

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION and
HENRY DE LIZ,

Respondent,

-and-

Docket No. CO-79-293-14

TRENTON EDUCATION ASSOCIATION and
BARBARA BERKMAN,

Charging Party.

SYNOPSIS

In an unfair practice decision issued by the Chairman, the Commission, noting the absence of exceptions, adopts the findings of fact, conclusions of law and recommended order of the Hearing Examiner that the Board, through its agent, violated the Act by basing certain critical comments contained in an evaluation report of a teacher upon the fact that the teacher had engaged in protected activities on behalf of the Trenton Education Association. As a remedy, the Board was ordered to remove the negative criticisms from the evaluation.

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Charging Party.

Appearances:

For the Respondent, Merlino, Andrew & Rottkamp, Esqs.
(Robert B. Rottkamp, Jr., of Counsel)

For the Charging Party, Greenberg & Mellk, Esqs.
(Arnold M. Mellk, of Counsel)

DECISION AND ORDER

On April 24, 1979, the Trenton Education Association (the "Association") and Barbara Berkman filed an Unfair Practice Charge against the Trenton Board of Education (the "Board") with the Public Employment Relations Commission alleging a violation of the New Jersey Employer-Employee Relations Act and specifically N.J.S.A. 34:13A-5.4(a)(1) and (3).

The Association alleges certain aspects of an evaluation of Barbara Berkman by her school's principal were negative and were a direct result of Ms. Berkman's protected activity on behalf of the Association.

It appearing that the allegations of the charge, if true, may constitute an unfair practice, a Complaint and Notice of Hearing

was issued on September 10, 1979. A hearing was held on November 13, 1979 before Commission Hearing Examiner Edmund G. Gerber at which time the parties were given an opportunity to present evidence, to examine and cross-examine witnesses and to argue orally. Post-hearing briefs were filed by both parties by December 27, 1979. The Hearing Examiner issued his Recommended Report and Decision on February 29, 1980, H.E. No. 80-32, 6 NJPER ____ (¶ ____ 1980), a copy of which is attached hereto and made a part hereof. The report was served upon the parties and the case transferred to the Commission. N.J.A.C. 19:14-7.1. Neither party has filed exceptions to the Hearing Examiner's Recommended Report and Decision. N.J.A.C. 19:14-7.3, provides, in part, that any exception which is not specifically urged shall be deemed to have been waived.

The Commission, pursuant to N.J.S.A. 34:13A-6(f), has delegated to the undersigned, as Chairman of the Commission, the authority to issue a Decision and Order in unfair practice cases on behalf of the entire Commission when the parties have not filed any exceptions to the Hearing Examiner's Recommended Report and Decision.

The Hearing Examiner found that the Board, through its agent, the principal who evaluated Ms. Berkman, had based his evaluation in part on his desire to discourage Ms. Berkman in the exercise of her protected rights. Ms. Berkman was found to be active in the Trenton Education Association as well as other groups. The Hearing Examiner concluded that although her activities relating to the parent-teacher organization, the faculty council and the "T&E" committee were not related to activities protected by this Act, the

principal did not separate protected from non-protected activities in his evaluation of Ms. Berkman. Accordingly he recommended that specific negative portions of her evaluation be removed.

After careful consideration of the entire record, and noting the absence of exceptions to the Recommended Report and Decision, the Commission adopts the Hearing Examiner's findings of fact and conclusions of law substantially for the reasons cited by him. Ms. Berkman was active in the Association and, inter alia, was grievance chairperson for her school. The Hearing Examiner concluded that the disputed comments of the principal were at least as much a response to her legitimate protected activities as they were to her performance as a teacher, and that the principal did not differentiate between these two functions. It further appears from the record that the disputed comments were motivated by animosity generated by her participation in such activities.^{1/} For example, one of the comments stated that Ms. Berkman "[C]onstantly complains that something or somebody is wrong." There is sufficient evidence on the record to support the finding that this comment and the others related to Ms. Berkman's role as grievance chairperson and other protected activities. Absent evidence that she performed this activity in an impermissible manner, such comments do violate the Act.

^{1/} All the disputed comments relate to unspecified non-classroom activities. All comments relating to her classroom performance and teaching skills were highly favorable.

Although we adopt the Hearing Examiner's findings of fact, conclusions of law and recommended order, one comment with respect to his discussion of protected activity is appropriate. The Hearing Examiner's recommended decision may be read to imply that a strict line exists between the nature of the activities of employee organization leaders which are directly related to the negotiation of terms and conditions or the presentation of a grievance and other activities which are intended to promote the legitimate interests of teachers but do not relate to mandatorily negotiable items. Such a reading would not be consistent with prior Commission decisions. See for example, In re Laurel Springs Board of Education and Mary Becken, P.E.R.C. No. 78-4, 3 NJPER 228 (1977). No such clear cut division exists. An employee is not absolutely insulated from adverse action by his or her employer for impermissible conduct simply because the activity was in furtherance of employee proposals on grievances or terms and conditions of employment. But, similarly an employee does not absolutely lose all protections of the Act because an action does not relate to a term and condition of employment. The fact that negotiations cannot occur concerning a particular subject does not mean that the employer is free to retaliate against a representative of the employee organization for seeking some other appropriate forum for making known the employees' legitimate position. CF. Article I,

Paragraph 19 of the New Jersey Constitution and Board of Ed. of the Township of Bernards v. Bernards Township Education Assn, 79 N.J. 311 (1979).

ORDER

Upon the entire record in this proceeding, IT IS HEREBY ORDERED that the Trenton Board of Education cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act by discriminating against employees in order to discourage the exercise of protected rights by including in the evaluation of any employee negative criticism of activities protected by the Act.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act:

a. Strike the following comments from Ms. Berkman's evaluation:

Part IV, Parent-Community Relations

B. "Is informed about local problems, understands the strengths and the problems of the school community"

Comment:

"But has used it to achieve her own objectives at the school's expense. Has tended to distort the facts to suit herself for whatever reason. Constantly complains that something or somebody is wrong. School programs have had to wait while I explained to her."

Part V, Personal Qualities and Relationships

A. "Demonstrates integrity and dependability"

Comment:

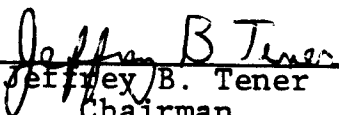
"Integrity and dependability are a state of mind that I've been forced to question because of her actions."

- D. "Adjusts well to new ideas and situations; accepts professional criticism and reacts favorably to it"
Comment:
"Appears to question professional criticism constantly."
- F. "Promotes good intra-school and inter-school relations; works well with co-workers"
Comment:
"Has displayed tendency to undermine (sic) constructive efforts; throws out remarks which have a detrimental effect on her colleagues."

b. Post copies of the attached notice marked "Appendix A". Copies of such notice on forms to be provided by the Commission shall, after being duly signed by the Board's representative, be posted by the Board immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Board to ensure that such notices are not altered, defaced or covered by any other material.

c. Notify the Chairman within twenty (20) days of receipt of this order what steps it has taken to comply herewith.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

DATED: Trenton, New Jersey
April 16, 1980

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act by discriminating against employees in order to discourage the exercise of protected rights by including in the evaluation of any employee negative criticism of activities protected by the Act.

WE WILL strike the following comments from Ms. Berkman's evaluation:

Part IV, Parent-Community Relations

B. "Is informed about local problems, understands the strengths and the problems of the school community"

Comment:

"But has used it to achieve her own objectives at the school's expense. Has tended to distort the facts to suit herself for whatever reason. Constantly complains that something or somebody is wrong. School programs have had to wait while I explained to her."

Part V, Personal Qualities and Relationships

A. "Demonstrates integrity and dependability"

Comment:

"Integrity and dependability are a state of mind that I've been forced to question because of her actions."

D. "Adjusts well to new ideas and situations; accepts professional criticism and reacts favorably to it"

Comment

"Appears to question professional criticism constantly."

F. "Promotes good intra-school and inter-school relations; works well with co-workers"

"Has displayed tendency to undermine (sic) constructive efforts; throws out remarks which have a detrimental effect on her colleagues."

TRENTON BOARD OF EDUCATION

(Public Employer)

DATED: _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION and
HENRY DE LIZ,

Respondent,

-and-

Docket No. CO-79-293-14

TRENTON EDUCATION ASSOCIATION
and BARBARA BERKMAN,

Charging Party.

SYNOPSIS

The Hearing Examiner finds that the Trenton Board of Education committed an unfair practice when in the evaluations of Barbara Berkman, a teacher in the Trenton school system, there appeared language which negatively commented on Association-related activity which was protected under the Public Employer-Employee Relations Act. It was recommended that the Commission order that language which commented upon protected activity in that evaluation be excised.

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, Merlino, Andrew and Rottkamp, Esqs.
(Robert B. Rottkamp, Jr., Esq.)

For the Charging Party, Greenberg and Mellk, Esqs.
(Arnold M. Mellk, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

The Trenton Education Association (Association) and Barbara Berkman brought this action alleging that the Trenton Board of Education (Board) and Henry deLiz engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended (Act), specifically N.J.S.A. 34:13A-5.4(a)(1) and (3) ^{1/} through evaluating Barbara Berkman in a negative manner. The charge was filed on April 24, 1979, and a Complaint issued on September 10, 1979. A hearing was held on November 13, 1979, at which time all parties were given an opportunity to examine witnesses, present evidence and to argue orally. Briefs were received by December 27, 1979.

^{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; and (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."

Barbara Berkman has been a teacher in the Luiz Munoz Rivera School in Trenton for four years. On April 9, 1979, Berkman received her annual evaluation, which was prepared by the school's principal Henry deLiz. The evaluation was highly favorable as to teaching skills, preparation and professional growth. But the evaluation contained a number of critical comments in the areas of Parent-Community Relations and Personal Qualities and Relationships. The specific comments are as follows:

In Part IV, Parent-Community Relations

- A. "Works understandingly and cooperatively with parents' knowledge"

Comment:

"Her work although understanding seems to be designed to disrupt the school program especially T & E."

- B. "Is informed about local problems; understands the strengths and the problems of the school community"

Comment:

"But has used it to achieve her own objectives at the school's expense. Has tended to distort the facts to suit herself for whatever reason. Constantly complains that something or somebody is wrong. School programs have had to wait while I explained to her."

- D. "Supports and participates in school-parent meetings and school-community related endeavors"

Comment:

"She instigated reactions that were negative to a problem that personnel and others were constantly working to rectify with the 6th grade at a PTO meeting where she used it as a platform and directed parents to write complaints to upper administration."

In Part V, Personal Qualities and Relationships

- A. "Demonstrates integrity and dependability"

Comment:

"Integrity and dependability are a state of mind that I've been forced to question because of her actions."

- D. "Adjusts well to new ideas and situations; accepts professional criticism and reacts favorably to it"

Comment:

"Appears to question professional criticism constantly."

F. "Promotes good intra-school and inter-school relations; works well with co-workers"

Comment:

"Has displayed tendency to undermine constructive efforts; throws out remarks which have a detrimental effect on her colleagues."

Berkman was very active in the Association during the time in question. She served as secretary of the Association and was a member of the grievance committee. In her year on the grievance committee approximately 20 grievances were filed (all were resolved in the preliminary steps of the grievance procedure). Berkman was the building representative at the Rivera School and acted as a liaison between the teachers in the Rivera School and the Association.

The Association brought this action alleging that Berkman's poor evaluations were motivated, at least in part, by her Association activities.

During the school year and prior to Berkman's evaluation, there was unrest, including picketing, at the Rivera School. Teachers, support staff, para-professionals and parents picketed the school and deLiz was the object of some of that picketing. This unrest did not originate in the Association but rather seemed to originate in other school-related organizations - the Faculty Council, the P.T.O. and the T & E Committee. Berkman was active in these organizations as well.

The Faculty Council, which is composed of the entire faculty, acts in an advisory capacity to the administration during the school year. The council voted to exclude deLiz from attendance and thereafter the council invited the Superintendent of Schools to come to the school for a meeting to discuss Mr. deLiz's allegedly poor performance as principal. Berkman was president of the council at this time. Berkman attended P.T.O. (Parent-Teacher Organization) meetings as the representative of the Council. It was at a P.T.O. meeting that Berkman, along with other teachers present, advised parents, who were concerned about the continued use of substitutes in the 6th grade, they could write letters to the Board requesting that a permanent teacher be hired. Members of the P.T.O. met at Berkman's home to discuss what they should do about their dissatisfaction with deLiz. It was apparently at this time that the picketing was planned.

Berkman was appointed to the T & E Committee, which consisted of four components, children, parents, administrators and teachers. The committee was to

issue a report stating building goals. Berkman and deLiz got into a dispute and had a heated argument over the report prepared by deLiz. Berkman argued it did not reflect the committee's thinking.

Berkman testified that in all her activities, in whatever the setting, she was always acting, at least in part, as a representative of the Association.

As Berkman testified about the picketing, "The Association was called in to represent the teachers because the teachers felt they were afraid of retribution from the administration so that the TEA took responsibility for a great many of the actions by the council or by the faculty" (T. p. 48).

Despite Berkman's assertion, her activities vis-a-vis deLiz had little to do with the Association and were not protected activities within the meaning of the Act. Many of the critical comments in Berkman's evaluation under "Parent-Community Relations" are specifically related to the P.T.O. and the T & E Committees and are outside the scope of protected activities. Assuming the motivation for such comments are genuine (which they were) these critical comments are not violative of the Act. Her activities on behalf of the Association cannot be used as a shield to protect her from legitimate discipline of her otherwise unprotected activities. See In re North Brunswick Township Board of Education, P.E.R.C. No. 80-69, 6 NJPER ___ (¶ 1979), In re North Warren Regional Board of Education, P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187, 1978), In re Council of New Jersey State College Locals, NJSFT-AFT, AFL-CIO, P.E.R.C. No. 78-55, 4 NJPER 153 (¶4072, 1978), affd. App. Div. Docket No. A-3422-77 (April 6, 1979).

It became apparent at the hearing however that deLiz himself could not in his own mind separate protected from non-protected activities. DeLiz knew of Berkman's Association activities. She filed grievances on her own and on behalf of others in the Rivera School. DeLiz spoke of an apparently unpleasant meeting with Association representatives and of the constant grievances, questions and complaints brought before him. Berkman testified the word grievance within the school came to mean any sort of complaint (T. p. 32). But deLiz did not attempt to clarify whether or not the grievances brought before him were Association-related grievances.

DeLiz's comments on Berkman's evaluation such as "constantly complains that something or somebody is wrong - school programs have had to wait while I

explained to her" are tainted by deLiz's failure to distinguish protected from unprotected activities. DeLiz's negative comments were designed to discourage "constant complaints." Some of these complaints concerned Association-related, protected activities. It follows that some of deLiz's negative comments violated §5.4(a)(3), for they were motivated in part by a desire to discourage the exercise of protected rights. In re Rancocas Valley Regional High School, P.E.R.C. No. 79-43, 5 NJPER 47 (¶10031, 197), affd. App. Div. Docket No. A-2204-78 (January 30, 1980), In re Haddonfield, P.E.R.C. No. 77-36, 2 NJPER 71 (1977).

Accordingly, the undersigned recommends to the Commission that they find that the Board violated §5.4(a)(3) of the Act and derivatively §5.4(a)(1) of the Act. The Complaint also names Henry deLiz as a respondent. DeLiz's activities were solely and exclusively on behalf of the Board. Accordingly it is inappropriate to find Henry deLiz individually committed an unfair practice.

Recommended Order

The Hearing Examiner recommends to the Commission they issue the following

ORDER

A. That the Respondent Trenton Board of Education cease and desist from:

1) Interfering with, restraining or coercing its employees in the exercise of rights guaranteed to them by the Act, by including in the evaluation of its employees negative criticisms of activities protected by the Act.

2) Discriminating against employees in order to discourage the exercise of protected rights by including in the evaluation of its employees negative criticism of activities protected by the Act.

B. That the Respondent Trenton Board of Education take the following affirmative action:

1) Strike the following comments from Berkman's evaluation since they interfere with the exercise of protected rights and were motivated, at least in part, by a desire to discourage the exercise of protected rights:

Part IV, Parent-Community Relations

B. "Is informed about local problems, understands the strengths and the problems of the school community"

Comment:

"But has used it to achieve her own objectives at the school's expense. Has tended to distort the facts to suit herself for whatever reason. Con-

stantly complains that something or somebody is wrong. School programs have had to wait while I explained to her."

Part V, Personal Qualities and Relationships

A. "Demonstrates integrity and dependability"

Comment:

"Integrity and dependability are a state of mind that I've been forced to question because of her actions."

D. "Adjusts well to new ideas and situations; accepts professional criticism and reacts favorably to it"

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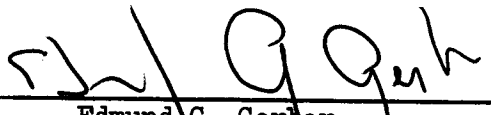
"Appears to question professional criticism constantly."

F. "Promotes good intra-school and inter-school relations; works well with co-workers"

Comment:

"Has displayed tendency to undermine constructive efforts; throws out remarks which have a detrimental effect on her colleagues."

2) Post at all places where notices to employees are customarily posted, copies of the attached Notice marked Appendix "A."



Edmund G. Gerber
Hearing Examiner

DATED: February 29, 1980
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of rights guaranteed to them by the Act, by including in the evaluation of our employees negative criticisms of activities protected by the Act.

WE WILL NOT discriminate against employees in order to discourage the exercise of protected rights by including in the evaluation of our employees negative criticisms of activities protected by the Act.

WE WILL strike from the evaluation of Barbara Berkman all negative criticism that interfere with the exercise of protected rights and were motivated at least in part by a desire to discourage the exercise of protected rights.

(Public Employer)

Dated _____

By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.