

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

JAMESBURG BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-79-325-50

JAMESBURG EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

In agreement with the Hearing Examiner, the Commission dismissed a complaint alleging violations of N.J.S.A. 34:13A-5.4(a)(1), (a)(3) and (a)(5). The Charging Party contended that the Board excessively disciplined and harrassed Sue Graham due to her Association activities. The Commission affirms the Hearing Examiner's findings and conclusions - including credibility determinations - that the Board did not violate the Act when it disciplined Graham for her central role in the distribution of a leaflet, containing the Association's position in a dispute with the Board, through students. In accordance with its decision in In re Manalapan-Englishtown Reg. Bd of Ed, P.E.R.C. No. 78-91, 4 NJPER 252 (¶4134 1978), the Commission concluded that the use of students as a conduit for the distribution of Association positions is an unprotected activity. Having concluded that the flyer distribution was not a protected activity, the subsequent discipline flowing therefrom, under the circumstances herein was determined not to be violative of the Act. The remaining allegations which are alleged to constitute the Board's harrassment of Graham are determined to be insufficient to support the (a)(1) and (a)(3) violations asserted.

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Appearances:

For the Respondent, Rubin, Lerner & Rubin, Esqs.
(David B. Rubin, of Counsel)

For the Charging Party, Klausner & Hunter, Esqs.
(Stephen E. Klausner, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission on June 4, 1979 by the Jamesburg Education Association and Sue Graham (the "Charging Party") alleging that the Jamesburg Board of Education (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"); more specifically, it is alleged that the Board's conduct was violative of subsections (a)(1), (a)(3) and (a)(5) of the Act.^{1/}

^{1/} These subsections prohibit employers, their representatives and 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. (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."

On December 4, 1978, the Association prepared and through its teacher-members, distributed a leaflet to students at the Kennedy Elementary School. The students were instructed to bring the leaflet home to their parents. The leaflet discussed the lack of heat in the school building and urged parents to contact the Superintendent to inquire about the situation. The alleged lack of heat in the building had been the subject of an earlier Association grievance.

On December 5, 1978, the Board sent a memo to Sue Graham, as President of the Jamesburg Education Association, informing her that her conduct vis-a-vis the distribution of the December 4, 1978 flyer, would be discussed at that evening's meeting of the Board.^{2/}

On December 8, 1978, three letters issued: (a) a letter of reprimand to all teachers, including Graham, involved in the flyer distribution; (b) a memo to Graham as Association President concerning the use of school facilities for Association business, which stated that the Association should purchase required supplies when it requested permission to use the facilities; and (c) a letter to Graham as an individual stating that she had left her class attended by an aide on December 7, 1978, and that in the future her presence was expected in class.

^{2/} It is stated in the testimony that the Board was under an obligation to inform Graham that her conduct would be discussed by the Board.

On December 15, 1978, Graham was informed via memo that the Board would again discuss her participation in the flyer matter at the December 19, 1978 Board meeting.

On December 28, 1978, Graham received a letter from the Superintendent indicating that their investigation of the flyer distribution matter revealed that she was chiefly responsible for the actions disapproved by the Board and that she was being given a "more formal reprimand."

In her testimony, Graham states that the Board harrassed her via correspondence and by the Superintendent's "surveillance" of her. ^{3/}

The Charging Party asserts that the Board violated the Act by meting out discipline for the distribution of the flyer; by singling out Graham for especial discipline because she was Association President and an Association activist; and that its conduct interfered with, restrained and coerced unit employees in the exercise of rights guaranteed to them by the Act.

On January 7, 1980, the Director of Unfair Practices issued a decision dismissing Count One of the instant unfair practice charge - that portion of the charge alleging that the Board had violated the Act by reprimanding teachers who utilized students to carry home the December 4, 1978 flyer.

In its brief to the Hearing Examiner, Charging Party urged a reconsideration of the conclusion reached by the Director.

^{3/} After the December 8, 1978 memo about her absence from class, Graham testified that whenever she met the Superintendent in the halls, he would ask her whether or not she then had a class.

The Hearing Examiner refused to consider that aspect of the charge.^{4/}

The Hearing Examiner found Ms. Graham's testimony lacking in credibility and concluded that the Association had failed to prove by a preponderance of the evidence that the Board had violated the Act by engaging in a pattern of conduct which interfered with the exercise of protected rights. Further, the Hearing Examiner found no violation of subsections (a)(3) or (a)(5) of the Act. Accordingly, the Hearing Examiner recommended that the complaint be dismissed.

The Charging Party has filed exceptions to the Hearing Examiner's Recommended Report and Decision. We will treat the exceptions seriatim. Charging Party first excepts to the Hearing Examiner's conclusion that the Board did not violate the Act when it disciplined Ms. Graham for her role in the distribution of the December 4, 1978 flyer. This exception is predicated upon Charging Party's argument that the Hearing Examiner misconstrued and improperly applied the Commission's decision in In re Manalapan-Englishtown Regional Board of Education.^{5/} In Manalapan, we concluded that the Association's utilization of students for the distribution of a letter containing the Association's position in an on-going labor relations dispute with the Board was not a protected activity; we further stated in part, that discipline

^{4/} The proper way to review a refusal to issue a complaint, based on all or part of an unfair practice charge, is by appeal to the Commission pursuant to N.J.A.C. 19:14-2.3, not by seeking reconsideration from the Hearing Examiner who is limited to hearing those issues upon which a complaint was issued.

^{5/} In re Manalapan-Englishtown Reg. Bd. of Ed., P.E.R.C. No. 78-91, 4 NJPER 262 (¶4134 1978).

part, that discipline resultant from the Association's use of students to distribute such materials was not in violation of the Act.

The Charging Party asserts herein that the material sent home with students was not labor relations material and therefore to apply the Manalapan rationale here is inappropriate. We find such an assertion to be unpersuasive. In Manalapan we found that the utilization of students as a conduit for the distribution of Association positions to be unprotected. Thus, a similar act herein is unprotected and we do not have to examine whether the substance of the flyer constitutes a "labor relations document."

The Charging Party's second exception states that health and safety issues have been accorded special status by other agencies and courts, in that certain employee actions have been deemed to be protected whereas, had they related to less important terms and conditions of employment, they would have been deemed unprotected. Having reviewed the decisions cited by Charging Party, we find reliance upon them in this matter to be misplaced. In these cases,^{6/} it was determined that the employer violated the National Labor Relations Act when it disciplined employees who had resorted to self help measures - various work stoppages - where they were faced with uncorrected hazards in

^{6/} NLRB v. Washington Aluminum Co., 370 U.S. 9, 50 LRRM 2235 (1962); G.W. Murphy Inc., 183 NLRB No. 97, 74 LRRM 1474 (1970); Roadway Express Inc. v. NLRB, 532 F.2d 751, 91 LRRM 2239 (CA4 1978), and Combustion Engineering, 224 NLRB No. 76, 93 LRRM 1049 (1976).

the workplace. Such self help measures are clearly distinguishable from the focal action herein - the utilization of students as an information conduit in a labor relations dispute.

The Charging Party's fourth exception relates to the Hearing Examiner's credibility determinations concerning Charging Party's only witness, Sue Graham. After an examination of the record herein, we find no basis for reversal or modification of the Hearing Examiner's determinations in this regard.

The Charging Party's third exception states that the Hearing Examiner failed to give proper weight to the evidence concerning other incidents in which Ms. Graham was singled out for harrassment. Upon consideration of the totality of circumstances herein, Charging Party submits that the Board should be found to have violated subsections (a)(1) and (a)(3) of the Act. We disagree. The central factual event upon which that argument rests is the discipline which resulted from the utilization of students for the distribution of the December 4, 1978 flyer. Having found the flyer distribution not to be a protected activity, the subsequent discipline therefor was, under the facts herein, not violative of the Act. However, Charging Party further argues that Ms. Graham was visited with greater discipline than was any other participant in the flyer distribution matter, due to her Association activism. The Association also contends that Ms. Graham was further harrassed by the Superintendent due to her Association activism.

The record does not support these contentions. The Hearing Examiner found Graham's testimony lacked full credibility. Further, the record indicates that the Board (and/or its agents) did conduct an investigation of the flyer distribution matter and concluded that Ms. Graham had a central role therein. Accordingly, the Board imposed a "more formal discipline" ^{7/} upon Ms. Graham. Other indications of harrassment on which the Charging Party relies are the letter concerning her absence from the classroom and the memo concerning the Association's use of school facilities for Association business. Having discounted the argument that Ms. Graham unfairly received additional discipline for the flyer distribution matter, these latter items must now be considered standing alone, as the Hearing Examiner correctly concluded.

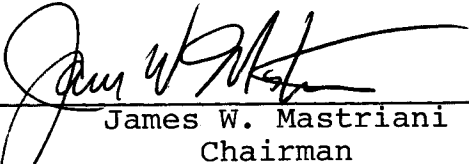
We agree with the Hearing Examiner's conclusion that these items are insufficient to support the (a)(1) and (a)(3) charges asserted by the Charging Party. Accordingly, we confirm the findings and conclusions of the Hearing Examiner substantially for the reasons stated by him.

^{7/} The "more formal discipline" was an additional letter of reprimand placed in Ms. Graham's personnel file reflecting the Board's conclusion that she played a central role in the flyer distribution matter.

ORDER

The Complaint in this matter, CO-79-325-50, is hereby dismissed in its entirety.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
January 20, 1981
ISSUED: January 21, 1981

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SYNOPSIS

In a Hearing Examiner's report and recommended decision, the Hearing Examiner recommends that the Public Employment Relations Commission find that the Jamesburg Board of Education did not commit an unfair practice when it chastised Sue Graham, a teacher employed by the Board and the President of the Jamesburg Education Association, for her responsibility in the distribution of a flyer to students to take home to their parents. The Commission has previously held that the distribution of flyers to students in order to communicate with parents is not a mode of communication that is a protected activity within the meaning of the Act.

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/or conclusions of law.

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Appearances:

For the Respondent

Rubin, Lerner & Rubin, Esqs.
(David B. Rubin, Esq.)

For the Charging Party

Klausner & Hunter, Esqs.
(Stephen E. Klausner, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on June 4, 1979 by the Jamesburg Education Association and Sue Graham (the "Association" or "Charging Parties") alleging that the Jamesburg Board of Education (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charging Parties alleged three separate counts. On or about December 4, 1978, the Association prepared and distributed a leaflet to the students at the Kennedy Elementary School. The students were instructed to bring the leaflet home to their parents. The leaflet complained of the lack of heat in the school building and suggested that the parents contact the Superintendent of Schools to make inquiries as to the status of boiler repairs. All teachers received a letter of reprimand for sending the leaflet home. The Association alleges as Count One that the

Board's action constituted a change in past practice. It was further alleged as Count Two that Sue Graham, the President of the Association, received letters on December 15 and 28, 1978 and January 11, 1979 which accused Sue Graham of instigating the distribution of the leaflet and, it was alleged, that the Board's action has had a substantial and deleterious affect upon the other members of the Association and fear of reprisal has prevented members from filing grievances subsequent to these incidents.

The Third Count alleged that on December 7, 1978 Sue Graham received a letter from the Superintendent criticizing her for having an aide assume full responsibility for her classroom. It was alleged that the Superintendent's action constituted the implementation of a new term and condition of employment without prior negotiation and further it was alleged that this letter has had a substantial chilling affect upon Sue Graham and the bargaining unit as a whole.

All three Counts were alleged to be violative of N.J.S.A. 34:13A-5.4(a) (1)(3) and (5) of the Act. ^{1/ 2/} On January 7, 1980 the Director of Unfair Practices issued a decision in which he refused to issue a Complaint on Count One of the charge, Jamesburg Board of Education and Jamesburg Education Association, D.U.P

1/ 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."

2/ The Complaint was amended on November 7, 1979. Said amendment only included additional allegations in support of the original Unfair Practice Charge. There were no new independent charges raised by this amendment. The Respondent, in its briefs, argues that this amendment is out of time and the charges herein should be dismissed as out of time in violation of Section 5.4(c) of the Act. Here, however, the original charge, filed on June 4, 1979 can stand alone independent of said amendment and Section 5.4(c) is not applicable.

No. 80-15, 6 NJPER 73 (¶11037, 1980). ^{3/} It appearing that the allegations of Counts Two and Three of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 7, 1980. Pursuant to said Notice of Hearing, a hearing was held on March 18, 1980. All briefs were received by September 9, 1980.

At the hearing, at the conclusion of the Charging Parties' case, the Respondent moved to dismiss the Complaint in this matter. The motion was granted as to Count Three, since, granting every favorable inference to the Charging Party, it was not shown that there was an alteration of a past practice as alleged. The motion was denied as to Count Two and, accordingly, only Count Two of the Complaint will be considered in this report

* * * *

Sue Graham was the only witness on behalf of the Charging Party. She is a third grade teacher employed by the Jamesburg Board of Education in the John F. Kennedy School. She is President of the Association and has been since 1977.

On November 28, 1978 Graham filed a class action grievance complaining of the lack of heat in the Kennedy building. The grievance lists temperatures of 59° in a fourth grade classroom, 54° in the Principal's office and 50° in the faculty room.

The heat remained inadequate in the building for the next several days. On December 4, 1978, 11 of 12 teachers in the building distributed a flyer to their students to take home to their parents. The flyer stated:

^{3/} The Charging Party in its brief argued that the Director's decision and most specifically his reliance upon the Commission's decision in Manalapan-Englishtown Regional Board of Education, P.E.R.C. No. 78-91, 4 NJPER 262 (para. 4134, 1978) were improper. I have independently reviewed the Director's decision and hereby find it correct and will not reconsider the allegation of Count One.

"JAMESBURG EDUCATION ASSOCIATION

For two consecutive days, (Friday and Monday), there has been no heat in our classroom. This is not the first time it has happened, and probably won't be the last.

We are concerned about our children! We can't tolerate this situation. We have gone "through channels" without success. We are, therefore, asking for your cooperation.

Please call the Superintendent, Mr. Kaniper at 521-0303. Please tell him that you don't want your children doing school work with their coats, hat and mittens on - that in this day and age your children are entitled to heat in their classroom.

You might want to ask why boiler repairs were not made over the weekend!

Thank you,

Jamesburg Education Association"

On December 5 Graham received a notice from Wayne Kaniper, Superintendent of Schools, addressed to her as President of the Association, that the Board will, that same evening, discuss whether her conduct violated the terms of the collective negotiations agreement between the parties.

On December 8, 1978 all teachers in the building, including Graham, received a disciplinary letter from Wayne Kaniper. The letter stated that Kaniper was contemplating further disciplinary action. He noted repairs were made to the school boiler over the weekend and he chastised the teachers for circumventing the principal of their school. Also on December 8 Graham received two letters from Kaniper. One, addressed to her personally stated:

"On December 7, 1978, a check of classroom after the repair of a heating system found you absent from yours, not present in the hall, and an aide assuming the full responsibility of the classroom and its students.

Your presence with your class at all times, unless directed otherwise, is a necessity to which your attention is appreciated and expected."

The other letter, addressed to Graham as President of the Association, stated:

"Due to the difficulty in assessing association costs in the use of school paper for duplicating purposes, the association must purchase the required supplies at the time of securing approval for use of school facilities and equipment."

On December 15, 1978 Graham again received a notification from Kaniper that the "Board of Education will be discussing the matter of distribution of flyers and (Graham's) participation therein at its December 19, 1978 meeting."

On December 28, 1978 Graham received a letter from Kaniper stating that after sending out the letter of December 8, 1978 to all teachers, an investigation was conducted by Kaniper which revealed that Graham "was the individual chiefly responsible for conceiving and implementing the actions disapproved by the Board and accordingly, it is believed that a more formal reprimand is in order." The letter accused Graham of "flagrant insubordination and a serious breach of professional duty." The letter states that her "leadership position with the association does not grant her immunity from discipline in this matter." It is the Association's position that these letters were the core of a pattern of harrassment against Graham.^{4/}

Graham testified that she did not conceive of the idea of the flyer nor did she type the flyer: that on December 7, when Kaniper visited Graham's classroom when she was absent, Graham was in the ladies room and she told Kaniper that she had to use the ladies room before he wrote his note of December 8: that in regards to Kaniper's other memo of December 8 the Association used its own paper for the flyer. Graham also testified that Kaniper thereafter constantly asked Graham what she was doing and whether she had a class whenever he would meet her in the school hallways. Graham also testified that in June of 1979 no one else would run as a candidate for the presidency of the Association because of the way she was treated.

The only testimony offered by the Respondent Board was from the current acting Superintendent, Ernest Barberio. In December of 1978 Barberio was the Principal of the Kennedy School. Barberio was not in the building on the morning of December 4. He first learned of the flyer when he contacted his secretary in the

^{4/} Two other letters were sent to Graham in January and February but they related strictly to grievances filed and are not relevant here.

in the afternoon. She told him, "Sue's at it again." When Barberio asked Graham to stop the flyer, she stated that it was too late for it was sent out at lunch time. Barberio testified that he knew personally of at least one teacher that would have been willing to run for the presidency of the Association in June and further that during this same time period the Board had decided not to renew Kaniper as Superintendent.

On balance, the Association has failed to show by a preponderance of evidence that the Board committed an unfair practice by engaging in a pattern of conduct which interfered with the exercise of protected rights.

Graham was less than completely candid as a witness. Her answers to my questions were evasive and overly narrow. There was no corroboration as to any of her testimony, e.g., no one else would run for the presidency of the Association. The Association tried to show that no investigation took place and the Board merely jumped to the conclusion that Graham, a staunch Association advocate, was responsible for the flyers. The Board witness was not a party to any investigation. He did testify that Kaniper asked him if he knew who was responsible for the notice (Barberio testified that he told Kaniper that he did not know). There are other indications that an investigation may have taken place. All teachers were reprimanded equally by the Board in the letter of December 8. It was only three weeks later Kaniper in his letter of December 28, indicates that his investigation revealed that she was chiefly responsible. Further in Kaniper's written response to a grievance, Kaniper wrote:

"I deem it quite significant that at no point in your presentation did you contest our finding that you were in fact the coordinator of the actions engaged in on the date in question... (M)y investigation revealed statements on your part to individuals connected with the Board wherein you purported to take responsibility for the actions of the group." 5/

It was not violative of the Act for the Board to discipline Graham and the

5/ N.J.A.C. 1:1-15.8 provides that in administrative hearings, hearsay evidence is admissible.

other teachers because they sent home the flyer. In Manalapan-Englishtown Education Association and Manalapan-Englishtown Board of Education, P.E.R.C. No. 78-91, 4 NJPER 262 (para. 4134, 1978) the Commission held distributing flyers to students in order to communicate with parents is not a mode of communication that is a protected activity within the meaning of the Act.

Most of the letters introduced into evidence were related to such discipline and standing alone the letters relating to the Association's procuring their own paper and to Graham's absence from her classroom are de minimus.

As stated above, Graham's testimony lacked full credibility and her assertions as to her relationship with Kaniper are not persuasive.


Accordingly, for the reasons set forth above the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Charging Parties have failed to prove by a preponderance of the evidence that the Respondent committed a violation of N.J.S.A. 34:13A-5.4(a)(1)(3) and (5) of the Act.

RECOMMENDED ORDER

It is hereby ORDERED that the Complaint in this matter be dismissed in its entirety.



Edmund G. Gerber
Hearing Examiner

DATED: October 30, 1980
Trenton, New Jersey