P.E.R.C. NO. 80-69

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH BRUNSWICK TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-78-74-51

NORTH BRUNSWICK TOWNSHIP
MAINTENANCE AND CUSTODIAL
ASSOCIATION, INC.,

Charging Party.

SYNOPSIS

The Commission dismisses a complaint against the Board of Education that the Board violated the Act when it dismissed two employees. The Association had charged that the two employees, who were officers of the Association, were dismissed as a result of anti-union animus. However, the Commission found that the Board's decision to discharge the two employees stemmed from their sleeping on the job and was in no manner motivated by anti-union sentiment. Valid independent grounds existed for the Board's conduct.

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NORTH BRUNSWICK TOWNSHIP
MAINTENANCE AND CUSTODIAL
ASSOCIATION, INC.,

Charging Party.

Appearances:

For the Respondent, Borrus, Goldin & Foley, Esqs.
(Mr. Anthony Vignuolo, of Counsel)

For the Charging Party, Mandel, Wysoker, Sherman, Glassner & Weingartner, Esqs.
(Mr. Jack Wysoker, of Counsel)

DECISION AND ORDER

On October 14, 1977 an Unfair Practice Charge was filed with the Public Employment Relations Commission by the North Brunswick Township Maintenance and Custodial Association, Inc., (the "Association") alleging that the North Brunswick Township Board of Education (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). In particular, the charge alleges that the Board's dismissal of Leonard Golazeski, President of the Association, and Richard Jones, Secretary of the Association, was motivated, in part, by anti-union animus in violation of N.J.S.A. 34:13A-5.4(a)(1), (2) and (3).

It appearing that the allegations of the unfair practice charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on January 18, 1978. Hearings were held on March 6, March 8, April 26, April 27, May 22 and May 28, 1978 before Edmund G. Gerber, Hearing Examiner of the Commission, at which time both parties were represented by counsel and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. Subsequent to the close of the hearings, the parties submitted post-hearing briefs.

On June 28, 1979, the Hearing Examiner issued his Recommended Report and Decision,[1/] a copy of which is attached hereto and made a part hereof. The original of the report was filed with the Commission and copies were served upon the parties. Exceptions and a supporting brief were filed by the Association on July 27, 1979 and by the Board on August 8, 1979. Pursuant to a request by the Association and in accordance with N.J.A.C. 19:14-8.2, both parties through counsel appeared before the Commission on September 20, 1979 to argue orally with respect to the instant matter.

The Hearing Examiner found that the Board violated N.J.S.A. 34:13A-5.4(a)(3) by dismissing Golazeski, but not by its dismissal of Jones. Despite Jones' position as Secretary of the

1/ H.E. No. 79-42, 5 NJPER 275 (¶10153 1979).

Association, his involvement in protected activity was found to be minimal and numerous warnings and complaints about his work performance had been lodged against him. On the other hand, as Association President, Golazeski's protected activity was significant. The Hearing Examiner noted that Assistant Superintendent Robert Blessing testified that the decision to discharge Golazeski was based upon his entire work record. This record contained several letters from Blessing reprimanding Golazeski for the exercise of protected rights. One such letter, which was placed in Golazeski's file on April 1, 1977, about two and one half months prior to his discharge, criticized the Association President for speaking directly with a member of the Board about a negotiations related problem rather than first reporting the matter to Blessing. Based upon the above, as well as other incidents which demonstrated animosity by Blessing toward Golazeski generated by the latter's union activity, the Hearing Examiner concluded that Golazeski's dismissal was motivated in part by a desire to discourage the exercise of protected rights.

Despite this finding, the Hearing Examiner noting that the exercise of protected rights cannot insulate an employee from the imposition of legitimate disciplinary sanctions, declined to recommend Golazeski's reinstatement. In support of his decision not to propose the customary relief, the Hearing Examiner relied upon footnote 4 in In re North Warren Regl Board of Education, P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187 1978) wherein the Commission stated:

> It must also be noted that while a finding that the action was taken in part, in retaliation for protected activity will establish that a violation of the Act has occurred, a remedy of reinstatement will not necessarily be required to effectuate the purposes of the Act when the evidence also indicates that the employee's performance would have justified the dismissal.

Accordingly, the Hearing Examiner recommended that the Commission only order the Board to cease and desist from disciplining its employees for the exercise of protected rights or taking any action against an employee because, either in whole or in part, said employee engaged in the exercise of protected rights.

The Association has excepted to the Hearing Examiner's Report on a number of counts. First, the Association takes issue with the finding that it was reasonable for the Board to conclude that the two employees in question were sleeping on the job, the incident immediately preceding their discharge. Second, the Association argues that the Hearing Examiner should have found that the two employees were on their break time and therefore not guilty of misconduct even if they had been sleeping. Third, it is claimed that the Hearing Examiner erred by not finding a derivative N.J.S.A. 34:13A-5.4(a)(1) violation. Fourth, the Association argues that despite Jones' poor work record and his nominal involvement in protected activity, the reasons for his discharge must be viewed as inextricably intertwined with the Board's illegal reasons for firing Golazeski. The Association contends that the Board could not have justified its discharge of the Association President for sleeping on the job if

it took less severe disciplinary action against Jones, for similar misconduct.

Finally, the Association excepts to the Hearing Examiner's failure to recommend reinstatement and back pay after finding that the Board's discharge of Golazeski was violative of 5.4(a)(3). Numerous National Labor Relations Board and Commission cases are cited by the Association in support of the proposition that an award of reinstatement with back pay is an indispensible remedy in (a)(3) discharge situations. A cease and desist order unaccompanied by reinstatement and back pay is, the Association argues, a hollow remedy.

Despite its insistence that reinstatement and back pay must be awarded in the instant matter if the aggrieved party is to be made whole, the Association acknowledges that under certain circumstances it may be appropriate to remedy an (a)(3) violation with a cease and desist order alone.[2/] However, the Association maintains that the factual background of the instant matter is such that it would be a dereliction of the Commission's statutory responsibility to adopt the Hearing Examiner's recommended remedy. According to the Association, the record is replete with examples of Golazeski's protected activities and of Blessing's hostility toward the Association in general and toward its President in particular. In addition, the Association points out that when Jones was caught sleeping for the first time in October 1976, he did not even receive a written reprimand whereas for the same offense Golazeski was fired. This disparity in treatment, the

2/ See p. 21 of transcript of oral argument.

Association maintains, demonstrates that the President's involvement in union activities influenced the Board's decision to a degree which warrants Golazeski's reinstatement.

The Board, on the other hand, excepts to the Hearing Examiner's Report and Recommendations on three grounds. First, it is asserted that the testimony of David Bishop, the Assistant Business Administrator at the time Golazeski and Jones were discharged, should not have been admitted into evidence. As a former employee of the Board, whose position had been abolished based upon Blessing's recommendation , the Board maintains that his testimony was so biased as to be incredible.[3/] The Board also excepts to the Hearing Examiner's finding that its conduct was violative of the Act. The fact that an employee is a union officer cannot, the Board argues, immunize him or her from discipline. Finally, the Board contends that the recommended order, i.e., the posting of a notice ordering the Board to cease and desist its illegal practices, is unduly severe.

After careful consideration of the entire record, the Commission finds that the Board did not violate (a)(3) when it discharged Golazeski and Jones.

To determine whether an employer's alleged discriminatory conduct is violative of N.J.S.A. 34:13A-5.4(a)(3), the Commission

3/ Nevertheless, the Hearing Examiner credited portions of Bishop's testimony. As the Commission has previously pointed out, we will not substitute our judgment for that of the Hearing Examiner's with regard to credibility determinations. The Board's arguments would also appear to go more to the weight to be given to the testimony, not to its admissibility.

applies the standard adopted in In re Haddonfield, P.E.R.C. No. 77-36, 3 NJPER 71 (1977). Therein the Commission declared that:

> A violation of N.J.S.A. 34:13A-5.4(a)(3) should be found if it is determined that a public employer's discriminatory acts were motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the effect of so encouraging or discouraging employees in the exercise of those rights.
>
> 3 NJPER at 72 (1977).

In that case we also made clear that this test does not interfere with an employer's right to discharge, suspend, refuse to promote employees, etc., for reasons unrelated to union activities. Thus, as the Association notes in its brief in support of its exceptions, when there exist valid independent grounds for an employer's actions, a violation of the Act will not ordinarily be found.

We conclude that despite the Hearing Examiner's finding that Blessing had on several occasions improperly reprimanded Golazeski for engaging in protected activity, the Board relied on the valid independent and unrelated grounds which existed for the decision to discharge Golazeski and Jones. Once an employer has provided an independent business justification for its conduct, as the Board has done herein, the Charging Party bears the burden for proving a nexus between an employer's past illegal acts and a decision to discharge or otherwise discipline an employee for unprotected activity. To demonstrate the existence of such a nexus, the Association relies heavily upon two facts.

First, the Association maintains that the Board has been inconsistent in its handling of employees caught sleeping on the

job. For example, when Jones was found sleeping for the first time in October 1976, he was not punished for this transgression. The Association argues that this fact, when coupled with Golazeski's union activities and Blessing's illegal reprimands, supports the inference that the Board's discharge of Golazeski was motivated in part by union animus. We cannot agree. This seeming disparity in treatment, which under other circumstances might carry greater weight, was satisfactorily explained by the Board. As the Board pointed out, at the time Jones was first caught sleeping the incident was not brought to the Board's attention by Bishop, Jones' immediate supervisor. It was only after Blessing assumed responsibility for the supervision of custodial personnel that he learned of the incident. By then almost a year had passed and understandably it was felt that it would be inappropriate to take disciplinary action at that late date. No other evidence was presented by the Association of the Board's customary method of discipling employees found sleeping on the job or of the Board's general approach to comparable violations of work rules.

Second, the Association relies upon Blessing's testimony on cross-examination during which he acknowledged that his recommendation for the discharge of Golazeski was based upon Golazeski's entire work record. However, the phrase "entire work record" can be subject to varying interpretations and does not necessarily include reprimands for protected activity. Moreover, almost two and a half months had elapsed between the date Golazeski was caught sleeping and the most recent improper reprimand by Blessing

of certain protected activities in which Golazeski was engaged. The only other evidence of possible union animus, noted by the Hearing Examiner, was a letter placed in Golazeski's personnel file by Blessing criticizing Golazeski for filing a grievance against an individual teacher. This incident occurred on July 23, 1976.

Given the timing of these events, the seriousness of the infraction involved; i.e., sleeping on the job, the Commission concludes that the Board's discharge of Golazeski was in no manner motivated by anti-union sentiment. Valid independent grounds clearly existed for the Board's conduct. The Association has simply not demonstrated to our satisfaction that the two reprimands, found by the Hearing Examiner to be illegal, influenced the Board in its decision to discharge Golazeski.[4/]

Unlike Golazeski, Jones was only nominally involved in union activity, had received no reprimands for exercising protected rights, and was a second offender. Aside from the Association's contention that Jones was discharged so as not to undermine the Board's decision to fire Golazeski, no other evidence of ill-motive was presented. Given that we have concluded that the Board's discharge of Golazeski was not motivated by anti-union animus, the inference suggested by the Association cannot be logically drawn.

Accordingly, we find that the Board's discharge of Golazeski and Jones was not violative of the Act. Moreover, since

4/ These two reprimands occurred more than six months prior to the filing of the unfair practice charge, see N.J.S.A. 34:13A-5.4(c), and therefore could not form the basis for a finding of unfair practices themselves. They were relied upon by the charging party only to give background to the allegations concerning the discharge itself.

the original charge makes no reference to the reprimands found by the Hearing Examiner to be illegal, we must assume that they were placed on the record solely for evidentiary purposes.

Finally, given that we have found no violation of the Act, there is no need to expand upon the footnote in North Warren, supra, wherein the Commission noted that under certain circumstances it may be inappropriate to order reinstatement and back pay despite finding an (a)(3) violation. There is no evidence of a violation of (a)(2) nor do we find an independent violation of (a)(1).

ORDER

For the reasons set forth above, IT IS HEREBY ORDERED that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Commissioners Hartnett and Parcells voted for this decision. Commissioners Graves voted against this decision. Chairman Tener, Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
December 4, 1979
ISSUED: December 5, 1979

H.E. No. 79-42

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

In the Matter of

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-78-74-51

NORTH BRUNSWICK TOWNSHIP MAINTENANCE AND CUSTODIAL ASSOCIATION, INC.,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends to the Public Employment Relations Commission that they find that two custodians who were fired by the Township of North Brunswick when they were discovered sleeping while on duty were not entitled to reinstatement even though they were officers of the North Brunswick Township Maintenance and Custodial Association, Inc. The Hearing Examiner did find that in the case of one of the custodians, rights protected by the New Jersey Public Employer-Employee Relations Act were interfered with but the interference with such protected rights was too remote from the discharge and the misconduct too substantial to warrant reinstatement.

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.

H.E. No. 79-42

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

In the Matter of

NORTH BRUNSWICK TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-78-74-51

NORTH BRUNSWICK TOWNSHIP MAINTENANCE AND CUSTODIAL ASSOCIATION, INC.,

Charging Party.

Appearances:

For the North Brunswick Township Board of Education
Borrus, Goldin & Foley, Esqs.
(Anthony B. Vignuolo, Esq.)

For the North Brunswick Township Maintenance and Custodial Association
Mandel, Wysoker, Sherman, Glassner & Weingartner, Esqs.
(Jack Wysoker, Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On October 14, 1977, the North Brunswick Township Maintenance and Custodial Association, Inc. (the Association) filed an Unfair Practice Charge with the Public Employment Relations Commission (the Commission) alleging that the North Brunswick Township Board of Education (the Board) violated N.J.S.A. 34:13A-5.4(a)(1), (2) and (3). 1/

It was claimed during the course of negotiations for a successor agreement there was considerable hostility and ill feeling. On or about July 7, 1977, while negotiating for a new contract the Board accused Leonard Golazeski and

1/ These subsections provide that employers, their representatives or agents are prohibited from: (1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) dominating or interfering with the formation, existence or administration of any employee organization; and (3) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.

Richard Jones, the President and Secretary of the Association, respectively, of sleeping while on duty on the 11 p.m. to 7 a.m. shift. The Association maintains that said allegations were entirely false and were made for the purpose of discouraging them and the Charging Party in the exercise of rights guaranteed under the Act.

The Director of Unfair Practices determined that the allegations of the Charge if true might constitute unfair practices and accordingly issued a Complaint and Notice of Hearing in this matter on January 18, 1978.

Hearings were held in this matter on March 6, March 8, April 26, April 27, May 22 and May 23, 1978. All parties were given an opportunity to present evidence, examine and cross-examine witnesses and present briefs.

Len Golazeski and Richard Jones were custodians on the 11 p.m. to 7 a.m. shift at the North Brunswick High School. Around 4 a.m. on July 7, 1977, John O'Connor, the Supervisor of Maintenance and Grounds, and Joseph DeBartolo, the Head Custodian, entered the high school unannounced. They testified that they went to the assigned work areas for the two men. The lights were out in the work areas and they could not find either man. They then went to the custodian's office, but again the lights were out and no one was there. At about 4:30 a.m., after retracing their steps, they went into a boy's room not far from the custodian's office. They turned the lights on but there is a modesty panel which obscured their view. When they walked passed the panel they saw Jones sitting on an upholstered bench. His eyes were red and he wasn't very responsive. O'Connor and DeBartolo testified that it appeared that Jones had just awakened.

Jones testified that at 3:30 a.m. he and Golazeski met for lunch. It was their habit to combine lunch with their other breaks. Jones told Golazeski that he was going to the bathroom and left Golazeski at the custodian's office.

Jones tried to relieve himself but he could not do so. He was in a lot of pain and sat down on the bench [2/] and after a while he lay down. The light was shining in his face so he turned it off. He was laying down when DeBartolo and O'Connor entered the boy's room and although they did not say anything DeBartolo put his hands out at the side in a questioning manner.

Jones was asked if he knew where Golazeski was. He replied that he did not. Jones went to look for Golazeski. DeBartolo and O'Connor testified that

2/ It was noted that two days later Mr. Jones was hospitalized for a recurring kidney problem.

Jones went through a doorway to an interior hallway and closed the door. The door required a key to open. Jones was 50-75 feet down the hall when they unlocked the door and both men started running to catch up to Jones. Jones entered the compactor room. They saw the light go on and through the doorway they saw feet move toward the floor. When they entered the compactor room, which is next to the custodian's office, they saw Jones and Golazeski standing together. The supervisors testified that Golazeski's eyes were red and not completely opened and it looked like he had just awakened. The soda box, a large flat-top box, sits next to the door to the compactor room and if someone were laying on it their legs would be visible through the door as they got up.

Jones' testimony was very different. He maintained that he went outside to the loading dock but DeBartolo and O'Connor didn't follow him. He went to the compactor room and when he got there he saw Golazeski standing at the door in the hallway leading to the compactor room. A moment later DeBartolo and O'Connor opened the other door and came in.

Golazeski testified that it was his habit to take his lunch and other break time after he finished cleaning the pool area. (The evidence revealed that there was no clear set time at which third-shift employees could take their lunch period or other breaks.) On the evening in question, he took his break at the desk in the custodian's office with the lights out. While he was sitting there he saw Jones going out on the loading dock walking toward the compactor door. There are overhead lights on the dock. Golazeski got up to open the door for Jones. Jones got halfway through the door when O'Connor and DeBartolo came through the door from the hallway. Nothing was said and the four of them went into the home economics room. They wanted to know what Golazeski was doing. O'Connor said he was going to report just what he had seen. DeBartolo didn't say anything.

Golazeski claimed that if he wanted to sleep on the job there were more comfortable places in the building than the compactor room. The room is not air conditioned and there is a bad odor from the compactor. The soda box which Golazeski was allegedly sleeping on is 47" x 32" but Golazeski is 5'10" and of heavy build.

DeBartolo testified that the compacting machine was in fact a paper goods shredder and was not in regular use.

It was also argued that one could not see into the compactor room in the manner alleged by the Board witnesses. At the joint request of the parties I visited the school building during the course of the hearing and I found that one could see into the compactor room as the Board witnesses testified. Further, there was no strong odor at the time of the inspection.

The Association maintains that there is more to this matter than this one incident and the real reason for Golazeski's and Jones' discharge was their activity on behalf of the Association. The Board's chief witness, Assistant Superintendent Robert Blessing, denied that Golazeski and Jones were fired for protected activity, but he acknowledged that the incident of July 7 was not the only reason for the two discharges. He maintains that the total employment history of both employees was taken into consideration in the decision to recommend the discharge of both men.

Leonard Golazeski began working for the Board on April 9, 1975, as a custodian. In May of 1975, the Custodians Association affiliated with the New Jersey Education Association and at that time Golazeski became Vice-President of the Association. He served as Vice-President for five months, until October of 1976.

During the fall of 1976 the Board and the Association were engaged in negotiations for a successor agreement. A tentative agreement was reached but on January 16, 1977, the Association members voted to reject the proposed contract. The Association president thereupon resigned. Golazeski was immediately nominated and elected President. Golazeski thereupon chose his own officers and appointed Jones as secretary.

Golazeski's first action as president was to demand that negotiations be reopened. At Golazeski's first negotiations session he brought a consultant from the N.J.E.A., Anthony Massaro, with him. Massaro testified that the Board President voiced displeasure with the membership for voting down the agreement and references were made about bringing outsiders (Massaro) into the negotiations.

Massaro testified that he took a great deal of abuse as the Association's spokesman but much of the abuse was directed at Golazeski as the one who caused the displeasure. Massaro and Golazeski testified that the Board negotiators were upset because the tentative agreement broke down and outsiders in the person of Massaro were brought in to do the negotiations.

Massaro was also at a meeting where Assistant Superintendent Blessing expressed displeasure to Golazeski at the number of grievances that were filed by the Association. Also, there was a mediation session that lasted until 2:30 a.m. and the parties were due to be present at an exploratory conference concerning an unfair practice charge (not the instant one) at the Commission's offices on the following day. Blessing would not give Golazeski the following evening off. (However, Golazeski was not docked for his attendance at the mediation session.)

Finally Massaro testified that some ten days before Golazeski was alleged to have been sleeping on the job the parties met at a grievance hearing before the Board. Blessing was unhappy and stated that where the Board placed a disciplinary letter in someone's file, the filing of a grievance won't help the situation.

It is undisputed that James Patten, an N.J.E.A. consultant was called by Massaro on April 7, 1977. Massaro asked Patten to go to a grievance meeting at Blessing's office. When he arrived Jones and Golazeski were in Blessing's office. Patten introduced himself but Blessing was upset that Patten was there and Blessing stated that the meeting was not a formal step in the grievance process and he would not meet with an N.J.E.A. representative present unless his labor relations counsel was also present. An argument ensued. Finally Blessing asked his secretary to call the police to have Patten removed. 3/

The former Assistant Business Administrator of the Board, David Bishop, 4/ was called by the Association as a witness. Bishop testified that Blessing did not like Golazeski. He felt Golazeski was stupid 5/ and Golazeski would bring up grievances which lacked merit just to stir things up. 6/ At one time, after Golazeski made a reference that Blessing could not take certain action because, "This isn't Red China" (see below), Blessing expressed annoyance and said, "I'll get that son of a bitch." 7/

As further evidence of Blessing's hostility, the Association introduced evidence concerning a grievance meeting involving three employees, Nevius, Lavers

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3/ Patten voluntarily left Blessing's office before the police arrived.

4/ Bishop's position was eliminated by the Board and consequently Bishop was fired.

5/ Vol. II, p. 10.

6/ Vol. II, p. 10.

7/ Vol. II, p. 6.

and Lamb. Each filed a grievance concerning letters in their personnel files. The letters related to different incidents. Due to a mix-up in scheduling time Lamb and Lavers appeared at Blessing's office. Blessing told them the time had been changed and Golazeski wouldn't be there for another hour. The men wanted to discuss their grievances anyway. Blessing asked them to sign a release that they voluntarily met without an Association representative. The grievance was settled at the meeting by removing the letters from the files of Lavers and Lamb. When Nevius arrived with Massaro and Golazeski the parties met but Blessing would not remove the letter from Nevius' file.

The Association claims that it was because Nevius chose to be represented by the Association that only his grievance was denied. Blessing testified that the disparity of treatment between Nevius, Lavers and Lamb stems from the employment history of the people involved. Lavers and Lamb had never been reprimanded whereas Nevius had received previous reprimands and disciplinary actions had been taken against him. Blessing claimed his action had nothing to do with the fact that Nevius was represented by the Association.

In general Blessing's characterization of the negotiations relationship was completely different from that of the Association witnesses. He noted that the Board attorney Allen Dzwilewski and Massaro were sarcastic with each other. 8/ But he did not hold any personal animosity toward Golazeski because of his position in the Association. He did believe that Golazeski acted in ways that exceeded his rights as Association President -- but in his testimony he distinguished such conduct from the right of an Association officer to aggressively represent his people.

Blessing testified that he felt that both Jones and Golazeski were poor employees entirely apart from their Association duties and it was only because they were union officers that they received satisfactory evaluations. That is, he felt that if he tried to take any action against either of them he would be faced with charges that he was discriminating against them because of their union activity.

He claimed that Jones continually had to be coaxed and threatened to perform his duties in a satisfactory manner and a number of letters of reprimand critical of his work were in his file. In November of 1976 Jones was cited for leaving work ten minutes early. In addition, this was the second time that Jones was caught

8/ Blessing testified that he would laugh at some of the comments but was told by the Association negotiator "It wasn't funny."

sleeping on duty. In October of 1976, at four in the morning, Jones was found sleeping at the desk in the custodian's office.

Golazeski was also criticized about his work, although not to the degree that Jones was. Similarly he was cited for leaving work ten minutes early in November of 1976.

Golazeski's major problem centered around his interpersonal relationships. On July 23, 1976, he received a letter from Blessing cataloguing a number of incidents all relating to his "attitude and comments when relating to fellow workers and supervisors." Specifically Blessing was critical of a grievance filed by Golazeski. A teacher wrote a letter complaining of the poor cleaning job done in the area that Golazeski was responsible for. The teacher also noted that newspapers left in a bookcase were removed every night. Golazeski filed the grievance in question against the teacher demanding an apology claiming the teacher "accused him of stealing the newspaper."

Blessing also noted that Golazeski was sarcastic and uncooperative with the vendor who serviced the pool. He left a mop and pail out with a sign: "Pool service please note room has been mopped. Barrel and utensils provided." The letter went on that Golazeski's attitude with fellow workers was "not conducive to a desirable co-worker relationship" and that comments made by Golazeski to Blessing in regards to a reprimand for a fellow employee were antagonistic and hostile. These comments included, "You can't do this or that, this is not China, you're the big wheel so you should know what's going on," "an employee doesn't have to do anything he doesn't want to." The letter continued, "Every employee has a right to an explanation of working conditions or to file a grievance. But to challenge a directive by a supervisor at the time of the directive and to do it with sarcasm is unacceptable if not insubordinate in its own right."

The last incident mentioned in the letter occurred after Golazeski had asked his supervisor, Mr. Danna, for a squeegee to remove excess water in the pool area. Danna left one for him but the following morning Danna found the squeegee with a note attached, "You know what you can do with this, I want to push water not concrete." Blessing warned Golazeski that unless he could work without incident and work in harmony with his fellow workers Blessing would recommend that Golazeski be fired.

Some eight months later on April 1, 1977, Blessing sent Golazeski another written reprimand. This letter also criticized Golazeski for a number of incidents. The first incident occurred when Golazeski, in his capacity as President of the Association, went to a Board member with a problem rather than to Mr. Blessing. Blessing responded that the proper chain of command was to go to Blessing. Golazeski responded, "When you do what Mr. Stone (a Board member) says let me know." In the letter Blessing stated that this was "out and out defiance of his administrative responsibilities." The letter also reprimanded Golazeski for reading correspondence in Blessing's secretary's typewriter and, finally, Golazeski was chastized for an incident where a supervisor handed a custodian two wrenches and directed him to tighten the bolts on seats in the auditorium. Golazeski took the tools from the custodian and gave them back to Danna stating it was out of title work and such work had to be done by maintenance employees, not custodians. 9/

Golazeski did not deny any of these incidents, 10/ but argued that with many of these incidents he was acting in his capacity as an Association representative and as to the notes, that was just his sense of humor and they were meant only in jest.

Analysis

The Board witnesses, particularly O'Connor (who testified about finding Jones and Golazeski asleep) proved to be reasonably forthright and credible in their testimony.

Golazeski's testimony was less so. He was argumentative as a witness (which is consistent with Blessing's characterization of his interpersonal problems) and his version of the sleeping incident is not convincing. He claimed he was sitting in the custodian's room with all the lights out. Yet O'Connor and DeBartolo testified that they looked into the custodian's office their first time through the building and it is logical to assume that they would look there. Contrary to Golazeski's statement that it does not make sense that he would sleep in the compactor room because there are far more comfortable places to sleep, an unlikely place is just the spot to take a nap if one is afraid of getting caught. Also, regardless of which version of what happened one believes, Jones did go right to where Golazeski was sitting or sleeping, not to Golazeski's work area.

9/ Blessing also sent Golazeski a separate letter concerning this one incident.

10/ Except for the incident where he left work early he claimed the clocks were off. But on the basis of Bishop's testimony I found Golazeski's claim unconvincing.

Jones was not particularly active as an Association officer and his participation in protected activities was slight. There was very little evidence introduced to show Association activity but he received numerous complaints and warnings about his work. 11/

The Commission created a twofold test to determine if discriminatory action in violation of the Act. In Haddonfield, P.E.R.C. No. 77-3, 3 NJPER 71 (1977) if an employer's discriminatory action was motivated in whole or in part by a desire to discourage protected activity or had the effect of discouraging such activity the employer's action constitutes an unfair practice.

Although Jones may have been sick when he lay down, it was not unreasonable for the Board not to believe Jones since he was found sleeping on a prior occasion and both Jones and Golazeski were apparently sleeping at the same time. The Board does not have to be correct in their belief that Jones was sleeping. As long as they believed he was and they acted in good faith in discharging Jones and there is no violation of the Act. Here the Association did not prove by a preponderance of the evidence that the Board did not act in good faith.

Golazeski's situation is more difficult. As with Jones, it was not unreasonable for the Board to believe that Golazeski was sleeping on the job. However, a number of the incidents complained of by Blessing were an outgrowth of his activities on behalf of the Association. Blessing testified that he didn't know that Golazeski was a vice-president in 1976. Nevertheless under Haddonfield, supra, if an employer's discriminatory actions had the effect of discouraging protected activity, such action constitutes an unfair practice.

In City of Hackensack, P.E.R.C. No. 78-30, 3 NJPER 280 (1977), the Commission adopted the Hearing Examiner's conclusions of law when he found that where an employee is processing a grievance, the Act grants limited protection from disciplinary action for offensive conduct. "An employee may not act with impunity even though he is engaged in protected activity. An employee's rights under §5.3 must be balanced by an employer's right to maintain order. Offensive conduct which is gratuitous or patently opprobrious may remove the protection of §5.3." Although when Golazeski made his comments, "You can't do this or that, this is not Red China," etc. he was not involved directly in the grievance process, the

11/ Although Bishop characterized Jones' work as average, I found this unconvincing. Bishop was fired by Blessing and under this circumstance such characterizations by a witness in Bishop's position are suspect.

conversation did relate to grievable matters. Golazeski's language was not profane nor did he make any personal attacks upon Blessing. All in all he deserved protection of the Act

Golazeski's filing a grievance against a teacher, although inappropriate, is a right expressly granted under §5.3 of the Act and is not grounds for discipline and, similarly, when Golazeski, in his capacity as president of the Association bypassed Blessing and spoke directly to a Board member about negotiations he, likewise was protected. See, Auto Truck Federal Credit Union and Retail Clerks, 232 NLRB No. 171, 97 LRRM 1088.

However, a good deal of Golazeski's conduct complained of by Blessing was not protected; the warning concerning Golazeski's relation with other employees, the caustic notes written by Golazeski, particularly the one to his foreman, certainly are not protected.

Similarly, when Golazeski took the tools from a fellow worker and returned them to the foreman, Mr. Danna, he was acting outside the ambit of the Act. See Machaby v. NLRB, 377 F.2d 59 (CA 1967) 65 LRRM 212 where the NLRB was upheld when it found that a shop steward was not unlawfully discharged because he instructed employees not to perform certain work. If Golazeski felt this was an improper work assignment he should have grieved same.

In Harrah's Club, 158 LRRM No. 76, 62 LRRM 1137, an employer warned pro-union employees that they would lose their jobs because of their support of the union and laid off a number of them in violation of §8(a)(3) of the National Labor Relations Act. Nevertheless it was held that the employer did not commit an unfair labor practice when he discharged a pro-union employee who was believed to be sleeping on the job. The Board held that not every termination which occurs after an anti-union warning is illegally motivated, just "because it coincides with these warnings and placates the employer's anti-union animus." An employer may still discipline the conduct of his employees. See also Successful Creation, Inc., 202 NLRB No. 33, 82 LRRM 1505.

The evidence revealed that Blessing did not like Golazeski and, since he was an officer of the Association Golazeski was exposed to and suffered improper disciplinary actions by Blessing. However this condition does not by itself destroy the Board's right to discipline (as in Harrah's Club, supra). Golazeski was protected by the Act when he became embroiled with Blessing when exercising

his protected rights, but such protections must not become a shield to insulate him from legitimate discipline.

Blessing's threat to "get Golazeski" was made a full year before the discharge, [12] and before Golazeski committed other, unprotected acts of insubordination. Blessing only acted when Golazeski committed a serious infraction which alone might warrant a discharge.

The evidence concerning specific anti-union animus was unconvincing. The Board never did anything unlawful during negotiations.

It is to be expected that in hard negotiations the parties might become angry with each other. Blessing also acted within his rights when he refused to meet with the N.J.E.A. representative at an informal grievance meeting. Section 5.4(b)(2) expressly provides that an employee organization may not interfere with an employer's selection of a representative for the adjustment of grievances. Blessing only insisted upon his right to have a representative of his own choosing before he met to discuss a grievance.[13]

However, in his testimony Blessing stated that his recommendation for the discharge of Golazeski (and Jones) was based upon his entire work record. [14] It necessarily follows that since parts of Golazeski's entire work record were the letters which negatively commented upon Golazeski's engagement in protected rights, one of the factors in Golazeski's discharge (Hackensack, supra) would be the exercise of protected rights and such a discharge would be violative of §5.4 (a)(3) of the Act.

In North Warren Regional, P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187, 1978) at footnote 4 the Commission stated, "While a finding that the action was taken in part for retaliation for protected activity will establish that a violation of the Act has occurred, a remedy of reinstatement will not necessarily be required to effectuate the purposes of the Act when the evidence also indicates that an employee's performance would have justified the dismissal.

Here, Blessing's interference with protected rights was too remote from the discharge and the misconduct too substantial to warrant reinstatement. Accord-

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12/ Blessing made the threat in private to Bishop after Golazeski commented, "You can't do that. This is not Red China," and Golazeski was disciplined for that in July of 1976.

13/ Once the representative insisted on staying in the room even though Blessing would not hold the meeting there was a statement and argument. Again under the circumstances the N.J.E.A. representative had no inherent right to remain in Blessing's office.

14/ Vol. IV, p. 149.

ingly, I will recommend that the Commission find a violation in accordance with their observation in North Warren, refrain from ordering reinstatement and order the posting of the attached notice only.

Recommended Order

Accordingly, it is hereby recommended that the Commission issue the following Order:

1) That the Board cease and desist from disciplining its employees for the exercising of protected rights or taking any action against an employee because, either in whole or in part, said employee engaged in the exercise of protected rights.

2) Take the following affirmative action:

a) Post the attached notice.

Edmund G. Gerber
Hearing Examiner

DATED: June 28, 1979
Trenton, New Jersey

RECOMMENDED POSTING

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from disciplining our employees for the exercising of their protected rights or taking any action against an employee because, either in whole or in part, said employee engaged in the exercise of protected rights.

WE WILL post in a prominent place at the North Brunswick High School copies of this notice for a period of sixty (60) consecutive days.

NORTH BRUNSWICK 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 Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 E.State St.Trenton, New Jersey 08609,Telephone (609) 292-6780