

P.E.R.C. NO. 83-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LOGAN TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CI-81-21-51

SANDRA C. WALDMAN,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Logan Township Board of Education violated subsections N.J.S.A. 34:13A-5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it did not renew the teaching contract of Sandra Waldman, vice-president of the Logan Township Teachers Association, for the 1980-81 school year. The Commission orders that Waldman be reinstated with back pay.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LOGAN TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CI-81-21-51

SANDRA C. WALDMAN,

Charging Party.

Appearances:

For the Respondent, Raymond J. Zane, Esq.

For the Charging Party, Selikoff & Cohen, P.A.
(Steven R. Cohen, of Counsel)

DECISION AND ORDER

On October 29, 1980, Sandra C. Waldman filed an unfair practice charge against the Logan Township Board of Education ("Board"). Waldman alleged that the Board violated subsections 5.4(a)(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), when it denied her a teaching contract for the 1980-81 school year because of her protected activities as vice-president of the Logan Township Teachers' Association ("Association").

On November 5, 1980, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C.

^{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; 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 rights guaranteed to them by this act."

19:14-2.1. On November 24, 1980, the Board filed an Answer in which it denied that Waldman's Association activities motivated its decision not to offer her a 1980-81 teaching contract.

Instead, the Board gave the following reasons for its decision:

1. Inconsistent classroom performance, in particular, displaying partiality to students of superior ability.
2. Marginal questioning and discussion skills especially in the use of non-related and graphic dialogue.
3. Inability to use discretionary behavior in regard to students, colleagues and administration.
4. Failure to provide and maintain an instructional program commensurate with experience and class size.

On February 4, 5, and April 29, 1981, Commission Hearing Examiner Edmund G. Gerber conducted a hearing. The parties examined witnesses and presented exhibits. They waived oral argument, but presented briefs by July 20, 1981.

On June 8, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 82-57, 8 NJPER ____ (¶ ____ 1982) (copy attached). He concluded that the Board violated subsections 5.4(a)(1) and (3). He specifically found that Waldman had proved that her activities as Association vice-president were a motivating factor in the Board's decision and that the Board had failed to submit credible evidence that it would not have renewed Waldman's teaching contract even in the absence of her protected activities. To remedy the violation, he recommended

that the Board reinstate Waldman with back pay and post a notice of its violation and remedial actions. He also recommended that the Commission not grant Waldman tenure and that the Board be given an opportunity to re-evaluate Waldman's teaching performance during the next year.

On July 14, 1982, after receiving extensions of time, the Board and Waldman filed Exceptions and supporting briefs. The Board contends that the Hearing Examiner erred in: (1) negatively characterizing the testimony of Waldman's principal concerning his attitude towards Waldman, (2) stressing the generally positive observation reports the principal gave Waldman, (3) making a recommendation concerning tenure. Waldman contends that the Hearing Examiner erred in not recommending that: (1) she receive tenure; (2) she receive interest along with back pay; (3) she recover her attorney's fees and costs; and (4) an independent violation of subsection 5.4(a)(1) be found.^{2/}

We have reviewed the record. Substantial evidence supports the Hearing Examiner's findings of fact, (Slip Opinion at pp. 2-14), with two inconsequential exceptions.^{3/} With these exceptions, we adopt and incorporate the Hearing Examiner's findings of fact.

^{2/} Both parties have requested oral argument. Because the parties have adequately briefed this matter, we deny this request.

^{3/} First, the Hearing Examiner incorrectly stated that Waldman protested the Board's failure to post notices of summer job vacancies at a September 5, 1979 meeting (Slip Opinion at p. 6); in fact, as the Hearing Examiner subsequently noted (Slip Opinion at p. 9), this concern was not raised until October 6, 1979. Second, the Hearing Examiner incorrectly stated that a publisher's representative was present at a meeting where the principal and Waldman had a disagreement (Slip Opinion at p. 14); in fact, it was an insurance company representative who was present.

We also agree with the Hearing Examiner's conclusions that the Board violated subsections 5.4(a)(1) and (3) when it did not renew Waldman's teaching contract for the 1980-81 school year (Slip Opinion at pp. 15-16).^{4/} East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981), sets forth the test for determining if an employer's alleged anti-union motivation makes a personnel action illegal. The charging party must first establish that his protected activity was a substantial or motivating factor in the employer's decision. If the charging party succeeds, then the employer must go forward and present evidence that it would have reached the same decision in the absence of the Charging Party's protected activity.^{5/}

In the instant case, Waldman succeeded, for the reasons set forth in the Hearing Examiner's opinion, in proving that her protected activity played a substantial role in the decision not to rehire her. Although the Board introduced some evidence of conduct on the part of Waldman which it alleged constituted legitimate educational reasons for its action, it did not succeed in rebutting the Charging Party's evidence that the Board would have renewed Waldman's contract had she not been such an aggressive Association representative. Based upon the Hearing Examiner's analysis of the

^{4/} The Hearing Examiner did not specify whether he found a derivative and/or independent violation of subsection 5.4(a)(1). We believe the Board violated this subsection independently and derivatively.

^{5/} The Taliaferro Court borrowed this test from the decision of the National Labor Relations Board in Wright Line, A Division of Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980), aff'd as modif. 108 LRRM 2513, 662 F.2d 899 (1st Cir. 1981), cert. den. (March 1, 1982). The NLRB, in turn, based its test on the decision of the United States Supreme Court in Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 (1977). See also, e.g., In re County of Bergen-Operating Bergen Pines County Hospital, P.E.R.C. No. 82-117, 8 NJPER _____ (¶ _____ 1982).

record and our own independent review of the entire record, we find that Waldman has established by a preponderance of the evidence that her protected activities on behalf of the Association were a substantial motivating factor in the Board's decision not to renew her contract and that the Board would not have made that decision but for her protected activity.

We specifically dismiss the Board's Exception contending that the Hearing Examiner erred in negatively characterizing the principal's testimony concerning his attitude toward Waldman and in stressing the generally positive classroom observation reports the principal gave Waldman. We will not second-guess the Hearing Examiner's credibility judgments on these issues which are based on his opportunity to observe the witnesses firsthand. See, e.g., In re State of New Jersey, College of Medicine and Dentistry, P.E.R.C. No. 82-33, 7 NJPER 588 (¶12264 1981), appeal pending App. Div. Docket No. A-997-81T3; In re Township of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980), aff'd App. Div. Docket No. A-3230-79 (1/23/81). We agree with the Hearing Examiner that the absence of any significant criticism or warning in the principal's reports belies his testimony that Waldman's classroom performance was horrendous.

We now consider the appropriate remedy. Once liability is established, the Board does not contest that reinstatement and back pay are appropriate remedies. We accordingly accept the Hearing Examiner's recommendations that we order these remedies.^{6/}

^{6/} We also award interest at the rate of 12% on the back pay due Waldman. Salem County Bd. for Vocational Ed. v. McGonigle, N.J. Superior Court, App. Div. Docket No. A-3417-78 (September 29, 1980); In re County of Bergen-Operating Bergen Pines County Hospital, supra; R. 4:42-11.

The Board does object, however, to any Commission determination which touches upon the issue of whether Ms. Waldman is entitled to tenure. Waldman responds that she is entitled to tenure pursuant to N.J.S.A. 18A:28-5 and the decision of the Commissioner of Education in Rockenstein v. Board of Education of the Borough of Jamesburg, Middlesex County, 1975 S.L.D. 191, aff'd State Board of Education, 1975 S.L.D. 199, Superior Court of New Jersey, Appellate Division, 1976 S.L.D. 1167 ("Rockenstein").

Under the particular facts of this case, we do not believe that our decision determines the tenure status of Ms. Waldman. Rockenstein does not require us to reach that question. In that case, the teacher ordered reinstated had completed three full years of continuous teaching; therefore, the first day back following reinstatement would determine tenure. The Commissioner of Education held that the break in service which occurred as a result of the improper termination could not constitute an interruption in the three years and a day of continuous service for the purposes of qualifying for tenure. Contrary to the Charging Party's assertion, this case does not hold that the period in between the improper termination and reinstatement is credited toward the three years of service for tenure purposes.

In this case, Ms. Waldman began her employment with the Board in December 1977 and was not renewed for the 1980-81 school year. She has not completed three years of continuous service, and will not be eligible for tenure until she has completed

approximately three more months of service. Therefore, her reinstatement pursuant to this order will not present the issue of her tenure status until she has completed three months of continuous service. This period of time will give the Board an opportunity to evaluate her present performance and to reevaluate her past performance free of the taint of unlawful discrimination based on her Association activities.^{7/}

Waldman also requests that we award her attorney's fees and costs. We decline this request. Assuming we have the power to make such an award in an appropriate case, we are not persuaded that the Board acted frivolously, in bad faith, or for oppressive reasons in defending this case. Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975); Tiidee Products, Inc., 194 NLRB No. 1234, 79 LRRM 1175 (1972), enforced as modified, 502 F.2d 349, (D.C. Cir. 1974), cert. den. 421 U.S. 991 (1975).

ORDER

The Public Employment Relations Commission orders that the Logan Township Board of Education:

A. Cease and desist from discriminating against Sandra Waldman by refusing to renew her teaching contract because of her activities protected under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

^{7/} Given the Board's Exception to the Hearing Examiner's recommendation that Waldman repeat her final year as a non-tenured teacher so that it can re-evaluate her based on a full year performance, we believe this remedy appropriate. Any question which may arise when Waldman's eligibility for tenure occurs can be considered at that time in an appropriate proceeding.

B. Offer Sandra Waldman reinstatement as a teacher in the Logan Township School District.

C. Pay Sandra Waldman the amount she would have received had the Board renewed her teaching contract and continued to employ her to present, together with 12% interest on that amount, less any monies she had earned during this period.

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

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

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Graves, Hartnett and Suskin voted in favor of the decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
September 14, 1982
ISSUED: September 15, 1982

APPENDIX "A"
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 discriminate against Sandra Waldman for her exercising rights protected under the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

WE WILL offer her reinstatement as a teacher in the Logan Township School District.

WE WILL pay Waldman the amount she would have received had the Board renewed her teaching contract and continued to employ her to present, together with 12% interest on that amount, less any monies she earned during this period.

LOGAN TOWNSHIP 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 the 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

LOGAN TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-81-21-51

SANDRA C. WALDMAN,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Logan Township Board of Education offer re-employment to Sandra Waldman, who they failed to renew after a third year of employment as a teacher. The Hearing Examiner found that the exercise of protected activity by Waldman was a motivating factor in the Board's decision and that the Board did not demonstrate that this action would have taken place in the absence of Waldman's protected conduct.

It was recommended that this reinstatement not grant tenure to Waldman even though she had served three years as a teacher for the Logan Township Board of Education.

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.

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

In the Matter of

LOGAN TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-81-21-51

SANDRA C. WALDMAN,

Charging Party.

Appearances:

For the Respondent, Raymond J. Zane, Esq.

For the Charging Party, Selikoff & Cohen, P.A.
(Steven R. Cohen, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On October 29, 1980, Sandra Waldman (Charging Party) filed an Unfair Practice Charge as an individual against the Logan Township Board of Education alleging 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). It was specifically alleged that the Logan Township Board of Education (Board or Respondent) refused to grant Waldman an employment contract for the 1980-1981 school year because she engaged in protected activity on behalf of the Logan Township Teachers' Association which is violative of § 5.4(a)(1) and (3) of the Act. ^{1/}

^{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."

It appearing that the allegations of the charge if true may constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 5, 1980, and hearings were conducted on February 4, February 5 and April 29, 1981. Both parties were given an opportunity to present evidence, examine and cross-examine witnesses, argue orally and present briefs. 2/

Sandra Waldman was first employed by the Logan Township Board of Education in December, 1977 as a science and reading teacher for the sixth, seventh and eighth grades at the Logan Township School. When she was hired there was just one school in the district. Subsequently a second school opened in the district.

The Logan Township Education Association was the exclusive majority representative for teachers in the district. In May of 1978 Waldman was elected vice-president of the Association for the following school year. Waldman never participated in negotiations and maintained a low profile in the Association during the 1978-1979 year. Waldman was very active and visible in the Association in the following school year, that is 1979-1980.

In April of 1980 Waldman was notified that her contract would not be renewed for the coming year.

She asked for, and received, a statement of reasons for her non-renewal. The statement listed the following reasons:

1. Inconsistent classroom performance, in particular displaying partiality to students of superior ability.

2/ Briefs were received by August 18, 1981.

2. Marginal questioning and discussion skills especially in the use of non-related and graphic dialogue.
3. Inability to use discretionary behavior in regard to students, colleagues and administration.
4. Failure to provide and maintain an instructional program commensurate with experience and class size.

Waldman maintains that the stated reasons were pretextual and the real reason for her discharge was her activity on behalf of the Association.

She points out that her evaluations have always been positive and she received no advance warning that she might not receive a contract for the coming year.

In Waldman's first year she was evaluated three times by the then principal and chief school administrator, Edward Meglis. The three teacher evaluations show clear growth during the year. The first evaluation on December 12, 1977, shows that Waldman was unsure of herself, hesitant and seemingly not fully prepared to present her lesson. The next two evaluations, on January 12, 1978 and again on March 13, 1978, were positive. They reflect better organization and increased competence. The third evaluation, particularly, was very positive in nature.

In the following academic year Meglis left the district. In or around December 1978 the Board hired Thomas Griggs as principal and Andrew Donnelly as Superintendent of Schools.

Waldman was observed only once during the 1978-1979 school

year. That evaluation was performed by Griggs in April of 1979. This evaluation was done on a form that lists 22 areas of teacher performance. Each area is rated on a scale of 1 to 5: 1) excellent, 2) strong, 3) satisfactory, 4) needs improvement, 5) unsatisfactory. Griggs testified that he did not use a rating of 1) excellent. Waldman received a rating of 2) in four areas: "Demonstrates careful planning both short and long term; Motivates students by generating interest and enthusiasm among them; Demonstrates ability to establish and maintain rapport with students; and Keeps parents informed in regard to the student and his class." In all other areas Waldman received 3's (satisfactory). 3/

In Waldman's final school year, 1979-1980, she was evaluated three times.

These evaluations are on forms quite different from the form used in the April 1979 evaluation. They allow for extensive comment by the evaluator and have only two entries which are designed for the evaluator to check. One is an overall evaluation of whether the lesson was satisfactory or unsatisfactory. In the other entry the evaluator can check off any of four major areas of concern: Personal Characteristics, Classroom Management, Teaching Effectiveness and Achieved Results. On all three evaluation forms Waldman was evaluated as satisfactory and none of the listed major areas of concern were checked off.

The first evaluation, dated December 14, 1979, was extremely positive in tone. Under evaluator's summary Griggs wrote a summary

3/ Griggs also made two relatively minor comments about the class in the space provided for "Additional Comments."

of the lesson that he observed. This description concludes with "Her manner of presentation was relaxed, friendly and deliberate, initiating a similar response in the students. A good rapport was established with a positive exchange of dialogue," and under Teacher Observation Summary and Conference Comments,

You promoted a positive exchange of dialogue. Your presentation style demonstrated a sophisticated ability to establish and maintain a good rapport with the student.

Student orientation to classroom routine appears well established. Congratulations on a fine job.

The second evaluation occurred on February 20, 1980. The tone of the description of the observed lesson under "Evaluation Summary" was completely neutral in tone except that a reading group's discussion was written up as a "light discussion." A bulletin board was characterized as also "attractive." Under Teacher Observation Summary and Conference Comments Griggs wrote;

It is quite apparent that you have established an excellent rapport with your high level students. Be aware of the other students' sensitivities and possible interpretation of partiality. The lesson for this group flowed smoothly, however, caution must be observed in opening discussion areas with comments such as "Godzilla in drag." The football player image served as an excellent example and may have been sufficient in itself within this group. ^{4/} Your concern for student comfort is commendable and appreciated. Standing on the heating unit and taping the shades is not an advisable solution to that problem. As indicated previously, student orientation to classroom routine appears well established. Taking

^{4/} The record establishes that the references to the football player and to "Godzilla in Drag" were used by Waldman to help the students conceptualize a description of a woman in the story they read. The woman in the story was described as a big woman and the students were confusing large size with obesity.

advantage of the incidental learning situation concerning pressure systems...was commendable. The bulletin boards continue to be attractive and the language arts signs above the blackboard are an interesting and functional addition.

The third observation was on March 18, 1980. The "Evaluatory Summary" of the lesson observed in this evaluation was completely neutral in tone.

Griggs' Teacher Observation Summary and Conference Comments is positive in tone.

Your use of the conjugation chart served a beneficial purpose in terms of this lesson and should have significant residual effects. It was evident that individual attention was focused on Brian's expressed confusion (once at the blackboard and at his desk). Please be careful that student responses are accurate. In Jon's efforts at the blackboard he used the third person plural (they) when third person singular (he, she, it) was required. Your discussion of regular and irregular verbs was good. Individualized assistance in regard to Ditto #76 was beneficial and certainly a positive byproduct of small class size.

Waldman became actively involved in the Association in only her final year of employment. On September 5, 1979, this activity began. Waldman and two other Association members, Kling, the Association president, and Marguerite Full, the Association secretary, met with Griggs to discuss three issues: a new requirement that teachers maintain registers, the Respondent's failure to provide proper preparation periods in the new school year, the removal of a ditto machine from the teachers' room, the Board's failure to post vacancies in accordance with contract provisions and an increase in Kling's non-teaching duties.

Before the meeting Kling requested that Waldman act as a

-7-

spokesperson both for the Association and himself. Fuller took no part in the discussion and confined herself to taking minutes of the discussion.

Initially, Griggs inquired as to whether Waldman, Fuller and Kling were coming to him with individual or Association problems and whether the Association members had taken a vote to determine whether these problems should be presented to Griggs. Waldman responded to the effect that these were Association matters and the Association was not required to take these steps prior to meeting with Griggs at the first step of the grievance procedure. Griggs became increasingly hostile and resentful. Griggs himself testified that he became annoyed with Waldman. ^{5/} Griggs referred to the Association's concerns over "minutiae" and "bullshit" and that the Association "can grieve until ying-yang." Griggs refused to discuss Kling's problem with Waldman despite Kling's request that he be represented by Waldman and despite her notification to Griggs that she was acting as Kling's Association representative. As Griggs testified, "I got upset with Mrs. Waldman because there are two incidents in there that I felt were not grievable and she's doing it to promote her own cause and own image as president...She's taken it upon herself to take things to [the] administration that other staff members knew nothing about or wanted to push. And they were not grievable...items. Not having a Xerox machine...and Mr. Kling's schedule [were] not in violation of the contract. They're not grievable items so how can she come to represent the Association on those

^{5/} Transcript Vol. III, p. 45.

items. That is why I was upset...." 6/

Shortly after the meeting, Waldman and Fuller entered the school parking lot when they were approached by the School Superintendent Donnelly. Donnelly requested that they meet with him in his office. When they met Donnelly stated he wasn't running a factory and made reference to how the Association was behaving like an industrial union. Donnelly did not specifically recall their conversation but he did not deny it took place. I find the testimony of Fuller is entirely credible. Fuller noted that Donnelly was upset because of the "philosophical split" concerning the function of the Association.

On the following day, September 6, Donnelly held a meeting with the executive committee of the Association which included Miriam Daly, the treasurer, as well as Waldman, Kling and Fuller.

Again, Donnelly had no specific recollection of the meeting but Fuller's notes taken at the meeting give a balanced view of this meeting and I so credit her testimony.

At the meeting Donnelly stated he wanted to find common ground so they could work together. Donnelly then mentioned that a per diem supplementary teacher, Kay Aspell, had resigned. Donnelly related how Aspell told him she was being forced to file a grievance by the Association but she believed she had nothing to file about, but someone from the NJEA said her position was illegal and Aspell was very upset. Donnelly then said, "This is undermining the staff." Waldman denied this and said she believed Aspell was upset about her

assigned duties. ^{7/}

After some further conversation about informally resolving complaints, Donnelly stated that "if you get no help from Griggs then come here. I think yesterday anyone would get his back up when three Association members come in. If each matter were seen individually it would be better." Donnelly also later suggested that individuals go in to see Griggs alone to discuss matters. Fuller testified that Donnelly was upset at this meeting over the clash in "philosophies" as to the proper role of the Association. Donnelly did not believe the Association was really a union, it was a teachers association.

Donnelly and the executive committee agreed to meet on a regular basis to discuss various problems. The first of these meetings occurred on October 6. Griggs joined Donahue in meeting with the Association executive committee.

Waldman brought up two issues that were still unresolved, the ditto machine and the preparation of registers. She also brought up a new issue. Jobs were created over the summer that were not posted. Waldman claimed this was a violation of the contract.

Waldman asked Donnelly if they were going into the first step of the grievance procedure, that is, an informal hearing. Griggs asked if the Association representative had its members vote on whether to grieve these matters. Waldman replied that Griggs had no right to question her about the Association. Griggs said he would continue to ask questions. Waldman replied that she might file an unfair

^{7/} Waldman testified that after the meeting she called Aspell and Aspell confirmed that her resignation had nothing to do with the Association.

practice charge over this issue. Griggs responded that he would continue to ask any question that he wanted.

Subsequently the relationship between the parties deteriorated. As admitted in the Respondent's brief, "Relations between Petitioner and Respondent began deteriorating subsequent to [the] meeting which was held on September 5, 1979 between Petitioner, several faculty members and Principal Griggs. Relations between Petitioner and Respondent, as well as other faculty members, became increasingly strained that year."

Margaret Mosser testified on behalf of the Association. She served as the Superintendent's secretary from July '79 to June '80. Mosser related how, on the first day of school, apparently September 5, Griggs called Donnelly's office. Donnelly was on another call so Griggs asked Mosser to "tell Donnelly, when he gets off the phone, that I have a problem with Mrs. Waldman, he'd like to see him over in his office."

When Mosser relayed the message to Donnelly he called Waldman a witch and said, "the beginning of the school year and they already have caused trouble."

Also in September or October, after a meeting with the Association, Donnelly came into the office and appeared very upset. He said that Waldman was a vicious troublemaker, that she was trying to run a little school association like it was a big corporation union.

Further when Donnelly became annoyed with Waldman, "he would call her a troublemaker or the blond witch, never anything

friendly. He always seemed very upset with Mrs. Waldman all the time." Donnelly always checked to see what time Waldman arrived or left school. Mosser also observed Donnelly going out of his way to apparently avoid speaking to Waldman on several occasions.

Mosser also had a conversation with Griggs around Christmas. Griggs replied that, "if Sandy (Waldman) kept her mouth shut and didn't make so many waves at school, she'd be okay."

The Board's witnesses deny that the decision not to renew Waldman was based upon her exercising of protected rights. Donahue testified that it was Griggs who conducted Waldman's evaluations and he and the Board both relied on Griggs' opinion when it was recommended that Waldman not be renewed.

Griggs' testimony as to the reasons for the discharge were less than convincing. At one point he testified that Waldman's discharge was not based upon the evaluations but he also stated that Waldman's performance during her evaluations was poor. When asked why the evaluations did not reflect this, Griggs responded that employees respond better to positive criticism. Griggs testified that in the conferences which followed the evaluations he would review her weak areas. When pressed as to why there was no significant criticism on the evaluation, Griggs stated in effect that Mrs. Waldman would bridle at any negative criticism and the only way to direct her was through praise. Griggs admitted that he never told Waldman that she was in danger of losing her position.

I cannot accept Griggs' testimony on face value. It is not credible that Griggs would be willing to criticize Waldman to

her face in a conference but not in a written evaluation. Further, once Griggs saw that she did not respond to positive reinforcement through good evaluations he never attempted to motivate through negative evaluations. There was nothing in the record to support the allegations in the Statement of Reasons as to Waldman's poor teaching ability.

I am satisfied that Griggs' motivation to recommend that the Board not renew Waldman was not based on her lack of teaching ability.

Griggs also testified that he felt that Waldman favored the brightest children in her class and belittled the less talented children. As an example he cited there was one child, T.N., who was sent to the principal's office by Waldman for disciplinary reasons. When Griggs talked to T.N. he accused Waldman of calling him "Dirt Farmer Joe and beaver-teeth." T.N. lived on a farm and had to do farm chores in the morning before school.

Waldman claimed that on a rainy day a number of boys came into her room with muddy feet. She asked all of them if they were dirt farmer Joes. She denied she called T.N. beaver teeth. T.N. was offered an opportunity to follow up on these charges by asking other children to verify his allegations but he had never done so.

Two parents did testify at the hearing concerning their belief that Mrs. Waldman was a poor teacher.

One of the parents had a daughter who was not a good student. Her daughter was upset with Mrs. Waldman. But the child was involved in several incidents. She was searched for cigarettes by Waldman. Waldman told the parent that some boys called her a name with obscene references, and it is not possible to accept this

parent's testimony at face value.

The other parent had a child who had a problem with Mrs. Waldman. The child liked her but the child was annoyed with Waldman because of an incident which occurred after Waldman received notice that Griggs would recommend that she not be renewed. This second parent was inconsistent and unresponsive to the questioning on both direct and cross-examination. One could never be sure she understood the questions put to her. Very little weight can be given to her testimony.

There was testimony from Griggs and other teachers about Waldman's personality, that it was overbearing.

Waldman did admit that in an argument with Griggs she stated, "You're so full of shit your eyes are brown." This statement came after Griggs had used similar language in conversations with Waldman, see above. Also Griggs once told the Association officers that "if anything bothers you come to me and say, Tom, this sucks."

There were a number of teachers who testified at the hearing about Waldman. There was a split in the faculty that followed two parallel, lines. There were the teachers of the early grades and the teachers of the upper grades, including Waldman. The teachers in the upper grades also held the leadership positions in the Association.

Vivian Schoeder, a kindergarten teacher who was a witness for the Board testified:

A Well, we had a very peaceful school there initially. Things went rather well between the Board and staff members. And when emergencies came up

where we maybe had to cover an early class or something, we just did it and there was never any hassle over it.

Well, then when Sandy came she made people aware that this was a breach of contract and she was very knowledgeable about the contract and things and we were stupid. We really were not knowledgeable. So we were many times aware that we had things to be disgruntled over, just figured it was part of the job. That's what caused the problems.

Waldman & Griggs had a run-in in front of the full faculty concerning the reading program. The disagreement culminated with Mrs. Waldman pointedly asking Griggs to come into her room and teach a lesson. A publisher's representative was present at the meeting and a number of teachers, but not all, had felt that Waldman's actions were unprofessional.

There also was an incident that was not part of the record, yet, seemed to affect the relationship of Griggs and Waldman, but to what extent cannot be determined. Griggs suspended Waldman for three days, but the Board of Education reversed the suspension and further expunged all references to this incident from her record.

On balance, it is apparent that Waldman is an aggressive, outspoken individual who may have, on occasion, exceeded the bounds of professionalism. However the actions involved have to be seen in light of a very poor relationship with Griggs and Donnelly, the root cause of which is activity protected by the Act. The protections of the Act are not necessarily lost by the use of profanity. Rather, that profanity has to be viewed within the totality of the parties' conduct. See City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶4011, 1977).

The Commission has adopted the National Labor Relations Board test for determining unlawful motivation in A-3 cases enunciated in Wright Line, 251 NLRB No. 150, 105 LRRM 1169 (1980).

The charging party must first make a prima facie showing sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision. Once this is established the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of protected conduct.

See, In the Matter of Madison Borough, P.E.R.C. No. 82-46, 8 NJPER (1981); In re Borough of Stone Harbor, P.E.R.C. No. 82-96, 8 NJPER (1982); In re East Orange Public Library and Constance Taliaferro, 180 N.J. Super. 155, 163 (1981).

In the instant case the Board did demonstrate that Waldman has shortcomings but it did not demonstrate that Waldman would have been non-renewed in the absence of her protected activities. And I recommend that the Commission find that the Logan Township Board of Education did violate §5.4(a)(1) and (3) when it failed to renew Sandra Logan's employment contract.

Therefore, by way of remedy, I hereby recommend that the Commission order that Waldman be offered reinstatement as a teacher. However this reinstatement should not grant tenure to Waldman. Her final year as a non-tenured teacher should be repeated so that her teaching performance should be re-evaluated by the Board free of the taint of unlawful motivation.^{8/} See Danvers School Comm. v. Tyman, 94 LRRM 3182 (Mass., 1977); Dennis Yarmouth Sch. Comm. v. Teachers, 94 LRRM 3187 (Mass., 1977); W. Bridgewater School Comm. v. Teachers,

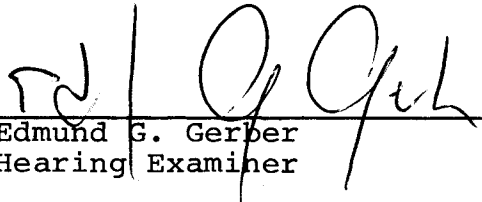
^{8/} In making this recommendation I am not taking a position on whether the Commission has the authority to in effect grant tenure. The recommendation here is based solely on the facts of this case.

94 LRRM 3189 (Mass., 1977); Bd. of Ed., Bellmore Merrick Central High School District v. Bellmore Merrick Teachers, 39 N.Y. 2d 167, 92 LRRM 2244 (1976); Bd. of Ed. of Chautaugua Central School District v. Chautaugua Central School Teachers, 41 A.D. 2d 47 (1973).

It is further ordered that Waldman receive back pay from the time of her severance from the Logan Township Board of Education to the time of the Board's offer of reinstatement, less any monies she earned during that same time period.

It is further ordered that the Logan Township Board of Education post at all places where notices to employees are customarily posted, copies of the notice marked Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon the receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

It is further ordered that the Respondent notify the Chairman of the Commission within twenty (20) days of receipt what steps it has taken to comply herewith.


Edmund G. Gerber
Hearing Examiner

Dated: June 8, 1982
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 discriminate against Sandra Waldman for her exercising protected rights.

WE WILL offer her reinstatement as a teacher in the Logan Township School District. This reinstatement will not grant tenure to Sandra Waldman.

WE WILL re-evaluate her teaching performance free of any unlawful motivations.

WE WILL further grant Waldman back pay from the time of her severance less any monies she had earned during that same time period.

LOGAN TOWNSHIP 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 James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.