P.E.R.C. NO. 88-35

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BURLINGTON COUNTY VO-TECH
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-86-3-21

ARLENE SPARE,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Arlene Spare against the Burlington County Vo-Tech Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when it reprimanded Spare and denied her reemployment, allegedly because she complained to State officials about a school's heat and ventilation. The Commission finds, however, that she was denied reemployment because of her excessive absenteeism.

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ARLENE SPARE,

Charging Party.

Appearances:

For the Respondent, John E. Queenan, Jr., Esq.

For the Charging Party, Selikoff & Cohen, P.A.
(Joel S. Selikoff, of counsel)

DECISION AND ORDER

On July 15, 1985, Arlene B. Spare filed an unfair practice charge against the Burlington County Vo-Tech Board of Education ("Board"). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5:4(a)(1) and (3),[1/] when it reprimanded her and denied her reemployment, allegedly because she complained to State officials about a school's heat and ventilation. It also

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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 exercise of the rights guaranteed to them by this act."

alleges the Board's actions violated the New Jersey and United States Constitutions.

On August 2, 1985, a Complaint and Notice of Hearing issued. On July 31, 1985, the Board filed its Answer. It admits refusing to renew Spare's contract, but contends it did so because of her excessive absenteeism. It denies the Complaint's other allegations.

On October 28 and 29, 1986, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

On May 28, 1987, the Hearing Examiner recommended that the Complaint be dismissed. H.E. No. 87-70, 13 NJPER 534 (¶18198 1987). He concluded that the reprimand and non-renewal were based on Spare's poor attendance, not her complaints.

On June 24, 1987, after receiving an extension of time, Spare filed exceptions.[2/] She excepts to many findings of fact.[3/] She also excepts to the Hearing Examiner's not finding these violations: (1) the Superintendent's memorandum requesting Spare to explain the complaint to the State independently violated subsection 5.4(a)(1) of the Act; (2) the Superintendent's refusal to relieve Spare from outside duty, which contributed to her absences, violated subsections 5.4(a)(1) and (3) because he relieved others

2/ We deny the request for oral argument.

3/ Almost all these exceptions concern the inferences the Hearing Examiner drew from basic facts. We will discuss these exceptions when we review the factual record .

making similar requests; and (3) the Board's refusal to renew Spare's contract violated subsections 5.4(a)(1) and (3) because (a) the reliance on Spare's attendance was pretextual as other employees had more absences, and no evidence supports the Hearing Examiner's finding that others with less absences were terminated because of absenteeism; and (b) Spare was discriminated against when she was reproached for using a "faculty" restroom, was sent hostile memoranda, was not relieved of outside duty, and was not acknowledged by administrative staff.

Spare has filed 21 exceptions to the Hearing Examiner's findings of fact. We now consider them.

(1) Finding of fact 3. The office lavatory was properly characterized as "private." It was intended for the use of administrators. Spare, as well as other faculty, was to use the public facility.

(2) Finding of fact 3 accurately states that the principal would "assist in resolving the situation."

(3) Finding of fact 5 accurately finds that Spare's doctor supported her belief that outside duty in "extremely cold or inclement" weather would affect her health.

(4) Hearing Examiners should not state that a witnesses testified to an occurrence. That is not a finding of fact. We modify finding of fact 5 to: "Spare explained to Schreiber that she enjoyed the duty and they agreed she would continue to perform the duty."

(5-7) We modify finding of fact 5. Spare submitted only one doctor's note.

(8) There is a typo on p. 10. The eighth line should be "CP-10," not "CP-7."

(9) We modify finding of fact 6 at p. 11 to delete "allegedly."

(10) Schreiber did not tell Spare that this was a form letter.

(11) We modify finding of fact 12. Spare submitted CP-16 to someone in the administration.

(12) We add to finding of fact 6 that the Board had not in the past voted to retain a non-tenured teacher that Superintendent Verdile did not want renewed.

(13-14) The Board applied its neutral absenteeism policy on occasional absences to Spare.

(15-16) Although this should be characterized as a conclusion of law, it was not pretextual to treat an employee's absence on workers' compensation or alcoholism differently from Spare's illnesses.

(17-18) Uncontradicted evidence shows Norton had pneumonia. It is not pretextual to treat this illness differently from Spare's.

(19-20) We modify finding of fact 7 to delete the reasons the Board did not renew the contracts of Brown, Glassgow and Anderson. The reasons are not clear from the record.

(21) There was no pattern of hostility towards Spare.

In sum, with the exception of the minor changes in findings 4, 5, 8, 9, 11 and 12, the Hearing Examiner's findings of fact (pp. 5-18) are accurate. We adopt and incorporate them here.

The Board did not violate the Act when it did not renew Spare's employment contract. To establish a violation, Spare must prove that she engaged in protected activity and the employer discriminated against her because of that activity. N.J.S.A. 34:13A-5.4(a)(3). In re Bridgewater Tp., 95 N.J. 236 (1984). Even if we assume that Spare's individual complaint to State health officials is protected activity, we do not find that the employer discriminated against her because of that activity. Rather, we find, in agreement with the Hearing Examiner, that she was not renewed because of her absentee record. Two key facts negate a discrimination finding. First, she had a very poor record: she was absent 22 times (21 of which were for illness) in her first eight months of employment as a non-tenured teacher. Second, the Board expressly rejected the Superintendent's alternate reason for non-renewal. The uncontroverted evidence is that its decision was based solely on her poor absentee record.

Spare has claimed that she was subjected to disparate treatment, thus demonstrating that her protected activity motivated the non-renewal. We now review these claims, but conclude that they do not prove a violation.

(1) The Superintendent's failure to recommend non-renewal of three teachers who had more total absences than Spare and similar

"occasional" absences. This disparity does not, under the circumstances, warrant a finding of discrimination. The Board decided that "occasional" absences were a greater concern than "total" absences. Further, two employees were on worker's compensation, one was an alcoholic and one had pneumonia. The Board could legally treat these absences differently; that it did so does not show an illegal motive.

(2) The refusal to relieve Spare from outside duty. Three other teachers were relieved from the outside duty of supervising students who smoked. These teachers had allergies. Spare did not have an allergy, but did submit a doctor's note saying she shouldn't go out in extremely inclement or bitterly cold weather. The refusal is not discriminatory since it is reasonable to distinguish between a permanent allergy and a temporary virus. Further, there is no proof that she had outside duty on any days that were extremely inclement or bitterly cold.

(3) In the spring, Spare was not permitted to use other rooms not in use. It is reasonable to expect a teacher to remain at her assigned station and Spare had no right to assume that she could move into another room without approval.

(4) Told not to use an office restroom. This room was reserved for the office staff.

These four factors, viewed individually or collectively, do not suggest that the reason of excessive absenteeism was pretextual. We therefore are not persuaded that the Board unlawfully discriminated against Spare when it did not renew her

employment contract.

We also dismiss the allegations of independent 5.4(a)(1) violations. The November 28, 1984 memorandum did not criticize or threaten her for engaging in protected activity. Compare Black Horse Pike, P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). Nor, for the reasons stated supra at 6, did the refusal to excuse Spare from outside duty violate the Act. Therefore, it is irrelevant whether this refusal contributed to Spare's illnesses.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Bertolino abstained. Commissioner Reid was not present.

DATED: Trenton, New Jersey
October 22, 1987
ISSUED: October 23, 1987

H.E. NO. 87-70

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

In the Matter of

BURLINGTON COUNTY VO-TECH
BOARD OF EDUCATION

Respondent,

-and-

Docket No. CI-86-3-21

ARLENE SPARE,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Burlington County Vo-Technical Board of Education did not violate the New Jersey Employer-Employee Relations Act when it adopted a recommendation not to renew the employment of a non-tenured teacher due to excessive absenteeism.

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. 87-70

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

In the Matter of

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BOARD OF EDUCATION

Respondent,

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ARLENE SPARE,

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Appearances:

For the Respondent, John E. Queenan, Jr., Esq.

For the Charging Party, Selikoff & Cohen, P.A.
(Joel S. Selikoff, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (Commission) on July 15, 1985 by Arlene B. Spare (Charging Party) alleging that the Burlington County Vo-Tech Board of Education (Board) violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. of the Act.[1/] The Charging Party was a

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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

Footnote Continued on Next Page

non-tenured teacher employed by the Board during the 1984-85 academic year, and the Board refused to reappoint her for further employment. The Charging Party alleged that she was not reappointed in retaliation for her exercise of protected activity. She also alleged violations of the United States and New Jersey Constitutions. The Charging Party sought a cease and desist order; an order directing the Board to re-employ her and reimburse her with interest for all back pay and benefits; and an order directing the Board to reimburse her for counsel fees and costs of suit.

A Complaint and Notice of Hearing (Exhibit C-1) was issued on August 2, 1985, and the Board filed an Answer (C-2) on July 31, 1985 denying any violation of the Act.[2/] The Board raised as an affirmative defense that the Commissioner of Education, and not PERC, had jurisdiction in this matter.

Procedural History

When the Complaint and Notice of Hearing issued on August 2, 1985 a hearing was scheduled for September 23 and 24, 1985. Due

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1/ Footnote Continued From Previous Page

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."

2/ The Answer was provided prior to the issuance of the Complaint because it was filed as an answer to the Charge, and was subsequently relied upon as the answer to the Complaint.

to extensive discovery and related motions, however, the hearing was not held until October 1986.[3/]

3/ During August 1985 the Charging Party propounded her first set of interrogatories, and the Board answered most of them. On September 4, 1985 the Charging Party requested that the hearing be adjourned to enable her to seek formal discovery. In September 1985 the Charging Party propounded a second set of interrogatories and I scheduled a prehearing conference to review the discovery matter. On October 7, 1985 I rescheduled the conference for October 23, 1985. On October 9, 1985 I received the Charging Party's motion to compel answers to the first set of interrogatories, and a motion for sanctions pursuant to N.J.A.C. 1:1-3.5.

The prehearing conference was held on October 23, 1985 to review the motions and resulted in my issuing on October 25, 1985 an unreported decision (C-3A) compelling answers to most of the interrogatories, but denying the motion for sanctions. By letter of November 19, 1985 the Charging Party requested an order compelling answers to additional questions, and on December 9, 1985 I issued an additional order (C-3B).

The Charging Party sent the Board a third set of interrogatories on January 7, 1986. On February 27, 1986 I received the Charging Party's February 21 letter informing me that the Board had not fully complied with C-3A and C-3B, and it again requested sanctions, and that my order be enforced by the Appellate Division. The Charging Party also requested to depose the superintendent, Benjamin Verdile. On March 12, 1985 I received a copy of the March 7 letter Board counsel sent to Charging Party counsel in response to Charging Party's February 21 letter. In the March 7 letter the Board provided certain requested material. On March 10, 1986 I responded to the Charging Party's February 21 letter and indicated that the Board counsel had represented that he would be providing additional information. I also reserved on the new request for sanctions.

On March 17, 1986 I received the Charging Party's correspondence of March 10 which was a motion to compel answers to the second and third set of interrogatories, and a new motion for sanctions. On March 20, 1986 I received the Board's March 19 letter indicating that it would do all it could to comply with my orders, and expressing no objection to deposing the superintendent. On March 20, 1986 I responded to the Charging Party's motion of March 10 and listed the results

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Hearings were held in this matter on October 28 and 29, 1986 where both parties presented witnesses and exhibits and argued

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3/ Footnote Continued From Previous Page

of telephone conversations I had with the parties. I explained that the Board had to provide certain specific information; I granted the Charging Party's motion to depose the superintendent; and I reserved on compelling any further answers to interrogatories until after the deposition(s) had been completed. On March 21, 1986 I received Charging Party's March 17 motion to depose the school principal, Don Schreiber. That same day I signed orders to depose the superintendent and principal.

On April 11, 1986 I received the Charging Party's April 9 motion to deem parts of the Board's Answer as admissions. During April 1986 the Charging Party sent the Board a fourth set of interrogatories.

All requested or required depositions were held on June 10, 1986. On June 18, 1986 the Charging Party advised me by telephone that depositions had been completed, and that only his fourth set of interrogatories remained unanswered. By letter of June 19, 1986 I requested the Charging Party to provide me with a copy of the fourth set of interrogatories so that I could determine what the Board would be required to answer. I also set a prehearing conference for September 4, 1986 to review the motion on sanctions and the motion on admissions, and I set a hearing for October 1986.

On July 2, 1986 I received the Charging Party's June 30 letter and fourth set of interrogatories. The Charging Party also asked for other information from the Board. On August 5, 1986 I received the Charging Party's July 31 letter requesting the information from the June 30th letter, and moving to compel answers to the fourth set of interrogatories.

On August 18, 1986 I issued an unreported decision (C-4) denying the motion for admissions, reserving on the motion for sanctions, and granting in part and denying in part the motion for discovery. On September 2, 1986 I received a copy of the Board's August 29 answers to the fourth set of interrogatories.

The prehearing conference was held on September 4, 1986 and resulted in resolving what remaining information had to be supplied to the Charging Party. On October 15, 1986 the Board forwarded more information to the Charging Party.

orally.[4/] The Charging Party filed a post-hearing brief on January 30, 1987.

Upon the entire record I make the following:

Findings of Fact

1. The Burlington County Vo-Tech Board of Education is a public employer within the meaning of the Act, and Arlene Spare was a public employee within the meaning of the Act.

2. Spare was employed by the Board in September 1984 as a basic skills teacher for remedial math and reading (T24). She taught no more than four students at any one time, and her teaching area was located in the mezzanine or loft area of the library (T24, T85). Two other teachers, William Boulier and Mary Cardinal, also taught in the mezzanine (T25). From the time she began working in September 1984, Spare found the mezzanine to be excessively hot. She learned that the windows had been screwed shut, and there was no other ventilation in that area.

Spare first discussed the conditions in the mezzanine with Boulier and Cardinal (T26), and then in late September spoke to her immediate supervisor, William Jordan, Director of Basic Skills, about the mezzanine problem (T28-T29). Neither Boulier nor Cardinal complained about the heat in the mezzanine (T215, T228-T229);

4/ Although there were two separate days of hearing the transcript pages were numbered consecutively, thus the transcripts will be referred to as "T" followed by the page number. The second day of hearing began at T190.

neither did the students' parents complain (T91). Jordan agreed with Spare that there was a problem, and he issued a work order (CP-1) on October 17, 1984 to correct the problem. After a short time the problem had not been corrected and Spare obtained Jordan's permission to discuss the matter with Allen Nordt, District Supervisor of Buildings and Grounds (T32). Nordt agreed that the problem had to be corrected (T33). On November 12, 1984 Spare received a memo (CP-2) addressed to all library staff from Principal Schreiber, indicating that the Buildings and Grounds staff would be repairing windows in the mezzanine. But no work was done on the windows at that time (T36).

3. In the Fall of 1984 there was no specific instruction to faculty regarding which restrooms to use (T220). Although a public restroom was available for use by Spare and other teachers in the library area (T220), Spare preferred a restroom with more privacy (T101). She discovered a private restroom located in a private hallway between the main office and the guidance office (T36, T101, T106, T220). Spare would enter the private restroom by going into the main office and behind the counter where the secretaries are located, and then into the private hallway, and leave by going back the way she had come (T37, T217).

Schreiber's secretary, Elizabeth Fleming, had told him that Spare had been coming into the office to use the private restroom. Fleming did not know of any reason why Spare used that facility as opposed to other available facilities (T217). Schreiber asked

Fleming to discuss the matter with Spare and ascertain why she used that particular facility which was primarily available for office and guidance staff (T217).

On November 13, 1984 Spare was leaving the main office after having used the private restroom and Fleming told her that she (Spare) was to discontinue using that restroom, and that there was a key available for the public restroom near the library (T37, T105). Spare characterized Fleming's tone of voice as "sort of yelled out," and characterized the office as being "full of people." (T37).

Schreiber had not heard or witnessed the incident between Fleming and Spare, but when he learned of the incident, he sent Spare a memo (CP-3) on November 14, 1984 asking Spare to explain why she needed to use the private restroom, and asking her to recollect the conversation with Fleming. Schreiber concluded CP-3 by saying that he would assist Spare in resolving the situation.

4. Sometime between November 14 and November 28, 1984, Spare's husband telephoned an official at the State Department of Education and inquired whether there were rules governing the ventilation of areas without windows in school facilities (T365). Mr. Spare informed the official that his wife (Charging Party) worked for the Board and was having a problem (T366). On November 28, 1984 the Charging Party received the following message from Superintendent Benjamin Verdile (CP-4).

Several facts have come to my attention, namely:

1. You have had difficulty with the facilities in the library.

2. You have connections in Trenton.

3. A state official called me about a complaint regarding the library facilities. This complaint was levied in Trenton.

In writing, I would like you to connect or disconnect the above facts.

Thank you.

After receiving CP-4 the Charging Party learned from her husband that he had called a state official regarding the ventilation problem in the mezzanine (T45). The state official called the superintendent and told him that one of his teachers complained about the facilities (T279). Spare responded to CP-4 by memorandum of December 3, 1984 (C-5), wherein she indicated that she had no connections in Trenton, but explaining that the call he (Verdile) received may have been as a result of a conversation her husband had had with a state official.

5. The record shows that an Attendance Monitoring System (J-4) for students and staff had been in place in the district during 1984-85. Section II of J-4 pertaining to staff attendance provided as follows:

> Given the records of staff attendance, a memo will be prepared, under the supervisor's signature, for each absence after the 5th, for any day other than death, court appearance, and professional day. Five or more consecutive such days are not to be considered part of the tally.

By December 10, 1984 Spare had already been absent 5-1/2 days (J-3). In conformance with J-4, Sec. 2, Spare, on December 20, 1984, received a letter (similar to R-2) from Jordan notifying her that she had been absent 5 1/2 days that school year, and inviting her to discuss any extenuating circumstances with him (T114).

In late December 1984 Spare developed an upper respiratory infection and was taking medication to alleviate the condition (T51). From the beginning of the school year Spare (and other teachers) had been assigned an outside duty for approximately 30 minutes twice a week supervising students in a smoking area (T52), and she thought that assignment might be contributing to her inability to get well (T51). She testified, however, that the outside duty did not cause her infection (T163). In late December Spare asked Jordan about being relieved from her outside duty and he explained that he lacked jurisdiction to resolve the matter (T124, T125). Spare explained the duty assignment to her doctor who, on January 16, 1985 gave her a note (CP-6) indicating that she need not go out in extremely cold or inclement weather because that would adversely affect her health.

Spare promptly took the note to Schreiber and asked if she could be excused from the outside duty until she overcame the infection (T53). Spare testified that Schreiber said that he could not make special rules for her, and that it was not his responsibility to change the duty (T54). Schreiber testified that Spare explained that she enjoyed the duty, and that they agreed she

would continue performing the duty (T231). Spare then apparently spoke to her doctor again, received another written note, and showed the note to Schreiber (T55). In response thereto Schreiber, on January 24, 1985, sent Spare a note (CP-7) inquiring as to the meaning of her last note (T55).

The following day Schreiber sent Spare a memo (CP-10) listing two concerns as follows:

1. When and if problems arise concerning your working conditions, you should refer them to appropriate channels within the school district.

2. Attendance.

In CP-7 Schreiber asked Spare to correct the concerns and he offered his assistance. On January 28, 1985 (CP-8) Spare responded to CP-7 by indicating that her doctor felt that inclement weather would adversely affect her health. On February 11, 1985, however, Schreiber sent Spare a note (CP-9) that she was still assigned to the outside duty. Spare was not relieved of that duty (T58), but between December 10, 1984 and February 25, 1985, Spare did not use any sick leave. However, she did use personal leave on two half-days during that time period (J-3).

6. On January 21, 1985 Verdile submitted recommendations to the Board (J-2) recommending the freezing of salaries for certain employees, and recommending non-renewal of five teachers including Spare. Spare apparently was unaware of J-2 at that time, and had not used more than the 5 1/2 sick days plus 1/2 personal day when

J-2 was issued (J-3). In J-2 Verdile, in addition to recommending Spare's non-renewal, also recommended the non-renewal of employees Mary Brown, Thomas Glasgow, Jeanette Roles, and Howard Strasser. None of those employees had been absent as often as Spare (J-3).5/

After Spare received CP-10 on January 25, 1985 she discussed the items listed therein with Schreiber. Schreiber allegedly told Spare that Verdile thought she had not gone through proper channels regarding the mezzanine (T60).

5/ Board President Richard Edge had been deposed prior to hearing. During that deposition there was this exchange (T199-T200):

Questioning by Mr. Selikoff:

"QUESTION: During an off the record discussion you indicated to me, Mr. Edge, that what happens in the district is that the superintendent sends a list for Board action which includes the names of those teachers he is recommending to be renewed for the upcoming year?

"ANSWER: That's Correct.

"QUESTION: And that would be non-tenured teachers at the same time? He also submits a list of the tenure teachers whom he is, in effect, approving for next year? In other words, that they be sent notice of continuation by the Board to re-employ?

"ANSWER: That's Correct.

"QUESTION: But of the teachers -- the list of teachers who have the appropriate certification, the procedure is, as I've described it; is that correct? In other words, no independent review of any individual teachers but approval of the list the superintendent is recommending for renewal?

"ANSWER: That's right."

On February 4, 1987 Spare received a letter from Schreiber (similar to R-2) regarding her attendance (T115). The letter said:

> This is to notify you that you have been absent six days this year as of 2/1/85. Should there be extenuating circumstances, you may wish to discuss it with me (T115).

On February 27, 1985 Verdile sent Spare a memo (CP-11) informing her that he planned to recommend her non-renewal to the Board. He advised her of her right to a Board hearing on March 26, 1985. As of February 27, Spare had used 8 1/2 sick days and one personal day (J-3). Spare requested the reasons for Verdile's recommendation (T64), and he responded with CP-12 on March 13, 1985. The reasons for non-renewal listed in CP-12 were:

1. You did not refer problems to the appropriate people within the school district.
2. Attendance.

Spare's use of sick leave sharply increased beginning February 25, 1985 - before she received CP-11. Spare was on sick leave 8 1/2 consecutive work days from February 25 through the half-day on March 7, 1985, and 7 consecutive work days from March 14 through March 22, 1985 (J-3, CP-17). By March 26, 1985 Spare had used 21 sick days and one personal day (J-3, CP-17). On that date she obtained a doctor's note (CP-16) attributing the February and March absences to flu, pharyngitis and a nasal condition. Spare argued that she submitted CP-16 to someone in the administration,

but she could not recollect when she submitted it, or to whom (T156-T157). Spare also argued that the conditions noted in CP-16 were the same as the conditions leading to her request to be switched from outside duty (T156). Having been allotted ten sick days for the year pursuant to J-1, Article 12, Sec. A., Spare had a balance of minus eleven sick days on March 26, 1985 (J-3).

On March 26, 1985 Spare appeared at a Board hearing with union representation to contest Verdile's non-renewal recommendation of her further employment (T145-T146, T162). Just prior to the March 26 hearing the Board received and reviewed Spare's complete attendance and work record (T288, T306-T307, T341-T342). The Board specifically rejected Verdile's recommendation not to renew Spare based upon complaints made on her behalf to an official of the State Education Department regarding the mezzanine. The Board felt that was not an appropriate reason for non-renewal (T328). The Board, however, did find Spare's poor attendance record to be a significant reason for non-renewal and it adopted Verdile's recommendation not to renew Spare based only on attendance (T146, T292).

On March 29, 1985 the Board sent Spare a letter (CP-13) officially notifying her of the Board's action and including the March 26 Board resolution which indicated that she was not offered a contract because of her excessive absenteeism.

7. Verdile testified that J-4, the Attendance Monitoring System, was initiated because the State Department of Education had begun to monitor attendance (T282-T283). He explained that

Burlington Vo-Tech was about to be monitored and he wanted a procedure in place to alert staff who had frequent absences (T283).

Sonia Martini, Board Secretary and Business Administrator, testified that as of January 21, 1985, four teachers, Fairbanks Brooks, James Norton, Raymond Anderson, and Donald Metzgar, had more absences than Spare (T345), but Metzgar's was really equal to Spare's (J-3). None of those employees were listed on J-2. Brooks had approximately 15 absences by that date, but she had been injured on the job and was receiving workman's compensation (T346, J-3); Norton had approximately 12 1/2 absences by that date, most of which were not occasional. Martini testified that Norton had pneumonia, and the record shows that Norton had started with 19 sick days in 1984-85 (his second year), and completed the year with 4 1/2 sick days remaining (T347, J-3); Anderson had two deaths in his family, including his daughter in November 1984 which led to a drinking problem. He had approximately 27 absences by January 21 and continued to be absent (a total of 59) and was terminated on April 29, 1985 (T348, J-3); Metzgar had approximately six absences by January 21, but only 4 1/2 of those were sick days, he too had been on workman's compensation, his last day of work was February 28, 1985, and he resigned on March 15, 1985 with a total of 13 1/2 absences (T349, J-3, R-3). Thus, by January 21, 1985 Spare had more absences than all but three non-tenured teachers (J-3). Approximately 50 non-tenured employees were included in the unit (J-3, R-3).

When Verdile recommended that Spare not be renewed on January 21, 1985 in J-2, he also recommended the non-renewal of four other teachers and recommended that the salary of eight other employees be frozen. It was not necessary for the Board to act on all of those recommendations, but of those recommendations it did consider, the Board did not adopt every recommendation (T293). The Board did not consider Verdile's recommendation to non-renew employees Brown, Glasgow and Roles because they resigned before the Board acted (T295-T296); it approved the recommendation not to renew Spare and employee Strasser, and it did not follow his recommendation to freeze the salaries of employees Driscoll and Earle, but did approve others (T294-T295, T330, J-2).

Spare testified that she became aware that the Board would not have rehired Brown, Glasgow and Anderson at least partially due to absenteeism (T147-T148).

8. The record shows that three different teachers were relieved of their outside supervision duty in 1984-85. Alexas Horowitz, a non-tenured teacher, was relieved of outside duty for the entire year by Assistant Principal Szymanski (T169, T170, T173). Horowitz had explained to Szymanski that she had an allergy problem, and she was given an indoor duty as substitute for the outside work (T170). There was no showing that Schreiber played any role in granting Horowitz's change of duty.

James Hoffman, another non-tenured teacher, testified that after performing outside duty for a short while he obtained a

doctor's note to be relieved of that duty due to allergies (T181). He gave Schreiber the note but did not hear from him until an official of the teacher's union spoke to Schreiber (T181-T182). Then Schreiber told Hoffman that he could switch duties with someone else if he (Hoffman) could find someone (T182). Schreiber, however, was not going to find someone for Hoffman to switch with (T182). Schreiber did not believe that switching duties was a good practice (T182-T183).

John Petronglo, a tenured teacher, had had an outside duty everyday for 40 minutes in 1983-84, and started with a 20-minute duty everyday in 1984-85 (T176-T177). Petronglo obtained a doctor's note regarding allergies and gave it to Schreiber. Several days later Schreiber allowed Petronglo to switch his duty to someone else on a rotating basis (T178), but Schreiber indicated that he was not obligated to rotate that duty (T118).

9. Certain events occurred after Spare was non-renewed in March 1985. In April 1985 Spare sent Schreiber a note (CP-14) indicating that because of the heat in the mezzanine, two teachers were letting her use their rooms when not in use to teach her students. The note indicated that if she did not hear from Schreiber to the contrary she would assume he had approved. Schreiber responded to CP-14 on April 23, 1985 (CP-15) and disallowed the change. He indicated that she should not assume his approval.

In May 1985 Spare filed a grievance over the conditions in the library mezzanine (T109). The grievance was apparently denied at a first-step meeting (T10).

On May 15, 1985 Spare prepared a work request form to repair library windows (R-1), and Schreiber approved the work order (T227).

Spare completed the work year having used 27 sick days and 3 personal days for a total of 30 absences for the year, more than any other employee but Anderson and Brooks, but Brooks went on workman's compensation in December 1984 (R-3, J-3).

10. Article X of the 1983-85 collective agreement between the Board and the labor organization representing teachers is a clause for the "Protection of Employees and Students" and provides as follows:

> A. Employees shall not be required to work under unsafe or hazardous conditions or to perform tasks which endanger their health, safety or well being following verification of such conditions.
>
> B. Procedure
>
> 1. If, in the opinion of the employee or the Association, hazardous or unsafe conditions exist within the building or on the school grounds, the superintendent shall be informed in writing of its existence.
>
> The report will contain the following information:
>
> a. Nature of hazard,
> b. Location of hazard
> c. Date that hazardous conditions began.
>
> 2. A conference between the reporting employee and the superintendent may be called by either party for more information concerning the existing problem.

3. The administration will consider all information and decide on the course of action. A copy of the decisions will be forwarded to the reporting employee for his/her files.

ANALYSIS

Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), articulates the governing legal standards for considering allegations of discriminatory personnel actions in violation of subsections 5.4(a)(1) and (3) of the Act. The charging party must first establish that his or her protected activity was a substantial or motivating factor in the disputed personnel decision.

No violation will be found unless the charging party has proved his or her case, by a preponderance of the evidence on the entire record. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected activity. Id. at 246. If the charging party establishes his or her case, the burden shifts to the employer to prove, as an affirmative defense and by a preponderance of the evidence, that the action occurred for legitimate business reasons and not in retaliation for the protected activity. If the employer does not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis.

Sometimes, however, the record demonstrates that a particular personnel action is based upon both a lawful motive and a motive unlawful under our Act. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that the protected activity was a motivating or substantial reason for the personnel action.

In applying Bridgewater here I first consider whether the Charging Party was engaged in protected activity, and then whether that activity was a substantial or motivating factor in the Board's decision not to renew. I find that Spare was engaged in protected activity when she complained about the temperature in the mezzanine, and that any inquiry made on her behalf to the State Department of Education regarding the mezzanine was similarly protected to the extent that it was assumed that she made the inquiry and/or was held responsible for the inquiry.

The Public Employees Occupational Safety and Health Act, 34:6A-25 et seq. (PEOSHA) became effective in New Jersey on January 17, 1984. That law at 34:6A-26 provides that:

> The Legislature finds that the safety and health of public employees in the workplace is a primary concern.

PEOSHA encourages employers and employees to cooperate to enforce standards for a healthy and safe workplace.

At N.J.S.A. 34:6A-38 PEOSHA gives public employees the right to request the inspection of premises by the office of the Commissioner of Health when they believe there is an existing violation of health standards.

In addition to the PEOSHA law, our Commission has held that issues dealing directly with employee safety and health are mandatorily negotiable. Union County, P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983); Twp. of Franklin, P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985); Maurice River Twp. Bd.Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987).

It is a consistent reading of both our Act and PEOSHA to find that public employees are protected in making inquiries regarding the safety of their workplace. In fact, the State Supreme Court and the Commission have recognized that public employees have a legitimate interest in presenting their views on matters that affect them as employees even if some of those matters may not be negotiable. Bd.Ed. Twp. Bernards v. Bernards Twp. Ed.Assn., 79 N.J. 311 (1979); Salem County Bd. for Vocational Ed., P.E.R.C. No. 79-99, 5 NJPER 239 (¶10135 1979), aff'd in part, rev'd in part, App. Div. Dkt. No. A-3417-78 (9/29/80); Commercial Twp. Bd.Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982).

Thus, whether or not a particular health or safety issue is ultimately negotiable, employees are protected in raising and discussing these issues with their employers. Although a labor organization and a public employer have the right to negotiate over

health/safety issues, if the results of those negotiations are more restrictive than the rights or procedures provided by OSHA, the negotiated results might be unenforceable. Since OSHA gives employees the right to raise health/safety issues with state officials outside a district, Spare's failure to follow the exact procedures in Article 10 could not be the basis upon which she could be non-renewed. See also Commercial Twp. supra; North Brunswick Twp. Bd.Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), aff'd App. Div. Dkt. No. A-698-78 (4/11/79).

Having determined that Spare was engaged in protected activity, and in view of the Board's knowledge of her exercise of protected activity, I now consider whether that activity was a substantial or motivating factor in the Board's decision not to renew. Although I believe that Spare's protected activity was one motivating factor behind Verdile's overall recommendation, it was not the only factor supporting his recommendation, and it was not a factor at all in the Board's decision not to renew her employment.

The Charging Party's Position

The Charging Party argued that both the Superintendent's and the Board's reliance on attendance as the basis for Spare's non-renewal was pretextual. She maintained that employees Anderson, Brooks and Norton all had more absences than Spare by January 21, 1985, yet the Superintendent had not recommended them for non-renewal. She also argued that had it not been for Verdile's illegal motive, he would not have otherwise recommended her for

non-renewal, and that she would not have been placed on the non-renewal list, but would have been placed on the renewal list, thus the Board would not have had the opportunity to consider her for non-renewal.

Spare further argued that Schreiber illegally refused to relieve her of outside duty, and that the outside duty aggravated her illness and resulted in additional absences which allegedly would not have occurred had Schreiber changed her duty assignment.

The Merits

Verdile did not express any reasons in J-2 or CP-11 for recommending Spare's non-renewal. But in CP-12, Verdile gave two reasons for his actions. He indicated that Spare had not followed proper procedure in reporting problems, and he listed attendance. Although I agree with the Charging Party that Verdile's first reason (not following complaint procedures) was illegally motivated, his second reason was based upon legitimate considerations.

Complaining Outside The District

Prior to the time the state official spoke to Verdile, Spare had gotten some cooperation from Schreiber and Nordt regarding the mezzanine. There was no evidence at that point to suggest that Verdile was angry regarding Spare's complaints. However, after the state official contacted the Board, Verdile issued CP-4 which tersely listed the short series of events. From the language in CP-4 I infer that Verdile was angry that a complaint regarding his school was levied outside the District.

Verdile evidently communicated to Schreiber his displeasure with what he (Verdile) perceived to be Spare's actions in complaining outside the District, because Schreiber sent Spare CP-10 on January 25 listing two concerns that needed correction: attendance and reporting working condition complaints outside the District. By listing Spare's failure to report problems within the District in CP-12 as a reason for not recommending her renewal, Verdile established that his motive, at least for part of his recommendation, was illegally based, since Spare (or someone on her behalf) had both a statutory (PEOSHA) and decisional right to voice working condition complaints outside the District. On that issue the Charging Party met its burden under Bridgewater.

Attendance

Meeting the Bridgewater test regarding complaints made outside the District, however, does not automatically mean that the attendance reason listed in CP-12 was pretextual. Rather, I find that Verdile had a dual motive for recommending Spare's non-renewal, and the attendance reason was legally based.

The Attendance Monitoring System for Staff (J-4) had been in place before Spare complained about the mezzanine. That system required the issuance of a letter to teachers with five or more occasional absences. In accordance with J-4 Spare received a letter on December 20, 1984 informing her that she had more than five absences. By January 21, 1985 Spare had more absences than all but three of the approximately 50 non-tenured teachers. Since poor

attendance is an appropriate reason for deciding not to renew a non-tenured teacher, it was not unreasonable for Verdile to recommend Spare's non-renewal on that basis.

The Charging Party argued that the Board's failure to recommend non-renewal on January 21 for Anderson, Brooks, Norton and Metzgar, three of whom had more absences than Spare by that date, was proof that attendance was pretextual. I cannot agree. Spare admitted that Anderson was to be non-renewed due to his attendance, and he was, in fact, terminated; Brooks had been on workman's compensation since before January so there was no need to recommend non-renewal; Norton had had pneumonia and his absences occurred in clusters, not individually like Spare's early absences; and Metzgar actually only had 4 1/2 sick day absences by January 21.

But more important than the recommendations Verdile did not make on January 21 were the recommendations he did make in J-2. He recommended, for example, that Glasgow and Brown not be renewed, and Spare testified that attendance was one reason for those recommendations. Both Glasgow and Brown had fewer absences than Spare.

The Charging Party further argued that had it not been for the illegal motive, Verdile would never have placed Spare on the non-renewal list. That is mere speculation. By January 21, and even more so by February 27, Spare had one of the highest absentee records of all non-tenured employees. Under those circumstances it was not unreasonable for Verdile to want to terminate Spare's

employment based upon attendance. The Charging Party thus did not satisfy the Bridgewater test regarding attendance because it did not prove by a preponderance of the evidence that Verdile's recommendation, insofar as it was based on attendance records, was improperly motivated.

Once the Board was considering Spare for non-renewal in March, it had the right to review Spare's complete and up-to-date records. The Board first convincingly rejected Verdile's recommendation that Spare be non-renewed because she made complaints outside the District. Thus, to the extent that Verdile was improperly motivated, the Board refused to adopt that action as its own.

Having rejected Verdile's first reason for recommending Spare's non-renewal, the Board considered the attendance issue. It found that on March 26 Spare, but for Anderson, had the highest absentee rate of any non-tenured teacher (22 absences), well above the contractual ten sick days per year. That was reason enough to approve Verdile's non-renewal recommendation. Thus, while the Charging Party proved that one of Verdile's reasons for recommending Spare for non-renewal was illegally motivated, the record supports a finding that the second reason was legally based, and the Board otherwise satisfied the Bridgewater test by proving that Spare would have been non-renewed for attendance in any event.

The Outside Duty

Schreiber did not act illegally by denying Spare's request to be relieved of outside duty. Although Schreiber had approved

some changes from outside duty early in the year, he was reluctant to make those changes, and only did so if the teacher found someone with whom to switch duty. The Charging Party did not show, however, that Schreiber had ever approved mid-year changes on a temporary basis as Spare requested.

The Charging Party argued that by not relieving her of outside duty it contributed to her absences. That argument is without merit. There is no proof that Spare's outside duty caused or even contributed to her numerous absences in late February and early March 1985. Spare submitted a doctor's note regarding outside duty (CP-6), but she did not present her doctor to prove a direct causal connection between her illness and the outside duty. Although Spare contracted an upper respiratory infection in December, she used no sick days between December 10, 1984 and January 16, the day she asked for a duty change, and she used no sick days between January 16 and February 25, 1985. If the outside duty were really affecting Spare's health I would have expected her to be absent between January 16 and February 25, 1985. She was not, however, and I find that the late February and early March absences were too far removed from Schreiber's January 16 refusal to change Spare's duty to attribute those absences to Schreiber's conduct.

Based upon the above analysis I make the following:

Recommendation

That the Commission ORDER that the Complaint be dismissed.6/

Arnold H. Zudick
Hearing Examiner

Dated: May 28, 1987
Trenton, New Jersey

6/ The Motion for sanctions is denied. Although the Board was occasionally slow to respond to the interrogatories, it cooperated in making all necessary information available to the Charging Party. The Charging Party complicated the discovery process by submitting four different sets of interrogatories at different times, many questions of which overlapped one another, and the Board appeared confused over what it had provided and what needed to be provided. I believe the Board, though slow, made reasonable efforts to respond, and its behavior does not warrant sanctions.