

P.E.R.C. NO. 93-88

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON TOWNSHIP  
BOARD OF EDUCATION,

Respondent,

-and-

BURLINGTON TOWNSHIP EDUCATION  
ASSOCIATION and JANE O'DONNELL,

Docket No. CO-H-90-171

Charging Parties,

-and-

LESLIE TUCKER,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Burlington Township Education Association and Jane O'Donnell against the Burlington Township Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act by granting a transfer request of the immediate past president of the Association, which caused the involuntary transfer of O'Donnell. The involuntary transfer allegedly interfered with O'Donnell's right to refrain from participating in Association affairs. The Commission finds that the president's good personal relationship with the superintendent, coupled with legitimate educational reasons relating to coaching assignments, convinced the superintendent to grant the president's longstanding transfer request.

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LESLIE TUCKER,

Intervenor.

Appearances:

For the Respondent, David M. Serlin, attorney

For the Charging Party, Selikoff & Cohen, P.A., attorneys  
(Joel S. Selikoff, of counsel; Kenneth A. Sandler, on the  
exceptions)

For the Intervenor, Leslie Tucker, pro se

DECISION AND ORDER

On December 20 and 28, 1989 and January 8, 1990, the Burlington Township Education Association and Jane O'Donnell filed an unfair practice charge and amendments. The charging parties allege that the Burlington Township Board of Education violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

seq., specifically subsection 5.4(a)(1),<sup>1/</sup> by granting a transfer request of Leslie Tucker, the immediate past president of the Association, which caused the involuntary transfer of charging party O'Donnell. They further allege that the involuntary transfer interfered with O'Donnell's right to refrain from participating in Association affairs.

On February 22, 1990, a Complaint and Notice of Hearing issued. On March 15, the Board filed an Answer admitting that the transfers occurred but denying that it had violated the Act.

On June 26 and 27, 1990, Hearing Examiner Margaret A. Cotoia conducted a hearing. The parties examined witnesses and introduced exhibits. They argued orally, but the stenographic recording of the arguments was lost by the court reporter. The parties also filed post-hearing briefs and replies. Although permitted to do so, Tucker did not file a post-hearing brief or position statement.

On December 27, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 92-16, 18 NJPER 69 (¶23031 1991). She found that the charging parties had failed to show that O'Donnell's inactivity in the union was a motivating factor in the transfer decision. She also found that the Board had legitimate and substantial business reasons for the transfer.

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<sup>1/</sup> This subsection prohibits 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." An allegation that the Board violated subsection 5.4(a)(5) was withdrawn at the hearing.

On March 27, 1992, after an extension of time, the charging parties filed exceptions. They claim that certain factual issues are insufficiently developed and key facts are omitted. They also except to certain legal conclusions. The charging parties have also moved to reopen the record to admit evidence of a January 1992 newspaper advertisement placed by the Board for an elementary level physical education teacher able to coach high school sports. We deny that request. Through the motion, we have learned from both parties that charging party O'Donnell retired as of February 1992. In addition, one of the high school physical education teachers has agreed to transfer to the elementary school to fill O'Donnell's position.

On May 11, 1992, after an extension of time, the Board responded to each exception and argued that the charging parties had failed to prove a connection between O'Donnell's lack of union activity and the decision to transfer her to the elementary school.<sup>2/</sup>

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-13) are accurate. We incorporate them with these additions.

We add to finding no. 6 that in August 1987, Tucker met with the superintendent in public at the "Cafe Gallery" to discuss

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<sup>2/</sup> On February 7, 1992, Tucker filed a letter with the Hearing Examiner arguing that her censure by the NJEA was not as severe as the Hearing Examiner's report appeared to indicate. We treat the letter as the intervenor's exceptions.

her transfer to the high school. Tucker ultimately asked that the transfer not take place then because the split schedule that was then available would make coaching "impossible" (2T54-2T55).

We add to finding no. 7 O'Donnell's testimony that when she saw the Association's president "getting special favors being hired into my position, I thought that to protect my job I better become active [in the Association]" (1T41). O'Donnell became an Association building representative in September 1989, the same month she was transferred out of the high school.

We add to finding nos. 17 and 18 that Tucker's 1984 request for a transfer to the high school explained that she needed a grade level change to maintain her enthusiasm for teaching and that she would be able to do a better job coaching if she had more contact with the players. Her testimony about her reasons for requesting a transfer was consistent with the reasons expressed in the 1984 letter (2T50-2T59).

N.J.S.A. 34:13A-5.4(a)(1) makes it an unfair practice for an employer to engage in actions that tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 n. 1 (¶10285 1979). Anti-union or pro-union bias need not be proved to establish

an independent violation of subsection 5.4(a)(1).<sup>3/</sup> N.J.S.A. 34:13A-5.3 protects an employee's right to refrain from union activity. This case asks whether the involuntary transfer of one teacher, not active in Association affairs, in order to satisfy the transfer request of another teacher, who was the Association president, tended to interfere with the statutory right of the first teacher to refrain from union activity.

On this record, we are unable to find that these transfers tended to interfere with the exercise of protected rights. The test we must apply is an objective one. We cannot find a violation simply because O'Donnell believed that, since Tucker had her transfer request granted, becoming a union representative would somehow improve O'Donnell's standing with the Board of Education. This record is filled with references to Tucker's good personal relationship with the superintendent. It appears that it was that personal relationship, coupled with legitimate educational reasons relating to coaching assignments, that convinced the superintendent to grant Tucker's longstanding transfer request. The evidence does not support a finding that Tucker's transfer request was granted because she was active in Association affairs, or that O'Donnell was transferred because she was inactive. On balance, given the employer's reasons for the transfer, we cannot conclude that the

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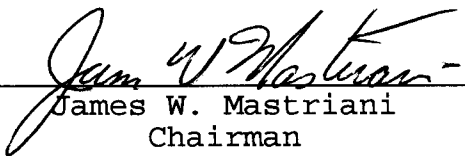
<sup>3/</sup> The charging parties have not asserted that the Board was seeking to encourage or discourage the exercise of protected rights or that the Board violated subsection 5.4(a)(3).

involuntary transfer of Jane O'Donnell tended to interfere with the exercise of protected rights and we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration. Commissioner Smith abstained.

DATED: March 29, 1993  
Trenton, New Jersey  
ISSUED: March 30, 1993

H.E. NO. 92-16

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

In the Matter of

BURLINGTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

BURLINGTON TOWNSHIP EDUCATION  
ASSOCIATION AND JANE O'DONNELL,

Docket No. CO-H-90-171

Charging Parties,

-and-

LESLIE TUCKER, EMPLOYEE

Intervenor.

SYNOPSIS

A Hearing Examiner finds that the voluntary transfer of union activist Leslie Tucker and the involuntary transfer of Jane O'Donnell, an employee who was not active in the union did not violate O'Donnell's rights under subsection 5.4(a)(1).

The Hearing Examiner finds that the Board had legitimate and substantial business reasons for O'Donnell's transfer. The Hearing Examiner also finds that the Association failed to show that O'Donnell's inactivity in the union was a motivating factor in the transfer decision and that the transfer did not tend to interfere with O'Donnell's right to refrain from union activity.



H.E. NO. 92-16

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

In the Matter of

BURLINGTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-171

BURLINGTON TOWNSHIP EDUCATION ASSOCIATION  
AND JANE O'DONNELL,

Charging Parties,

-and-

LESLIE TUCKER, EMPLOYEE

Intervenor.

Appearances:

For the Respondent,  
David M. Serlin, Attorney

For the Charging Party,  
Selikoff & Cohen, attorneys  
(Joel S. Selikoff, of counsel)  
(Kenneth A. Sandler, on the brief)

For the Intervenor,  
Leslie Tucker, pro se.

HEARING EXAMINER'S REPORT AND  
RECOMMENDED DECISION

On December 20 and December 28, 1989 and on January 8, 1990, the Burlington Township Education Association and Jane O'Donnell ("Association") filed an unfair practice charge and amendments with the Public Employment Relations Commission

("Commission") alleging that the Burlington Township Board of Education ("Board") violated subsection 5.4(a)(1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act")<sup>1/</sup> The Association alleges that the Board's involuntary transfer of teacher Jane O'Donnell ("O'Donnell") and voluntary transfer of teacher Leslie Tucker ("Tucker") violated O'Donnell's right to refuse to be active in the Association. Tucker requested intervenor status and was granted same at the April 11, 1990 pre-hearing conference. Tucker chose to limit her intervention to a post-hearing brief or position statement (1T5, 1T6)<sup>2/</sup> .

On February 22, 1990, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On March 15, 1990 the Board filed an Answer, denying that its transfer of O'Donnell violated her right to be inactive in the Association. I conducted a hearing on June 26 and 27, 1990 at which the parties examined witnesses and presented exhibits. The parties filed briefs by November 5, 1990 and reply briefs by November 21, 1990.<sup>3/</sup> Based

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<sup>1/</sup> This subsection prohibits 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." An additional allegation that the Board also violated subsection 5.4(a)(5) was withdrawn at the beginning of the hearing.

<sup>2/</sup> "1T" refers to the hearing transcript dated June 26, 1990. "2T" refers to the hearing transcript dated June 27, 1990. The parties made closing arguments on the record, but the stenographic tape of the closing statements was lost by the court reporter.

<sup>3/</sup> Tucker did not file a post-hearing brief or position statement.

upon the entire record in this matter I make the following:

FINDINGS OF FACT

1. O'Donnell has been employed by the Board as a physical education teacher since 1969. From September 1969 to June 1976 O'Donnell taught elementary physical education. From 1975 to 1976, O'Donnell taught two days a week at the high school. From September 1976 to June 1989 O'Donnell taught full time at the high school. From September 1989, O'Donnell taught physical education full time at the elementary school level to first grade, kindergarten and preschool children (J-2).<sup>4/</sup> Before September 1989, O'Donnell had five years of experience teaching first graders but no experience teaching physical education to kindergarten or preschool children (1T41, 2T128). O'Donnell's classroom observations and annual reviews for 1988 and 1989 (CP-5, CP-6, CP-7 and CP-8) are favorable and do not indicate any performance problems.

2. Tucker has been employed by the Board as a physical education teacher since 1970. Tucker taught elementary physical education in various elementary grades from September 1970 to June 1988. When Tucker taught in the elementary school, she did not teach health education (2T63, 2T128). In the 1988-89 school year

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<sup>4/</sup> Exhibits are designated as follows: Joint exhibits are "J", the Association's exhibits are "CP" and the Board's exhibits are "R".

Tucker also taught one period of physical education at the high school (J-2).

3. O'Donnell served as junior varsity women's basketball coach from September 1976 to June 1977. She was women's head basketball coach from September 1977 to June 1984. She was not recommended for reappointment to that position (R-1, 1T44, 1T46, 1T47, 1T48) O'Donnell also supervised the high school weight room two afternoons a week from September 1987 to June 1989 (J-2).

4. Tucker's coaching experience is as follows: assistant women's varsity basketball coach and head women's varsity softball coach from September 1972 to June 1973; assistant men's varsity baseball coach from September 1982 to June 1984; assistant women's field hockey and head womens softball coach from September 1984 to June 1986; assistant women's field hockey coach, assistant women's basketball coach and head women's softball coach from September 1985 to June 1987; assistant women's field hockey and head women's softball coach from September 1988 to June 1989 and assistant women's field hockey coach and head women's softball coach from September 1989 to the date of hearing (J-2).

5. In the 1988-89 school year, the high school physical education staff consisted of O'Donnell, Edgar Moss ("Moss") and Harold Robertson ("Robertson").<sup>5/</sup> Moss taught at the high school

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<sup>5/</sup> In addition, Tucker taught one class per day at the high school (J-2).

since 1969 and coached four sports from 1970 to the present, including two at the time of hearing. Moss had five months elementary teaching experience (1T43). Robertson taught at the high school since 1975 and coached two sports from 1975 to 1987 and one sport from 1987 to 1989 (J-2) Robertson had six to eight weeks elementary teaching experience (1T43).

6. Tucker was Association President from September 1975 to June 1989 (J-2). During her tenure as Association President, Tucker met with Superintendent Haworth ("Haworth") and various Board members on an informal basis in a variety of social settings (2T52, 2T53, CP-14).<sup>6/</sup> Tucker resigned the Association Presidency on June 12, 1989 (2T47).

7. O'Donnell has been a member of the Association since 1969 but had never participated beyond her membership from 1969 to 1989 (1T41). In September, 1989, O'Donnell sought a seat on the Association's Representative Council (1T40).

8. Moss participated on the Association's negotiations team from approximately 1984 to the time of hearing (1T73, 2T32). Robertson participated on the Association's negotiations team during

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<sup>6/</sup> Tucker stated that these informal contacts were encouraged by the NJEA (2T53). NJEA Field Representative George Suleta testified that meetings are encouraged and that informality is common but that such meetings should be confined to business (2T91).

the 1987-88 school year (1T78, 1T79, 2T32). Haworth <sup>7/</sup> and members of the Board's negotiating committee<sup>8/</sup> were aware of Moss' and Robertson's roles on the negotiations team (1T77, 1T79 2T32, 2T33, 2T41, 2T42). Robertson was also a member of the Association's Representative Council and grievance committee (CP-10, CP-11, CP-12, 1T80).

9. The collective negotiations agreement between the Association and the Board covering September 1988 to June 1989 addresses involuntary transfers as follows:

A. Involuntary Transfer - in cases where a teacher/secretary is transferred involuntarily to another school the teacher/secretary will meet with the Principal. The teacher/secretary may also request a meeting with the Superintendent in order to discuss the reasons for the transfer (J-1).

10. On March 9, 1989, O'Donnell learned from her supervisor Athletic Director Richard Ballard ("Ballard") that she was being considered for transfer from the high school to an elementary school (1T20, 2T68, 2T69). The next day O'Donnell discussed the transfer rumor with her principal, Mr. Haaf ("Haaf"), who had knowledge of a possible transfer involving O'Donnell and

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<sup>7/</sup> Haworth testified that was aware of Robertson's participation on the Association Negotiations Committee but does not remember Moss' involvement in negotiations (2T111, 2T112, 2T129). I find that Haworth and the Board were aware of both Robertson's and Moss' involvement with the Association.

<sup>8/</sup> At least two board members who were aware of Moss' position on the Association's negotiations committee were on the Board in June, 1989 (1T78).

Tucker (1T23). Haaf told O'Donnell that he had not been consulted about her transfer (1T32). Ballard and Haaf were pleased with O'Donnell's performance and were not in favor of such a transfer (1T22, 1T23, 2T129, 2T130)<sup>9/</sup>. However, Haaf believed that the Board would approve the transfer(1T24).

11. On March 16, 1989, O'Donnell met with Haworth and Assistant Superintendent Fritz ("Fritz") to discuss the possibility of a transfer (1T24). O'Donnell expressed her opposition to the transfer and her reservations over her lack of experience teaching kindergarten and preschool children (1T24, 1T25). Haworth justified the transfer on the basis of Tucker's coaching three high school sports. O'Donnell then offered to coach if it would prevent the transfer (1T25, 2T28, 2T29). Haworth and Fritz told O'Donnell that they would consider her request to remain at the high school (1T25, 1T26).

12. By a letter dated March 23, 1989, Haworth confirmed O'Donnell's transfer to the Young elementary school (CP-1, 1T26, 1T27). O'Donnell requested a meeting with the Board before the transfer took place (CP-2, 1T27). O'Donnell met with the Board in executive session to discuss her transfer on June 21, 1989 (R-2, R-3, R-4, 1T27, 1T54). At that meeting, Haaf spoke on O'Donnell's behalf. He stated that he did not want Tucker transferred to the

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<sup>9/</sup> NJEA Field Representative George Suleta testified that such a transfer against the recommendation of the building principal is unusual (2T84).

high school, and also praised O'Donnell's performance (1T29, 1T30). Ballard also attended that meeting and recommended that O'Donnell remain at the high school (2T67, 2T68). The transfer of Tucker from the Young <sup>10/</sup> Elementary School to Burlington Township High School and the transfer of O'Donnell from the high school to Young Elementary School was approved at the June 21, 1989 Board meeting (R-11, J-2). The following day, O'Donnell received a letter from Haworth confirming the transfer (CP-3, 1T31).

13. Upon her transfer to the high school, Tucker continued as the head softball coach and the assistant field hockey coach but did not continue as assistant womens basketball coach, a position she had held prior to the transfer (1T65, 2T130). Tucker also taught health education in the high school (2T64).

14. Beginning in September, 1989, O'Donnell was assigned to the Young School teaching first grade, kindergarten and preschool physical education (1T41). This was the first instance in Haworth's tenure that he recommended that the Board grant the request of a teacher for a voluntary transfer that resulted in the involuntary transfer of another teacher (J-2).<sup>11/</sup>

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<sup>10/</sup> Young School was formerly known as Pinewald School (J-2).

<sup>11/</sup> Testimony and exhibits were offered to show other instances of involuntary transfers (2T119 through 2T126, 2T132 through 2T135, R-12, R-13, R-14, R-15). However, on cross-examination, Haworth testified that the original stipulation in J-2 that the Tucker and O'Donnell transfers were unique was still correct. Even if that is not the case, I find that the other transfers in the record are not similar or identical to the transfers at issue and I accord that evidence no weight.



15. When O'Donnell was in the high school, she was the only high school physical education teacher who did not coach a sport (1T66). There have been many teachers who have coached sports in the high school while assigned to another school (R-5, 1T94, 1T95, 1T96, 1T97).<sup>12/</sup> However, Tucker was one of only two of those teachers who coached more than one sport and one of only two teachers who worked in an elementary school and was a head coach (2T12, 2T13, 2T73). Tucker was also one of only two teachers who taught in the elementary school and were head coaches of a sport<sup>13/</sup>

16. Soon after she learned of the transfer in the Spring of 1989, O'Donnell filed charges against Tucker with the New Jersey Education Association ("NJEA") (1T33, 1T34). In December of that year, the NJEA committee of censure, suspension and expulsion of members held a hearing on the charges (1T30). At Tucker's request, Superintendent Haworth wrote a letter (CP-4) on December 12, 1989 "to whom it may concern" concerning his decision to transfer O'Donnell and Tucker (1T36). The letter detailed the circumstances of the transfer decision and specifically criticized O'Donnell's "difficulty in working with our student body" (CP-4). The letter also listed poor public perception of the high school and

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<sup>12/</sup> R-5 lists 19 teachers who have coached high school sports while teaching at a different location. Of the 19, three are no longer employed by the Board and two are employed outside of the district and are employed by the Board as coaches only.

<sup>13/</sup> There are also coaches who teach in the middle school but that building is within walking distance of the high school.

O'Donnell's lack of coaching high school sports as reasons for the transfer (CP-4). O'Donnell was never advised of this difficulty, it was not mentioned in her annual evaluations and Haworth did not review those documents before preparing CP-4 (2T129, 2T130). At the time of this hearing, the NJEA proceeding was under appeal. The initial recommendation of the NJEA committee was censure of Tucker (R-6, 1T58, 2T23).

17. Tucker's requests for transfer to the high school were based on her coaching three high school sports (2T50). Working in an elementary school made it difficult to communicate with both athletes and the athletic director (2T59). When Tucker taught in the elementary school, she had two assistant softball coaches who taught in the high school (2T99). The head coaches of the sports Tucker was an assistant coach for also worked in the high school when Tucker worked in the elementary school (2T100). Working in the high school enabled Tucker to track attendance of her term members, allowed her to be instantly aware of any schedule changes or cancellations and made it easier to manage equipment and uniforms (2T58, 2T59). In the past Tucker had problems communicating with athletic directors Stimenz and Ballard about game cancellations and postponements (2T64, 2T65). Ballard agrees that there are advantages to having coaches in the high school as teachers, including improved and timely communication with the athletic director (2T70, 2T71). Tucker was also looking for a change in the age group of students that she taught (2T50).

18. Tucker had previously requested a transfer to the high school in 1984 (2T48, R-8, R-9<sup>14/</sup>.) In 1987, a possible transfer to the high school was discussed with Haworth (CP-16, 1T56, 2T54). The 1987 request was made in the midst of negotiations and was withdrawn by Tucker (1T64, CP-15). Tucker withdrew that request because the transfer would have been part-time and she would have still been in the elementary school in the afternoon, which was inconvenient for coaching (2T55). Tucker was also approached by some of her colleagues and discouraged from following through with the transfer in 1987 because it would not be in the best interests of the Association. She backed away from the transfer because of those requests (2T56).

19. During her tenure as Association President, Tucker met with Haworth and various Board members on an informal basis in a variety of social settings (2T52, 2T53, CP-14). On at least one or two occasions when Haworth and Tucker met to discuss Association and Board business, they discussed Tucker's desire to transfer to the high school (2T129). When Tucker made those requests, she considered them made in her capacity as a teacher rather than as Association President (CP-15). When Tucker made her request for transfer, she was aware that it would result in the transfer of another teacher (CP-14). Although she requested the transfer, she did not specifically request O'Donnell's position (2T66).

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14/ Tucker's letter expressed an interest in transferring to the high school if there was an opening available or if another teacher was interested in a change (R-8).

20. Tucker also discussed her transfer request with Ballard in March, 1989 and requested his support. Ballard stated that if there was a staff increase, he would recommend the transfer but that any transfer decision was the Board's (2T68). Ballard also told Haaf that if he could expand his staff to two women physical education teachers, that he would like to transfer Tucker (2T70). Ballard stated that the possibility of two female and one male physical education teachers in the high school was not practical. In the absence of a female teacher, Ballard used the female nurse to fill in under certain situations for short periods of time. There were no males available to provide similar coverage (2T69, 2T70).

21. Haworth first discussed a transfer with Tucker in 1984 when she submitted a letter asking for a high school position (R-8, 2T106). Haworth next initiated the possibility of transferring Tucker in 1986-87 (2T107). When O'Donnell expressed concern about the possibility of Tucker's transfer in 1986-87, Haworth suggested that O'Donnell get involved in some high school co-curricular activities (2T107, 2T108). O'Donnell had not previously approached Haworth to request co-curricular assignments or coaching positions, although Haworth stated that such requests are more appropriately made to the principal or athletic director (2T113). Haworth also stated that the principal was the person who should contact a staff member to discuss proposed transfers (2T113, 2T114). Haworth made the decision to recommend the transfers of O'Donnell and Tucker in March, 1989 (2T109). That decision was made after discussions with

Haaf, Business Administrator Michael Gersie ("Gersie") and Assistant Superintendent Fritz (2T109, 2T110, 2T111). They also discussed the possibility of transferring Moss or Robertson but dismissed that quickly because of their lack of elementary school experience (2T111)<sup>15/</sup>. The union activity or lack thereof of O'Donnell, Tucker, Moss or Robertson was not discussed as a factor for the transfers (2T110, 2T111).

22. Gersie also favored transferring Tucker to the high school because he felt that the district benefited from having coaches located in the high school (2T92, 2T93). He listed communication with athletes and the athletic director, monitoring athletes' academic performance and handling team transportation as several advantages (2T92, 2T93, 2T94, 2T98). Gersie stated that Tucker's union activity or O'Donnell's lack of union activity were not factors in the transfers (2T94). Gersie stated that he and Haworth also discussed the possibility of transferring Moss or Robertson from the high school in exchange for a male middle school physical education teacher (2T94, 2T95).

#### ANALYSIS

The Association asserts that the Board's decision to switch Tucker and O'Donnell's teaching assignments had a tendency to interfere with O'Donnell's right to refrain from Association

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<sup>15/</sup> This conflicts with O'Donnell's testimony that Haworth told her that Moss and Robinson had not been considered for transfer (1T30, 1T31, 1T94). I find that if they were considered for transfer, the ideas was dismissed quickly.

activity. That is, granting Tucker's transfer request interfered with O'Donnell's right to be less active in the Association than Tucker.

A public employer independently violates subsection (a)(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); adopting H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988); UMDNJ -- Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1957); Mine Hill Twp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). The charging party need not prove an illegal motive in order to establish an independent violation of subsection 5.4 (a)(1) of the Act. Morris, The Developing Labor Law, at 75-78 (2d ed. 1983).

I find that O'Donnell was engaged in "protected activity" under the Act by her minimal involvement in the Association. She was "refraining" from "assisting an employee organization." Such abstinence is protected under section 5.3 of the Act.<sup>16/</sup>

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<sup>16/</sup> N.J.S.A. 34:13A-5.3 provides in pertinent part that:  
"...public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity..." (emphasis supplied).

The Board had a managerial prerogative to transfer O'Donnell and Tucker. Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144 (1978). I also find that the Board had a legitimate and substantial business justification for the transfer. Tucker coached three high school sports at the time of the transfer and continued to coach two after the transfer took place. It is uncontroverted that O'Donnell coached no high school sports since 1984. There are substantial advantages to the district to employ its coaches in the school in which they coach. Although other coaches in the district worked outside of the high school, the transfer of Tucker replaced a teacher who coached no high school sports with one who coached two or three high school sports. Even Athletic Director Ballard, who opposed the transfer, testified to the advantages of high school coaches working as high school teachers. There are also business reasons for not transferring Moss or Robertson to the elementary school. They had substantially less elementary experience than O'Donnell and Ballard testified that a high school physical education staff of two women and one man was not practical. I find that the above reasons provide ample and legitimate business justification for the transfer.<sup>17/</sup>

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<sup>17/</sup> I do not find that O'Donnell's performance was a factor in the transfer. The record reflects an exemplary teacher. I specifically do not credit CP-4, including the ambiguous references to difficulties working with the student body. O'Donnell's evaluations show that she was a highly proficient and well regarded educator and I credit them.

The Association contends that Tucker, the then Association President, was favorably considered for transfer over other less active Association members. Even assuming arguendo that Tucker was given extraordinary consideration over all other employees, there is no evidence that the Board gave her such consideration based upon her status with the Association. Rather, the record suggests that she had developed a friendly personal relationship with Dr. Howarth and some Board members. Whether Dr. Howarth or the Board discriminatorily favored Tucker in granting her transfer request is not at issue. Rather, there must be some showing of a nexus between O'Donnell's lack of union activity and her involuntary transfer. I find that there is no evidence of a nexus between Tucker's transfer request and her Association activities, and that there is no evidence of a nexus between O'Donnell's involuntary transfer and her lack of union activity. I find no evidence, direct or indirect, that O'Donnell's inactive position with the Association was a motivating factor in the Board's decision to transfer her.

I also find that O'Donnell's transfer did not tend to interfere with her right to refrain from union activity. Once the decision was made to transfer Tucker to the high school, another teacher would have to be transferred from the high school physical education department. Athletic Director Ballard stated that a department of two women and one man, which would have resulted if someone other than O'Donnell had been transferred, would have been impractical. I find that O'Donnell's position as the only woman in



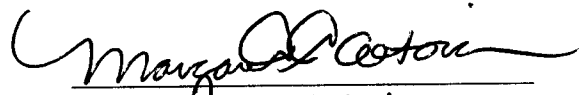
the high school physical education department led to her transfer, rather than her lack of union activity. I therefore find that O'Donnell's transfer did not tend to interfere with her right to refrain from union activity.

CONCLUSION

The Burlington Township Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1) by the involuntary transfer of teacher Jane O'Donnell.

RECOMMENDATION

I recommend that the Commission ORDER that the Complaint be dismissed.

  
Margaret A. Cotoia  
Hearing Examiner

DATED: December 27, 1991  
Trenton, New Jersey