

H.E. NO. 2015-7

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

In the Matter of

IRVINGTON BOARD OF EDUCATION,
Respondent,

-and-

Docket No. CO-2013-161

IRVINGTON EDUCATION ASSOCIATION,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Irvington Board of Education violated 5.4a(3) and (1) of the Act by transferring an Irvington Education Association building representative from Union Avenue School to University Middle School in retaliation for protected conduct. The Hearing Examiner found both direct and circumstantial evidence of hostility and that the recommendation was "laundered" through neutral supervisors. Boston Mutual Life Ins. Co. v. NLRB, 692 F.2d 169, 111 LRRM 2983 (1st Cir. 1982). The Hearing Examiner also found that the Board violated 5.4a(3) and (1) of the Act by assigning another IEA building representative to a 9:30 a.m. lunch period and writing a negative classroom performance evaluation of her.

The Hearing Examiner recommends that the Board did not violate the Act by assigning the IEA President classroom responsibilities. The examiner also recommends that the Board did not violate the Act when its representative made certain remarks in a faculty meeting and when a third IEA building representative's teaching assignment was changed in the 2012-2013 school year.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent
Hunt, Hamlin & Ridley, attorneys
(Ronald Hunt, of Counsel)

For the Charging Party
Oxford Cohen, attorneys
(Samuel B. Wenocur, of Counsel)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On December 13, 2012, February 15, 2013 and March 18, 2013, Irvington Education Association (IEA) filed an unfair practice charge and amended charges against Irvington Board of Education (Board). The charge alleges that in September, 2012, the Board assigned "classroom responsibilities" to IEA President Eileen Wesley, ". . . violating an established practice between the parties" that the IEA president has no classroom responsibilities. The Board's action ". . . makes it impossible" for Wesley to handle her duties as IEA president." The charge

also alleges that in September, 2012, the Board either transferred or changed the schedules of IEA building representatives and unit employees Barbara Menza and Anthony Del Vecchio in retaliation for their union activity. The amended charge alleges that on January 9 and 14, 2013, Board Superintendent Hackett threatened IEA President Wesley with disciplinary action and changed a protocol by which IEA representatives attend school meetings and functions in retaliation for Wesley's exercise of rights as President.^{1/} Another amended charge alleges that beginning in the fall of 2012, Union Avenue Middle School Principal Cheryl Chester began harassing and retaliating against IEA building representative and unit employee Jodie Hollander for engaging in union activity. The adverse actions include changing Hollander's schedule and giving her a poor classroom evaluation. Finally, the amended charge alleges that in March, 2013, Chester acknowledged in a faculty meeting that, ". . . she would be attempting to bust the union and she cannot make individual deals with teachers because it would break IEA policy." The Board's actions allegedly

^{1/} IEA withdrew this allegation on the first hearing date, pursuant to an informal disposition reached with the Board (1T11-1T12; 2T39).

violate 5.4a(1) and (3)^{2/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On March 22, 2013, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On April 23, 2013, this case was reassigned to me. On October 16, 2013 and May 6, 2014, I conducted a hearing at which the parties examines witnesses and presented exhibits. Post-hearing briefs were filed by July 28, 2014. Replies were filed by August 28, 2014.

Upon the record, I make the following:

FINDINGS OF FACT

1. The Board and IEA signed a collective negotiations agreement for a negotiations unit of teachers extending from July 1, 2009 through June 30, 2012 (J-1).^{3/} Article XX, paragraph 4 of the agreement provides:

The President of the [IEA] shall have three consecutive teaching periods followed by one prep period with no other assignments. The

^{2/} These provisions 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."

^{3/} "J" represents joint exhibits; "T" represents the transcript, preceded by a "1" or "2" signifying the first or second day of hearing, followed by the page number(s); "C" represents Commission exhibits; "CP" represents Charging Party exhibits; and "R" represents Respondent exhibits.

balance of the regular school day may be used to conduct IEA business, providing the President does not abuse the privilege. The Superintendent and the Board reserve the right to terminate this schedule if there are any abuses and the President shall be assigned a regular teaching assignment.

The agreement includes a multi-step grievance procedure (Article XVI) ending in binding arbitration (J-1).

2. Madeline Edwards was a unit employee and IEA President for many years. From 1995 through June of 2010, then-President Edwards was employed as a "math resource specialist" at Mt. Vernon Ave. School (1T24; 1T34). She visited classrooms to provide "model" and "master" lessons for three periods per day. Unlike classroom teachers, President Edwards did not have homeroom responsibilities; did not take attendance; did not meet with parents or students outside the classroom; did not chaperone field trips and did not write lesson plans (1T30). She was free to conduct IEA business after 11 a.m. each workday (1T29). Edwards testified that one could not successfully perform the duties of both classroom teacher and Association President (1T52). (The unit ranged in size from more than 1100 employees to about 650, currently) (1T66; 1T84-1T85). Her testimony was unrebutted; I credit it.

4. Eileen Wesley is a social studies teacher and has been IEA President since July, 2011 (1T65; 1T71). In previous leadership positions with the IEA, Wesley learned that only the

IEA President enjoyed a "half-time release," meaning that the president had "non-teaching assignments" of three periods per day, affording her time to conduct IEA business (1T66; 1T68). From 2005 through June, 2012, Wesley was employed as "computer lab teacher/facilitator" and worked with students who were accompanied by teachers and with teachers. Wesley did not have homeroom responsibilities and did not take attendance (1T72; 1T7).

3. Debbie Ellis was employed by the Board for many years as a teacher (1T118). In February, 2010, she became acting IEA President and in June was elected President, serving in the capacity until her retirement in June, 2011 (1T118; 1T126). During the entire period of her presidency, Ellis was employed as a "technology coach," assisting teachers with technology "training." I infer that Ellis performed those duties for one-half of any workday, the other one-half devoted to IEA responsibilities (1T120). She was not required to grade students' performance or test students or meet their parents (1T127-1T128).

5. In spring, 2012, Wesley learned from high school principal Burnett Davis and then-assistant superintendent Neely Hackett that she may be returned to the classroom as a social studies teacher (1T74-1T75). Wesley objected, telling them that, ". . . going back into the classroom would really be breaking

policy as to what the President has done, a regular teaching position" (1T75). She advised that a classroom teaching assignment would interfere with her duties as IEA President (1T76). Wesley also remarked that the title she held (computer lab teacher/facilitator) was ". . . a valuable and necessary asset to the [high] school that I worked in" (1T75). Wesley admitted that they told her that, ". . . they had no other choice, that this had to be taken care of because of budgetary issues, that they needed me back in the classroom and that was where I had to go" (1T76).

Hackett became interim Superintendent for the 2012-2013 school year and Superintendent in the 2013-2014 school year (1T51). She testified that budgetary constraints resulted in reductions in force (RIF) in the 2011-2012 and 2012-2013 school years (2T62; 2T64). She corroborated that all "computer lab facilitators" were "cut," including several in elementary schools and Wesley's position at the high school (2T64).^{4/} She testified: "[W]e cut everything that was not a classroom teacher, with the exception of our technology coaches" (2T64-2T65). She testified that the reason for the reductions was,

^{4/} Hackett testified that Wesley began her "classroom" responsibilities in the 2011-2012 school year. I do not credit her testimony because Wesley testified that she remained a computer lab teacher/facilitator for the school year following her ascendance to the IEA presidency in July, 2011 (1T71; 1T73-1T74). I find that Wesley would have a specific recollection of and familiarity with such facts.

". . . to save money; to put those people back in the classrooms, which caused a bumping. Those people went back in the classrooms; the newer teachers were laid off" (2T65). Supervisors and directors were also laid off (2T66). No facts indicate that anyone was employed in a computer lab teacher/facilitator position in the 2012-2013 school year. Nor do any facts rebut Hackett's testimony about layoffs caused by budgetary constraints. I credit her testimony.

6. Before the 2010-2011 school year, the Board maintained a teaching schedule of 45-minute periods. The contractual dispensation for IEA presidents (see finding no. 1) meant that they taught three consecutive classes for a total of 135 minutes (2T57; 2T59). In September, 2010, the Board implemented "block scheduling," with each "block" representing about 90 minutes (2T56; 2T57). "Block scheduling" also entails varying the length of preparation periods; on an "A-day" block schedule for example, a teacher could have a 45-minute period of classroom instruction followed by a 45-minute preparation period. On a "B-day" block schedule, the same teacher could have a 90-minute preparation period (2T57-2T58).

7. In September, 2012, Wesley was assigned to teach social studies for one "block" (84 minutes) each day, requiring her to take student attendance, prepare lesson plans, grade tests and reports and meet with students and their parents (1T77-1T78;

1T101-1T102; 1T105). Grading students and preparing lesson plans consume about two hours per day beyond classroom teaching (1T101). Although Wesley is no longer assigned computer lab facilitator duties exclusively, she performs them for 42 minutes every other day, together with a preparation period of equal length (1T102-1T103). On alternate days, Wesley has a full "block" of preparation time (1T103).

Wesley was not offered any other positions in fall, 2012 (1T106). Wesley testified that her teaching duties have interfered with her ability to fulfill her duties as IEA President (1T79). Wesley also admitted that the remaining "few" out-of-classroom positions available, such as math specialist and ELA specialist require certifications she does not possess (1T79; 1T88; 1T107). I credit Wesley's uncontested testimony. Wesley was qualified for an available "technology coach" title in the 2013-2014 school year but not apply for it (2T71-2T72).

8. Jodie Hollander is a health and physical education teacher employed by the Board at Union Avenue School for about nine years (1T136-1T137; 1T138). During her employment, about six different principals presided at Union Avenue School, including Cheryl Chester, who assumed her position in December, 2010 (1T138).

In 2012-2013 school year, Hollander was an IEA building representative at Union Avenue School (1T138). Hollander

testified that before the 2012-2013 school year, her professional relationships with all Union Avenue School principals, including Chester, were "professional and amicable" (1T139). She testified that before the 2012-2013 school year, she had not received any disciplinary warnings or suspensions and received very good evaluations (1T139-1T140). Specifically, in the 2010-2011 and 2011-2012 school years, Hollander's annual evaluations were performed by an assistant principal and a physical education supervisor (1T140). Hollander's testimony is unrebutted; I credit it.

Hollander returned to Union Avenue School on October 15, 2012, following a maternity leave of absence (1T140). At that time, two IEA representative positions were available at the school in part because one representative/teacher had been transferred to another school (1T141). Hollander had believed [correctly; see finding nos. 16 and 17] that that representative -- Barbara Menza -- did not have a "friendly" relationship with Principal Chester (1T141). Hollander and another teacher promptly filled the vacancies (1T143).

The day after Hollander became an IEA representative, Chester reprimanded her in front of students because she was reportedly ". . . depriving students of physical education" (1T147). Hollander testified that a substitute teacher for an absent physical education teacher normally takes a class to a

room to do written work. The "office" typically advised the substitute of a room where the students are to be taken. If the office does not assign a specific room, the substitute normally escorts the students to the cafeteria to do written work. On or about October 16, 2012, a substitute escorted a class to the cafeteria, in keeping with the practice. That day, four students arrived late at the gym and Hollander directed them to the cafeteria. They soon returned, stating that the class was not there. Hollander redirected them to the office, thinking that someone there directed the substitute teacher (and the students) to an alternate room. The late arriving students promptly returned again and Principal Chester walked in after them and berated Hollander, "Who are you to send the sub[stitute] somewhere else and deprive these students of physical education?!" (1T47). Chester had not in the past admonished Hollander publicly. Hollander's testimony was unrebutted; I credit it.

On another (unspecified) date, Chester issued a written reprimand to Hollander because she assertedly failed to submit a required "substitute binder" that Hollander in fact submitted. Chester later retracted the reprimand (1T148-1T149).

In or around mid-year, Chester changed Hollander's schedule without notice by requiring her to take her lunch period at 9:30 a.m. and rescheduling her preparation period to 1:25 p.m. The

cafeteria is not open for business at 9:30 a.m. and no other teacher in the building was assigned to a 9:30 a.m. lunch period (1T149-1T150; 2T115). Hollander scheduled several meetings with Chester to address her changed lunch period but the principal cancelled all of them (1T150). On an unspecified date, Chester told Hollander that ". . . because [she] doesn't buy school lunch in the cafeteria it shouldn't matter if the cafeteria was open for [her] to eat lunch" (1T150).

Hollander filed a contractual grievance contesting her changed lunch period (1T150). Following an investigation, then-interim superintendent Neely Hackett sustained the grievance (2T77; 2T79). Hackett testified that Chester told her that ". . . she was trying to get the cafeteria or hallway covered" (2T78). I do not credit Hackett's hearsay testimony about Chester's purported justification. Hollander's schedule was changed promptly to provide her a lunch period later in the day, when the cafeteria was open (1T151; 2T79). Chester did not testify in this proceeding.

9. On January 31, 2013, Chester issued an email to Hollander advising that an in-class evaluation of her will be conducted on February 7 from 2:08-2:51 p.m. (9th period). The email cautioned that the date and time of it were "tentative;" that the evaluation could occur ". . . anytime during the week of February 4, 2013" (CP-1).

10. On the morning of February 5, 2013, Chester walked into Hollander's regularly assigned classroom during a class and did not remark to her upon the ambient room temperature (1T154). Chester returned to the classroom at about 2 p.m. to perform the evaluation and immediately remarked that the room was, ". . . too cold" and demanded that Hollander change rooms, despite Hollander's preparation of her classroom for the anticipated evaluation (1T155; 1T56). Specifically, Hollander had positioned handouts, books and materials in her classroom and had written extensively on the chalkboard (1T156). Hollander immediately removed her students to another classroom that had been prepared for the next day by the teacher regularly assigned to that room. For example, the chalkboards had been written on. Hollander ordered four students to retrieve the materials from her classroom (1T157). Chester conducted Hollander's evaluation during the ninth period that afternoon (1T157).

11. On an unspecified date, Chester issued her evaluation of Hollander that was critical in almost all matters, including Hollander's ill-prepared classroom and her failure to provide the students "additional materials" (1T158). Hollander received about 22 "not-effective" ratings (2T81). The evaluation also warned of endangering her students by keeping them in a cold classroom (1T159-1T160). Chester also issued to Hollander a sixty-day improvement plan setting forth scheduled meetings and

tutorial efforts designed to improve teacher performance within sixty days (1T159).

12. Hollander contested the evaluation in a contractual grievance (1T159). Superintendent Hackett considered the grievance, noting that Hollander's evaluation had "quite a few non-effective ratings" (2T81). "What grabbed [Hackett's] attention was that the room of the evaluation was moved prior to the evaluation" (2T81). She credibly elaborated:

As soon as the bell rings, the evaluation starts. So we're evaluating how the kids enter the classroom. Are they organized? Are they structured? We're evaluating how the teacher quieted the children. We're evaluating how the teacher set the tone for the lesson. Are the students engaged? It starts from bell to bell.
[2T81-2T82]

Hackett asked Chester about her evaluation of Hollander. Hackett testified that Chester told her that she told Hollander to ". . . let her know if the room was cold prior to the evaluation" (2T83). Hackett testified that Chester ". . . was very upset that Hollander had not told her that the room was cold." Hackett admitted that the school building to which Chester and Hollander were assigned had "heating problems" and that heat in its classrooms is controlled by a custodian and not a teacher (2T120). In the absence of Chester's testimony, I credit Hollander's testimony that Chester did not remark on her

classroom's temperature when she visited it the first time on February 5, 2013.

Hackett also read Chester's evaluation of Hollander but could not discern what portions were ". . . accurate or not because I wasn't in the room" (2T83). Hackett determined, ". . . to redo the evaluation because the room was switched" (2T83). She decided to participate with Chester in the second evaluation of Hollander (2T84). She also vacated the corrective action plan Chester had recommended for Hollander (2T118).

13. On an undisclosed date, Hackett and Chester evaluated Hollander's teaching performance in a 45-minute health education class, requiring, ". . . a full-fledged formal lesson" and testing of "instructional skills" (2T85; 2T86). Hollander had been evaluated in the past for her performance in physical education classes that intrinsically emphasize ". . . facilitating and coaching" (2T85). Hackett and Chester concurred that Hollander's performance showed that she ". . . needed extensive work in her instructional skills" and was "very good" at maintaining the students' behavior (2T86). Hollander received "nine or ten not-effective ratings," (out of about 40 categories) but was not placed in a new corrective action plan (1T174; 2T86; 2T118). (Hackett believed that monitoring could improve Hollander's instructional performance (2T134)). Hollander admitted that her second evaluation was "fair" (1T168).

14. On an unspecified date in March, 2013, Chester told Hollander that a teacher had asked her why no election had been conducted for the IEA representative positions. Chester did not identify the teacher (1T145). One of Hollander's duties as IEA representative was to resolve issues between unit employees and the Board, a task she was unable to accomplish because Chester did not keep their scheduled appointments to discuss such matters (1T146; 1T150).

15. Also on an unspecified date in March, 2013, Hollander, Wesley and an unnamed representative of the New Jersey Education Association convened a meeting with Chester and Hackett that preceded a faculty meeting at Union Avenue School (1T161). The purpose of their meeting was to clarify the role of the IEA at the school and the limits of an administrator's authority (1T16). One topic discussed was prohibiting "special deals" with individual teachers, i.e., permitting those with a ninth (and final) class period of "preparation" to leave the building early in order to attend to their "coaching jobs" (1T162). The record is not clear that a decision not to release teachers early was reached in the meeting. In unrelated testimony, Hackett opined that preparation periods should be used to improve academic achievement (2T58). Pressed on cross-examination to define "special deal," Hollander testified that some teachers were permitted to leave early for medical appointments without taking

paid leaves and others were required to take such leaves (1T1710). She also testified that Chester permitted some teachers to leave the building to perform "extra work" while providing substitutes for them in their classrooms. Other teachers were not provided substitute "coverage" (1T171). I credit her unrebutted testimony.

In the subsequent faculty meeting, Chester stated that as a result of the meeting with the IEA representatives, she was no longer permitted to authorize "special deals." She also advised the gathering that if teachers wanted ". . . to have things done, they should just come to her instead of going to the union" (1T172).

16. Barbara Menza is a sixth grade teacher at Union Avenue School and an IEA representative (1T180-1T181). Menza worked at Union Avenue School from about 2005 through August 2012, when she learned of her transfer to University Middle School for the 2012-2013 school year (1T186-1T187). She has been employed by the Board for 30 years and was an IEA representative in the 2010-2011 and 2011-2012 school years (1T180-1T181).

Before November, 2010, the principal at Union Avenue School was Eugene Harris, with whom IEA representative Menza had an amicable relationship. Specifically, Harris maintained an "open door policy," and Menza could freely express her concerns about school collective negotiations relationship matters to him

(1T182). Chester replaced Harris as Principal at Union Avenue School in November or December, 2010 (1T182; finding no. 8). Chester insisted upon pre-arranged appointments with Menza (and the other IEA building representatives) to discuss IEA building concerns and cancelled them, typically (1T183; 1T184).

17. On an unspecified date in the 2010-2011 or 2011-2012 school year, Menza arrived late to school and parked her car in an adjacent small lot that Chester had declared unavailable to teachers (1T184). Cars were parked in the lot that day (1T185). Menza told an assigned security guard that she will remove her car during her first available time period. Upon reaching her classroom, Menza was paged and told to remove her car. She promptly located someone to "cover" her classroom while she returned to the parking lot. There, Chester yelled, "I told you no one's allowed to park back here." Menza replied, "I understand. I'm sorry. But I was running late. I thought it was more important to be on time for the class. I was coming out to move the car during third period" (1T184-1T185). Chester replied, "It's inexcusable. I want that car moved right away." As Chester walked away, Menza heard her say to "Tommy," a nearby security guard, "I'm going to get her ass, even if she is a rep." (1T185; 1T201-1T202). I infer that "rep" means IEA representative. Menza received a written reprimand for the parking infraction (1T212-1T213).

On cross-examination, Menza admitted that on the day she parked illicitly, she, ". . . was not sure who was parked there" and that on unspecified subsequent days, "security" parked in that lot. She specifically admitted that teachers were not allowed to park there (1T202-203). On redirect examination, Menza testified that she subsequently observed that teachers parked in the disputed lot "everyday" and were not threatened or punished (2T208). In the absence of other adduced facts, I find that despite a prohibition against teachers parking in that lot, they in fact parked there after Menza was reprimanded.

18. Frantz Meronvil has been employed as the Board's Mathematics Supervisor since January 4, 2011. His duties are to oversee the mathematics department in the Board's eleven schools; insure that curriculum and instruction are aligned; and assist in the hiring of math teachers (2T42; 2T148).

At or around the end of the 2011-2012 school year, Meronvil learned that a mathematics teacher assigned to University Middle School, Mr. Oladoja, had difficulty managing students in his classroom (2T44). Meronvil discussed the matter with that school's Principal, Mr. Sabuur. Meronvil proposed switching Oladoja with another teacher. Meronvil also spoke with Principal Chester, inquiring if she ". . . will accept a switch of any teacher to replace Mr. Oladoja in University Middle" (2T45; 2T47). Chester answered that she would soon reply. When she

did, she told Meronvil that Union Avenue School had a teacher [i.e., Menza] who is "strong in classroom management" and is certified to teach kindergarten through sixth grade (2T46). Oladoja was certified to teach kindergarten through twelfth grade. Meronvil testified:

At that time, we were planning on increasing the number of students participating in high level math at both middle schools; so, [Chester] will have Mr. Oladoja teach pre-algebra or algebra-one classes at Union Avenue Middle. . . .I said that [Menza's inability to teach seventh and eighth graders] will not be a problem because I can switch another teacher to the seventh grade and put her in sixth grade where she would be able to control the class better over there.
[2T46]

Meronvil's explanation or rationale was unrebutted; I credit it. Meronvil admitted that he didn't know anything about Menza except that ". . . she was strong in classroom management" (2T145). He specifically acknowledged that he didn't know at that time that Menza was an IEA representative (2T145). He also admitted that he didn't know how Menza was selected for University Middle School; he relied on Chester's recommendation (2T146).

19. Menza did not request a transfer. In or about early August, 2012, she learned that she had been transferred from Union Avenue School to University Middle School (1T187-1T188). Menza promptly emailed Principal Chester, requesting, ". . . a statement as to the reason for this transfer," pursuant to the terms of the collective negotiations agreement (CP-2(a)).

Chester referred Menza to the Board Human Resources Director (1T191). Menza promptly emailed the Human Resources Director, requesting a reason for the transfer (CP-2(b); 1T191). In the absence of a reply, Menza asked then-assistant Superintendent Hackett for a meeting to discuss her transfer (CP-2(c); 1T191; 2T73). Hackett had authority to decide transfers (2T74-2T75).

20. On August 8, 2012, Hackett, Wesley and Menza met to discuss the transfer (1T192). Hackett testified that Meronvil and not Principal Chester initiated the proposed transfer, specifically, the "exchange" of Menza for Oladoja (2T74; 2T75-2T76). I credit Hackett's un rebutted testimony. In light of her authority to decide transfers, I also find that her testimony is corroborated by Meronvil. Hackett admitted that the selection of Menza for the transfer, ". . . had to be Chester's call because they called her to ask her about the switch" (2T113). Chester did not independently ask Hackett to transfer Menza (2T74). I credit Hackett's testimony that she was unaware that Menza was an IEA representative at Union Avenue Middle School (2T115).

In the meeting, Hackett read aloud a letter Chester had written to her, praising Menza as a "good teacher;" as "good with students;" and as having good relationships with parents and other teachers (1T192-1T193; 1T204). The quoted characterizations are admissions in Menza's testimony. Hackett did not show the letter to Menza (1T192-1T193). The letter was

neither marked for identification nor introduced into evidence. Menza then asked Hackett, "Would you move someone who is this good?" (1T193). Hackett replied: "Well, maybe she's taking one for the team" (1T193). I infer that Hackett was indirectly referring to Meronvil's suggestion to switch teachers Menza and Oladoja. I do not infer from Hackett's remark that Chester's true or sole purpose in recommending Menza for transfer was to benefit students. Menza was transferred to University Middle School for the 2012-2013 school year, where she taught sixth grade mathematics (1T186-1T187; 1T198).

21. Sometime in October, 2012, Menza spoke with Mr. Sabuur, Principal of University Middle School, in his office. He said to Menza: "You're doing a great job," and added, "I'm surprised." Menza asked, "Why are you surprised?," to which Sabuur replied, "Well, from the way Chester described you, I thought you were horrible" (1T196). Menza replied: "I've always had good evaluations. I don't understand." Sabuur answered: "I'm pleasantly surprised. I'm glad to have you on board" (1T196-1T197). On cross-examination and pressed to agree that Sabuur never said that Chester disapproved of her IEA activities, Menza testified:

What [Sabuur] said was, 'she wanted to move you here. She wasn't happy with you. And since I had someone who had poor classroom management, I took the opportunity to make a switch.' [1T206]

Menza's testimony was unrebutted; I credit it.

22. Sometime after the end of the 2012-2013 term, Hackett transferred Principal Chester from Union Avenue School to University Middle School. On July 30, 2013, Menza issued an email to Superintendent Hackett requesting her transfer back to Union Avenue School as a sixth grade mathematics teacher. She wrote:

As you know, last year Ms. Chester transferred me from [Union Avenue Middle School] to [University Middle School] without so much as a courtesy call. When I emailed her requesting the reason for the move, she simply referred me to H.R. I have seen her several times this year . . . and she did not acknowledge me once. Having worked with Ms. Chester I know how difficult it can be and would like to avoid a stressful, hostile work environment. [CP-3]

Hackett approved Menza's transfer back to Union Avenue Middle School (1T180; 2T131-2T132).

23. Anthony Del Vecchio is a recently-retired Board English teacher who also was an IEA building representative at the high school from 2006-2013 (2T5-6). Before the 2012-2013 school year, Del Vecchio taught public speaking and drama exclusively for six consecutive school years (2T8). As an IEA representative, Del Vecchio represented teachers facing possible discipline and met with the high school Principal, Burnett Davis, once per week from about 2009 until he retired in 2013. Their collective

negotiations relationship was both uncontentious and ". . . contentious, at times" (2T7).

In or around mid-August 2012, Del Vecchio learned of his schedule for the upcoming school year. For the first time, he was assigned to teach a class of "Introduction to English 9," a basic skills course and two of (a possible) six classes of public speaking/drama (2T12; 2T13). The other four were assigned to another teacher (2T14).

Apart from certain RIFs implemented that summer (see finding no. 5), the high school had "major problems" with the schedule. Some classes were scheduled to have 40 students; others had no students (2T69-70). Fixing the problems required ". . . quite a few schedule changes" (2T70).

Del Vecchio asked high school Principal Davis why his schedule had been changed. Davis replied: "We have to share the wealth" (2T14). Del Vecchio inferred that Davis meant that he wanted other teachers to share in the instruction of drama (2T24). Del Vecchio next sought a meeting with Superintendent Hackett. She told him that she would not have placed him to teach "basic skills" courses but needed to consult with Principal Davis (2T14-15; 2T107). Hackett admitted her belief that Del Vecchio ". . . didn't have the skill set" to teach "Introduction to English 9" and ". . . pretty much said that to him" (2T108).

Weeks later, Del Vecchio was pulled from teaching "Introduction to English 9" because of the relatively low number of students enrolled (2T109). He was assigned as a "push-in" teacher in English as Second Language (ESL) classes (2T16). Hackett confirmed that she participated in that reassignment, testifying that, ". . . his skill set was better there than with struggling English 9 students" (2T109). A "push-in" teacher assists another teacher in course instruction (1T16). Hackett testified:

He is coming from an English background, so he can also help with the content. A lot of times our ESL students . . . don't do well on the standardized tests. So, his goal was to come in and provide them with or support the teacher with English instruction. So I thought that would be a good fit for him.
[2T110]

Hackett's testimony was unrebutted; I credit it.

In or around November, 2012, Del Vecchio's assignment changed again. He was reassigned from ESL classes to "S.A.T./Creative Writing" classes, comporting with his teaching certification in English (2T17; 2T25).

On an unspecified date in the 2010-2011 school year, teacher and IEA representative Del Vecchio met with an assistant principal, Mr. Denis, and requested an extension of a deadline for the submission of teacher work in the mathematics department (2T9). Denis denied the request, to which Del Vecchio remarked to him, "This will be a war," meaning that Del Vecchio intended

to instruct unit employees in the mathematics department, ". . . not to hand anything in" (2T9). After conferring with Principal Davis, Denis advised Del Vecchio, "We'll give them another week." Del Vecchio agreed (2T10).

About two weeks later, Del Vecchio received a memorandum authored by Denis (though not addressed to him) advising the guidance department that public speaking courses and drama courses would no longer be offered to students as electives (2T11). Del Vecchio spoke to Davis about the discontinuation, advising him that one of the electives ". . . was needed for NCAA scholarships and sports programs" (2T20). Davis replied that he didn't know of the NCAA requirement (2T11). Del Vecchio showed Davis Denis's memorandum (2T11). Davis next met with the guidance department and soon afterwards rescinded the memorandum (2T11). Although another teacher was asked to teach those electives in the following school year (2011-2012), that teacher was transferred to another Board school. Del Vecchio taught the electives in the 2011-2012 school year (2T12).

ANALYSIS

IEA contends that its President Wesley's assignment to a "classroom position" (with attendant duties of marking attendance, grading tests and papers, meeting with students and parents, etc.) changes a practice that the IEA President does not work in a position with classroom responsibilities (IEA brief at

14). The Board argues that the disputed assignment is consistent with Article XX, paragraph 4 of the collective negotiations agreement (Board brief at 13).

Allegations of unilateral changes in terms and conditions of employment implicate section 5.4a(5)^{5/} of the Act, which was not enumerated in the unfair practice charge upon which the Complaint issued. The charge alleges however, that the Board, ". . . violated the established practice that the IEA President had no classroom responsibilities." I assume that the issue of unilateral change was fully and fairly litigated. See Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n. and Collingswood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd. 10 NJPER 78 (¶15043 App. Div. 1983).

From 1995 until fall, 2012, all IEA presidents performed teaching duties for about one-half of each workday that were not "classroom positions" (with their myriad of attendant duties). In September, 2012, following notice to her the previous spring, IEA President Wesley was assigned to teach social studies and computer lab facilitation for a total number of instructional

^{5/} This provision prohibits public employers, their representatives or agents from: "(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."

minutes that did not exceed the practice or the contractual limit.

The right to assign duties is a managerial prerogative outside the scope of negotiations. See, e.g., Perth Amboy Bd. of Ed., P.E.R.C. No. 83-36, 8 NJPER 573 (¶13264 1982). Beyond the exercise of that prerogative, the remaining questions are whether classroom positions fall within the meaning of "teaching periods" and whether responsibilities attendant to such positions necessarily run afoul of the prohibition against "no other assignments" as those terms appear in Article XX, paragraph 4 of the agreement.

I find that these issues comprise at most a breach of contract claim that does not warrant the exercise of the Commission's unfair practice jurisdiction. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). The Board's conduct suggests neither a repudiation of a clear contract provision nor specific indicia of bad faith.^{6/} I recommend that this allegation be dismissed.

6/ Human Services contemplates deferral to a negotiated grievance procedure culminating in binding arbitration when a charge essentially alleges a violation of section 5.4a(5) interrelated with a breach of contract claim. In this case however, no Answer was filed (that could have identified the contract claim), nor did the charge reference Article XX of the agreement. In the absence of a contract provision, I do not believe that the IEA President would have an "inherent right" to release time that could be vindicated under section 5.4a(5). See City of South Amboy, P.E.R.C. No.

(continued...)

The facts do not show that the Board discriminated against Wesley or the IEA in violation of section 5.4a(3) by assigning her classroom teaching duties. In re Bridgewater Tp., 95 N.J. 235 (1984). Uncontested facts show and the IEA concedes that all "support" positions, including the computer lab facilitator position held by Wesley in the 2011-2012 school year were RIF'ed at that year's end, owing to budgetary constraints (IEA brief at 15). The Board duly notified Wesley in the spring of 2012 that it intended to assign her to a classroom position the next fall, over her objection. No facts indicate that the Board's decision was pretextual or that it was in retaliation for the exercise of protected conduct. Bridgewater.

I next consider whether Barbara Menza's transfer from Union Ave. School to University Middle School for the 2012-2013 school year violated section 5.4a(3) and derivatively a(1) of the Act. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this

6/ (...continued)
85-16, 10 NJPER 511, 513, fn. 5 (¶15234 1984). Even in the apparent absence of a contractual grievance contesting the Board's action, I am reluctant to substitute our process for the parties' grievance procedure.

activity and the employer was hostile toward the exercise of protected rights. Id. at 246.

If the employer does not present any evidence of a motive not illegal under the Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both unlawful motives and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242.

I find that IEA has proved by a preponderance of evidence that Menza's protected conduct was a substantial or motivating factor in the Board's decision to transfer her from Union Avenue School to University Middle School for the 2012-2013 school year.

In the 2010-2011 and 2011-2012 school years, Union Avenue School Principal Cheryl Chester received Menza's requests for meetings to discuss IEA building concerns, demonstrating the Board's knowledge of Menza's protected conduct. Chester frequently cancelled any scheduled meetings. Chester also remarked to a security guard after admonishing (and later, reprimanding) Menza for illicitly parking her car in a specific nearby lot, "I'm going to get her ass, even if she is a rep." I

find that Chester's remark is direct evidence of anti-union animus, notwithstanding a literal possibility that Chester meant that Menza would not receive favorable treatment for a workplace rule infraction because she is an IEA representative. I doubt that possibility because nothing in the incident itself or in its context prompted Chester's reference to Menza's IEA role. That possibility is further diminished by Chester's omitting to appear and testify in the Hearing and uncontested testimony that other teachers who parked their vehicles in the same lot as Menza did not suffer adverse consequences, demonstrating disparate treatment. See State v. Clawans, 38 N.J. 162, 171 (1962); Int'l. Automated Machines, Inc., 285 NLRB No. 139, 129 LRRM 1265, 1266 (1987) (when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge). Finally, and in the absence of Chester's testimony, I draw a negative inference from the factual question arising from her threat; specifically, was it limited to the circumstance of Menza's parking infraction or was it unqualified?

The record reveals two apparently irreconcilable opinions Chester offered about Menza's professional abilities that underpin the transfer from Union Avenue School to University Middle School for the 2012-2013 school year. The laudatory one

was read aloud by Hackett in her August 8, 2012 meeting with Wesley and Menza. The disparaging one was told to Menza in October, 2012 by University Middle School Principal Sabuur. I find that the only possible source of disparagement revealed on this record is Menza's IEA role or activities. In that context, I specifically note Menza's hearsay testimony that Sabuur admitted to her, "[Chester] wanted to move you here. She wasn't happy with you." The Board did not call Sabuur to testify in rebuttal.

In Boston Mutual Life Ins. Co. v. NLRB, 692 F.2d 169, 111 LRRM 2983 (1st Cir. 1982), the Court granted enforcement of a NLRB order even though the management official who ultimately fired the complainant was unaware of that employee's union activity. The Court was, ". . . reluctant to adopt a rule that would permit the company to launder the bad motives of certain of its supervisors by forwarding a dispassionate report to a neutral superior." Id., 111 LRRM 2985. In his review of the record on appeal, then-Circuit Judge Breyer wrote approvingly that the ALJ and the Board, ". . . saw the case as a pretext case, i.e., a case in which there is no mixture of 'good' and 'bad' motive because the 'good' motive does not exist." Id.

I find that this case is also a pretext case. Meronvil conceded that he relied on Chester's recommendation to implement the switch of teachers Oladoja and Menza. Superintendent Hackett

admitted that the selection of Menza for transfer was ". . . Chester's call." I infer that Hackett relied in substantial part on Chester's written recommendation of Menza (the other possible source was Meronvil's recommendation). In the circumstances of this case, I find that the Board's defense amounts to a laundering of Chester's bad motives by her forwarding a positive recommendation of Menza for her transfer for a pretextual reason through neutral, reliant superiors -- Meronvil and Hackett, both of whom were unaware of Menza's IEA activities or role. By coincidence, an opportunity arose for Chester to have IEA building representative Menza moved out of the building and she exploited it.

If the Commission disagrees that the facts of this case demonstrate that the Board's motive was pretextual, I recommend that the IEA has proved by a preponderance of evidence that Menza's protected conduct was a substantial or motivating factor in her transfer from Union Avenue School to University Middle School. Considering Chester's anti-union animus towards Menza; her unrebutted remarks to Principal Sabuur; her failure to testify at the Hearing (from which I draw a negative inference regarding her reason for selecting Menza); and the absence of evidence (apart from Chester's recommendation) showing that Menza was either the best choice for transfer among math teachers at Union Avenue School or would have been transferred anyway, I find

that Chester selected Menza for transfer because she wished to be rid of that IEA representative, thereby violating 5.4a(3) and derivatively a(1) of the Act.

I next consider whether the Board violated 5.4a(3) and a(1) of the Act during the 2012-2013 school year when Union Avenue Middle School Principal Cheryl Chester assigned IEA representative and physical education and health teacher Jodie Hollander to a personal lunch period in the third period of the workday and when she issued a poor classroom evaluation of her.

I have found that Chester displayed anti-union animus towards IEA representative and teacher Menza during the 2011-2012 school year, which preceded Hollander's return to employment from a maternity leave of absence. Hollander had worked without incident at Union Avenue School under Principal Chester for the 2010-2011 and 2011-2012 school years. Almost immediately after Hollander first became an IEA building representative in mid-October, 2012, (replacing Menza) Chester reacted intemperately to a perceived workplace infraction and publicly blamed Hollander for it, without apparent justification.

Hackett's testimony that Chester told her that she assigned the early lunch period to Hollander in order to provide "coverage" to a cafeteria or hallway does not comport with the residuum rule, N.J.A.C. 1:1-15.5(b). I do not credit that asserted justification. Even if I credit that testimony, it

fails to explain why Chester selected Hollander for a 9:30 a.m. lunch period. The only other possible reason that Chester ordered Hollander to take a 9:30 a.m. personal lunch period was that the IEA representative and teacher did not buy her lunch when the cafeteria was open for business. Just how or why Chester knew about Hollander's eating habits (or anyone else's, for that matter) is not established on this record. In the absence of Chester's testimony, I find that that reason is likely pretextual and alternatively, does not amount to a legitimate business justification. Although Superintendent Hackett reversed Chester's directive by sustaining Hollander's contractual grievance contesting the "early" lunch period, I find that Chester's conduct violated 5.4a(3) and (1) of the Act.

Superintendent Hackett essentially admitted that Chester's February, 2013 evaluation of Hollander's classroom performance was unfair and invalid, warranting both rescission and redoing, with the follow-up evaluation conducted in the Superintendent's presence. The replacement evaluation was significantly improved under Hackett's auspices, obviating the need for a "corrective action plan" that Chester had imposed on Hollander at the time of the initial evaluation. I infer that in the interim between evaluations, or in or around that time, Chester without justification asked Hollander why no election had been conducted for the positions of IEA representative. Consistent with both

evidence of Chester's anti-union animus on this record and a negative inference drawn from her failure to testify, I find that her unanticipated order that Hollander change her classroom minutes before evaluating her teaching performance was intended to either worsen that performance or render a good one unlikely. Chester's disavowed evaluation in part criticizes Hollander for adverse conditions that the Principal basically created -- failure to exercise discretion in determining that Hollander's classroom was "too cold" and failure to provide adequate materials in the substituted classroom. For all of these reasons, I find that Chester's February, 2013 evaluation of Hollander was tainted by anti-union animus.

No witness testified that in March, 2013, Chester said in a faculty meeting that she, ". . . would be attempting to bust the union," as set forth in the amended charge filed on March 18, 2013. The record is unclear about the precise discussion among Board and IEA representatives in advance of that faculty meeting and unclear about whether those representatives reached any agreement concerning terms and conditions of employment, including dispensation(s) for certain teachers' early departures (see finding no. 15). Chester's remark, ". . . if teachers wanted to get things done, they should come to her instead of going to the union" is unclear in its meaning and implication. In the absence of facts demonstrating that Chester's remarks in

the March, 2013 faculty meeting violated 5.4a(1) of the Act, I recommend that the allegation be dismissed. See e.g., Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

Finally, I must assess whether the Board unlawfully changed teacher and IEA representative Del Vecchio's teaching assignment at the high school in the 2012-2013 school year, violating section 5.4a(3) and (1) of the Act. Specifically, IEA claims that Del Vecchio was deprived of teaching four of six elective drama and public speaking courses at the high school that year, as he had done in the six consecutive previous years.

Near the end of the 2010-2011 school year, Del Vecchio vociferously disagreed with a high school assistant principal's denial of a requested extension of time for certain teachers to file reports or documents. Principal Davis intervened and authorized the extension. About two weeks later, Del Vecchio read a memorandum written by the assistant principal announcing the discontinuation of public speaking and drama courses in the next school year. Principal Davis again intervened, restoring the electives for the 2011-2012 school year. Although another teacher was assigned to teach those courses, he was transferred to another school, and Del Vecchio taught six periods of those electives in the 2011-2012 school year. In the absence of any

facts to the contrary, I infer that Principal Davis awarded the courses to Del Vecchio.

In August, 2012, Del Vecchio belatedly learned that he would be teaching only two periods of drama and public speaking in the 2012-2013 school year. Principal Davis told Del Vecchio in response to his demand for an explanation, that ". . . we have to share the wealth," meaning that another teacher was awarded the other four periods of those elective courses. Del Vecchio's assigned non-elective classes changed three times in the 2012-2013 school year. The IEA did not rebut Superintendent Hackett's testimony that the 2012-2013 school year was rife with scheduling problems and that she personally participated in making changes to Del Vecchio's teaching assignment.

The IEA has not demonstrated anti-union hostility, a necessary component of a Bridgewater case. The events of 2010-2011 show that Principal Davis acted in Del Vecchio's favor and not to his detriment. Nor has it shown that his 2012-2013 classroom teaching assignment changes and his reduced elective course load are traceable to anti-union animus. I recommend that this allegation be dismissed.

RECOMMENDATION

I recommend that the Commission find that Irvington Board of Education violated section 5.4a(3) and (1) of the Act when it transferred unit employee and IEA representative Barbara Menza

from Union Avenue School to University Middle School in or around August, 2012; when Principal Chester changed unit employee and IEA representative Jodie Hollander's personal lunch period to 9:30 a.m. in or around January, 2013; and when Principal Chester issued a negative classroom evaluation of Hollander and a 60-day improvement plan for her in or around February, 2013.

I also recommend that the Commission find that Irvington Board of Education did not violate section 5.4a(3) and (1) of the Act when Principal Chester addressed the faculty in a meeting in March, 2013 and when unit employee and IEA representative Anthony Del Vecchio's teaching assignment was changed in August, 2012 in part by reducing the number of periods he taught elective courses public speaking and drama from 6 to 2. I also recommend that the Irvington Board of Education did not violate the Act by assigning IEA President Eileen Wesley to teach social studies in or around September, 2012.

RECOMMENDED ORDER

I recommend that Irvington Board of Education

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by threatening retaliation against IEA representative and teacher Barbara Menza for engaging in protected activities; by transferring Menza from Union Avenue

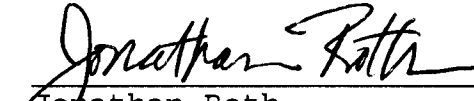
School to University Middle School in September, 2013; assigning IEA representative and teacher Jodie Hollander to a 9:30 a.m. lunch period in the 2012-2013 school year; and issuing a negative classroom evaluation of her teaching performance and a 60 day improvement plan in February, 2013.

2. Discriminating in regard to hire or tenure of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by transferring IEA representative Barbara Menza from Union Avenue School to University Middle School; assigning IEA representative Jodie Hollander to a 9:30 a.m. lunch period and issuing a negative classroom evaluation of her teaching performance and issuing her a 60-day improvement plan.

B. Take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix A. Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.


Jonathan Roth
Hearing Examiner

DATED: January 9, 2015
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by January 20, 2015.



NOTICE TO 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 the rights guaranteed to them by the Act, particularly by threatening retaliation against IEA representative and teacher Barbara Menza for engaging in protected activities; by transferring Menza from Union Avenue School to University Middle School in September, 2012; assigning IEA representative and teacher Jodie Hollander to a 9:30 a.m. lunch period in the 2012-2013 school year; and issuing a negative classroom evaluation of her teaching performance and a 60 day improvement plan in February, 2013.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by transferring IEA representative Barbara Menza from Union Avenue School to University Middle School; assigning IEA representative Jodie Hollander to a 9:30 a.m. lunch period and issuing a negative classroom evaluation of her teaching performance and issuing her a 60-day improvement plan.

Docket No. CO-2013-161

Irvington Board of Education
(Public Employer)

Date: _____

By: _____

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 the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372