

P.E.R.C. NO. 78-64

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO EDUCATION ASSOCIATION AND
EMPLOYEES' ASSOCIATION OF WILLINGBORO,

Charging Parties,

Docket No. CO-78-178

-and-

BOARD OF EDUCATION OF THE TOWNSHIP
OF WILLINGBORO,

Respondent.

SYNOPSIS

The Special Assistant to the Chairman denies a request for interim relief relating to a Unfair Practice Charge filed on behalf of the two Associations. The Associations had contended that the Board of Education had violated the New Jersey Employer-Employee Relations Act by terminating the employment of individuals represented by the Associations, while not terminating any employees subsumed within the negotiations units represented by two organizations that did not support the Charging Parties in a strike that the Charging Parties had conducted, solely to undermine the status of the Associations and to discriminate, with regard to tenure of employment, against employees in the Associations' units, to discourage them in the exercise of their protected rights to form, join and assist the employee organization of their choice.

The Special Assistant in part determined that there appeared to be substantial and material disputed factual issues present that could only be resolved through the Commission's plenary hearing procedures, after the issuance of a complaint, if such a complaint was issued. The undersigned, moreover, was not satisfied that the Associations, in the circumstances in this case, were engaged in protected activities under the Act. The Special Assistant determined that, assuming arguendo that the Associations had satisfied the "substantial likelihood of success" standard, it did not appear that any harm suffered by the Charging Parties as the result of the Board's RIF determinations was irreparable in nature.

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BOARD OF EDUCATION OF THE TOWNSHIP
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Appearances:

For the Charging Parties, Joel S. Selikoff, Esq.

For the Respondent, Barbour & Costa, Esqs.
(John T. Barbour, on the brief)

INTERLOCUTORY DECISION

On February 17, 1978 the Willingboro Education Association and the Employees' Association of Willingboro (the "Associations" or the "Charging Parties") filed an Unfair Practice Charge with the Public Employment Relations Commission (the "Commission") alleging that the Board of Education of the Township of Willingboro (the "Board") violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Associations thereafter filed an amended Unfair Practice Charge that was docketed by the Commission on March 2, 1978. The amended charge alleged essentially that the Board had violated subsections 1, 3 and 5 of Section 5.4 of the Act^{1/} by terminating the employment of certain

^{1/} These subsections prohibit 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)

(continued)

unit members represented by the Associations to avoid the incurring of a deficit for the 1977-78 school year, while not terminating any individuals subsumed within the negotiations units represented by the Willingboro Educational Administrators' Association and the Willingboro Educational Secretaries' Association -- two organizations that did not support the Charging Parties in a work stoppage that they engaged in against the Board from November 4, 1977 to December 5, 1977 -- solely to undermine the status of the Charging Parties and to discriminate, with regard to tenure of employment, against employees in the Associations' negotiations units, to discourage them in the exercise of their protected rights to form, join and assist the employee organization of their choice.

The Associations' charge, as amended, was accompanied by a request for interim relief, pending the disposition of the unfair practice proceeding. A proposed Order to Show Cause was prepared on behalf of the two Associations and submitted to the Commission. The Commission executed the request for an Order to Show Cause on February 22, 1978 that was originally made returnable on March 9, 1978. The show cause hearing was later postponed until March 16, 1978 by joint consent.

1/ (Continued) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act; and (5) Refusing to negotiate in good faith with the 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.

The Order to Show Cause hearing was conducted on March 16, 1978 by the undersigned, who as Special Assistant to the Chairman has been delegated the authority to act upon requests for interim relief on behalf of the Commission. The parties appeared at the hearing represented by counsel. At the conclusion of that hearing the undersigned entered his determination and the reasons for same into the stenographic record. The undersigned concluded the Associations had not satisfied the Commission's standards that had been developed for evaluating the appropriateness of interim relief^{2/} and therefore denied the charging parties' application for interim relief as sought in its formal application before the Commission. This written interlocutory decision has been prepared in accordance with the request of the parties for a written exposition of the reasons for that determination.

Many of the facts in this matter are not in dispute. The Associations are exclusive majority representatives of certain employees employed by the Board. The Willingboro Education Association represents all certificated teaching personnel within the district and other non-supervisory professional employees. The Employees' Association of Willingboro represents essentially all non-professional, non-certified employees within the school district, excluding secretarial and clerical personnel and supervisors. On or about November 4, 1977 employees who are members of the units represented by the

^{2/} These standards will be referred to in a later section of this interlocutory decision.

Charging Parties began to withhold their services in the district, in protest over stalled, protracted contract negotiations. This strike lasted through December 5, 1977, when a tentative settlement was concluded with the Board. During the period between November 4 and December 5, 1977 members of the administrators' and secretaries' units represented by the Willingboro Educational Administrators' Association and the Willingboro Educational Secretaries' Association, respectively, who had both concluded tentative agreements with the Board by November 5, 1977, reported for work.

On December 14, 1977 the Board conducted a conference session at which discussions took place concerning the steps that the Board would take to effectuate economies in light of a projected deficit of approximately \$890,000 for the 1977-78 school year. The Board, by vote, tentatively determined that such steps would include, among other things, a reduction in force affecting its employees. It was tentatively agreed on that date that 17 secretarial and clerical personnel represented by the Secretaries' Association would be terminated and at least one unfilled position within that unit would be abolished. It was also tentatively decided to terminate one Assistant Principal at each of the four secondary schools. This particular position was included in the negotiations unit represented by the Administrators' Association. With respect to the units represented by the charging parties, eight individuals represented by the Teachers' Association would be terminated and one unfilled position abolished, and 11 individuals represented by the Employees' Association (three

custodians and eight bus aides) would be discharged pursuant to the reduction in force.

At an open public meeting held on December 19, 1977, the Board reversed itself concerning tentative decisions it had made on December 14, 1977, with specific respect to those employees who would be terminated. The Board voted not to RIF any members of units represented by the Secretaries' Association and the Administrators' Association. The Board terminated one-half of all elementary school art, music and physical education teachers, numbering approximately 15, and formalized its tentative decision of December 14 to eliminate the unfilled position of bi-lingual teacher. Furthermore, the Board made permanent its tentative decision of December 14, 1977 to terminate 11 individuals represented by the Employees' Association.

The charging parties contend that only one explanation for the change in the Board's personnel decisions from December 14 to December 19, 1977 exists. They refer to a memorandum, dated December 16, 1977, from the Superintendent of Schools in Willingboro to all Board members, a copy of which is attached to this decision and designated as appendix "A". This memorandum in part contained a recommendation from the Superintendent with supportive documentation, that one-half of all art, music and physical education teachers be terminated. The charging parties specifically refer to the Superintendent's statement that the RIFs tentatively announced on December 14, 1977 affecting the administrative and secretarial personnel dealt "a terrible blow" to their morale, and that "the administrators and

secretaries feel that they have been rebuked for supporting the Board's position during the recent strike, instead of being rewarded."

The Charging Parties submit that the Board's actions served to undermine their status as majority representatives and chilled the rights of unit members to support these organizations without fear of penalty or reprisal. The Associations maintain that individuals in their two units were singled out for termination solely as a result of being represented by the Willingboro Education Association and the Employees' Association of Willingboro. The Charging Parties concluded that it was no defense that the adversarial relationship between them and the Board involved unprotected activities in part, i.e., strike activities, since it was well established law that an employer acts unlawfully when he acts adversely to employees' protected rights, e.g., the right to form, join and assist an employee organization of their choice, even though illegal acts may have been engaged in by the affected employees at one time. At the show cause hearing the charging parties stated that it prayed in part for an order that would direct the Board to reinstate those employees RIF'd in decisions announced from December 19, 1977 whose terminations had not been previously announced on December 14, 1977.

The Board, besides challenging specific factual representations made by the Associations, asserts that the Charging Parties

have not established any likelihood of success on the merits of its legal allegations. More specifically the Board maintains that no protected rights are involved in the instant matter, inasmuch as the only significant activity referred to in the Associations' pleadings that allegedly resulted in the Board's final RIF decisions related to an illegal strike, not to protected rights under the New Jersey Employer-Employee Relations Act. The Board also contends that there has been no showing of irreparable harm that would warrant any extraordinary relief.

In passing upon these various arguments it must be borne in mind that this is an interim relief proceeding seeking extraordinary relief, pursuant to N.J.A.C. 19:14-9.1 et seq. The standards that have been developed by the Commission for evaluating the appropriateness of interim relief are of a rather stringent nature. These standards are similar to those applied by the courts when confronted with similar applications. Basically the test is twofold: The substantial likelihood of success on the legal and factual allegations in the final Commission decision, and the irreparable nature of the harm that will occur if the relief is not granted.^{3/} After reviewing

3/ See In re Township of Little Egg Harbor, P.E.R.C. No. 94, 1 NJPER 36 (1975); In re State of New Jersey (Stockton State College), P.E.R.C. No. 76-6, 1 NJPER 41 (1975); In re Township of Stafford, P.E.R.C. No. 76-9, 1 NJPER 59 (1975); In re City of Jersey City, P.E.R.C. No. 77-13, 2 NJPER 293 (1976); In re Ridgefield Park Board of Education, P.E.R.C. No. 78-1, 3 NJPER 217 (1977); In re Newark Redevelopment and Housing Authority, P.E.R.C. No. 78-15, 4 NJPER 52 (1978).

all the written materials submitted by the parties, as well as the oral arguments proffered on March 16, 1978, the undersigned concludes that it cannot be said at this juncture that either the facts or the law germane to this instant matter are so clearly in the Associations' favor so as to concede to them the substantial likelihood of success before the Commission on the ultimate merits of this case.

There would appear to be substantial and material disputed factual issues, relating in part to the existence and effect of the Superintendent's memorandum of December 16, 1977, that may only be resolved through the utilization of the Commission's plenary hearing procedures, after the issuance of the complaint, if such complaint is issued. Moreover, the undersigned is not satisfied that the Associations have established that the Board's actions in selecting only employees in the units represented by the Associations to be RIF'd were discriminatorily and illegally motivated as the result of the exercise of protected activities under the Act by members of these particular employee organizations. The Commission has determined in the past, most recently in In re Long Branch Board of Education, P.E.R.C. No. 77-70, 3 NJPER 300 (1977), appeal pending, (App. Div. A-4787-76), that striking is not a protected activity under the Act. In fact, this fact is apparently conceded by the Associations in this case. The undersigned is unable to accept the Associations' position that the one month strike engaged in by those organizations is not at

issue in this case, but only the right of employees legally to form, join and assist particular employee organizations and the negotiations positions they espouse. In any event the Commission itself has not yet determined in any comprehensive fashion what the exact parameters of "protected activity" may be under the Act, e.g., whether particular actions may be inherently destructive of legally protected employee rights, while primarily being directed at the suppression or punishment of illegal acts engaged in by employees. Given the facts in this case it would not be appropriate to predict what the Commission's decision will be on this yet undecided point of law.

Additionally, even assuming arguendo that the Associations had a more compelling case that would satisfy the "substantial likelihood of success" standard, it does not appear that any harm suffered by the charging parties as the result of the Board's RIF determinations is irreparable in nature. In this regard, the undersigned notes that it is very questionable as to whether the Employees' Association of Willingboro has been harmed at all by the Board's final RIF decision made on December 19, 1977. The Board on that date, as set forth before, simply made permanent its tentative decision of December 14, 1977 to terminate three custodians and eight bus aides in the units represented by the Employees' Association. There is not even an allegation on the Charging Parties' part that there was any change in the Board's decision vis-a-vis the Employees' Association as a result of the aforementioned memorandum of the Superintendent dated December 16, 1978.

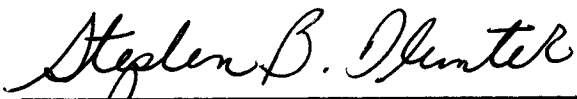
For all the foregoing reasons, the application for interim

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relief is hereby denied.

BY ORDER OF THE COMMISSION

A handwritten signature in cursive script that reads "Stephen B. Hunter". The signature is written in dark ink and is positioned above a horizontal line.

Stephen B. Hunter
Special Assistant to the Chairman

DATED: Trenton, New Jersey
April 6, 1978

APPENDIX "A"

December 16, 1977

TO ALL BOARD MEMBERS
FROM DR. ROMANOLI

There are several considerations that I would like to present to your attention. In support of the recommendations to eliminate half of the Art, Music and Physical Education staff at the elementary school level, I am attaching a proposed schedule. This points up how the time of the remaining specialists would be used and what the logistic affects would be.

In addition, it should be pointed out that for instruction in Art, Music and Physical Education to be effective, it must have continuous reinforcement. Specifically, the provision in the contract (ARTICLE V, Section G., as attached) which states that elementary teachers must be present only the first ten minutes and the last ten minutes when an Art, Music or Physical Education specialist is teaching negates the value of the special experience in that the teacher, being absent, is not familiar with the lessons presented to the youngsters and therefore cannot reinforce it during the interim when the majority of the time in that subject area is the responsibility of the classroom teacher.

On that basis, it is the superintendent's conclusion that Art, Music and Physical Education in the elementary school will not be affected deleteriously by the proposed reduction in staff. Statistically speaking, the superintendent predicts that under any statistical measure, there would be "no significant difference" in achievement.

A revised calendar of reporting periods for the elementary schools is attached for your information, including a date for parent-teacher conferences.

The superintendent feels it is his duty to inform all Board members that he has learned of a possible strike by the Willingboro Educational Secretaries Association which is scheduled to take place Tuesday morning if the cuts which were proposed at Wednesday night's meeting are effected Monday evening. The source of my information has always been accurate; I have no reason to believe that this information is inaccurate.

APPENDIX "A"

SECRET

TO ALL BOARD MEMBERS FROM DR. ROMANOLI, December 16, 1977, Page Two

In addition, I'm sure that most Board members have by this time considerable feedback which indicates that the actions of the Board Wednesday night dealt a terrible blow to the morale of the administrative staff, as well as to the secretarial association mentioned above.

It is my feeling that if such a strike occurs that the administrators will not participate in such a strike. It is only fair that you be aware that the administrators and the secretaries feel that they have been rebuked for supporting the Board's position during the recent strike, instead of being rewarded.

Have a nice weekend.