

P.E.R.C. NO. 2019-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CLARK TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2016-290

CLARK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a Hearing Examiner's report and recommended decision dismissing the complaint. The Clark Education Association's charge alleged that the Clark Township Board of Education violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1) and (3), by non-renewing a unit member because she was a member of the Association's negotiations team. The Commission holds that in the absence of a contractual tenure claim, the Board had a managerial prerogative to non-renew the unit member and that the Association failed to sufficiently demonstrate that anti-union animus triggered the Board's decision.

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.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CLARK TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2016-290

CLARK EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Weiner Law Group LLP, attorneys
(Patricia C. Melia, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys
(Gail Oxfeld Kanef, of counsel)

DECISION

On June 27, 2016, the Clark Education Association (Association) filed an unfair practice charge against the Clark Township Board of Education (Board) alleging that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically subsections 5.4a(1) and (3),^{1/} by non-renewing secretary Denise Hessler (Hessler) because she was a member of the Association's negotiations team.

^{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"; and "(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."

PROCEDURAL HISTORY

On February 24, 2017, the Director of Unfair Practices issued a complaint and notice of hearing. On March 3, the Board filed an answer. On May 16, the Board filed a corrected answer. A hearing was held on June 19 and October 5, 2017.^{2/}

On April 10, 2018, the Hearing Examiner issued a report and recommended decision concluding that the Association had not proven that anti-union animus was a substantial or motivating factor in Hessler's non-renewal and the Board had a managerial prerogative to determine whether to reappoint Hessler after her employment contract expired. H.E. No. 2018-7, 44 NJPER 349 (¶100 2018). Accordingly, the Hearing Examiner recommended that the complaint be dismissed.

On April 20, 2018, the Association filed a three-page letter from which the following exceptions to the Hearing Examiner's report and recommended decision can be gleaned^{3/}:

2/ "T" represents the transcript, preceded by a "1" or "2" signifying the first or second day of hearing, following by the page number(s). "CP" represents Charging Party exhibits and "R" represents Respondent exhibits.

3/ N.J.A.C. 19:14-7.3, entitled "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

(continued...)

-Business Administrator R. Paul Vizzuso's (Vizzuso) hostility toward Hessler's union activity is the basis upon which her employment was not renewed for the 2016-2017 school year and the timing of her non-renewal - a few months after Vizzuso expressed anti-union animus - is significant evidence;

-although the Hearing Examiner determined that Vizzuso's statement that Hessler requested a title change was false, the Hearing Examiner erred in finding that Vizzuso's other statements were credible because it was apparent that Vizzuso would make false statements as a means of self-preservation;

-the Hearing Examiner erroneously determined that Hessler's non-renewal was not due to her union activity despite clear evidence of hostility toward Hessler's union activity and the Hearing Examiner's determination that numerous reasons listed for Hessler's non-renewal "lacked merit" and were added to the list of reasons to "pad" the list; and

-hostility is evident in the Board's failure to offer Hessler an aide position for the 2016-2017 school year despite the fact that she had been so successful in that role in the past.

On April 24, 2018, the Board filed opposition to the Association's exceptions. In sum, the Board maintains that the Hearing Examiner accurately found that the Association failed to

3/ (...continued)

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.

meet its burden of proving that anti-union animus was a substantial or motivating factor in Hessler's non-renewal.

We have reviewed the record. The Hearing Examiner's findings of fact are supported by the record and we adopt them. (H.E. at 3-30).

SUMMARY OF FACTS

The Association represents all regularly employed, full-time and part-time certificated and non-certificated employees of the Board as specified in the recognition clause (Article I) of the parties' collective negotiations agreement (CNA) including, but not limited to, secretarial and clerical employees, paraprofessionals, and teaching assistants. The Board and the Association are parties to a CNA in effect from July 1, 2013 through June 30, 2016.

Hessler was hired by the Board as an office aid in 2007. She worked as a teacher assistant from 2009-2014 and as a paraprofessional from 2014-2015. In January 2015, Hessler joined the Association's negotiations team and was asked to help represent teacher assistants and paraprofessionals in successor contract negotiations. Hessler consistently received positive written performance evaluations throughout this period.

In May 2015, Hessler applied for a position as a 10-month secretary in the Board's central office. After she accepted the Board's offer to start in September 2015, Hessler was offered a

12-month payroll secretary position and she accepted. Shortly after starting as payroll secretary, Hessler told then-interim Superintendent Edward Grande (Grande) that she was unqualified for the position. Grande and then-interim Business Administrator Mark Kenney (Kenney) agreed with Hessler's assessment and suggested that she accept the 10-month secretary position that she was previously offered but remain the payroll secretary until a replacement was hired.

In October 2015, the Board hired a replacement payroll secretary. Around the same time, Grande suggested that Hessler accept a recently vacated 12-month health benefits/transportation secretary position and Hessler agreed despite having no prior experience working in matters of health care benefits and transportation. Hessler admitted that she was "new and unqualified" for the health benefits/transportation secretary position. (1T81:5-15; H.E. at 5). In early to mid-November 2015, Vizzuso was hired to replace Kenney as Business Administrator. For the remainder of the 2015-2016 school year, Vizzuso was Hessler's direct supervisor and contact person in the event she needed assistance in performing her job duties.

In December 2015, Vizzuso called Hessler into his office and stated:

I heard you were on the negotiation committee. I feel it's a conflict of interest. You know too much information.

[1T102:12-22; 1T33:23 thru 1T34:7; H.E. at 6-7.]

Vizzuso went on to repeatedly indicate that he felt uncomfortable working across the table from Hessler and that he needed to obtain a legal opinion about any conflict of interest. (1T102:22 thru 1T03:16; 1T34:7-14; H.E. at 7).

In January 2016, Vizzuso again called Hessler into his office and stated:

Well, what does the union do for you anyway?
I'm going to try to change your title to a
benefits/transportation coordinator.

[1T36:1-22; 1T105:7-18; H.E. at 7.]

Vizzuso indicated that he remained unhappy that Hessler was on the negotiation committee, that there was a conflict of interest working across the table from each other, and that he wished to change Hessler's title in order to take her out of the union. (1T35:16 thru 1T36:22; 1T104:14 thru 1T105:18; H.E. at 7-8).

Later in January 2016, Vizzuso called Hessler into his office and indicated that the Board attorney had said she could remain on the negotiation committee but could not speak with the committee about any confidential information. (1T36:23 thru 1T37:14; 1T111:1-19; H.E. at 8). After this interaction, Hessler admitted that Vizzuso never raised any potential conflict of interest related to her participation on the negotiation committee again. (1T111:20-23; H.E. at 8).

On April 29, 2016, Hessler met with Grande and Vizzuso and was hand-delivered a letter from the Board dated April 29 that provides:

Please be advised that you have not been recommended for renewal for the 2016-2017 school year. As such, effective June 30, 2016, your employment with the Clark Board of Education shall end. Please be advised that you have a right to request a statement of reasons for your non-renewal within fifteen (15) days of your receipt of the notice, as well as the right to an informal appearance before the Board for the purpose of trying to convince the Board to offer your re-employment. If you are inclined to request a statement of reasons or an informal appearance before the Board, please communicate your request in writing to me at the above address.

[CP-3; 1T51:16 thru 1T54:6; H.E. at 21.]

Hessler received an identical letter dated May 4 via certified mail. (R-4; 1T126:23 thru 1T128:17; H.E. at 21). On May 11, Hessler sent a letter to the Board requesting a statement of reasons for her non-renewal and an opportunity to appear before the Board. (R-5; 1T128:18 thru 1T129:9; H.E. at 22).

On May 26, 2016, Hessler met with Vizzuso and was hand-delivered her 2015-2016 performance evaluation dated May 11. (CP-4; 2T58:19 thru 2T60:22; 1T55:9 thru 1T58:7; H.E. at 22). On or about May 27, Hessler received a letter from the Board dated May 25 that provides in pertinent part:

You were recently notified that your employment contract with the Clark Public School District has not been renewed for the

2016-17 school year. You thereafter requested a Statement of Reasons for the non-renewal, and this letter is in response thereto.

The following incidents were taken into consideration in non-renewing your employment:

1. In February 2016, you left the office without permission. This incident was documented in a letter from Mr. Vizzuso to you, dated February 25, 2016.
2. Your poor attendance record from September 2015 to the Present. You have used 10 sick days, 5 personal days, and 3 family illness days, totaling 18 days.
3. The verbal warning you received on Thursday, March 24, 2016 about your inability to use a sick day the following week after you advised Mr. Vizzuso of your plan to spend that week vacationing in Mexico.
4. Your inability or refusal to follow directives from Mr. Vizzuso. Specifically, an error resulted in communication with an employee regarding her COBRA refund on April 13, 2016, due to your taking a "shortcut" approach.
5. Having a poor/resistant attitude when given assignments by Mr. Vizzuso, such as cross-training with the payroll secretary.
6. Restructuring of the Business Office to envelope certain responsibilities that you expressed continued discomfort with since your original promotion to a twelve-month secretarial position, e.g., payroll duties.
7. Your communications with parents on several occasions that were perceived as unhelpful and rude, which resulted in numerous phone calls to the Interim Superintendent's office.

8. Your inability to resolve transportation issues, which resulted in phone calls to Mr. Vizzuso or to the Interim Superintendent's Office.

9. Your being on personal calls during work time, specifically when you were needed during a busing issue on the afternoon of April 8, 2016.

10. Outside of vacation time, your need to be present during the summer months to arrange bus routes and to ensure that new employees' health benefit accounts are established after such repeated comments by you as, "You won't be seeing me in the summer."

11. Your repeated requests to modify your work schedule. For example, we had to have your non-renewal meeting on Friday, April 29, 2016 to accommodate your dog's grooming schedule.

In addition to this statement of reasons, I have reviewed your most recent performance evaluation dated May 11, 2016. Your rating of "1 - Does Not Meet Standards" in 7 out of 14 categories buttresses my decision to non-renew your employment. Specifically, you received a rating of "1" in the following categories:

- a) Performs work that is neat, accurate, and complete
- b) Completes the work required in the allotted time
- c) Uses sound judgment in the performance of the required work
- d) Readily learns and applies new ideas, procedures, rules, and techniques
- e) Shows interest in the performed work
- f) Is diligent and resourceful in performing her work
- g) Follows instructions when performing her duties

[CP-5; 1T58:17 thru 1T59:15; 1T177:3-20; H.E. at 25-27.]

On June 27, 2016, the Association filed the instant unfair practice charge.

STANDARD OF REVIEW

The standard we apply in reviewing a Hearing Examiner's decision is set forth in pertinent part at N.J.S.A. 52:14B-10(c):

The head of the agency, upon a review of the record submitted by the [hearing officer], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision . . . , the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the decision, but shall state clearly the reasons for doing so. The agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.^{4/}

4/ N.J.A.C. 19:14-7.2 provides:

The record shall consist of the charge and any amendments; notice of hearing; answer and any amendments; motions; rulings; orders; any official transcript of the hearing; and stipulations, exhibits, documentary evidence, and depositions admitted into evidence; together with the hearing examiner's report and recommended decision and any exceptions, cross-exceptions, and briefs and answering briefs in support of, or in opposition to, exceptions and cross-exceptions.

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 factfinder's "credibility determinations and . . . feel of the case based upon his or her opportunity to see and hear the witnesses"); Cavalieri v. Bd. of Trustees of the Public Employees Retirement System, 368 N.J. Super. 527, 537 (App. Div. 2004) (it is the factfinder's "credibility findings that control, unless they are arbitrary or not based on sufficient credible evidence in the record as a whole").

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 Ridgefield Bd. of Ed., P.E.R.C. No. 2013-75, 39 NJPER 488 (¶154 2013); Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, 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).

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an

employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.” State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). We have held that a violation of another unfair practice provision derivatively violates subsection 5.4a(1). Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Allegations of anti-union discrimination under N.J.S.A. 34:13A-5.4a(3) are governed by In re Bridgewater Tp., 95 N.J. 235, 240-245 (1984). “The charging party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action.” Newark Housing Auth., P.E.R.C. No. 2016-29, 42 NJPER 237, 239 (¶67 2015). 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. Ibid. 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. Ibid. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. Ibid. 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. Ibid.

ANALYSIS

The Association's first and third exceptions challenge the Hearing Examiner's determination that Vizzuso's hostility to Hessler's union activity was not a substantial or motivating factor for her non-renewal. We reject these exceptions. New Jersey courts and the Commission have held that in the absence of a contractual tenure claim on behalf of a non-professional school employee, public employers have a managerial prerogative to determine whether to reappoint an employee after an individual employment contract has expired. See Wayne Tp. v. AFSCME Council 52, 220 N.J. Super. 340 (App. Div. 1987); Washington Tp. Bd. of Ed., P.E.R.C. No. 88-148, 14 NJPER 471 (¶19199 1988).

Accordingly, it was incumbent upon the Association to establish that the Board unlawfully exercised its prerogative to non-renew Hessler in retaliation for engaging in protected activity.

The Association asserts that Vizzuso's comments about Hessler's union activity, the timing of Hessler's non-renewal, and the fact that numerous reasons listed for Hessler's non-renewal "lacked merit," "seemed to be exaggerated," and/or were added to "pad" the list, sufficiently demonstrate that anti-union

animus was a substantial or motivating factor in the Board's decision.

The Hearing Examiner acknowledged that some of Vizzuso's comments (i.e., asking what the union did for Hessler and suggesting a title change in order to take Hessler out of the union) "demonstrated hostility to Hessler's membership on the Association['s] negotiation team" and agreed that some of the enumerated reasons for Hessler's non-renewal "lack[ed] merit." (H.E. at 33-34). However, he also found that some of Vizzuso's other comments (i.e., asserting that Hessler's membership on the Association's negotiation team created a conflict of interest based upon her knowledge) were in fact lawful even if they were "naively baseless."^{5/} (H.E. at 32-33).

The Hearing Examiner also considered the timing of Hessler's non-renewal and found that the Association failed to sufficiently demonstrate that anti-union animus triggered the Board's decision. The Hearing Examiner noted that anti-union animus was not shown between the time of Vizzuso's comments in February and Hessler's non-renewal in April, and that any Board effort to

^{5/} See N.J.S.A. 34:13A-3(g) (specifying that "membership in any appropriate negotiating unit [is] incompatible with [the] official duties" of "confidential employees" based upon their "functional responsibilities or knowledge in connection with the issues involved in the collective negotiations process"); N.J.A.C. 19:11-1.5 (indicating that public employers may file a clarification of unit petition in order to determine if statutory exclusions apply to particular titles/employees).

actually pursue a title change for Hessler was not established. He found that Hessler, Vizzuso, and Grande had negligible communications regarding, and did not play an active role in, any substantive collective negotiations. The Hearing Examiner also found that anti-union animus was not established as the basis of Hessler not being advised of misconduct as it occurred. (H.E. at 34-35). Moreover, the evidence substantiates several of the Board's stated reasons for Hessler's non-renewal including the following:

- Hessler admitted leaving the Board office on one occasion without notice or authorization from her supervisor (1T45:5 thru 1T50:4; CP-2; CP-5 at ¶1; H.E. at 12-15);

- Hessler admitted making an error or miscalculating a COBRA refund without seeking assistance (1T64:20 thru 1T66:13; 2T44:2 thru 2T46:11; 2T61:17 thru 2T62:1; CP-5 at ¶4; H.E. at 18-21);

- Hessler was unavailable to deal with a busing issue because she was on a personal telephone call and continued the call in Grande's presence during work hours (1T198:24 thru 1T200:13; CP-5 at ¶9; H.E. at 17-18);

- Hessler provided one or more inappropriate responses to parents' questions regarding busing issues (2T52:2 thru 2T53:20; 1T194:5 thru 1T198:17; CP-5 at ¶¶7-8; H.E. at 29); and

- Hessler was hesitant to participate, and resistant to engaging, in mandatory cross-training particularly with respect to payroll duties (1T191:2 thru 1T194:4; 2T47:2 thru 2T51:21; CP-5 at ¶¶5-6; H.E. at 28).

We agree with the Hearing Examiner's determination that although there is circumstantial evidence of hostility, the Association failed to prove by a preponderance of evidence in the entire record that hostility was a substantial or motivating factor in Hessler's non-renewal.

The Association's second exception contends that the Hearing Examiner erred in finding that Vizzuso's statements - other than those pertaining to Hessler requesting a title change - were credible. We reject this exception. The Commission may not "reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record." N.J.S.A. 52:14B-10(c); see also New Jersey Div. of Youth and Family Services, 375 N.J. Super. at 144; Cavalieri, 368 N.J. Super. at 537.

The Association has not cited any evidence to support its assertion that "Vizzuso would make false statements as a means of self-preservation." Moreover, our review of the record demonstrates that the Hearing Examiner carefully evaluated and weighed a considerable amount of contradictory testimony. See, e.g., H.E. at 10-11 (crediting Hessler's testimony rather than Vizzuso's regarding their interactions pertaining to her

membership on the Association's negotiation committee); H.E. at 12, n.4 (not crediting Vizzuso's testimony regarding the length of Hessler's absence); H.E. at 16-17 (crediting Hessler's testimony about whether she was asked to or changed her type of leave designation); H.E. at 27-28 (crediting Hessler's testimony regarding her usage of sick days); H.E. at 29 (crediting Hessler's testimony that she was not told about those complaints); H.E. at 30 (crediting Hessler's testimony that she never stated an intention to be significantly absent during the summer). We will not substitute our reading of the transcripts for his first-hand observations and judgments.

The Association's fourth exception asserts that hostility to Hessler's union activity is evident in the Board's failure to offer her a teacher aide position for the 2016-2017 school year. We reject this exception. As noted by the Hearing Examiner, the record is devoid of any other indication that there were teacher aide positions available between April and June 2016. (H.E. at 22, 35). With respect to the 2015-2016 school year, Grande was asked about the availability of teacher aide positions for Hessler to transfer into, and he responded as follows:

Off the top of my head, I cannot answer with certainty because most of our - as far as our paraprofessional responsibilities, which is one subset of our aides, I can say more no than yes because we attempted to go with long-term substitutes in those roles.

[2T22:2 thru 2T23-10; H.E. at 22.]

Moreover, Hessler testified that she "used most of [her] sick days" after she was non-renewed and the record demonstrates that she used 24 sick days and 1 personal day between May 4 and June 30, 2016. (1T61:15 thru 1T62:18; R-6; R-7; H.E. at 27-28). We agree with the Hearing Examiner's assessment that Hessler's extensive absences in May and June 2016 severely damaged any prospects for the Board offering her a position for the 2016-2017 school year.

Accordingly, we agree with the Hearing Examiner and find that the Association has failed to prove a violation of subsections 5.4a(1) or (3) of the Act.

ORDER

The complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Boudreau and Voos voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: August 16, 2018

Trenton, New Jersey