

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE BOROUGH  
OF MONTVALE,

Respondent,

Docket No. CO-78-1-21

-and-

MONTVALE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Montvale Education Association filed an unfair practice charge against the Board of Education of the Borough of Montvale alleging that the Board had committed an unfair practice by failing to renew the employment contract of a teacher for the 1977-78 school year. It was the position of the Association that this action was taken in retaliation for the employee's refusal to sign a statement against the grievance chairman and chief negotiator for the Association.

The Hearing Examiner concluded that there were valid educational reasons for the Board's decision not to rehire the teacher in question and that the Board's decision was in no way motivated by a desire to discourage employees in the exercise of protected rights. Neither party filed exceptions to the Hearing Examiner's Recommended Report and Decision. The Commission, after reviewing the entire record, adopted the Hearing Examiner's findings of fact and conclusions of law and ordered that the complaint be dismissed in its entirety.

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Charging Party.

Appearances

For the Respondent, Parisi, Evers & Greenfield, Esqs.  
(Mr. Irving C. Evers, Of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.  
(Mr. Sanford R. Oxfeld, Of Counsel)

DECISION AND ORDER

On July 5, 1977, the Montvale Education Association (the "Association") filed an Unfair Practice Charge with the Public Employment Relations Commission alleging that the Board of Education of the Borough of Montvale (the "Board") had committed 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"). Specifically, it was alleged that the Board had violated N.J.S.A. 34:13A-5.4(a)(1), (2), (3), and (4) by failing to renew Mrs. Emily Everling's employment contract for the 1977-1978 school year. The Association maintains that this action was taken in retaliation for Everling's refusal to sign a statement against James Fitzpatrick, grievance chairman and chief negotiator for the Association.

It appearing that the allegations contained in the charge, if true, might constitute unfair practices within the meaning of

the Act, a Complaint and Notice of Hearing was issued on September 13, 1977.

Pursuant thereto, a hearing was held before Robert T. Snyder, Hearing Examiner of the Commission, on November 15, November 16 and December 8, 1977 and January 24, February 28 and March 28, 1978, at which both parties had the opportunity to examine and cross-examine witnesses, present evidence and argue orally. Post hearing briefs were filed by the Respondent on June 21, 1978 and by the Charging Party on June 22, 1978. A letter in reply to the Charging Party's brief was also filed by the Board on July 10, 1978.

On September 28, 1978, the Hearing Examiner issued his Recommended Report and Decision, which report included findings of fact and conclusions of law and a recommended order. The original of the report was filed with the Commission and copies were served upon all parties. A copy is attached hereto and made a part hereof. H.E. No. 79-16, 4 NJPER \_\_\_\_ (Para. \_\_\_\_ 1978).

None of the parties has filed exceptions to the Hearing Examiner's Recommended Report and Decision. See N.J.A.C. 19:14-7.3.

Upon careful consideration of the entire record herein, the Commission adopts the findings of fact and conclusions of law rendered by the Hearing Examiner substantially for the reasons cited by him. Specifically, the Commission concurs in the Hearing Examiner's finding that Everling was not rehired for valid educational reasons and that the Board's decision was in no manner motivated by a desire to discourage the exercise of protected rights. As is

clearly substantiated by the evidence contained in the record, the Board decided not to renew Everling's contract based upon a steady deterioration in her ability to control her pupils' behavior, a sharp decline in student interest and enrollment in Everling's chorus and a gradual worsening of her relationship with her principal and the music department coordinator. The request made by the Principal and the Superintendent that Everling put in writing her complaints concerning Fitzpatrick, whom she had, on several occasions, charged was verbally harassing her, was entirely legitimate. This request which forms the basis of the Association's charge was made out of a sincere desire to lend assistance to Everling and to reestablish a harmonious working relationship between her and Fitzpatrick. There was simply no credible or conclusive evidence presented at hearing which would indicate that either the Principal or the Superintendent were attempting to utilize Everling's problems with Fitzpatrick as a means by which to discipline or discharge the latter due to his union activity. Moreover, the Commission agrees with the Hearing Examiner that under the circumstances in this case Everling's refusal to submit a written statement did not constitute protected activity.<sup>1/</sup> Finally, assuming arguendo that Everling's actions were protected under the Act, there is no evidence in the record to support the conclusion that Respondent's decision not to renew Everling's contract was influenced in any

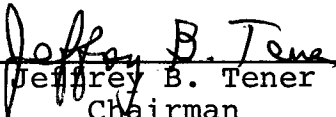
<sup>1/</sup> Under some circumstances, the refusal to assist the employer in trying to build a case against a union activist might be protected activity.

manner by the latter's failure to reduce to writing her complaints regarding Fitzpatrick.

ORDER

For the reasons set forth above, the Commission hereby adopts the Hearing Examiner's recommended order. Accordingly, it is HEREBY ORDERED that the Complaint be dismissed in its entirety.

BY ORDER OF THE COMMISSION

  
\_\_\_\_\_  
Jeffrey B. Tener  
Chairman

Chairman Tener, Commissioners Hartnett and Parcels voted for this decision. Commissioner Graves voted against this decision. Commissioners Hipp and Schwartz abstained.

DATED: Trenton, New Jersey  
November 14, 1978  
ISSUED: November 15, 1978

STATE OF NEW JERSEY  
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RELATIONS COMMISSION

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- and -

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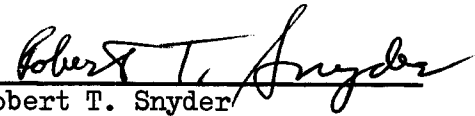
Charging Party.

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

E R R A T A

<u>Page</u>	<u>Line</u>	<u>Correction</u>
1	16 - 19	Reverse Appearances so that Irving C. Evers, Esq. appears for Respondent and Rothbard, Harris & Oxfeld, Esqs. (Sanford R. Oxfeld, Esq. Of Counsel, appears for the Charging Party.
4	26	Change "metal" to "mettle"
7	1	Change "February, 1976." to "February, 1977."
9	12,14	Change "advise" to "advice"
10	14	Change placement of phrase ", who was not contradicted," so that it appears after "Everling" and before "that Kalna"
11	16	Change "contract" to "contrast"
12	26	Change "midly" to "mildly"

DATED: Newark, New Jersey  
October 10, 1978

  
Robert T. Snyder  
Hearing Examiner

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

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Respondent,

- and -

Docket No. CO-78-1-21

MONTVALE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practice filed by the Association, which alleged that the Board discriminatorily denied a non-tenured Middle School music teacher and chorus director renewal of her employment contract for a second year. The Association is the exclusive collective negotiations representative for all teachers and other professional employees employed by the Board.

The Association charged that the teacher's non-renewal was motivated by her refusal to accede to pressure applied by her principal and music department coordinator to provide the Board with a statement supporting oral complaints she had made about the conduct of the Association's grievance chairman. The Board's reliance on the teacher's ultimate refusal to pursue her complaints is alleged to have interfered with her rights guaranteed under the Act and to have discouraged employees in the exercise of such rights. The Examiner concluded that the non-renewal was made for valid educational policy reasons related solely to consideration of her overall work performance as a teacher in the district, but that even if the Board had been motivated, in part, by her decision to remain neutral in the Administration's efforts to pursue complaints against the Association's grievance chairman, its conduct was in furtherance of its obligation to maintain professionalism in its teaching staff and was not based on the teacher's exercise of any protected activity.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

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

In the Matter of

BOARD OF EDUCATION OF THE  
BOROUGH OF MONTVALE, 1/

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Docket No. CO-78-1-21

MONTVALE EDUCATION ASSOCIATION

Charging Party.

Appearances:

For the Respondent, Irving C. Evers, Esquire

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.  
(Sanford R. Oxfeld, Of Counsel)

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

Statement of the Case

An unfair practice charge filed with the Public Employment Relations Commission ("Commission") on July 5, 1977 by the Montvale Education Association ("Charging Party" or "Association") alleges that the Board of Education of the Borough of Montvale ("Board" or "Respondent") has 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"). The Association charges that the Board has violated 13A-5.4(a)(1),(2),(3) and (4) of the Act 2/ by failing to renew

1/ The name of the employer was corrected by motion at the outset of hearing.

2/ These Subsections prohibit 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.  
 (2) Dominating or interfering with the formation, existence or administration of any employee organization.  
 (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.  
 (Continued next page)



Mrs. Emily Everling's employment contract for the 1977-78 school year "predicated solely upon its desire to force Mrs. Everling to give a statement against her will, against the P.R.R. Chairman and Chief Negotiator of the Education Association."

It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 13, 1977. By Answer, filed on September 16, 1977, the Board denied the allegations of unfair practice, specifically denying that the termination not to offer Mrs. Everling a contract for the 1977-78 school year was predicated upon any desire to force her to give a statement against her will but, rather, was based upon a consideration of her overall performance as a teacher in the Montvale School System.

Hearing was held before the undersigned on November 15, November 16, and December 8, 1977 and January 24, February 28 and March 28, 1978. All parties were given full opportunity to present relevant evidence, to examine and cross-examine witnesses and to file briefs. Post-hearing briefs were filed by the Respondent on June 21, 1978 and by the Charging Party on June 22, 1978. A letter in reply to Charging Party's brief was also filed by the Board on July 10, 1978.

Upon the entire record in the case and from my observations of the witnesses and their demeanor I make the following:

#### FINDINGS OF FACT

##### The Alleged Unfair Practices

##### A. Introduction and issues

The principal issue framed by the pleadings is:

1. Whether the Respondent refused to renew Mrs. Everling's employment for the 1977-78 school year because she resisted pressure to provide the Respondent with a written statement against the Association's grievance chairman and chief negotiator. In order for the Charging Party to prevail on this issue it must establish not only that the Respondent's action was predicated upon Everling's refusal to provide the statement but also that the refusal constituted the exercise of rights guaranteed by the Act. Only the exercise by her of the

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2/ (continued)

(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act."

rights guaranteed to employees by N.J.S.A. 34:13A-5.3<sup>3/</sup>, affords protection to her against the unfair practices of interference and discrimination in regard to her tenure of employment as those practices are defined in N.J.S.A. 34:13A-5.4<sup>4/</sup>. Accordingly, the principal sub-issue framed by the pleading is:

2. Whether Mrs. Everling's refusal to provide the statement constitutes an exercise of rights protected by the Act.

Another issue framed by the pleadings and the evidence presented at the hearing is:

3. Whether, apart from Mrs. Everling's resistance to providing the Respondent with the statement, did the Respondent refuse to renew her employment because she engaged in other conduct protected by the Act.

B. The History of Emily Everling's Employment Relationship

Emily Everling was hired by the Board as a vocal music teacher, for grades 5 through 8 in the Fieldstone Middle School, commencing with September, 1976. The school system operated by the Board comprises the Fieldstone School as well as elementary classes. In her pre-employment application, Mrs. Everling had listed more than 8 years prior experience in public school teaching in addition to two years as a teacher in private school. Prior to her hire she had been interviewed by Middle School Band-Music Director Anthony Maio. Although a non-supervisory employee within the bargaining unit, Maio had interviewed many applicants for the job, had initially recommended one individual who took another job after his interview, and then had recommended Everling along with two others to Superintendent of Schools Richard C. Rice.

In her capacity as Middle School vocal teacher, Mrs. Everling led the school chorus and was expected to work closely with the Middle School's long-standing Band-Music Director, Anthony Maio.

According to Everling, at an orientation meeting for new teachers, Middle School Principal Dr. David Kalna, himself newly employed in the District

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<sup>3/</sup> That section of the Act provides, in pertinent part: "...public employees shall have, and shall be protected in the exercise of, the right, fully and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity..."

<sup>4/</sup> See f.n. 2.

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a month earlier, sought to dissuade them from joining the Association <sup>5/</sup> by noting that often people who joined often changed and failed to continue to be professionals and they should feel absolutely no obligation to join. Kalna, who testified for the Respondent, denied making these remarks. He said he told the new teachers of the important role played by the Association and indicated he totally supported their membership in it provided they do not give up their individual rights to express themselves the way they feel is correct and proper. I do not credit Everling's version of Kalna's remarks. Kalna, having just commenced his duties as Principal would have had no experience with the Association and it is therefore unlikely he would have prematurely expressed such an opinion regarding membership in the Association. Viewing the alleged statement as an expression of view regarding membership in teacher associations generally, based upon Kalna's demeanor during his full testimony and the absence of any other expressions of hostility toward the Association even claimed by Everling <sup>6/</sup>, and upon observation of Everling's demeanor, which will be discussed at later points in this Report, I credit Kalna's version of the remarks. It is also likely that Everling misinterpreted Kalna's statement since Kalna himself noted he referred with approval to teacher members retaining their individual points of view. Everling joined the Association shortly afterward in September, 1976.

According to Everling, she had had a conversation early in the school year with James M. Fitzpatrick, a long time teacher of 7th and 8th grade social studies in Fieldstone and the Association's then grievance chairman and past chief negotiator, regarding field trips. This conversation was corroborated by Fitzpatrick who testified he had told Everling, who favored them, that field trips were a waste of taxpayers money. Fitzpatrick said he was testing Everling's "mettle" in making the comment and that Everling's reaction was one of surprise.

In mid-October, Everling met Kalna, requested two field trips for the chorus and asked for ideas for such trips. As related by Everling, she brought up Fitzpatrick's derogatory comments about such trips, to which Kalna responded

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<sup>5/</sup> I find that the Association is a representative of public employees within the meaning of the Act. It has been the exclusive representative for collective negotiations concerning the terms and conditions of teachers and other professional employees employed by the Montvale School District for some years. I also find that the Respondent is a public employer within the meaning of the Act.

<sup>6/</sup> Everling's testimony relating Kalna's view of the Association's grievance chairman will be discussed, infra.

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that Fitzpatrick was the Association, that the Association in the District was really quite weak, and it was a one man operation. Although Kalna denied making any comments about Fitzpatrick, I conclude that Fitzpatrick's position with the Association was in all likelihood mentioned by Kalna. It would have been natural for him to have done so. However, based again on Kalna's limited involvement with the Association after little more than a month of school and given the facts regarding Everling's later receipt of assistance in meetings with the School District Administration from Association President Frank Riena and Fieldstone Building Representative Dena Rae Lange, which are inconsistent with the opinion attributed to Kalna that the Association was a one man operation, I do not credit Everling's characterizations of Kalna's remarks regarding the Association and Fitzpatrick's role.

On October 29, 1976, Kalna made his first personal evaluation of Everling based on an observation of a 5th period class. His report contained uniformly "very good" notations with respect to various criteria relating to Everling's personal qualities, preparations for teachings, teaching skills and discipline-management in conducting a 5th period class, and included in the last category an "excellent" notation for pupil behavior. <sup>1/</sup> The report also contained a number of suggestions for improvement in classroom presentation.

In accordance with normal practice, in the fall 1976 semester, the chorus participants were organized into two choruses, comprising 5th and 6th, and 7th and 8th grade students. The 7th and 8th grade chorus was considered a mini-course, meeting twice a week, for which students were required to commit themselves for a full marking period, one third of the school year or at least through the winter concert, the performance highlight of the fall semester held each year in December.

Mrs. Everling experienced difficulty during the fall semester in dealing with the behavior of certain female members of the 7th and 8th grade chorus and in retaining student participation in that chorus through the winter concert. In a November 1, 1976 handwritten note to Dr. Kalna, Mrs. Everling acknowledged she would not be surprised if several of the parents of certain chorus members

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<sup>1/</sup> The evaluation report permitted notations to be made in any of four columns, including, in addition to the two described, "satisfactory" and "unsatisfactory". Dr. Kalna testified creditably that based upon Mrs. Everling's years of teaching experience he would have expected her to have achieved many more "excellent" evaluations than she did achieve, and that he considered this and a subsequent evaluation to be only "average."

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called him, and, she also noted her belief that her best approach was to stay friendly with them and put up with their temporary insults. In the note, Mrs. Everling thanked Dr. Kalna for his help and asked if he had any ideas or suggestions (presumably relating to the behavior problems) to let her know. A later November 23, 1976 note from Everling to Kalna acknowledged Kalna's recent assistance in addressing the group which helped improve behavior. Particularly with regard to 7th and 8th grade students, Mrs. Everling appeared to have a problem in obtaining chorusters' response to her directions. Prior to the winter concert, Music Director Maio had been approached by a group of some 24 female students, whom he knew, asking to be let out of chorus for a variety of reasons, including dislike of the program and selections, Mrs. Everling's manner of presentation and not getting along with Mrs. Everling. Maio convinced them to remain through the winter concert and also encouraged his own band students who were members of the chorus to also remain. The winter concert performance of the choruses was a success, and Everling received a warm note from Superintendent of Schools Richard C. Rice congratulating her on the event. Yet, following the concert, 7th and 8th grade student participation dropped to such a significant degree, from 56 members prior to the concert to 19 afterward, 12 of whom were band members, that at Maio's suggestion, in an unprecedented action Everling combined the two choruses into one for the spring semester and concert. The drop-off in participation, in excess of 39%, far exceeded a limited reduction in members in the 1973-74 school year. In the other three school years since 1972-73 the choruses experienced limited increases in membership.

According to Everling, sometime in the late fall of 1976 Fitzpatrick again conversed with Everling, this time passing comments personally critical of her appearance. According to Everling, she believed Fitzpatrick had called her a pigmy, to which comment she took offense. She reported this incident to both Maio and Kalna. Fitzpatrick explained that sometime in the fall, he saw Everling wearing a shawl in the teacher's room and asked her if she was afraid teachers would get a wrong image of her. Among other comments, Fitzpatrick asked Everling if she was afraid the students would think of her as an old lady. Fitzpatrick added that when he saw Everling react negatively to his comment he tried to lighten his repartee by commenting that maybe the students would think she was Clint Eastwood. I accept Fitzpatrick's detailing of the incident, particularly given Mrs. Everling's testimony that she may have misunderstood his comments at the time, but in accordance with Everling's and Kalna's testimony I place the shawl incident in early

February, 1977. Kalna states that on February 7, 1977, Everling came to him crying and upset and told him Fitzpatrick had called her an old hag. He does not

relate any earlier report from Everling that Fitzpatrick had called her a pigmy, or referred offensively to her shawl. However, Kalna did testify that on December 3, 1976, he saw Everling standing outside the main office with a glazed look in her eyes. She came into his office crying <sup>8</sup> , and told him Fitzpatrick had asked her why she was doing extra work as it related to a community sing for the chorus when it wasn't required. Malo testified that Everling reported Fitzpatrick had called her an old hag in late October, 1976 and then reported a second similar incident involving Fitzpatrick on February 7, 1977.

In view of the fact that it was not until February 7, 1977 that matters came to the point that Everling was asked to put her complaints in writing, I conclude that there were at least two, possibly three, incidents involving personal criticism by Fitzpatrick of Everling's appearance and that the last, relating to Everling's shawl in early February, 1977, led Malo and Kalna to recommend as discussed infra in more detail, that Everling, who had appeared extremely upset by Fitzpatrick's conduct, sign a statement regarding them.

Another incident contributed to this recommendation to Everling. On December 22, 1976, according to Kalna and not disputed by Everling, shortly after noon, a Mrs. Birnbamm, a library media teacher, in the company of Mrs. Everling, went to Kalna's office to complain about Fitzpatrick having reprimanded her for having failed to attend a Board meeting on December 20 as Association representative and then having written a note of apology to Superintendent Rice. Everling, who had been asked by Birnbamm, a good friend, to accompany her, without knowing then the substance of Birnbamm's complaint, went along. Kalna testified that after Birnbamm relayed the incident, Everling informed Kalna that she had had similar confrontations with Fitzpatrick. Everling, on cross-examination could not recall voicing similar complaints at the meeting. I credit Kalna's recollection of the meeting, particularly in the absence of any contrary testimony, Mrs. Birnbamm not having been called as a witness.

Within a day or so following this meeting, Kalna approached Fitzpatrick and asked him if he would not please stop whatever it was that he was doing to

8 Kalna's secretary, a Mrs. Hayde testified she recalls seeing Everling in an agitated state on December 3, 1976 and when she came out of his office her eyes were red and teary as if she had been crying.

Everling. Fitzpatrick responded that new teachers are sometimes very sensitive and don't understand his approach. He indicated he does have difficulty "switching gears" and sometimes comes on a little strong. <sup>2/</sup>

On January 3, 1977, the first school day following Christmas recess, Everling told Kalna that Fitzpatrick was treating her better. However, by February the incidents were continuing. On February 3, 1977, Everling telephoned Kalna's office on the intercom to ask for an afternoon substitute. She then came to Kalna's office at noon and said she had another incident with Fitzpatrick on February 7, 1977. Everling informed Kalna that Fitzpatrick had called her an old hag. Kalna testified she was crying and upset. On rebuttal, Everling did not recall being upset when she visited Kalna's office in December, or having cried at any time in Kalna's office. She added that she wore contact lenses and sometimes her eyes became red and appeared to be tearing from their use. Mrs. Everling struck me as sensitive and very concerned with Fitzpatrick's personal reaction to her. Further, she paused and hesitated a great deal in testifying in both direct and cross-examination. While the Charging Party counsel argues that her demeanor during her testimony, particularly in the face of vigorous cross-examination, evidences a high degree of self-control, I am persuaded that Everling did become quite upset by Fitzpatrick's continued baiting of her, to the point of crying when she reported the incidents to Kalna.

At the meeting on February 7, 1977, Kalna reminded Everling that this was the third time that she had come to him for assistance on her problems with Fitzpatrick, and he asked her to put her concerns in writing because he had already approached Fitzpatrick informally and there wasn't too much more he could do if Fitzpatrick wasn't responsive to his, Kalna's, expression of concern. Mrs. Everling did not testify to any meeting with Kalna on February 7, but did not deny such a meeting either. I credit Kalna's testimony as to the date and substance of the conversation.

Everling testified that at the end of the school day on February 7, Maio told her that he had spoken to Kalna and that they both felt she should take the initiative in getting something in writing concerning Fitzpatrick and that she should persuade Nemeroff (apparently a third teacher having problems with Fitzpatrick) and Birnbaum to do the same. Everling added that Maio told her that

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<sup>2/</sup> Fitzpatrick had also been approached by Association President Riena after the "shawl" incident. Riena told Fitzpatrick that Everling didn't think whatever it was he said to her was funny and he told Fitzpatrick to stop it.

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Fitzpatrick had been a problem in the Music Department for several years and he felt now was the time to get something in writing and she would be sorry if she did not because he, Fitzpatrick, would come back periodically and do the same thing. Everling also testified that Maio advised her that he had assurances she would be provided security if she did proceed. After reviewing notes she had made five days after the conversation in order to refresh her recollection, Everling clarified this last statement to the affect that Maio emphasized that she had his support and he wanted her to know that the administration also gave her its support in writing a statement.

According to Maio, Everling asked him on February 7 to see Kalna on her behalf as the situation with Fitzpatrick was unbearable. He saw Kalna that day and reported Kalna's advice to Everling the next morning that if she had any complaints to put them in writing. He denied passing along assurances that nothing would happen to her if she complied with this advice. I credit Maio's recollection of the conversation in this regard, particularly in light of Everling's clarification and find no assurances were given her which could be interpreted as providing her security of employment, although I credit Everling that Maio did indicate she would have the administration's support in pursuing the matter.

On February 8, at the end of the day, according to Everling she saw Kalna to arrange a substitute teacher for the following day.<sup>10/</sup> Kalna brought up the Fitzpatrick matter. Everling testified he urged her to write and sign a statement concerning Fitzpatrick and assured her she would be given protection. She testified he also took out what appeared to be Fitzpatrick's personnel file, reading something from it so she would know the kind of person she was dealing with, and said he would be willing to put his own job on the line in order to get something in writing against Fitzpatrick. Everling testified she told Kalna she was having some personal family problems and "I don't think this is the time for me to take any such action." (Tr. 38). According to Everling, Maio saw her again as she was preparing to leave school and expressed the hope she would take care of the matter immediately before she left school that day.

<sup>10/</sup> Respondent introduced into evidence a memorandum dated February 8, 1977 from Everling to Kalna advising that she wished to take off the following day for rest and recuperation, noting her belief it was best for her and the students. Everling testified that she was experiencing some unstated personal or family problems which was causing her to miss some teaching time and which was pre-occupying her. In the memo Everling also stated "Believe I will be ready

to take position by weekend." Everling's testimony regarding her February 8



In Kalna's interpretation, Everling came to his office after having had another confrontation with Fitzpatrick that day before classes began in the teachers lounge and asked for the next day off. She reported that when she asked Fitzpatrick if he wouldn't stop what he was doing to her, he replied "Well - if I don't hurt you, who am I going to hurt." Again, Everling was quite upset and crying and this being the fourth time she had come to Kalna for aid he again urged her to put her concerns in writing. Kalna testified he also told her that as building principal he would definitely put his job on the line to see that she was adequately protected in terms of legal protection so she could voice her concerns without restraint or any negative feelings. As a new employee he didn't feel she should have to endure such problems. Kalna denied he expressed any offer of job security. He also testified that Everling indicated she would "probably be ready to take a stand by the weekend." I credit Kalna's version of the conversation but also credit Everling, who was not contradicted, that Kalna did read from a personal file on Fitzpatrick he maintained, but not the school personnel file, to influence Everling to take action. I further conclude that Kalna's interpretation on his "job on the line" comment more nearly accords with the facts. I also note that whether or not Kalna expressed a personal wish to get Fitzpatrick, which he denied, such an expression is not inconsistent with his expression of concern, which I credit, that Everling would not be harassed or suffer further indignity from Fitzpatrick or from any other source. Neither would it, in my view, support the Charging Party's implicit claim that the Respondent was discriminately motivated to discipline or discharge Fitzpatrick, a predicate for the claim that Everling's ultimate refusal to cooperate in the matter constitutes the protected conduct of support for a key Association official and that the Respondent terminated her employment for that reason. The record contains some minimal references to clashes between Fitzpatrick and the School District Administration apparently resulting in proceedings over the years seeking to withhold his increments or dismiss him but does not indicate what, if any, Association activities engaged in by Fitzpatrick may have motivated such actions. <sup>11/</sup> In any event, the evidence is persuasive that the Respon-

11/ There was some reference during Fitzpatrick's cross-examination to an Association grievance filed against Kalna for his actions taken as Principal, and, further, that a number of grievances went the full route to arbitration, in one of which Fitzpatrick sought as relief that the Board take action against itself as it would against a teacher for violation of a policy. However, the timing, precise nature and extent of the grievances was not pursued by Respondent during presentation of its case and I find the evidence of Fitzpatrick's activities in this regard too unsubstantial on the record to provide a basis for a finding of a discriminatory motive against him, particularly in light of the strong record evidence of his abrasive conduct with other teachers.

dent, and, in particular its agent Kalna, were motivated in urging Everling to pursue her complaints by Fitzpatrick's sarcastic personal behavior and unprofessional conduct with other teachers, leading to an inefficient, tense and unproductive educational environment, rather than by any Association activities engaged in by Fitzpatrick.

On March 3, 1977, Everling again wrote a note to Kalna recounting her problems in maintaining discipline with three students who refused to remain after school as requested by her and asking him to attend a conference with her and the students to let them know they cannot continually behave in this manner.

Through February and into March, Everling still had not made a decision about supporting her complaints against Fitzpatrick with a written statement.

On March 15, 1977, Kalna made a second written evaluation report based upon a routine observation of Everling's third period class that day. The report again contained mainly "very good" notations with respect to the various criteria used in evaluating teacher performance previously described, supra, at page 5, but this time, in contrast with Everling's earlier evaluation report, noted a variation in pupil behavior between the upper limit of "very good" and the borderline of "satisfactory." In Kalna's words, he observed that some children were very well behaved and responsive while other were misbehaving and were not responding. (Tr. 554-5). Kalna also made a suggestion for rearranging student seating to increase participation, decrease fooling around and allow the teacher to more closely direct the attention of the class. The report also contained two "excellent" notations for variety of activities and relationship with pupils.

Meanwhile, Everling was experiencing some difficulties in getting along with Maio and was isolating herself from him, in part for reasons which will become clear in the next section of this Report. She also experienced difficulty in making arrangements for scheduling chorus rehearsal time or chorus presentations out of school with minimum supervisory involvement as the Principal expected her to do.

At around the same time as the March 15 evaluation, Everling met Riena, Association President, told him of the incidents involving Fitzpatrick and the administration's reaction, and her feeling that the matter should be discussed with Superintendent Rice. Riena agreed and advised he would arrange such a meeting. Even earlier, in February, according to Riena, in testimony not contradicted by Everling, Everling had told him of Fitzpatrick's upsetting remarks to her, and had asked him to speak to Fitzpatrick. Riena's meeting with Fitzpatrick is noted, supra, page 8, at f.n. 9. A meeting was arranged with Rice for Friday, March 25 at 12:30 p.m.

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Prior to the meeting, from 9:15 to 10:00 a.m., Rice observed Everling's conduct of a music instruction class, and prepared an observation report which he forwarded to Everling on March 28 for her review and response. In it, Rice observed, criticized and recommended improvements in Everling's handling of a reprimand of a disruptive female student and of an unresponsive male student who wasn't doing the class assignment. He also noted that the pacing of a portion of the class seemed satisfactory for students with musical backgrounds and experience but too fast for others, evidenced by restless behavior of many students at the time. Rice also commented that Everling did not know the name of the reprimanded female student and had commented it was difficult to know 600 pupils by name. At the conclusion of the March 25 class, Rice also conferred with Everling regarding certain student behavior in the classroom which he had found to be unacceptable. In the course of the discussion, Everling voiced approval of Rice's personal involvement during the class with a student whose deportment had been questionable. By memorandum of April 4, 1977, Everling responded to the observation report. She pointed out positive aspects of the lesson, questioned certain observations and suggested that a student quotation be removed so as not to reflect on her teaching or the student. Rice had observed the student loudly exclaiming in a critical manner as to certain comments of a folk singer on a record which Mrs. Everling had played for the students. Mrs. Everling, unsure whether Rice's report could be construed as reporting student criticism of her rather than of the recording artist, on the next meeting of the class, on April 1, suggested to the student that she write Mr. Rice a letter making clear her comments had not been directed to Mrs. Everling. The student prepared such an explanatory note, was given a pass to leave the class, presented it to Mr. Rice, who returned to class with the student and mildly admonished Mrs. Everling for sending the student out of class to deliver such a letter and for having requested the student to write such a letter without advising the student of her rights.

At the noon meeting on the same day, March 25, between Everling, Riena and Rice, Everling emphasized Maio's involvement in the matter of her complaints against Fitzpatrick. She stated her belief that he was placing undue pressure on her to sign a statement against Fitzpatrick and asked for clarification of his status in the chain of command since he made her feel he had gotten her the job. Everling responded negatively to Rice's inquiry as to whether her teaching had been affected by Fitzpatrick's conduct. Rice also noted these were serious charges Everling was making about Maio. When Rice asked what he should do, Riena noted

Everling was non-tenured and thus was in an awkward position to act. Rice, who also testified as to the meeting, stated without contradiction that he reaffirmed the fact that Maio had some coordinating responsibilities and that Kalna was her immediate superior. Rice also testified without dispute that Everling stated that some of her colleagues had put her on guard against Maio. Riena, called by the Charging Party, added in testimony that Everling had also complained that Maio had told her not to associate with others in the building.

Rice told Everling to think the matter over during the weekend and the meeting was continued on the next school day, March 28. On Monday morning, March 28, Everling was observed for the third time by Kalna in an 8th grade music class.

In the continued meeting with Rice later in the day Everling disclosed that Kalna had also asked her to sign a statement regarding Fitzpatrick and that he had shown her Fitzpatrick's personnel file. Rice told her that the file was a building principal's file, not the district personnel file and again noted that she was making serious charges. Everling said this was not a personal vendetta and she just wanted the situation cleared up. Rice told her that if she wanted anything done against Kalna she would have to sign a statement. Everling informed Rice that she wanted Riena to represent her from that point on. According to Rice and not disputed by the Charging Party, Riena said he would like Rice to take action against Maio and Kalna by drawing up unspecified charges to be submitted to him and Everling for review and subsequent filing by the Superintendent on their behalf. The charges were to relate to Maio and Kalna's attempts to secure a written statement from Mrs. Everling concerning her harassment by Fitzpatrick. Further, according to Rice a dispute arose between Everling and Riena as to whether Maio or Kalna was the source of the problem, Riena interjecting to dispute Everling's contention that she believed Kalna was responsible rather than Maio. When Rice then indicated he would like to follow up on the matter but if he did so it would involve going back to the genesis of the problem, Riena interrupted to say that Fitzpatrick should not be part of the investigation. Rice then stated if they wanted the matter followed up he expected them to give him their written complaint against Kalna and Maio with any supporting data. Riena said he would have to check the matter further with the N.J.E.A. and others before making such a determination and the meeting concluded. Neither Riena nor the Association took any further steps in the matter. At none of these three subsequent meetings between them did Everling mention Rice's March 25 observation report.

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According to Everling, at a meeting held on April 4 with Dr. Kalna to discuss the March 28 observation, as she came into the room Dr. Kalna told her that she would be rehired for the upcoming school year. Everling did not recall any other statements made by Kalna at the meeting even after she reviewed contemporary notes made by her in an unsuccessful attempt to refresh her recollection. Everling did not otherwise testify to the March 28 observation. In contrast, Dr. Kalna testified that he had a conversation with Everling about his observation at 4:20 p.m. on March 28 at which time Kalna had with him and showed to Everling his handwritten observation which was then given to his secretary, Mrs. Hayde, for typing. He added that the typing was completed April 4 and placed in Everling's mailbox on April 5 and on April 7 was jointly signed when Everling returned it to him. At the March 28 discussion of the observation Mrs. Everling said she thought it was too negative and handed it to a fellow teacher, Diane Schoendorf, to read and comment. Schoendorf responded that the observation was not the best or the worst she had ever read. Kalna noted that Everling did not request any changes in the handwritten observation and it was ultimately signed by her without change. The observation contained various comments suggesting ways of making discipline and instruction more effective, noted again Mrs. Everling's unfamiliarity with pupil names but also noted "Mrs. Everling continues to work hard for a strong music program...With continued concern, hard work and responsiveness, Mrs. Everling will build a top program." Dr. Kalna's version of the date, timing, participants and substance of his discussion with Mrs. Everling regarding this observation is credited. I note first Mrs. Everling's failure to recall any other facts relating to the conference which she claims occurred on April 4, other than Dr. Kalna's offer to rehire. Furthermore, Mrs. Everling, who testified on rebuttal, did not dispute Kalna's version of the events and conversations. Neither did the Charging Party call Schoendorf to contest Kalna's testimony that she reviewed and commented on the handwritten report on March 28. In particular, Mrs. Everling's testimony that Dr. Kalna guaranteed her rehire is at odds with Superintendent Rice's somewhat critical observation a few days prior and the continued problems Mrs. Everling had encountered in dealing with her students and in obtaining continued interest in the chorus by 7th and 8th grade students. There is also no evidence that Kalna had received any report from music coordinator Maio on April 4 and certainly, his input would have been sought before a final decision regarding Mrs. Everling would have been made. As the Board would be making the determination on renewal, by the end of April, such a pre-mature statement by Dr. Kalna be-

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fore consultation with and recommendation to the Board and opportunity for the Board's response, particularly given Kalna's otherwise restrained conduct, is so illogical as to be unbelievable.

On April 1 Everling met again with Supt. Rice. She wanted to tell him something she had failed to mention at prior meetings. This time she took along Association Building Representative Diana Rae Lange. Among other things, Everling told Rice that Dr. Kalna said he would put his job on the line to get something in writing against Fitzpatrick. Everling does not recall any response from Rice to this remark. Everling also stated that she had not included Rice in her prior criticisms of Administration personnel to which Rice testified without contradiction he replied he was a big boy and could take care of himself. Rice also testified without rebuttal that Everling told him she had prepared a document which would be very incriminating to Maio and Kalna but never produced it. Rice repeated his prior position that he could only assist if he received a written statement and his investigation would go back to the source of the problem.

By a memorandum dated April 5 addressed to Supt. Rice regarding Fitzpatrick, Everling stated that "at this time I intend to take a neutral position in regard to the Fitzpatrick situation (as discussed on March 25, March 28 and April 1). A vacation is long overdue." According to Everling she had the memorandum typed, folded it, placed it in an envelope addressed to Rice and either placed it in his mailbox or delivered it to his office and left it with his secretary that day. According to Rice's testimony he assumed from the memorandum that Mrs. Everling had decided not to submit a statement of complaint against Kalna or Maio. He did not take the memo as indicating a decision by Everling not to pursue a written complaint against Fitzpatrick.

Everling testified that on the following day, she received her final evaluation report from Dr. Kalna. This report, while more critical of her performance than prior reports, showed a continued deterioration of pupil behavior, particularly among older pupils, while also reviewing, unlike the prior reports, her total performance including that outside the classroom. Kalna noted Everling's enthusiasm ranged from very good to satisfactory; her poise, from very good to unsatisfactory; her teaching skills, from very good to satisfactory with a range from very good to unsatisfactory for full class participation, provision for individual needs, and pupil behavior and responsiveness, with the added note that Mrs. Everling appeared to be very good in these qualities with younger students but unsatisfactory with the older ones. The report noted that the observation

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covered her performance in all areas of school life from September, 1976 to date. It went on to note that Everling came to Fieldstone well versed in technical music skills and that her presentations had mixed reviews with student response lacking in enthusiasm. It noted further that while Mrs. Everling tries to be kind and considerate to her students and they generally respond in like manner, the older students appear to need more than just this and reference is made specifically at this point to the large number of 7th and 8th grade student problems as it relates to chorus and the subsequent reduction in upper grade membership and that the principal became involved in these problems in several cases. The report noted older students frequently challenge Mrs. Everling's authority since she does not know most of their names. The report further indicated visible deterioration in Mrs. Everling's working relationship with the principal, commenting that she has become defensive and less responsive to suggestions and adding that during the last observation conference (of March 28) in contrast to the prior practice, Mrs. Everling requested a colleague to be present and respond to the principal's written statement. Finally, the report refers to Mrs. Everling's emotional state, referring to her having cried in his office and having problems with other teachers, one such episode having resulted in her going home early on a school day, sick. It further notes that her relationship with her music colleague has deteriorated and polarized communication between them. The report goes on to refer to a noticeable avoidance in making decisions, referring specifically to a recent instance when Mrs. Everling insisted that the principal select the time and day for chorus practice on April 4. The report continued that until mid-year Mrs. Everling expressed an air of confidence and positive thinking; however, most recently she appears withdrawn and insecure. It concluded that in view of her prior experience the principal had higher expectations for the coordination of her technical music skills with a responsive classroom program and large chorus. The principal concluded that in his view this music position is too demanding for Mrs. Everling to successfully and comfortably manage.

The Charging Party relies to a large extent upon the timing of the submission of this final evaluation report to Mrs. Everling occurring a day following her statement of neutrality in regard to the Fitzpatrick situation made to the Superintendent. However, Charging Party could offer no evidence as to the date of the report's preparation. Kalna was corroborated by his secretary, Hayde, that he prepared the report in draft form on Friday, April 1, reviewed it over the week-

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end and gave it to his secretary for typing on April 4. <sup>12/</sup> The final report typed on April 4 was forwarded to Everling by placement in her mailbox at Fieldstone on April 5 or 6. Kalna further testified that at no time prior to the final report was he made aware of Everling's April 5 memorandum to Rice. In fact, according to Kalna, he did not see the Everling memorandum to Rice until the hearing.

Mrs. Everling responded in writing by memo dated April 25 to the final evaluation report. Among other general comments, she noted that this was the first mention of strained relationships, emotional instability, and general deterioration of performance after midyear. She went on to claim that these difficulties derived solely from Dr. Kalna's efforts and those of the music director to persuade her to write and sign a statement against another faculty member who is also a representative of the union. Everling went on to observe that when it became clear that she would not sign the statement she observed the change in both their attitudes towards her which did in fact affect their working relationships. Once these changes in attitudes became evident she took these problems along with representatives from the union to Mr. Rice. She asked his reconsideration of her final evaluation so that it may accurately reflect her true performance.

While Mrs. Everling claimed that the pressure on her to sign the statement against Fitzpatrick led to the deterioration in her relationship with Kalna and Maio, it was only after Fitzpatrick's continued baiting of her led to her unstable emotional state and Kalna's talk with Fitzpatrick had had no effect that both Kalna and Maio in early February suggested a written complaint. I conclude it was Mrs. Everling's ambivalence and indecision from February 7 to mid-March with respect to pursuing her protest against Fitzpatrick which contributed to her problems in the District and tensions with both Maio and Kalna. It is clear from the testimony that she changed her view of the matter following conversations with Association representatives starting sometime in mid-March, but by this time the problem was pre-occupying Everling and affected her working relationship with Maio. Everling sought to avoid Maio, going so far as to lock her door to keep from meeting with him at his request. Where previously the two had worked together, for example Maio having recommended that 7th and 8th grade students remain in the chorus through the winter concert and having assisted in the decoration of her classroom, Everling by mid-March had complained to Kalna about Maio's idea for a sugges-

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<sup>12/</sup> I conclude that Charging Party's efforts to discredit Hayde's firm recollection of these dates was unsuccessful. An attempt was made to show bias on her part because of a prior acquaintance with Supt. Rice and that she had an otherwise faulty memory. Neither attempt was convincing.



tion box for students and pursued her complaints against Maio's concurrence in Kalna's initial suggesting and then urging that she submit a written complaint against Fitzpatrick. <sup>13/</sup> In her response to the evaluation Everling did not question her failure to make independent decisions on chorus practice, although she responded in detail to other evaluations in the report.

At Mrs. Everling's meeting with Dr. Kalna on April 7 to discuss her final evaluation Kalna introduced the evaluation as an overall accounting of her performance both inside and outside of the classroom. Thus, Mrs. Everling's criticism of the report that certain objections had not been raised in prior reports based solely on classroom observation failed to appreciate that her conduct with colleagues and superiors, and her administration of the chorus and her other duties were now being evaluated comprehensively for the first time. As the two commenced discussing the report, Mrs. Everling indicated that she would prefer to have Mr. Riena or someone else present. She then noted that she found Dr. Kalna's statements obnoxious, refused to continue the discussion and left the room. There was no further resumption of the conference although Kalna requested Everling to agree to a further meeting.

It was not until April 22, 1977 that Everling signed and returned Superintendent Rice's observation report of March 25. By memo of the same date, Maio provided Supt. Rice with a preliminary end of the year music department report. Among other things he expressed concern with the vocal program in grades 5 through 8. He referred to the steep drop in student enrollment, he expressed his view that personality to engender enthusiasm and excitement among the students was a high priority for the program and noted, "Although Mrs. Everling has the highest musical qualification, she appears to be deficient in dealing with large groups of Middle School children and 'lacks grace under pressure'...It appears as the pressure of the forthcoming concert draws closer, she has found it necessary to leave school at midday on many occasions, and has a high absentee rate." Maio concluded that the interests of the Middle School students would be best served with a healthy, energetic, enthusiastic choral director, who would attract large number of participants into the choral program.

<sup>13/</sup> When Fitzpatrick learned of Maio's request to Mrs. Everling to sign the statement against him accompanied by implications of administration support and assistance, he had heated words with Maio; the Association also sought to exclude Maio from membership because of a conflict of interest between his coordinating duties and the representation goals of the Association. That decision was defeated on a ratification vote of the membership and Maio has continued to remain a member of the Association.

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Then, by letter dated April 26 Supt. Rice informed Everling that he had been instructed by the Board of Education to inform her that her services would not be required after the expiration of her current contract on June 30, 1977. In response to Everling's request for a statement of reasons, by letter dated May 18 Board President William J. Johnston listed the following major reasons why the Board would not offer her a new contract for the 1977-78 school year, all of which exemplified the Board's dissatisfaction with her performance and behavior. They included many of the observations and criticisms made previously by Dr. Kalna and Rice and her coordinator colleague Maio. They were: an inconsistent pattern of personal behavior; lack of poise in dealing with colleagues and students; an inability to generate full class participation; failure to make provision for individual needs; failure to maintain satisfactory discipline; failure to communicate effectively with her music colleague; failure to make decisions which were hers to make; failure to sustain student interest and participation; failure to establish a good relationship with many of her students; failure to give proper attention to organizational duties and responsibilities; failure to present lesson material effectively; failure to demonstrate the ability to accept and use constructive criticism and insufficient growth and development of the chorus program. A number of them refer specifically to her work with the 7th and 8th grades and chorus. A hearing before the Board followed and Mrs. Everling was terminated at the end of June 1977. Respondent's final determination not to renew Everling's probationary employment was made in accordance with a Board Policy directive which has as its goal the creation of a superior teaching staff. In accordance with that policy, expressions of personal opinion outside of a teaching situation may not ordinarily serve as a basis for recommending nonrenewal so long as the expression does not promote disharmony in staff relationships, interfere with the regular operations of the schools or impede the employee in the performance of his duties.

### C. Analysis and Conclusion

I am convinced, based upon the record evidence of her employment relationship, the salient features of which have been set forth in the above subsection of this report, that Mrs. Everling's non-renewal was based upon her conduct and performance as a music teacher in the Fieldstone Middle School and was not based upon any exercise by her of activity protected by the Act. Mrs. Everling's problems in securing student interest and enthusiasm in the chorus, particularly among the 7th and 8th grade students surfaced early. With respect to her music

classes as well as the choruses, the record shows she experienced problems in maintaining satisfactory discipline, called upon the assistance of the principal a number of times and even had the Superintendent involved personally in such problems. While the friction with her music department coordinator and colleague, Maio, arose, at least in part, from her indecision in pursuing her complaints against Fitzpatrick and her alignment with the Association representatives in seeking a solution of the problem short of providing evidence against the Association grievance chairman, nonetheless, she failed to maintain the close rapport with the department coordinator necessary for a successful chorus program. Certain of the observations in the first two evaluation reports made by her principal show that Mrs. Everling did not always achieve sustained interest and an atmosphere of learning for all her students in the classroom. As Mrs. Everling became increasingly distraught by her failure to resolve her problems with Fitzpatrick and Maio, <sup>14/</sup> her poise, classroom control and effectiveness suffered correspondingly and were all reflected in her final evaluation. <sup>15/</sup> Particularly in view of Mrs. Everling's extensive prior teaching experience, a factor which played a part in the Board's evaluation of her effectiveness as a music teacher and director of the chorus program, there is more than sufficient evidence in the record upon which to conclude, as did the Respondent Board, that Mrs. Everling's performance did not warrant her renewal following a one year

14/ While Everling appeared to be most upset in her first presentation to Supt. Rice by Maio's pressure on her to sign the statement, I find that Maio is not an agent of the Respondent but rather is a teacher within the negotiating unit who acted in a coordinating capacity for the music department. Accordingly, his conduct is not attributable to the Respondent and any Charging Party reliance upon Maio's reaction to her resistance to his pressure as evidence of the Respondent's motivation in not renewing Mrs. Everling is misplaced.

15/ Charging Party stresses Kalna's apparent inconsistency in simultaneously noting in his third observation that Everling could build a top music program and concluding in his final evaluation that the position was too demanding for her to successfully manage. While appearing to show some ambivalence in Kalna's attitude I am unwilling to conclude that Kalna's final evaluation was influenced by the intervening event of Everling's statement of neutrality. Apart from the lack of proof of Kalna's prior knowledge, the two reflect to a certain degree their different purposes. The observation report was directed to discussing a particular class performance and while recognizing Everling's obviously professional classroom presentation was also somewhat critical in other passages of her relations with students. The comment regarding the music program should be viewed in such a setting. The final evaluation placed the classroom work in the context of Everling's overall performance, including her relations with colleagues and superiors and her direction of the chorus.

probationary period. 16/

I also conclude that Mrs. Everling's ultimate decision to remain neutral in the controversy arising from her complaints against the Association's grievance chairman did not contribute to her non-renewal. The evidence fails to show that Principal Kalna knew of Mrs. Everling's decision to remain neutral before he made his final critical and negative evaluation of her work performance. Indeed, the memo of neutrality was sufficiently ambiguous so as to cause Supt. Rice to conclude with good reason that Everling had decided to refrain from pursuing her most recent complaints against Kalna and Maio rather than having decided to refrain from complying with her principal's request that she sign a complaint against Fitzpatrick. Neither Kalna nor Rice pressured Everling to sign a complaint against Fitzpatrick. Rice, in particular, never mentioned a complaint against Fitzpatrick since the thrust of Everling's complaints by that time were against Kalna and Maio. Both were in the posture of receiving, and reacting to repeated oral complaints from Everling. The request for written complaints made by both appears to have been a reasonable response so that a full investigation of her differing but serious allegations could be made. These conclusions, coupled with the independent evidence of Administration concern with her teaching and choral direction, convince me that Everling's neutrality was not a motivating cause of her dismissal. 17/

Having found that the Respondent's determination not to renew Mrs. Everling was not motivated by her conduct vis-a-vis Fitzpatrick, there is no need to reach a determination as to the second issue posed earlier in this report. However, in view of the fact that my recommendation with respect to the reasons for

16/ See Borg-Warner Corp., 155 NLRB No. 95, 60 LRRM 1447 (1965). (Employer acted in accord with regular practice of screening employees during their probationary period, did not deviate from standards normally applied in assessing suitability for continued employment, even assuming presentation of personal grievances constituted protected conduct under the National Labor Relations Act).

17/ The Charging Party makes much of the successive observations of Everling by her principal and Superintendent on March 25 and 28 at a time when Everling had still not agreed to formalize her complaint against Fitzpatrick but was meeting with the Superintendent. While some might view such conduct as suspicious, it should be remembered that the Respondent was required to make a decision regarding Everling's retention within a month. Kalna had made only two prior observations and the Superintendent, who principally advised the Board in such decisions, had made none. Nothing in the record suggests that Rice's observation and report represented a deviation from normal practice in assessing performance or that the successive observations was anything but coincidental.

Mrs. Everling's non-renewal is subject to further review before the Commission, I will briefly discuss this issue. Assuming, therefore, that the Board was motivated in whole or in part by Mrs. Everling's resistance to her principal's requests that she pursue in written form her complaints against Fitzpatrick, I conclude that Everling's conduct in this regard was not protected by the Act, certainly not under the particular facts in this proceeding.

Contrary to the Association's contention, rather than having sustained pressure applied to her by the School District Administration to sign a statement against Fitzpatrick, it appears that only after a successive series of complaints during which Everling became increasingly distressed, did Kalna finally suggest that in order to avoid further problems she sign a statement against the Association's grievance chairman. The accompanying assurances, contrary to the Association's contentions, were to provide Mrs. Everling every legal protection that the Administration could accord, and did not guarantee her employment security. The Respondent's conduct in this regard was proper. It was protecting a teacher from further humiliation and protecting the education process from disruption and further tensions. Further, I do not find evidence in the record that would support a conclusion that the Respondent was discriminatorily motivated against Fitzpatrick when it offered Everling this advice. Fitzpatrick's conduct was interfering with the work performance, not only of Everling, but of two other teachers, and, apart from his Association role as grievance chairman and negotiator, in his role as teacher interrelating with other teachers in the educational program he had a duty and an obligation to perform as a professional. An employee is not protected if an employer acts against him because of his actions taken as an individual employee unrelated to any union.<sup>18/</sup> Thus, in its encouragement of Everling to pursue her complaint, the Respondent was exercising its professional and managerial responsibilities. Respondent's conduct in this regard was designed to persuade Everling, just as any other probationary professional employee in like circumstances, to exercise responsibility to improve the education environment. It also follows that the Respondent could consider her indecisiveness and ultimate failure to pursue a series of complaints which she herself had initially and successfully raised as part of her overall conduct in evaluating her work performance as a teacher without subjecting itself to a violation of the Act. I therefore conclude that assuming the Respondent relied in part upon her ultimate refusal to trigger or cooperate in an investigation of the Association's grievance and negotiating chairman, such conduct did not violate the Act.

18/ In re Haddonfield, P.E.R.C. No. 77-36, 3 NJPER 71 (1977).

With respect to the third issue posed earlier in this report, I find that Mrs. Everling did engage in protected activity when she sought the aid of the Association in presenting her complaint regarding Dr. Kalna, and particularly Maio, to Supt. Rice. She was accompanied to the meetings by either the Association President or building representative. The subject matter of the meetings concerned her working relationship with a teacher, a department coordinator and her principal. She also asked Rice that something be done about the problems facing her and the Association President, on her behalf, requested that charges be brought against the principal and music director. <sup>19/</sup> While I find that Everling was engaging in protected activities on these occasions I do not find that the Respondent was motivated by her association with union representatives in determining not to renew her.

There is no evidence of animus at any of these meetings toward either the Association representative who arranged, accompanied Everling to and participated at the first two or the building representative who accompanied her to the third. Supt. Rice's ready accessibility to confer at length outside the grievance procedure on a matter of this nature does not manifest any animus toward Everling's reliance upon Association representation or assistance. See Borg-Warner Corp., cited supra. I am convinced that the recommendations of the principal and Superintendent that Mrs. Everling not be renewed were made for educational policy reasons and not as retaliation for her Association activities. <sup>20/</sup> Finally, the record contains no evidence that the Board of Education itself, or any member, including its President Johnston who signed the May 18, 1977 statement of reasons for Everling's non-renewal, were discriminatorily motivated against Mrs. Everling. <sup>21/</sup>

In summation, I conclude that Everling's work performance constituted the sole basis for the Board's determination not to renew her contract and that even if the Respondent had relied, in part, upon her refusal to pursue her complaints regarding the Association grievance and negotiating chairman, such con-

<sup>19/</sup> See N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 50 LRRM 2235 (1962).

<sup>20/</sup> In the Matter of Laurel Springs Board of Education and Mary Becken, P.E.R.C. No. 78-4 at page 4, 3 NJPER 127.

<sup>21/</sup> In the Matter of State of New Jersey and Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO (Ramapo College), P.E.R.C. No. 78-55 at page 8, 4 NJPER par. 4072, appeal pending App. Div. Docket No. A-3422-77.

duct did not interfere with Everling's rights as an employee under the Act nor was intended to nor did discourage employees in the exercise of the rights guaranteed them under the Act. Finally, while Everling engaged in the protected activity of assisting the Association under N.J.S.A. 34:13A-5.3 by seeking and receiving the Association's aid in pursuing her complaints with Supt. Rice, I conclude that the Respondent did not rely in any way upon this conduct in concluding that Everling's contract should not be renewed.

The Charging Party having failed to adduce evidence that the Respondent has violated N.J.S.A. 34:13A-5.4(2) and (4) I will also recommend that these allegations be dismissed as well.


Upon the foregoing and upon the entire record in this case the Hearing Examiner makes the following recommended:

CONCLUSIONS OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1),(2),(3) and (4) when it determined not to renew Mrs. Emily Everling's contract as music teacher and chorus director at Fieldstone Middle School in the School District in the Borough of Montvale.

RECOMMENDED ORDER

The Board of Education of the Borough of Montvale not having violated the Act, it is **HEREBY ORDERED** that the complaint be dismissed in its entirety.

  
Robert T. Snyder  
Hearing Examiner

DATED: Newark, New Jersey  
September 28, 1978