickford, on or about July 1, 2011, that she could not apply for potential re-employment as a teaching assistant because there was a civil action suit with the Board, Drimones denied that the conversation occurred and testified that she was on vacation from June 28, 2011 through July 6, 2011, and did not learn about the charges in

this matter until October or November 2011. The Hearing Examiner credited Drimones' testimony, finding that it was specific and her recall sharper whereas Bickford's testimony regarding the alleged conversation was vague (finding of fact 47). We find that Bickford's role as the Association's Building Representative or the charges in this matter were not factors in the decision not to rehire her.

Fourth, the Hearing Examiner cited to the record and addressed in detail the reasons why rehiring was not based on seniority as per the conversations between Turitz and Danzig in findings of fact 24-34. The Association asserts that the fact that seniority was not used as the criteria for rehiring, enabled the Board to keep Bickford (hired September 1994) and Ganci (hired April 1996)^{8/} off the rehire list. The record reflects that Turitz and Danzig had a long working relationship and had negotiated the first two CNAs beginning in 2004. The Hearing Examiner credited Turitz's testimony that he thought selection by seniority was advisable, absent disciplinary history, and that he would recommend it to the Board. Turitz made his recommendation to the Board; however, the selection by seniority provision was not accepted by the Board and not included in the modification agreement. Although Turitz never informed Danzig that the Board

^{8/} Calautti was hired in September 1996, but as set forth above, she was not given priority in the modification agreement since she was RIF'd in January 2011.

did not agree to the seniority provision, the modification agreement was clearly written and was signed by Ganci and the Board representatives. We find that there is no evidence in the record to conclude that the Board did not include the seniority provision in the modification agreement in order to target the Association or any of its members or that the Board did not negotiate in good faith with the Association.

Fifth, the Association's exception that only Association officers who resigned their positions were rehired (asserting that this is essentially evidence that the Board was hostile to the protected activity of the Association and its members) was addressed by the Hearing Examiner in finding of fact 46. The Association's Vice-President, George Wagner, and its Treasurer, Denise Carelli, resigned their positions with the Association after being RIF'd; both were rehired. Wagner, however, did not testify, and was characterized by Ganci as not being very active in the Association. Ganci also did not offer any reasons why Wagner resigned. According to Ganci, Carelli resigned her position because the Treasurer position became too demanding because she (Ganci) had been out sick for a prolonged period of time. Additionally, two other Association officers were rehired, Building Representative Sue Ritz, and Pat Gross, who had been membership Chair for approximately one month. We find that there

is no evidence in the record that the Board only rehired Wagner and Carelli because they resigned their Association positions.

Finally, the Association's exception that of the eight teaching assistants that were not initially rehired, Ganci and Bickford were the only eligible teacher assistants not ultimately rehired, was addressed by the Hearing Officer in findings of fact 37-42. Genaro and Zappel did not want to return for the 2011-2012 school year. Shaffer was not rehired because the specific student she worked with was transferred to his home district. Essbach was not rehired due to a significant disciplinary history. Briety had performed door security functions and was initially not rehired due to lack of versatility because he did not wish to work in a classroom; he was later rehired when the door security position was reestablished. According to Noonan^{9/}, Manalis was initially not rehired due to a very poor attendance record, however she was rehired and there is no evidence in the record regarding her actual attendance record or why she was rehired. Manalis is the only teacher assistant that was rehired who may have potentially had a similar employment history as Ganci and Bickford. However, without any specific evidence in the record as to Manalis, we cannot conclude that Ganci and

^{9/} Noonan testified that he recommended that Manalis not be rehired.

Bickford were not rehired based on their affiliation with the Association.

Thus, based on the above, we are in agreement with the Hearing Examiner that the Board did not violate sections 5.4a (1), (2), (3), (4) and (5) of the Act.

ORDER

The unfair practice charge in this case is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Wall voted in favor of this decision. Commissioners Jones and Voos voted against this decision.

ISSUED: April 25, 2013

Trenton, New Jersey