

P.E.R.C. NO. 2015-77

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CENTRAL REGIONAL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2012-345

CENTRAL REGIONAL BUS DRIVERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's recommended decision in an unfair practice case filed by the Central Regional Bus Drivers Association against the Central Regional Board of Education. That decision recommended that the Commission find that the Board violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1) and (3), when it retaliated against the Association President for exercising protected activities. The Commission rejects the Board's exceptions, finding that the Hearing Examiner's findings were tied to witness testimony and supported by precise citations to the record, that she gave reasoned explanations for her credibility determinations. The Commission holds that the Hearing Examiner properly applied Commission cases in concluding that the Board used criticism and adverse evaluations to illegally retaliate against the Association President for her exercise of protected conduct.

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, Hiering Gannon & McKenna, attorneys
(Thomas Gannon, of counsel)

For the Charging Party, Selikoff and Cohen, attorneys
(Keith Waldman, of counsel)

DECISION

On June 20, 2012 and July 17, 2013, the Central Regional Bus Drivers Association (Charging Party or Association) filed an unfair practice charge and amended charge, respectively, alleging that the Central Regional Board of Education (Respondent or Board) violated 5.4a(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. Specifically,

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."

the Association alleges that the Board retaliated against then Association President Kathleen McKelvey-Gleason for exercising protected activities. It is alleged that the Board disciplined her for insubordination, undesirable conduct and unsatisfactory performance, in particular by including criticisms of her role as Association President in both her 2011-2012 and 2012-2013 evaluations and an addendum attached to the 2011-2012 evaluation. Among its remedies, the Association requests removal of all discipline from her file that arises from her conduct as a union leader.

This case is before the Commission on exceptions filed by the Board to the Recommended Decision and Order of a Commission Hearing Examiner [H.E. No. 2014-13, 41 NJPER 3 (¶2 2014)] concluding that the Board violated 5.4a(3) and, derivatively and independently, 5.4a(1), when its Transportation Coordinator Barbara Sargeant and Business Administrator Kevin O'Shea issued evaluations in 2011-2012 and 2012-2013 to McKelvey-Gleason giving her "Needs Improvement" ratings in one category, and criticizing her and threatening discipline for her Association activities.

Commission Hearing Examiner Wendy L. Young conducted an evidentiary hearing, evaluated the testimony of witnesses, reviewed documents admitted into evidence and considered

arguments made in post-hearing briefs.^{2/} The Hearing Examiner recommended that the Commission issue an order directing that the Board cease and desist from its violations of the Act, remove and redact the challenged adverse ratings and/or comments, including references to her position as Association president, from her evaluations, adjust her score accordingly, and post a Notice to Employees.

The Board has filed exceptions^{3/} and a supporting brief and the Association has filed a brief in opposition to the exceptions. The Board asserts:

A. The Hearing Examiner erred in her descriptions and findings (Nos. 10 through 14) concerning an April 27, 2012 incident at the entrance to the Transportation Coordinator's trailer in the bus yard.

B. The Hearing Examiner erred by concluding that, because the Transportation Coordinator conceded that her interaction with McKelvey-Gleason did not prevent her from

2/ The witnesses who testified at the hearing were sequestered.

3/ N.J.A.C. 14-7.3, Exceptions; cross-exceptions; briefs; answering briefs, provides in pertinent part:

(b) 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.

doing her job, there was no basis for McKelvey-Gleason to receive any adverse evaluation ratings. The Board asserts that the Hearing Examiner discounted McKelvey-Gleason's inappropriate behavior that occurred over a period of years and had no basis to credit the testimony of the charging party over the Board's witnesses.

C. The Hearing Examiner erred in her findings concerning the May 13, 2013 incident regarding the AESOP system.^{4/} The Board asserts the findings were improperly based on uncorroborated hearsay testimony because none of the three drivers who allegedly had a problem with the system testified.

D. The Hearing Examiner erred in applying the appropriate standard for evaluating whether the Association met its burden for proving that the Board violated the Act.

In response, the Association contends that in the evaluation documents and the testimony of the Transportation Coordinator and the Business Manager, the negative ratings and comments expressly acknowledge that they were issued in response to McKelvey-Gleason's activities on behalf of the Association, thus establishing anti-union animus. The Association argues that the Hearing Examiner's credibility rulings can not be set aside unless demonstrated by the Board to be arbitrary, capricious, or unreasonable because they lacked support in the record.

We begin with the standard we apply in reviewing the Hearing Examiner's findings of fact. We cannot review these findings de

^{4/} AESOP is the district's computerized call-out system used by drivers

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 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 (H.E. No. 2014-13 at 3-25). 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, she gave reasoned explanations as to why she was crediting one witness and discrediting another. We therefore adopt and incorporate all her findings of fact. We clarify a minor issue about McKelvy-Gleason's tone during the April 27, 2012 discussion between McKelvy-Gleason, standing in the doorway of the trailer, and Sargeant, seated at her desk inside. First we adopt the Hearing Examiner's findings (H.E. No. 2014-13 at 10, n.4) discrediting the version supplied by Sargeant's boyfriend Raymond Marks, based on his pecuniary interest in supporting Sargeant and his inconsistent accounts, on one hand stating that others witnessing the encounter seemed horrified, but later asserting that those present considered McKelvy-Gleason's tone as "the norm." We note that the Hearing Examiner (H.E. No. 2014-13 at p32) acknowledged that McKelvy-Gleason's voice was raised, but also found, based on consistent evidence in the record, that she normally spoke in excited or agitated tones when discussing Association business. We thus reject the Board's assertion that the tone used by McKelvy-Gleason deprived her actions of protected status.

N.J.S.A. 34:13A-5.3 guarantees to all public employees the right to engage in union activities, including the right to form or join a union, negotiate collectively and make their concerns

known to their employer. It further provides that a majority representative of public employees shall be entitled to act for and represent the interest of public employees.

Section 5.4a(3) prohibits an employer from retaliating against an employee or majority representative for exercising these rights. Under Bridgewater Tp., 95 N.J. 235 (1984), no violation will be found, however, 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 does not present any evidence of a motive not illegal under our Act or if its explanation is 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 the conduct. Id. at 242.

We now review the Board's exceptions.

We reject Exception A. As recited in H.E. No. 2014-13 at p.5, an agency head does not have carte blanche to reject a Hearing Examiner's findings of fact based on credibility determinations. The Hearing Examiner's reasons (bias based on pecuniary interests and inconsistent descriptions of the reactions of others present) as to why she did not credit Mark's account are spelled out in her report (H.E. No. 2014-13 at 10, n.4). Under such circumstances, the record need not contain testimony that directly rebuts the statement of a witness the Hearing Examiner does not find credible. In addition, the Hearing Examiner acknowledged (H.E. No. 2014-13 at 32) that McKelvy-Gleason's voice may have been raised during the April 27, 2012 incident, but that consistent testimony in the record established that her tone was the norm for her when discussing work-related issues.

We also reject Exception B. Both the direct testimony of the Board's witnesses and McKelvy-Gleason's 2011-2012 evaluation, in particular the written addendum thereto, expressly criticize McKelvy-Gleason's activities on behalf of the Association. The Hearing Examiner comprehensively analyzed Commission cases that draw the line between vigorous advocacy by union representatives during meetings with superiors about working conditions and those cases where the circumstances and/or the union official's

behavior move into the realm of insubordination. We find that the Hearing Examiner properly applied those cases in holding that McKelvy-Gleason was criticized and adversely evaluated in response to protected conduct.

We reject Exception C asserting that only hearsay testimony was cited for the Hearing Examiner's finding that there were problems with the AESOP system. It is true that none of the three drivers who McKelvy-Gleason said had problems with AESOP (Finding No. 31) testified. However, the AESOP incident began when McKelvy-Gleason attempted to use it on the evening of May 16, 2013 after she accompanied her husband to the hospital because he had a medical emergency (H.E. No. 2014-13 Finding No. 29). To the extent the efficacy of the AESOP system is a material fact, the Hearing Examiner's finding does not rest solely on hearsay testimony as McKelvy-Gleason testified concerning her own unsuccessful attempt to access AESOP.

Finally, Exception D is a generalized assertion that the Association did not meet its burden of proof. The Board asserts that the evaluations were not discipline for allegedly protected conduct, but were instead tools to help McKelvy-Gleason improve her conduct and job performance. The Hearing Examiner's Findings of Fact and conclusions of law establish that the Board used the evaluations to retaliate against McKelvy-Gleason for her exercise of protected conduct in violation of N.J.S.A. 34:13A-5.4a(1) and

(3). Violations of these subsections of the Act have been found in similar circumstances. See Maple Shade Board of Education, P.E.R.C. No. 97-67, 23 NJPER 30 (¶28021 1996).

ORDER

A. The Central Regional Board of Education shall 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 issuing to Association President McKelvey-Gleason evaluations in 2011-2012 and 2012-2013 critical of her conduct as Association president and threatening discipline for her activities on behalf of the Association.

2. Discriminating in regard to the 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, particularly by issuing to Association President McKelvey-Gleason evaluations in 2011-2012 and 2012-2013 critical of her conduct as Association president and threatening discipline for her activities on behalf of the Association.

B. The Central Regional Board of Education shall take the following affirmative action:

1. Immediately rescind the addendum to the 2011-2012 evaluation prepared by Business Administrator Kevin O'Shea, change the "NI" rating in that evaluation under "Personal

Qualities", number 4, to "EF" and redact from Transportation Coordinator Barbara Sargeant's commentary any reference to McKelvey-Gleason's status as Association President.

2. Immediately change the "NI" rating in McKelvey-Gleason's 2012-2013 evaluation under "Personal Qualities", number 4, to "EF".

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 sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

4. Within twenty (20) days of receipt of this decision, the Board notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Boudreau, Eskilson, Jones, Voos and Wall voted in favor of this decision. None opposed. Commissioner Bonanni was not present.

DATED: June 25, 2015

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 issuing to Association President McKelvey-Gleason evaluations in 2011-2012 and 2012-2013 critical of her conduct as Association president and threatening discipline for her activities on behalf of the Association.

WE WILL cease and desist from discriminating in regard to the 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, particularly by issuing to Association President McKelvey-Gleason evaluations in 2011-2012 and 2012-2013 critical of her conduct as Association president and threatening discipline for her activities on behalf of the Association.

WE WILL immediately rescind the addendum to the 2011-2012 evaluation prepared by Business Administrator Kevin O'Shea, change the "NI" rating in that evaluation under "Personal Qualities", number 4, to "EF" and redact from Transportation Coordinator Barbara Sargeant's commentary any reference to McKelvey-Gleason's status as Association President.

WE WILL immediately change the "NI" rating in McKelvey-Gleason's 2012-2013 evaluation under "Personal Qualities", number 4, to "EF".

Docket No. CO-2012-345

CENTRAL REGIONAL 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, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372