P.E.R.C. NO. 86-119

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MANCHESTER REGIONAL HIGH SCHOOL
EDUCATION ASSOCIATION,

Charging Party,

-and- Docket No. CO-86-18-28

MANCHESTER REGIONAL HIGH SCHOOL
BOARD OF EDUCATION,

Respondent.

SYNOPSIS

The Public Employment Relations Commission affirms an Administrative Law Judge's initial decision that two cases pending before the Commission and Commissioner of Education should be consolidated and that the Commissioner has the predominant interest to decide the cases. The Commission disagrees, however, with that aspect of the Administrative Law Judge's decision that the existence of legal grounds to withhold an employee's salary increment would moot the unfair practice charge and directs the Administrative Law Judge to apply the tests set forth in In re Bridgewater Tp., 95 N.J. 236 (1984) in determining whether an unfair practice was committed.

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Appearances:
For the Charging Party, Bucceri & Pincus, Esqs.
(Sheldon H. Pincus, Of Counsel)

For the Respondent, Schwartz, Pisano & Simon, Esqs.
(Nathanya G. Simon, Of Counsel)

DECISION AND ORDER

On July 17, 1985, the Manchester Regional High School Education Association ("Association") filed an unfair practice charge against the Manchester Regional High School Board of Education ("Board") with the Public Employment Relations Commission. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act ("Act"), specifically subsections 5.4(a)(1), (3) and (5),[1/] when it withheld Thomas

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."

DiCerbo's salary increment for the 1985-1986 school year. This action was allegedly taken in unlawful retaliation against DiCerbo's exercise of protected activities as Association President. Specifically, the charge alleged that DiCerbo engaged in these protected activities: (1) extensive history of processing grievances and collective negotiations with the Board; and (2) recent grievance activity and public criticism of the superintendent including speaking at a Board meeting concerning the reorganization of the district staff and expressing "no confidence" in the superintendent. The charge alleges that the superintendent was aware of this activity and threatened to file disciplinary charges against him. Finally, the charge alleges that the Board and superintendent investigated his supervision of a group of students during a ski trip unrelated to school and charged that he permitted minors to consume alcoholic beverages. The charge further alleges that these stated reasons were a pretext to discipline him and the Association for their union activity, alleging that: (1) DiCerbo was not, at first, aware that beverages had been consumed; (2) when he became aware, he immediately confiscated the beverages; and (3) the Board knew he had been caring for a student who had suffered an epileptic seizure. Therefore, the charge concludes that the "basis for the Board's withholding of DiCerbo's increments...[was] its desire and motivation to penalize DiCerbo for both his Associational activities...and those of predecessor leaders of the Association."

On September 16, 1985, DiCerbo filed a petition with the Commissioner of Education ("Commissioner"). The petition alleges the Board was "arbitrary, capricious and unreasonable" when it withheld his increment and repeats his claim that he was not responsible for the students' consumption of alcoholic beverages.

On August 9, 1985, the Commission's Director of Unfair Practices issued a Complaint and Notice of Hearing. On August 30, 1985, the Board filed its Answer. It admits it knew DiCerbo was Association President, but denies that it withheld his increment because of his Association activities. As affirmative defenses, it asserts that it had good cause to withhold DiCerbo's increment and that the Commissioner has "primary jurisdiction" to decide this matter.

On September 2, 1985, the Board filed its Answer to DiCerbo's petition with the Commissioner of Education. It contends that it had "good and sufficient cause" to withhold DiCerbo's increment and stated that he "permitted, allowed, aided and abetted the consumption of alcoholic beverages by pupils of the Manchester Regional High School District."

On September 10, 1985, the Board filed tenure charges against DiCerbo with the Commissioner. The Board charged DiCerbo with insubordination and conduct unbecoming a teacher for arranging a trip for students not approved by the Board and permitting students to consume alcohol.

On September 30, 1985, DiCerbo filed his Answer to the tenure charges with the Commissioner. He denied the charge's allegations and, as an affirmative defense, contended that the Commission has primary jurisdiction to decide the matter.

On September 27, 1985, the Association filed an amended unfair practice charge with the Commission. It alleges that the tenure charges were in retaliation against DiCerbo's and the Association's protected activity and were designed to deprive the Commission of jurisdiction to decide the unfair practice charge.

On October 28, 1985 the Association filed a motion to consolidate before the Commission. It contends we have the predominant interest to decide all issues.

On November 4, 1985, the Board filed a response and cross-motion before this Commission. It agrees that the pending matters should be consolidated, but contends the Commissioner has the "predominant interest."

On December 10, 1985, the Chairman, pursuant to N.J.A.C. 1:1-14.4, referred the motions to the Administrative Law Judge assigned to the case by the Office of Administrative Law for an initial determination, subject to this Commission's review. N.J.A.C. 1:1-14.5.

On January 23, 1986, Hon. Sybil R. Moses, A.L.J., issued an order on Motion for Consolidation and to determine Predominant Interest. The administrative law judge first concluded, in agreement with the parties, that consolidation was appropriate. She then found the Commissioner to have the predominant interest. She based this conclusion on the following factors: the Commission's

jurisdiction is limited to unfair practice matters while the Commissioner has jurisdiction over "all the issues contained in DiCerbo's tenure charges, including teacher union-school board relations" (at 6); the sustaining of tenure charges would preclude a finding that anti-union animus was a substantial factor in the discharge; the Association conceded that additional hearings would be necessary on the tenure issue if the Commission held the initial hearing and "PERC cannot determine if anti-union animus is the substantial motivating factor until a ruling is made on the validity of the disciplinary action under educational law"; the Commission's "policy...to defer to the Commissioner in a case in which unfair labor charges arise in conjunction with a tenure charge proceeding" and "PERC will not exercise jurisdiction here over DiCerbo's unfair practice claim until a ruling has been made on the validity of the tenure charges." Based upon these factors, the A.L.J. ordered:

(1) the Commissioner has the "predominant interest" in this matter;

(2) The issues arising from DiCerbo's conduct on the ski trip are the predominant issues and the Commissioner shall issue a final decision on those issues;

(3) "that if there are legal grounds to withhold the increment and/or suspend DiCerbo pursuant to law, then any legal grounds (sic) for anti-union animus will become moot;"

(4) if there are no sufficient legal grounds to uphold the tenure charges and/or increment withholding, then the Commission shall make the final decision on charges of anti-union animus.

On January 31, 1986, the Association filed exceptions to Judge Moses' initial decision. It contends Judge Moses erred in: (1) concluding that the existence of cause for an increment withholding and/or tenure dismissal will bar an unfair practice finding; (2) ignoring the requisite test and burden of proof set forth in In re Bridgewater Tp., 95 N.J. 235 (1984); (3) concluding that the Commission be divested of jurisdiction over the unfair practice allegations; and (4) recommending that the Commissioner of Education first review the Administrative Law Judge's initial decision. On February 6, 1986, the Board filed its response. It urges adoption of Judge Moses' initial decision.

The parties and Judge Moses agree that these two cases should be consolidated. So do we. See N.J.A.C. 1:1-14.3. The main issue presented here is which agency, if any, has the predominant interest. Judge Moses found the Commissioner to have the predominant interest. Applying the standards set forth in N.J.A.C. 1:1-14.5(a), we agree and hold that the Commissioner has the predominant interest. We do so because the central question requires an evaluation of DiCerbo's conduct while on a trip with students and specifically his role, if any, in the students' consumption of alcoholic beverages. On balance, we believe this is the dominant issue in dispute and one which is of particular concern to the Commissioner. N.J.A.C. 1:1-14.5(a)(2) and (3).

Accordingly, we affirm Judge Moses' predominant interest order.[2/] We disagree, however, with her order that "if there are sufficient legal grounds to withhold the increment and/or suspend Mr. DiCerbo pursuant to the education law, then any legal grounds for anti-union animus will become moot." In re Bridgewater Tp., 95 N.J. 236 (1984) sets forth the requisite standard:

> the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. Transportation Management, supra, ___ U.S. at __, 103 S.Ct. at 2474, 76 L.Ed.2d at 675. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. Id. at 242.

We emphasize that an examination of the employer's reasons is necessary to apply the test. However, it is not enough that a set of facts exists which could constitute "cause" for the employer action. The employer's burden, assuming the prima facie case has been made, goes beyond a finding of "cause." Rather, it must establish not simply "cause", but more importantly "that the same action would have taken place even in the absence of the protected activity." Id. at 242. See also Centre Property Mgmt., 277 NLRB No. 154, 121 LRRM 1108, 1109 (1985) (A judge's personal belief that

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2/ We do not, however, agree with certain aspects of her analysis.

the employer's legitimate reason was sufficient to warrant the action taken is not a substitute for evidence that the employer would have relied on this reason alone). Accordingly, we direct the Administrative Law Judge to apply this test.

ORDER

The consolidation and predominant interest order are affirmed. The aspect of the order which moots the unfair practice charge if sufficient legal grounds exist to withhold the increment and suspend is reversed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Reid abstained. Commissioners Hipp and Horan were not present.

DATED: Trenton, New Jersey
April 18, 1986
ISSUED: April 21, 1986