

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GALLOWAY TOWNSHIP EDUCATION
ASSOCIATION,

Respondent,

-and-

Docket No. CE-76-30-68

GALLOWAY TOWNSHIP BOARD OF
EDUCATION,

Charging Party.

SYNOPSIS

In a decision in an unfair practice proceeding, the Commission finds the exceptions filed by the Board of Education relating to the findings of fact and conclusions of law of the Hearing Examiner to be without merit. The Commission, in agreement with the Hearing Examiner, finds that the Board of Education had failed to prove by a preponderance of the evidence that the Association did, in fact, threaten to strike. The Board had alleged in this charge that the Association had committed a violation of the New Jersey Employer-Employee Relations Act by threatening to engage in an illegal strike in order to compel the Board to accede to the Association's demands in negotiations. The Commission therefore adopts the Hearing Examiner's recommended order and dismisses the complaint in this proceeding in its entirety.

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Docket No. CE-76-30-68

GALLOWAY TOWNSHIP BOARD OF
EDUCATION,

Charging Party.

Appearances:

For the Respondent, Starkey, White & Kelly, Esqs.
(Mr. James M. Blaney, of Counsel)

For the Charging Party, Murray, Meagher & Granello, Esqs.
(Mr. James P. Granello and Mr. Robert J. Hrebek, of Counsel)

DECISION AND ORDER

On December 9, 1975, the Galloway Township Board of Education (hereinafter the "Board") filed an unfair practice charge with the Public Employment Relations Commission (hereinafter the "Commission") alleging that the Galloway Township Education Association (hereinafter the "Association") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (hereinafter the "Act"). The charge alleged that the Association had violated N.J.S.A. 34:13A-5.4(b)(1), (3) and (5) by threatening to engage in an illegal strike.^{1/}

^{1/} These subsections provide that employee organizations, their representatives or agents are prohibited from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit. (5) Violating any of the rules and regulations established by the commission."

It appearing that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 2, 1976.

Hearings were held before a Hearing Examiner, Edmund G. Gerber, on March 24, 1976 and December 14, 1976.^{2/} Both parties were given the opportunity to examine witnesses, present evidence and argue orally. Letter memoranda were filed by both parties in lieu of briefs and the Association filed post-hearing affidavits, all of which were filed by March 18, 1977. The Hearing Examiner issued his Recommended Report and Decision (hereinafter the "Report") on June 7, 1977.^{3/} The Hearing Examiner found that the Board had failed to prove by a preponderance of the evidence that the Association did, in fact, threaten to strike. The

Hearing Examiner emphasized that the only evidence presented by the Board tending to substantiate the charge that the Association had authorized an illegal strike was a newspaper article. However, the reporter who wrote the article testified that she had received

^{2/} Following the March 24, 1976 hearing, the parties requested a delay in the scheduling of the hearing to facilitate efforts to reach a settlement of the matters raised in the charge and other related problems. Subsequently, in the late fall the Board as Charging Party advised the Hearing Examiner that it wished to pursue the Complaint and the second day of hearing was held.

^{3/} H.E. No. 77-18, 3 NJPER 184 (1977).

the information on the Association's purported activity from a telephone call and she candidly admitted that she did not know if the person who had called her was in fact the President of the Association and that she did not otherwise verify the information in the article. The Hearing Examiner further emphasized that the only other witness called was Erwin Dick, the former president of the Association, who testified that to his knowledge the Association had never authorized a strike. A copy of the Hearing Examiner's Report is annexed hereto and made a part hereof.

Timely exceptions were filed by the Board in correspondence dated June 20, 1977. The Association submitted a letter memorandum, dated June 28, 1977, in response to the Board's letter exceptions.

The Board has filed exceptions to the Hearing Examiner's Report which will be treated seriatim.

The Board first objects to the lack of weight given by the Hearing Examiner to Erwin Dick's exercise of his privilege against self-incrimination during the course of the hearing. The Board's attorney asked Mr. Dick whether he had attended a meeting of the Association at the time discussed in the newspaper article. On the advice of his counsel, Dick refused to answer, claiming his privilege against self-incrimination. In footnote 5 of his Report the Hearing Examiner sets forth the basis for this assertion of the privilege by Mr. Dick:

In its Charge, the Board had argued that a strike authorization by the Association exposed its members to liability for criminal conspiracy

under N.J.S.A. 2A:98-1, and had cited Bd. of Ed., Union Beach v. N.J.E.A., 53 N.J. 29, 38 (1968) as authority. Mr. Dick's counsel submitted that Dick had a privilege not to answer any questions relating to his possible attendance at an Association meeting on the ground that his answers might incriminate him if the Board proved right.

The Board argued that even if strike activity did expose an individual to possible criminal liability, thus warranting the exercise of the privilege against self-incrimination, Mr. Dick had waived that privilege by certain of his conduct and statements.^{4/} At the request of the Board's attorney, the Hearing Examiner held an in camera hearing on December 14, 1976 to ascertain if Mr. Dick had, in fact, waived his right to assert the privilege. He determined that Mr. Dick had not waived the right, and therefore limited the Board's questioning to Mr. Dick's knowledge of the Association's activities on this question, but not Mr. Dick's personal involvement.

The Board's exception argues that the Hearing Examiner should have given weight to the fact that Mr. Dick claimed the privilege. In this regard the Board further submits that:

"It would appear that since Mr. Dick was permitted to exercise the privilege

^{4/} N.J.A.C. 19:14-6.6 requires Hearing Examiners to give effect to the rules of privilege recognized by law. Rule 25 of the New Jersey Rules of Evidence provides the privilege: "Subject to Rule 37, every natural person has a right to refuse to disclose in an action to a police officer or other official any matter that will incriminate him..." Rule 37 reads, in pertinent part: "A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has...(b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone..."

against self-incrimination that the in camera testimony was to the effect that he had participated in either an illegal action or an action which he believed so illegal as to compel him to exercise the privilege."

The Board maintains that the Hearing Examiner should have found that these factors, at least in part, support the Board's allegations in the unfair practice charge.

The Board's exception would appear to misconstrue the point of the in camera hearing. It was not for the purpose of ascertaining whether Mr. Dick had done some act for which he had a realistic basis for fearing possible criminal liability. It was rather for the purpose of determining whether his subsequent conduct may have constituted a waiver of his right to claim the privilege under the terms of Rule 37 of the New Jersey Rules of Evidence. It was irrelevant to the question of waiver whether Mr. Dick actually had said or done anything which could have incriminated him. Logically, therefore, no inference can be drawn from the Hearing Examiner's determination that Mr. Dick had not waived his privilege.

Additionally, the Commission believes it would be inappropriate to permit the Hearing Examiner to draw the type of inference urged by the Board even if such was a logical possibility from the type of hearing or the exercise of the privilege. Once the Hearing Examiner has determined that the invocation of the privilege by the witness is appropriate, it would be a denigration of that privilege to then draw a damaging inference from its

exercise.^{5/} For these reasons the Commission dismisses this exception of the Board and specifically adopts and affirms the Hearing Examiner's rulings on these issues.

The Board next submits that the Hearing Examiner did not fully weigh or credit the testimony of the reporter called by the Board as to the identity of the caller who related to her information relating to a strike authorization vote by the teachers within the Galloway Township school district. For the reasons set forth above, the Commission finds that this exception of the Board has no merit to it. There is sufficient evidence within the record of this proceeding to support the Hearing Examiner's analysis of the relevance of the reporter's testimony.

The Board next excepts to the Hearing Examiner's statements that the Board's charge concerned whether or not an illegal strike had been called by the Association. The Board appears to

^{5/} In this regard the Commission notes that Rule 23 of the New Jersey Rules of Evidence sets forth the basic privilege of a person not to testify in a criminal action in which he or she is the accused. That Rule as originally enacted contained a provision which read: "If an accused in a criminal action does not testify after direct evidence is received of facts which tend to prove some element of the crime, and which facts, if untrue, he could disprove by his own testimony, counsel and the judge may comment on his failure to testify, and the trier of fact may draw an inference that accused cannot truthfully deny those facts." Rule 23 (4).

This particular subdivision was specifically declared unconstitutional as a violation of the Fifth and Fourteenth Amendments of the United States Constitution's protection against self-incrimination. State v. Lanzo, 44 N.J. 560 (1965) While that case dealt with the criminal trial itself, the Commission believes that permitting inferences to be drawn as urged by the Board would, in an analogous fashion, also serve to violate the protection afforded by the privilege.

submit that subsumed within its charge that the Association failed to negotiate in good faith was the additional assertion that, even if the newspaper article referring to the strike authorization was untrue, the Association had to bear responsibility for "setting the record straight" by refuting these misstatements so as to preserve the atmosphere necessary for meaningful collective negotiations between the parties. The Board argues that whether or not a strike threat was issued by the Association is in some degree irrelevant so long as it was believed by the Board that a strike threat had been issued and so long as the Association did nothing affirmatively to correct that impression. The Board thus concludes that the Hearing Examiner should have found the Association guilty of violating the Act by failing to take all necessary steps to assure the Board that the substance of the newspaper article was unfounded and untrue.

The Commission, after careful consideration of the entire record, finds that the Board has used the vehicle of exceptions to a Hearing Examiner's Report to introduce an entirely different set of charges against the Association that had not been set forth in any prior pleadings and that had not been litigated in any way before the Hearing Examiner.^{6/} The Association is now alleged to have violated the Act by essentially failing to discern the feelings of the trustees of the Board, i.e., to realize the effect that inaccuracies in the newspaper article had on the Board, and by failing

^{6/} This particular point was only briefly alluded to for the first time in a post-hearing brief submitted by the Board.

to dispel the Board's fears by correcting any misrepresentations. The Board's "Catch-22" logic would require that a Hearing Examiner consider not only the actual allegations of a particular charge, but what the responsibilities, if any, of a respondent would be relating to matters in dispute if the particular charges were proven to be unfounded and based on misleading or ambiguous information. The Commission finds that the Hearing Examiner rendered a decision, fully sustainable on the facts of the case, that dealt adequately with all the issues in dispute as set forth in the pleadings and as litigated by the parties. This particular exception of the Board refers to matters not before the Hearing Examiner and therefore is completely without merit.

The Board next excepts to the Hearing Examiner's acceptance of the Association's answer in this matter that was not filed until after the conclusion of the hearings. The Board does concede that it is aware that the Commission's Rule on the submission of an answer to a complaint (N.J.A.C. 19:14-3.1 et seq.) should be liberally interpreted so as not to substantively jeopardize a party in proceedings before the Commission. The Commission specifically adopts the Hearing Examiner's analysis of this particular contention of the Board^{7/} and concludes that good cause has been shown for the acceptance of the answer submitted by the Association in correspondence dated January 20, 1977. We note specifically that the Board has not advanced any argument that it had been

^{7/} See note 9, p. 4 of the slip opinion.

prejudiced in the preparation of its case by the failure of the Association to file a formal written answer prior to January 20, 1977. The Association's position relating to the Board's charge had clearly been enunciated through this entire proceeding.

Lastly, the Board suggests that, in light of a recent judicial decision, Galloway Township Board of Education v. Galloway Township Education Association, 149 N.J. Super. 352, Motion for Rehearing denied, May 5, 1977; Petition for Certification granted, 7/20/77, ____ N.J. ____ (Appeal Pending), the Hearing Examiner's Report ought not to have been issued in the first instance. In Galloway, the Appellate Division determined that the achievement of a contractual agreement rendered moot the charge that the Board had committed an unfair practice by refusing to pay teachers increments, according to the pre-existing salary schedule, during the course of negotiations for a successor agreement. The Board in the instant matter suggested that the Commission "should perhaps determine that the [Instant] matter was mooted by voluntary resolution of the parties of a successor Agreement and therefore the Hearing Examiner should never have reached any of the issues either pro or con in the instant Charge."

We note with reference to this particular exception that the Board, as Charging Party, never attempted to withdraw its charge in this proceeding. Indeed, the Special Assistant to the Chairman, Stephen B. Hunter, contacted the Board's attorney after receipt of the Board's exceptions to determine whether this last "exception" of the Board was intended to be a withdrawal of the

Board's charge. The Special Assistant was informed at that time that the Board did not wish to withdraw its charge.

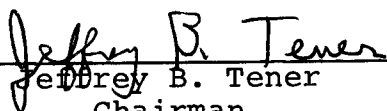
It is interesting to point out with reference to this last exception that the Board, in its other exceptions to the Hearing Examiner's Report, advanced certain arguments that are similar in tone and content to arguments that were raised by the Commission relating to the concept of mootness in its Petition for Certification that was recently granted by the Supreme Court in Galloway, supra, i.e., that a party that engages in unfair negotiating tactics which alters the balance between the parties at the negotiating table will have benefited from its wrongdoing, and the respondent may be subjected to similar coercion in subsequent negotiations, if said illegal conduct is not effectively remedied.

Furthermore, with reference to this last exception of the Board, the Commission notes that by adopting the findings of fact and conclusions of law of the Hearing Examiner in this instant matter, it effectively accomplishes that which would have taken place had the Board actually withdrawn its charge, i.e., the termination of any further proceedings in this matter.

ORDER

For the above-stated reasons, the Commission hereby adopts the Hearing Examiner's recommended order and the instant complaint^{8/} is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst, Hartnett and Parcels voted for this decision.
Commissioners Hipp and Hurwitz abstained.

DATED: Trenton, New Jersey
August 16, 1977
ISSUED: August 17, 1977

^{8/} In his recommended Order, the Hearing Examiner inadvertently referred to dismissal of the Charge.

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE PUBLIC EMPLOYMENT
RELATIONS COMMISSION

In the Matter of
GALLOWAY TOWNSHIP EDUCATION ASSOCIATION,
Respondent,

-and-

Docket No. CE-76-30-68

GALLOWAY TOWNSHIP BOARD OF EDUCATION,
Charging Party.

SYNOPSIS

A Commission Hearing Examiner recommends the dismissal of a complaint in an unfair practice proceeding. The Charging Party, Galloway Township Board of Education, alleged that the Galloway Township Education Association committed an unfair labor practice by threatening an illegal strike of its members, thus demonstrating a refusal to bargain in good faith.

The Hearing Examiner finds, that although New Jersey has not yet decided whether a threat to strike by public employees constitutes an unfair practice, it is unnecessary to reach that question in this case, since the Board failed to prove by a preponderance of the evidence that the Association did, in fact, threaten to strike.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and conclusions of law.

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RELATIONS COMMISSION

In the Matter of
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Respondent,

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GALLOWAY TOWNSHIP BOARD OF EDUCATION,
Charging Party.

Appearances:

For Galloway Township Education Association,
Starkey, Turnbach, White & Kelly
(Edward J. Turnbach)

Starkey, White & Kelly
(James M. Blaney)

For Galloway Township Board of Education,
Murray, Meagher & Granello
(James P. Granello)
(Robert J. Hrebek)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

The Galloway Township Board of Education (the "Board"), a public employer, filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") on December 9, 1975, alleging that the Galloway Township Education Association (the "Association"), employee representative of the teachers, nurses, guidance counselors and librarians employed by the Board, had committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act (the "Act") ^{1/}by threatening to engage in an illegal strike.

1/ The charge specifically alleged that the Association violated N.J.S.A. 34:13A-5.4(b)(1), (3) and (5). These subsections provide that employee organizations, their representatives or agents are prohibited from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.

"(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit.

"(5) Violating any of the rules and regulations established by the commission."

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 2, 1976, and hearings were held before the undersigned on March 24, 1976 and December 14, 1976. ^{2/}

On December 4, 1975, the Atlantic City Press carried a news article ^{3/} indicating that the teachers in Galloway Township had authorized a strike (at an indefinite future date) because of their long unresolved dispute with the Board of Education over salaries. The article identified Erwin Dick, President of the Galloway Township Education Association as the source of the writer's information. Five days later the Board filed the Unfair Practice Charge which is the basis of this case.

The Board's first witness was Kathleen Woodruff, who wrote the aforementioned article. Woodruff testified she had received a telephone call at her office from someone identifying himself as Erwin Dick. She said she had met Dick before while covering the subject for her paper, but that she could not identify him by voice. She didn't remember the conversation specifically and didn't remember verifying the source for this particular story, but said that sometimes she did verify sources. When pressed as to the circumstances in which she would verify, she indicated she probably would not have verified the phone call in question. ^{4/}

The Board also called Erwin Dick as a witness and asked him if he had attended a meeting with the teachers around the time the newspaper article appeared. On the advice of counsel, Dick refused to answer,

^{2/} All parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Respondent filed post-hearing affidavits and both parties filed letter memoranda in lieu of briefs, all of which were filed by March 18, 1977. There is no dispute and, accordingly, I find that the Board is a Public Employer within the meaning of the Act and is subject to its provisions, and that the Association is an employee representative within the meaning of the Act and is subject to its provisions. An Unfair Practice Charge having been filed with the Commission alleging that the Association has engaged or is engaging in unfair practices within the meaning of the Act as amended, a question concerning alleged violations of the Act exists and this matter is appropriately before the Commission for determination.

^{3/} Exhibit CP-1.

^{4/} Transcript, 3/24/76, pages 42-43.

claiming his privilege against self-incrimination. ^{5/} The Hearing Examiner sustained his privilege, but granted the Charging Party's counsel's request to submit a post-hearing memorandum on the question of Mr. Dick's privilege.

An in camera hearing was held on December 14, 1976, wherein it was determined that Dick had not waived his right to claim a privilege against self-incrimination. ^{6/} The regular hearing then continued and counsel for the Board was allowed to question Dick again, not about his personal involvement, but about the Association's action.

Dick testified that at a meeting on December 3, 1975, a proposal for a strike vote was made but that, to his knowledge, it was not voted upon. He testified that, to his knowledge, the Association had not authorized a strike. ^{7/ 8/}

The Board claimed in post-hearing memoranda that the Association

^{5/} In its Charge, the Board had argued that a strike authorization by the Association exposed its members to liability for criminal conspiracy under N.J.S.A. 2A:98-1, and had cited Bd. of Ed., Union Beach v. N.J.E.A., 53 N.J. 29, 38 (1968) as authority. Mr. Dick's counsel submitted that Dick had a privilege not to answer any questions relating to his possible attendance at an Association meeting on the ground that his answers might incriminate him if the Board proved right.

^{6/} N.J.A.C. 19:14-6.6 requires Hearing Examiners to give effect to the rules of privilege recognized by law. Rule 25 of the New Jersey Rules of Evidence provides the privilege: "Subject to Rule 37, every natural person has a right to refuse to disclose in an action to a police officer or other official any matter that will incriminate him..." Rule 37 reads, in pertinent part: "A person waives his right or privilege to refuse to disclose or to prevent another from disclosing a specified matter if he or any other person while the holder thereof has...(b) without coercion and with knowledge of his right or privilege, made disclosure of any part of the privileged matter or consented to such a disclosure made by anyone..."

^{7/} Transcript, 12/14/76, pages 34-41.

had admitted the charge by failing to file a timely answer, but the Hearing Examiner cannot accept the Board's claim. ^{2/}

The only evidence presented by the Board tending to substantiate the charge that the Association had authorized an illegal strike was a newspaper article, supplemented by the testimony of a reporter, who wrote the article but could not verify who had called her and given her the information on which it was based. Erwin Dick was the only other witness called by the Board and he testified that, to his knowledge, the Association had never authorized a strike.

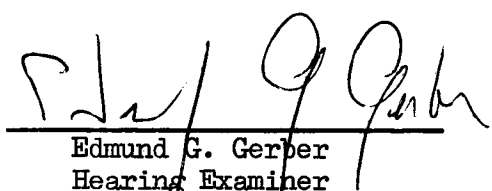
Accordingly, the Hearing Examiner finds that the Board failed to prove by a preponderance of the evidence that a strike had been authorized by the Association and therefore, it is unnecessary to reach the legal question, not yet decided in New Jersey, of whether a threat to strike by public employees is an Unfair Practice within the meaning of the Act.

I therefore find that the Association has not violated §(b)(3) of the Act. Further, no evidence was introduced concerning alleged violations of §(b)(1) and (5).

RECOMMENDED ORDER

Accordingly, for the reasons set forth, it is recommended that the charge in this matter be dismissed in its entirety.

DATED: June 7, 1977
Trenton, New Jersey


Edmund G. Gerber
Hearing Examiner

^{2/} At the first hearing, counsel for the Board indicated he had no objection to having the Association's formal answer filed subsequent to the hearing and accepted an oral statement of the Association's defense (Tr., 3/24/76, p. 6). Edward J. Turnbach represented the Association at the first hearing in March; he prepared an answer and obtained the necessary signatures but did not file it with the Commission or serve it on the opposing party. He was preparing to leave the firm of Starkey, Turnbach, White & Kelly and at the time of his departure was under the erroneous impression this dispute had been settled and there was no need to file the answer (Affidavit of Turnbach, 3/2/77). James M. Blaney was later assigned to the case and had no reason to review the file until he was preparing for the second hearing in December. He didn't notice whether or not the answer had been filed and it was not until mid-January, 1977 that the Charging Party first complained that no answer had been filed (Affidavit of Blaney, 2/24/77). Under these circumstances, the Board's request that the Association be penalized for failure to strictly comply with the rule requiring a timely answer to a complaint [N.J.A.C. 19:14-3.1] must be denied.