P.E.R.C. NO. 84-100

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLETOWN TOWNSHIP,

Respondent,

-and- Docket No. CI-83-33-116

VIRGINIA CLANCY,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that a letter from a former Mayor of Middletown Township to the president of Monmouth Council #9, New Jersey Civil Service Association violated the New Jersey Employer-Employee Relations Act because it could have tended to interfere with her protected activity. Under all the circumstances of this case, however, the Commission declines to order any affirmative relief.

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Appearances:
For the Respondent, Crummy, Del Deo, Dolan & Purcell
(Michael Quinn, of Counsel)

For the Charging Party, Lomurro, Eastman & Collins
(Donald M. Lomurro, of Counsel)

DECISION AND ORDER

On April 15, 1983, Virginia Clancy, president of Monmouth Council #9, New Jersey Civil Service Association ("Association"), filed an amended unfair practice charge against Middletown Township ("Township") and its former Mayor. The charge, as amended, alleges that the Township and Mayor violated subsection 5.4(a)(1) [1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when the Mayor wrote a letter to Clancy stating, in part: "It might be well if you attended more to your duties in the Assessor's office, rather than meddling in business that the Township Committee has every right to conduct concerning the Township's operation."[2/]

1/ This subsection prohibits public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act."

2/ The amended charge supplemented the original charge by specifying the date -- November 4, 1982 -- of the Mayor's letter and attaching a copy.

On June 28, 1983, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. The Township then filed an Answer asserting the following:

> The statement attributed to Mr. Self was not intended to nor did it have the effect of interfering with the lawful union activities. Ms. Clancy's job was not placed in jeopardy as a consequence of engaging in any protected activity. Ms. Clancy's letter to Mr. Self and the Township Committee bypassed appropriate grievance procedures. Mr. Self, then Mayor of Middletown had a right to express his views concerning the business of the Township Committee. This unfair practice charge is moot. Mr. Self is no longer Mayor of the Township. Ms. Clancy and/or Monmouth Council No. 9 suffered no demonstrable injury.

On December 10 and 19, 1983, respectively, the Township and Clancy entered the following stipulations:

> 1. Middletown Township ("Township") is a public employer within the meaning of the New Jersey Employer-Employee Relations Act ("Act") and is subject to its provisions.
>
> 2. Virginia Clancy ("Clancy" or the "Charging Party") is a public employee within the meaning of the Act and has been employed by the Township for approximately ten (10) years, and she has been President of Monmouth Council No. 9 for approximately three years.
>
> 3. On October 27, 1982, Clancy sent Township Mayor Frank Self the letter marked as Exhibit J-2, and by letter dated November 4, 1982, a copy of which is attached to the Charge contained in Exhibit C-1, Mayor Self responded to Clancy's letter, and his letter included the statement attributed to him in the charge.

4. No further action was taken by the Township against Clancy or her terms and conditions of employment as a result of Mayor Self's letter.

5. Mayor Self is no longer Mayor, his term expired on December 31, 1982. However Clancy is still employed by the Township and is still President of her union.

6. The Charging Party asserts that the Mayor's remarks to Clancy contained in his November 4 letter violated the Act. The Respondent denies that those remarks violated the Act.

7. Pursuant to N.J.A.C. 19:14-6.7 the parties herein agree to waive a hearing and a Hearing Examiner's Recommended Report and Decision and agree to submit this matter directly to the Commission for a decision based upon the documents in evidence which include Exhibit C-1, the Complaint and Notice of Hearing, the Charge, and the letter of November 4, 1982, Exhibit C-2, the Answer, Exhibit J-1, the parties' collective agreement, and Exhibit J-2, the letter of October 27, 1982; these Stipulations of Fact; and any briefs to be submitted by the parties.

8. In so stipulating the parties recognize that the facts as stipulated constitute the complete record to be submitted to the Commission. The Charging Party is placed on notice that to the extent that the stipulated facts are insufficient to sustain the Charging Party's burden of proof by a preponderance of the evidence, the Complaint may be dismissed by the Commission.

Similarly, the Respondent is advised that it too must rely upon the sufficiency of the stipulated record to sustain any affirmative defenses it has asserted or to rebut or disprove the existence of a prima facie case established by the Charging Party.

9. The parties agree to the simultaneous submission of briefs by December 23, 1983 and to the submission of reply briefs no later than January 6, 1984.

In her brief, Clancy asserts that the Mayor's letter violated subsection 5.4(a)(1) because it contained a statement

which tended to interfere with her right to engage in the protected activity of seeking to preserve a unit employee's job. She relies upon In re Commercial Township Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), affirmed, App. Div. Docket No. A-1642-82T2 ("Commercial Township") and In re Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981) ("Black Horse Pike").

In its brief, the Township asserts that the statement cautioning Clancy to attend to her job rather than to meddle in the Township's business is too isolated and de minimis to warrant an unfair practice finding and the use of the Commission's injunctive power. It relies upon NLRB v. Copes-Vulcan, Inc., 611 F.2d 440, 102 LRRM 2581 (3rd Cir. 1979) and Pease Co. v. NLRB, 661 F.2d 1044, 1047, 109 LRRM 2092 (6th Cir. 1981).

Under all the circumstances of this case, we agree with Clancy that the Mayor's letter violates subsection 5.4(a)(1), but we also agree with the Township that no relief besides the finding of a violation is warranted.

In Black Horse Pike and Commercial Township, we found that public employers violated subsection 5.4(a)(1) when their agents made statements threatening an employee's job status not because of that employee's job performance, but because of that employee's conduct as an employee representative. Black Horse Pike explained this fundamental distinction:

> A public employer is within its right to comment upon those activities or attitudes of an employee representative which it believes are inconsistent

with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However, as we have held in the past, and as noted by the Hearing Examiner, the employer must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer. See, In re Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979) and In re City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶14001 1977).

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions; one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible criticism may be appropriate and even legal action, as threatened here, may be initiated to halt or remedy the other's actions. However, as in this case, where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment. In the instant case, when Horton represented Ms. Cohen at the November 13 meeting he was not engaged in activity which was relevant to his performance as an industrial arts teacher.

* * *

The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticizm into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity.3/

3/ As we stated in Commercial Township, it is immaterial that an allegedly illegal statement did not actually coerce an employee or was not illegally motivated; it is the tendency of the employer's conduct, not its result or motivation, which is at issue. (Footnote added).

In the instant case, the letter in question contained a statement making an impermissible connection between Clancy's job status and her role as an employee representative. This statement could have tended to interfere with, restrain, or coerce Clancy in acting as an employee representative.[4/] We cannot sanction such a statement emanating from the Mayor nor dismiss it as isolated or de minimis.[5/] Accordingly, we find a technical violation of 5.4(a)(1). Under all the circumstances of this case, however, we do not believe that further Commission action is necessary or warranted. The Township did not take further action against Clancy; there is no suggestion of anti-union animus or illegal motivation; the Mayor is no longer in office; and this opinion clearly delineates the appropriate boundaries between impermissible statements and permissible comments for the parties' future guidance.

4/ Clancy's letter opposing the subcontracting of dog catching to a private service and the consequent elimination of a unit employee's job was protected activity. Our Supreme Court has recognized that employees have a legitimate interest in presenting their views on matters that affect them as employees through their representative, even if these matters may not ultimately be submitted to binding arbitration. Teaneck Bd. of Ed. v. Teaneck Ed. Ass'n, __ N.J. __ (1983); Bd. of Ed. Twp. of Bernards v. Bernards Twp. Ed. Ass'n, 79 N.J. 311 (1979); N.J. Const. Art. I, Paragraph 19.

5/ The two cases the Township cites are distinguishable because the remarks in question there, under all the circumstances of those cases, were less readily construable as having the tendency to interfere with, restrain, or coerce the employee representatives.

ORDER

For the foregoing reasons, the Commission declines to order affirmative relief.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hipp, Newbaker and Suskin voted in favor of this decision. None opposed. Commissioner Graves abstained and Commissioner Hartnett was not present.

DATED: Trenton, New Jersey
February 15, 1984
ISSUED: February 16, 1984