

P.E.R.C. NO. 83-117

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOON, et al,

Petitioners,

v.

OAL Docket No. EDU-9605-82

BERGEN COUNTY VOCATIONAL
BOARD OF EDUCATION,

Respondent.

BERGEN COUNTY VOCATIONAL
SCHOOL SYSTEMS,

Respondent,

-and-

Docket No. CO-83-74-65

BERGEN COUNTY VOCATIONAL TECH-
NICAL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, applying Hackensack v. Winner, 82 N.J. 1 (1980) and N.J.A.C. 1:1-9.7, holds that it, not the Commissioner of Education, has the predominant interest in determining the legality of the withholding of three teachers' increment. The three teachers, all officers in the Bergen County Vocational Technical Education Association, filed petitions with the Commissioner of Education asserting that their increments were withheld primarily because of anti-union animus. The Association, on behalf of all three teachers, filed an unfair practice charge with PERC also asserting that the increments were withheld because of anti-union animus.

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Appearances:

For the Respondents, Greenberg & Covitz, Esquires
(Morton R. Covitz, of Counsel)

For the Charging Party in CO-83-74-65 and Petitioners
in EDU-9605-82 Schneider, Cohen, Solomon & DiMarzio,
Esquires (Bruce D. Leder, of Counsel)

DECISION ON REVIEW OF PREDOMINANT
INTEREST DETERMINATION

On January 13, 1983, Administrative Law Judge Ward R. Young issued an Order pursuant to N.J.A.C. 1:1-14.1 et seq., determining that a dispute concerning the withholding of annual salary increments from three teachers employed by the Bergen County Vocational Board of Education predominately related to the jurisdiction of the Commissioner of Education to review the withholding of teaching staff members' salary increments pursuant to N.J.S.A. 18A:29-14, rather than the jurisdiction of this Commission to hear

and resolve charges of unfair practices pursuant to N.J.S.A. 34:13A-5.4(c). The predominant interest ruling was made because the affected teachers sought restoration of their withheld increments by filing separate petitions in their own names with the Commissioner of Education and by having their majority representative file an unfair practice charge with this agency. Thus, questions of concurrent agency jurisdiction were raised by virtue of the dual filings and a predominant interest proceeding was commenced in order to avoid duplicative administrative hearings and the possibility of inconsistent final administrative adjudications.^{1/} See City of Hackensack v. Winner, 82 N.J. 1 (1980).

Following the issuance of Judge Young's order, counsel for the Association and the teachers requested, on January 20, 1983, that we review the interlocutory order. See N.J.A.C. 1:1-9.7 (a). On January 25, 1983, the Chairman of the Commission advised all interested parties and agencies that the Commission would review the predominant interest determination. On that same date, the Commissioner of Education indicated it would not review Judge Young's order. We have been provided with the complete record upon which Judge Young made his predominant interest determination. The parties have also submitted argument as to why we should

^{1/} Judge Young initially determined the predominant interest question in a prehearing order. After it was pointed out that a predominant interest determination must be made in accordance with N.J.A.C. 1:1-14.1 et seq., a predominant interest motion was heard, although the Commission was not notified of its opportunity to be heard on the motion (N.J.A.C. 1:1-14.2). Additionally, the caption of Judge Young's order contains neither the caption on the unfair practice charge, nor the docket number of the charge, but it is apparent from the text of the order that the Judge was aware of both filings and made a ruling as to which agency had the predominant interest in the controversy.

reverse Judge Young's ruling, as argued by the teachers and the Association, or why we should affirm the ruling as urged by the Board.

The unfair practice charge filed in this matter alleges that the Board violated N.J.S.A. 34:13A-5.4(a)(1), (3), and (5),^{2/} by withholding the teachers' increments. The charge asserts that all three teachers were active in filing and/or processing grievances for members of the Association's unit in their capacities as Association officers and representatives and alleges that all received notices that their increments would be withheld just prior to a meeting scheduled by the Board and the Association to process several grievances which these teachers were pressing on behalf of the Association. The Association alleges, in its charge, that the grievances had the potential for "gross embarrassment" of the Board but does not indicate the subject matter of the grievances. The charge notes that only four increments were withheld in the entire district at the end of the 1981-82 school year and asserts that anti-union animus is the sole reason the increments were withheld from the three teachers involved in the case before us and the matter before the Commissioner of Education.

^{2/} These subsections 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; and (5) Refusing to negotiate in good faith with a 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."

In its Answer to the charge, the Board acknowledges that two of the three teachers have filed grievances but denies that they involve any embarrassment to the Board. The Board denies that the withholding was done in retaliation for union activity and asserts that poor teaching performance and failure to cooperate with the Board in "educational endeavors" prompted the withholding of the increments. The Board asserts that exclusive jurisdiction of this dispute is vested in the Commissioner of Education by virtue of N.J.S.A. 18A:29-14 and states it had ample business justification for its action.

The petitions filed by each teacher with the Commissioner of Education are essentially identical. Each recites the teacher's job with the district and his official position with the Association.^{3/} All petitions assert that each teacher was active in the policing of the collective negotiations agreement and the processing of grievances. Each petition alleges that the teacher did not receive any prior warning that his increment might be withheld and asserts that the decisions to do so were made hastily and just prior to a scheduled meeting to discuss the allegedly embarrassing grievances with the Board. The petitioning teachers all assert their teaching performances and evaluations were equivalent to teachers who received their increments and assert that the increments were withheld for reasons which were "untrue, vague and/or motivated by anti-union animus". The petitions allege that the Board's action was "in violation of both N.J.S.A. 18A:29-14 and

^{3/} Petitioner Cummings is President of the Association, Petitioner Boon is the Association's membership chairman and Petitioner Vivona is a member of the Association's negotiating team.

primarily, in violation of N.J.S.A. 34:13A-5.4(a)(1), (3), and (5)." (Emphasis added)

The Board filed answers to each petition generally denying the allegations and specifically denying that petitioners Boon and Vivona were active in the filing and processing of grievances. Association President Cummings' active role in grievance processing was acknowledged by the Board in its Answer.

Both the petitions and the unfair practice charge seek the identical relief: restoration of the increments, a cease and desist order, the posting of a notice of the violations and costs and counsel fees.

In determining which of two or more agencies has the predominant interest over a controversy where the jurisdiction of each agency has been invoked, N.J.A.C. 1:1-14.4(a), enacted in response to the Supreme Court's decision in City of Hackensack, supra., lists four factors. They are:

1. Whether the common issue before the two agencies is, for either agency, the sole, major or dominant issue in dispute and whether its determination would either serve to moot the remaining questions or to affect substantially their resolution;
2. Whether the allegations involve issues and interests which extend beyond the immediate parties and are of particular concern to one or the other agency;
3. Whether the claims, if ultimately vindicated, would require specialized or particularized remedial relief available in one agency but not the other;
4. Whether the common issue is clearly severable from the balance of the controversy and thus will permit nonduplicative factual and legal determinations by each agency.

Judge Young made reference to these factors in his decision but simply concluded that the Commissioner of Education had

the predominant interest. However, no explanation of his reasoning is contained in his opinion.^{4/} He cited In re Roxbury Township Board of Education, P.E.R.C. No. 80-126, 6 NJPER 207 (¶11100 1980) in which we held that a claim that an employee was discriminated against on account of having filed a petition with the Commissioner of Education was an issue to be tried before that agency, in support of his predominant interest finding. However, that case has no relevance whatsoever to the instant controversy where the petitioners and the Association allege the Board's action was taken in retaliation for the exercise of rights guaranteed by the New Jersey Employer-Employee Relations Act.

We turn now to a consideration of the four factors in light of the record and the parties' arguments.

The Association argues that an initial determination by either agency would not serve to moot the remaining questions but that an initial determination by PERC would substantially determine the issues before the Commissioner. The Board argues that because the propriety of the Board's action, from an educational standpoint, will be a factor in both determinations, the Commissioner's initial resolution would substantially determine the controversy.

The trial of a charge alleging a violation of N.J.S.A. 34:13A-5.4(a)(3) must necessarily consider both issues raised by this controversy; i.e., whether anti-union discrimination was a

^{4/} The Commission, in accordance with N.J.A.C. 1:1-9.7(f), had requested Judge Young to prepare a written memorandum, an option provided by the above-cited rule, explaining the reasons for his ruling.

factor in the withholding of the increment and whether the Board was educationally justified in withholding the increment in the absence of the discriminatory motivation. See East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981).

However, the Commissioner of Education would confine his inquiry to the educational justification for the withholding of the increment and would not pursue whether the petitioners had exercised rights guaranteed by the Employer-Employee Relations Act, and whether they were punished by the Board for engaging in such activities. Thus, we believe that a determination by this agency would serve to either moot or substantially determine the issues which would be considered by the Commissioner whereas the converse would not be true.

With regard to the second factor, the proceeding before the Commissioner involves personal actions of each of the three teachers. The case commenced before our agency involves the associational rights of all teachers represented by the Board since retaliation for union activity tends to chill the rights of all employees in the negotiating unit. Cf. Red Bank Regional H.S. Bd. of Ed. v. Red Bank Reg. H.S. Ed. Ass'n, 78 N.J. 122 (1978). Moreover, it has been recognized that the unfair practice sections of the Act are designed to enforce and protect public rights. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ed. Ass'n, 78 N.J. 25 (1978).

It is clear that both we and the Commissioner of Education could restore the teachers' increments. However, where we find an unfair practice to have occurred, we are directed by the Act to issue a cease and desist order and customarily order notices

posted which are included among the remedial claims of the petitioners and the Association. Thus, our remedial practices are particularly suited to preventing reoccurrences of prohibited conduct through the cease and desist order's obligations, whereas the Commissioner's remedial focus would not be directed toward this same end. In addition, the posting of a notice in retaliation cases helps to dissipate the chill created by the illegal acts on the rights of unit members.

Finally, with regard to the fourth factor, we find that the controversy is not sufficiently severable so as to allow independent determinations by both agencies. The factual proofs pertaining to each claim are likely to be quite similar so that separate hearings would be duplicative. Since the ultimate question to be decided by each agency is whether the increments were wrongly withheld, allowing both agencies to render final determinations would pose the potential for inconsistent adjudication that the Hackensack decision and the rules concerning predominant interest determinations were designed to avoid.

Based upon the above factors and the Association's complaints with each agency in which it is alleged that the primary, if not sole reason for the Board's actions was to retaliate against the teachers for their alleged exercise of protected activity, we are convinced that the Administrative Law Judge erred in holding that the predominant interest in this controversy lies within the jurisdiction and expertise of the Commissioner of Education. We hold that this agency has the predominant interest in this single controversy and direct, in accordance with N.J.A.C. 1:1-14.5(c), that a single hearing be conducted upon

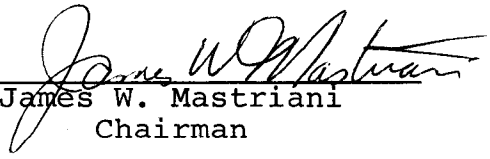
the consolidated case before PERC Hearing Examiner Edmund G. Gerber.^{5/} In evaluating any claim of the Board that the withholding of the increments was educationally justified, the Hearing Examiner is directed to apply appropriate precedents established by the Commissioner and State Board of Education, as well as the courts.

ORDER

A. P.E.R.C. Docket No. CO-83-74-65 and OAL Docket No. EDU-9605-82 (Agency Ref. No. 379-9/82A) are hereby consolidated for hearing before PERC Hearing Examiner Edmund G. Gerber.

B. The initial decision of the Hearing Examiner shall be served upon both the Commissioner of Education and the Public Employment Relations Commission, but only the Public Employment Relations Commission, the agency having the predominant interest in this matter, shall issue a final administrative decision.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Suskin, Hartnett and Graves voted for this decision. Commissioners Hipp and Newbaker abstained. None opposed.
DATED: Trenton, New Jersey
February 16, 1983
ISSUED: February 17, 1983

^{5/} Judge Young's order did not specifically order consolidation of the two cases. We shall do so.