

P.E.R.C. NO. 83-22

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST PATERSON BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-81-390-19

WEST PATERSON EDUCATION
ASSOCIATION & RUTH BINDER,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on a charge the West Paterson Education Association and Ruth Binder filed against the West Paterson Board of Education. The charge had alleged that the Board, in retaliation for Binder's activities as an Association official and in an effort to isolate Binder from the mainstream of Association activities, transferred her from teaching fifth grade to teaching fourth grade. The Commission concludes that the Board was motivated by the need to improve the language and math skills of the fourth graders Binder was assigned to teach.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST PATERSON BOARD OF
EDUCATION,

Respondent,

-and-

Docket No. CO-81-390-19

WEST PATERSON EDUCATION
ASSOCIATION & RUTH BINDER,

Charging Parties.

Appearances:

For the Respondent, Aron, Till & Salsberg, Esqs.
(Rodney T. Hara, of Counsel)

For the Charging Party, Zazzali & Kroll, Esqs.
(Kenneth Nowak, of Counsel)

DECISION AND ORDER

On June 26, 1981, the West Paterson Education Association ("Association") and Ruth Binder filed an unfair practice charge against the West Paterson Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged 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, in retaliation for Binder's activities as an Association official and in an effort to isolate Binder

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."

from the mainstream of Association activities, it transferred her from the position of fifth grade teacher in the Middle School to the position of fourth grade teacher in Elementary School No. 1, a school with only six teachers.

On July 28, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. On August 10, the Board filed its Answer. It admitted transferring Binder, but denied that it did so in retaliation for her pro-union activities or to isolate her from other teachers. Instead, it asserted that it assigned Binder to the fourth grade position in order to promote its overall goal of providing students with a thorough and efficient education.^{2/} It further denied that the Middle School was the hub of Association activity and alleged that only 30 of the 66 teachers in the unit worked there.

The parties engaged in extensive discovery. On January 22, February 5, March 5, 17 and 22, 1982, Commission Hearing Examiner Alan R. Howe conducted hearings at which the parties examined witnesses and presented evidence. The parties waived oral argument, but filed post-hearing briefs by June 25, 1982.

On June 28, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 82-65, 8 NJPER ____ (¶ _____ 1982) (copy attached). He recommended that the Commission dismiss

^{2/} The parties have agreed that it is not material whether Binder's move is labelled a transfer or a reassignment.

the Complaint. Although he found that the relationship between Binder and the superintendent had deteriorated since 1970, he concluded that anti-union animus did not motivate her transfer. Rather, the Board, accepting the superintendent's recommendation, reassigned Binder because it needed a teacher with her skills and experience to remedy a deficiency in basic skills in the fourth grade at School No. 1, a deficiency Binder herself had decried.

On July 9, 1982, the Association filed Exceptions. It asserts that the Hearing Examiner erred in not finding that: (1) the superintendent first advised Binder that she was being transferred to improve language skills, then shifted his explanation to improving math skills; (2) other teachers also complained about the inadequate preparation of fourth graders; (3) it was incongruous to reassign the previous fourth grade teacher, a supposedly weak teacher, in School No. 1 to teach second grade; (4) anti-union animus motivated Binder's reassignment; (5) Binder's reassignment would result and has resulted in a decline in Association activity, and (6) other teachers were more qualified for the reassignment. On July 19, 1982, the Board filed a detailed response.

We have reviewed the record. We adopt the Hearing Examiner's findings of fact and conclusions of law.

The heart of this case is the perception of the superintendent and the Board that the fourth grade students at School

No. 1 suffered from deficiencies in basic math and language skills and needed the guidance of a dedicated, demanding, and disciplined teacher such as Binder in order to correct these deficiencies. The superintendent and the Board considered other teachers, but decided that Binder was the best teacher available for the assignment. The Hearing Examiner found the testimony of the superintendent and the Board president concerning these crucial matters credible and persuasive, and the record provides an ample objective, as well as subjective, basis for his findings. Accordingly, we agree with the Hearing Examiner that the Board reassigned Binder to teach the fourth grade at School No. 1 because of the educational needs of the students there and not because of Binder's activities on behalf of the Association. In re Board of Ed. of the Vocational Schools in the County of Essex, P.E.R.C. No. 82-32, 7 NJPER 585 (¶12263 1981); In re Laurel Springs Bd. of Ed., P.E.R.C. No. 78-4, 3 NJPER 228 (1977).

The Association's Exceptions are without merit. They essentially ask that we substitute our credibility judgments and weighing of the evidence for the conclusions reached by the Hearing Examiner who had the firsthand opportunity to observe the witnesses. We will not do so. See, e.g., In re State of New Jersey, College of Medicine and Dentistry, P.E.R.C. No. 82-33, 7 NJPER 588 (¶12264 1981), appeal pending App. Div. Docket No. A-997-81T3; In re Township of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980), aff'd App. Div. Docket No. A-3230-79 (1/23/81).

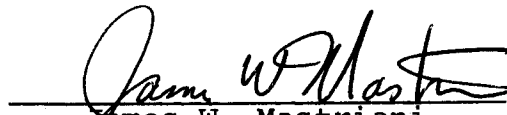
Specifically, the superintendent's initial statement to Binder that she was being reassigned in order to improve language skills and the complaints of other teachers about the inadequate preparation of fourth graders are not especially significant; the crucial fact here is that there was a basic skills problem, in both language and math, at School No. 1. Similarly, we perceive no incongruity in initially reassigning Kennedy to teach the second grade and subsequently reassigning her to teach the fourth grade at another school; these reassignments placed Kennedy in positions where the need to improve the basic skills of students was not as acute and she could receive the assistance of more capable teachers. For the reasons previously mentioned, we will not reverse the Hearing Examiner's ultimate conclusion that educational concerns motivated the reassignment, nor do we believe, even assuming that the reassignment somewhat diminished Binder's ability to interact with other teachers, that the Board deliberately reassigned Binder to isolate her and reduce her effectiveness. Finally, we do not believe that the Hearing Examiner erred in failing to find that there were other candidates more qualified than Binder for the job of improving the basic skills of fourth graders at School No. 1. To the contrary, the record shows that the superintendent and the Board considered other candidates and legitimately concluded that Binder would be the most effective teacher because she possessed the precise skills needed to remedy the basic skills problem: the ability to

motivate students, plan lessons, teach beneficial study habits, and instill discipline. Accordingly, we dismiss the Exceptions and the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett and Suskin voted in favor of this decision. Commissioner Graves voted against the decision. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey

September 14, 1982

ISSUED: September 15, 1982

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

In the Matter of

WEST PATERSON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-390-19

WEST PATERSON EDUCATION ASSOCIATION
& RUTH BINDER,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it transferred Ruth Binder, the President of the Association, from the fifth grade in the Middle School to the fourth grade in School No. 1 on April 14, 1981. The Hearing Examiner found that Binder had been an Association activist as its President for many years but that her protected activities were not a "substantial factor" or a "motivating factor" in the Board's decision to transfer her in April 1981. Further, the Board established a legitimate business justification or educational policy decision in making the transfer. School No. 1 had been deficient for some years in the Minimum Basic Skills test, required by the State, and the Superintendent and the Board were persuaded that Binder had the teaching capabilities to assist and rectify educational deficiencies in the fourth grade at School No. 1.

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

WEST PATERSON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-390-19

WEST PATERSON EDUCATION ASSOCIATION
& RUTH BINDER,

Charging Party.

Appearances:

For the Respondent

Aron, Till & Salsberg, Esqs.
(Rodney T. Hara, Esq.)

For the Charging Party

Zazzali & Kroll, Esqs.
(Dennis J. Alessi, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission on June 26, 1981 by the West Paterson Education Association and Ruth Binder (hereinafter the "Charging Party," the "Association" or "Binder") alleging that the West Paterson Board of Education (hereinafter the "Respondent" or the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent on April 18, 1981 notified Binder that she was being transferred from the Middle School to Elementary School No. 1, the effect of which was to reduce Binder's opportunity to function effectively as President of the Association, a position which she has held for a number of years, and the Association alleges further that the transfer was pretextual and in retaliation for Binder's exercise of protected activity on behalf of the Association for many

years, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the act, a Complaint and Notice of Hearing was issued on July 28, 1981. Pursuant to the Complaint and Notice of Hearing, hearings were held on January 22, February 5, March 5, 17 & 22, 1982^{2/} in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by June 25, 1982.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The West Paterson Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The West Paterson Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. Ruth Binder is a public employee within the meaning of the Act, as amended, and subject to its provisions.

1/ These Subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

2/ The delay in the commencement of the hearing was due to extensive discovery in September and October 1981 and, thereafter, to accomodating the trial schedules of the parties and the Hearing Examiner.

4. Binder has been employed by the Board as a classroom teacher since 1958. Binder has for at least the past 10 years been teaching the 5th grade at the Memorial School, which is the Middle School containing grades five (5) through eight (8). Prior to teaching at the Memorial School Binder had taught the 4th grade for approximately five years. The testimony did not develop further Binder's prior teaching experience.

5. Binder has been the President of the Association for the past five or six years and prior to that she has served as President for various periods of two to three years at a time. She has been both Vice-President and Secretary of the Association as well as Chairman of the Grievance Committee. Binder has been a member of the Negotiations Committee continuously since sometime prior to 1968. During some of these years Binder has held as many as three positions with the Association at one time for the reason that other members of the Association are unwilling to face the Superintendent and members of the Board.

6. It is admitted or undisputed by the Board that: (a) during the past four or five years Binder has been the major Association spokesman in the presentation of nearly all grievances to the Board; (b) during this same period Binder has testified at approximately five grievance arbitration hearings as the Association's main witness and, notwithstanding that Binder's testimony has been in direct conflict with the testimony of Superintendent, Harold L. Ritchie, the Association has prevailed in all of these arbitrations; (c) during the past four or five years Binder was the major spokesman in approximately four grievances which were presented to and settled at the "Board level" of the grievance procedure; (d) additionally, during this period, Binder was the major spokesman in approximately 12 informal grievances which were settled at the "Superintendent level;" and (e) finally, Binder was the primary witness for the Association in two proceedings which were

initiated by the Board before the Commission.^{3/}

7. Binder also testified at length regarding her relationship with Superintendent Ritchie, who has been the Board's Superintendent since 1960. Binder testified without contradiction that over the past ten or twelve years her relationship with Ritchie has become less friendly and more formal. Even as far back as 1973-74 Ritchie told Binder that the Board considered her to be a "troublemaker" who was always "stirring up things." Binder testified credibly that over the past seven or eight years Ritchie has, on at least 12 to 15 occasions, said to Binder that she was a "thorn in his flesh." Binder testified that by 1978-79 the relationship between herself and Ritchie had become more strained and that several times he raised his voice to her, which he had never done before, and that he once walked out of a meeting where Binder was present. At a May 12, 1980 meeting in Ritchie's office where a grievance was being discussed on an overtime problem Ritchie claimed that he had been "sucked in" by Binder and thereafter became very antagonistic toward Binder. During the 1980-81 school year Ritchie became very upset over the filing of three grievances by Binder within one week, stating that he did not know what Binder was trying "to do to me." The foregoing recital describes the essentials of the extent of change in the relationship between Binder and Ritchie over the past ten or twelve years.

8. As of February 25, 1981 Superintendent Ritchie had recommended to the Board that Binder be continued in her assignment as a 5th grade teacher at the

^{3/} There was extensive testimony by Binder, which detailed the various grievances and arbitrations, in which Binder has been involved over the past ten or twelve years. The subject matter of the grievances and arbitrations was explored thoroughly at the hearing. The Hearing Examiner finds it unnecessary for the purposes of his decision to recapitulate here the specific subject matter of the grievances and arbitrations as testified to by Binder. As found above, the Board in no way disputes Binder's lengthy and extensive activity in grievances and arbitrations on behalf of the Association.

Memorial Middle School (R-1, Appendix "C"). However, in or around this time Binder heard a rumor that she was to be transferred from the Middle School for the 1981-82 school year. She did not speak to Ritchie about the rumor until just prior to the Easter vacation early in April 1981. At that time Ritchie said that it was the "Board's doing" and that the reason therefor was that the Board had received so many complaints from parents coupled with Binder's complaint that students were not prepared for her 5th grade at the Middle School. As a result, according to Ritchie, the Board had decided to transfer Binder to the 4th grade in School No. 1 so that she could work on the problem of better preparing students for the 5th grade.^{4/}

9. Thereafter, on April 13, 1981, Ritchie recommended to the Board that Binder be assigned to the 4th grade in School No. 1 for the 1981-82 school year (R-2, Appendix "A").^{5/}

10. Binder was formally transferred to School No. 1 by the Board at a meeting on April 14, 1981. The Respondent introduced considerable evidence to support its decision to transfer Binder from the 5th grade at the Middle School to the 4th grade at School No. 1 based on educational reasons, namely, that School No. 1 had for several years been lowest on the scale of achievement in the Minimum Basic Skills test, which are State-mandated, in comparison with the Gilmore and Olbon Elementary Schools (see, for example, R-5 and R-9). The deficiency of School No. 1 was also confirmed by the achievement test results of the Scientific Research

^{4/} Ritchie and the Board determined that Binder was best suited for the 4th grade at School No. 1 since she recognized the deficiencies in the 4th grade when she was in the 5th grade at Memorial Middle School and that she had the instructional capabilities and could demand the behavior required in order for students to succeed.

^{5/} Ritchie also recommended that a teacher, Patricia Kennedy, who had been the 4th grade teacher at School No. 1 for the 1980-81 school year, be transferred to the Olbon School as a 2nd grade teacher. He had determined that Kennedy needed greater support from other staff members inasmuch as Ritchie had recommended that Kennedy not receive an increment for the 1981-82 school year due to her teaching deficiencies. Kennedy ultimately received her increment, and was transferred to the 4th grade at the Gilmore School.

Associates series ("SRA") for the 1979-80 school year (R-8).

11. On April 16, 1981 Binder wrote to Benjamin Desmond, the Board Secretary, stating that she believed that she was transferred from the 5th grade at Memorial School to the 4th grade in School No. 1 "...because of my activities in the West Paterson Education Association..." (R-4). Under date of May 6, 1981 Desmond replied to Binder denying the allegations in her letter of April 16, 1981, and stating that "...The Board in the exercise of its discretion made this assignment (of Binder) to strengthen basic skill instruction in that grade in School No. 1 following the recommendation of the Superintendent of Schools..." (CP-12).

12. Binder was one of among 14 teachers who were involved in reassignments or reductions in force for the 1981-82 school year due to an anticipated reduction in State funds for that year. Binder was well aware of this and even appeared at a Board meeting in the Spring of 1981 with the affected teachers where Binder spoke about her impending transfer. As to Binder's knowledge as to what was transpiring in this regard see Exhibit CP-9.

13. The Memorial School is situated on one floor while School No. 1 has three or four flights of stairs. Binder fractured her left hip in October 1979 which required insertion of multiple pins. Under date of April 21, 1981 Binder's orthopedic surgeon gave her a letter, which recited the foregoing medical history, and stated that "...The patient may have difficulty in going up and down the stairs particularly if an emergency situation should arise..." (CP-13). Binder showed this letter from her doctor to Ritchie on May 14, 1981 and asked him to turn it over to the Board. Ritchie said that he would handle it himself and there was no conclusive testimony at the hearing that the Board was ever formally apprised of Exhibit CP-13.

14. Binder had an administrative hearing pursuant to the collective negotiations agreement on May 28, 1981 regarding her claim that the transfer was unacceptable for medical reasons. The minutes of this meeting disclose that nothing conclusive resulted (CP-14).

15. Notwithstanding that Binder conceded on cross-examination that the Board has the right to transfer personnel and that no teacher has the right to be assigned to any particular school or class, Binder claimed that the Association was prejudiced by her transfer in that the Memorial School has many more teachers and more grievances, and that without her presence the administration of the collective negotiations agreement would be impaired. Binder acknowledged that the Superintendent was located immediately next to School No. 1 and that, therefore, she had ready access to the Superintendent.

16. The final action of the Superintendent on the reassignment or transfer of Binder and other teachers for the 1980-81 school was set forth in a letter to the Board dated July 20, 1981 (R-3). The reassignment or transfer of Binder to the 4th grade in School No. 1 was reconfirmed.

17. Binder continued to protest her transfer or reassignment on medical grounds as recently as August 29, 1981 (CP-15). The transfer took place as scheduled commencing in September 1981. Ritchie testified without contradiction that since Binder's transfer to School No. 1 he has observed no problem with her handling fire drills and that she had been absent only 5-1/2 days for illness, which he testified was a good record.

THE ISSUE

Did the Respondent Board violate Subsections(a)(1) and (3) of the Act when it transferred Ruth Binder, the President of the Association, from the Middle School to School No. 1 on April 14, 1981?

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate
Subsections(a)(1) And (3) Of The Act
When It Transferred Binder From The
Middle School To School No. 1 On
April 14, 1981

The Hearing Examiner finds and concludes that the Respondent Board did not violate Subsections(a)(1) and (3) of the Act by its transfer of Ruth Binder, the

President of the Association, from the 5th grade in the Middle School to the 4th grade in School No. 1 on April 14, 1981. The Hearing Examiner concludes that the Board's action in transferring Binder was based upon a legitimate business justification and was not motivated by anti-union animus toward Binder.

The Commission's "in part" test in Subsections(a)(3) cases, which was originally set forth in Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977), has been modified by the Appellate Division in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981). There the Court adopted the analysis of the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977) and the decision of the National Labor Relations Board in Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980) in determining whether or not a Subsection(a)(1) or (a)(3) violation has been established. In Mt. Healthy, a case brought under the First and Fourteenth Amendments, the United States Supreme Court stated that the complaining party has the initial burden:

"...to show that his conduct was constitutionally protected, and that this conduct was a 'substantial factor'--or, to put it in other words, that it was a 'motivating factor' in the Board's decision not to rehire him. Respondent (the complaining party) having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct." (429 U.S. at 287).

The NLRB, in adopting the Mt. Healthy test, stated in Wright Line:

"Under the Mt. Healthy test, the aggrieved employee is afforded protection since he or she is only required initially to show that protected activities played a role in the employer's decision. Also, the employer is provided with a formal framework within which to establish its asserted legitimate justification. In this context it is the employer who has 'to make the proof.' ..." (105 LRRM at 1174).

The Appellate Division in Taliaferro stated that it was persuaded that the Mt. Healthy approach was sound, and that it prevents "...undue emphasis upon the 'in part' test and the failure to analyze thoroughly and completely the case presented by the employer ..." (180 N.J. Super. at 163).

The Commission has, in two decisions issued after Taliaferro, supra, found that

employer conduct vis-a-vis an alleged violation of Subsections(a)(1) and (3) of the Act "...were primarily motivated by legitimate business concerns, and under Wright Line would not have violated the Act.": Madison Board of Education, P.E.R.C. No. 82-46, 7 NJPER 669, 670 (1981) and Borough of Stone Harbor, P.E.R.C. No. 82-96, 8 NJPER 278 (1982).

In his opening statement counsel for the Charging Party stated that the alleged discriminatory transfer of Binder in April 1981 resulted not from a sudden recent incident, which he described as "a big bang," but rather from "a slow burn." By the latter he referred to a gradual deterioration in the relationship between Binder and Ritchie, which resulted in Ritchie taking retaliatory action against Binder by transferring her from the Middle School to School No. 1 (1 Tr. 8, 9).

Based on the foregoing Findings of Fact the Hearing Examiner is not persuaded that Binder's alleged deteriorating relationship with Ritchie had anything whatever to do with Binder's transfer in April 1981. The facts are legion that Binder was "out front" for the Association as its President over a period of many years. As the Hearing Examiner observed at the hearing it is only natural that there would be some tension, irritation and hostility between an aggressive President of an Association and a Superintendent under the circumstances of the Superintendent's authority being challenged on given issues (1 Tr. 36, 37). Further, notwithstanding that Binder testified without contradiction that on a least 12 to 15 occasions Ritchie stated to her that she was a "thorn in his flesh," Binder testified that Ritchie is a person dedicated to his job, basically very kind and thoughtful and takes an interest in people (1 Tr. 34).

Thus, the Hearing Examiner perceives that the relationship between Ritchie and Binder over the years was what one might expect of adversaries whose interests did not always converge. On balance, the Hearing Examiner cannot conclude from the instant record that Ritchie was motivated by anti-union animus toward Binder

in her capacity as an active and aggressive President of the Association. In so concluding the Hearing Examiner has considered fully his findings on the relationship between Binder and Ritchie over a period of 10 or 12 years as set forth in Finding of Fact No. 7, supra.

Based on the foregoing, the Hearing Examiner concludes that the Charging Party has failed to prove by a preponderance of the evidence that Binder's activities on behalf of the Association were a "substantial factor" or a "motivating factor" in Ritchie's recommendation and the Board's decision to transfer Binder from the Middle School to School No. 1 on April 14, 1981. Under this analysis the Hearing Examiner need not address the question of whether or not the Board would have transferred Binder even in the absence of the exercise by Binder of protected activities on behalf of the Association. However, even assuming arguendo that the Charging Party had proven that Binder's activities were a "substantial factor" or "motivating factor" in the Board's decision to transfer her in April 1981, the Hearing Examiner has no difficulty whatever in concluding that the Board was motivated in its decision to transfer Binder by a legitimate business justification and that, therefore, the transfer would have occurred even in the absence of Binder's exercise of protected activities on behalf of the Association.

The Board's right to transfer an employee in the context of an educational policy decision is a clear managerial prerogative and has been so held by the New Jersey Supreme Court: Ridgefield Park Board of Education v. Ridgefield Park Education Association, 78 N.J. 144, 156 (1978). Binder did not dispute the Board's inherent right to transfer her, but alleged that the transfer was in retaliation for her exercise of protected activities as President of the Association over many

years. Thus, an officer of an Association has been held not to have an inherent right to work on a particular shift: State of New Jersey (Department of Corrections), P.E.R.C. 80-132, 6 NJPER 218 (1980). It is worthy of note that the Commission, in the foregoing case, found that there was no evidence that an Association officer, while working on a different shift, would not be able to carry out his Association duties. So, too, does Binder have no right, by virtue of her office in the Association, to work in a particular school. Further, the record establishes clearly that the functioning of the Association should not be materially impaired by the fact that Binder is now at School No. 1. (See 2 Tr. 112, 113; 3 Tr. 2, 8, 9, 15, 16).

Turning now to the Respondent's evidence of a legitimate business justification for its decision to transfer Binder, it is first noted that the Board in 1981 had received complaints from parents about the level of achievement of pupils in School No. 1. Binder herself was fully aware of this and had complained that pupils coming from School No. 1 to the Middle School for her 5th grade class were not adequately prepared. The Minimum Basic Skills (MBS) test scores for School No. 1 had for some years been wholly deficient in comparison to the Gilmore and Olbon Elementary Schools (see Finding of Fact No. 10, supra). Ritchie, in reaching his decision to recommend the transfer of Binder from the 5th grade at the Middle School to the 4th grade at School No. 1, had concluded that Binder had the ability to motivate her students, develop habit formation and instill discipline within the classroom (4 Tr. 30, 31). Based on Binder's overall strength and instructional capability, the Board accepted Ritchie's recommendation. Clearly, this was a legitimate educational policy decision wherein the Board was seeking to remedy a deficiency in the 4th grade at School No. 1 by the transfer of a competent teacher to effectuate that objective. The Commission has had occasion to sustain the transfer of a union activist based upon legitimate educational policy reasons. See, for example, Laurel Springs Board of Education,

P.E.R.C. No. 78-4, 3 NJPER 228 (1977) and Board of Education of the Vocational Schools of Essex County, P.E.R.C. No. 82-32, 7 NJPER 585 (1981).

Additionally, the Hearing Examiner finds and concludes that the Board's handling of the transfer of Kennedy from the 4th grade at School No. 1 to the 4th grade at the Gilmore Elementary School for the 1981-82 school year in no way establishes discrimination as to Binder. Kennedy, who was almost denied an increment for the 1981-82 school year, was clearly in need of teaching support, which she would obtain at the Gilmore Elementary School. Also, it is noted that Gilmore had no history of MBS problems (3 Tr. 58; 4 Tr. 40, 41; R-9).

Finally, the Hearing Examiner has attached no significance to the medical reasons offered by Binder as to why she should not be transferred. There was no showing that the Board was motivated by a desire to make life physically difficult for Binder in its decision to transfer her to School No. 1. Ritchie testified without contradiction that since Binder's transfer he has observed no problem with her handling fire drills and that her absentee record has been good (see Finding of Fact No. 17, supra).

Based on all of the foregoing, the Hearing Examiner will recommend that the alleged violations by the Board of Subsections(a)(1) and (3) of the Act be dismissed.

* * * *

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


CONCLUSION OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it transferred Ruth Binder, the President of the Association, from the Middle School to School No. 1 on April 14, 1981.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint

be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: June 28, 1982
Trenton, New Jersey