

P.E.R.C. NO. 91-112

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SCHOOL DISTRICT OF THE CHATHAMS,

Respondent,

-and-

Docket No. CI-H-90-30

KENNETH L. EILERS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the School District of the Chathams. The Complaint was based on an unfair practice charge filed by Kenneth L. Eilers alleging that the District violated the New Jersey Employer-Employee Relations Act when it terminated Eilers allegedly in retaliation for his attempts to unionize the custodial staff. The Commission concludes that the District proved that even absent Eilers' protected activity, he would have been the employee laid off.

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Appearances:

For the Respondent, Vogel, Chait, Schwartz & Collins,
attorneys (Laura J. Lande, of counsel)

For the Charging Party, Klausner & Hunter, attorneys
(Stephen B. Hunter, of counsel)

DECISION AND ORDER

On October 3, 1989, Kenneth L. Eilers filed an unfair practice charge against the School District of the Chathams. The charge alleges that the District violated subsections 5.4(a)(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it terminated Eilers' employment, allegedly in retaliation for his attempts to unionize the custodial staff.

On October 11, 1989, a Complaint and Notice of Hearing issued. The District's Answer admitted that Eilers was terminated

^{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."

but denied that the termination was because of his protected activity.

On January 23 and 25, March 20, 21 and 22, and April 2, 1990, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by August 6, 1990.

On February 12, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-22, 17 NJPER 113 (¶22049 1991). She found that the recommendation of Charles Heine, the Supervisor of Building and Grounds, that Eilers be terminated was partially motivated by his distaste for Eilers' protected activity. But she also found that Rocco Orlando, the Board Secretary/Business Administrator, made an independent and lawfully motivated recommendation that Eilers be terminated and that the District would have terminated Eilers even absent his protected activity.

On March 18, 1991, after an extension of time, Eilers filed exceptions. He contends that the Hearing Examiner erred in making certain findings of fact and in concluding that Orlando's recommendation was lawfully motivated and that the District would have terminated him absent his protected activity. The District's reply urges us to adopt the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-38) are thorough and accurate. We incorporate them. We specifically accept her credibility determinations and reject Eilers' exceptions asserting that Orlando,

Adamowski, Hill and Hyland knew of his role in the second organizational drive before his termination; that Orlando knew that the first drive was directed against him; that Adamowski agreed to promote Hyland if he would sell out the union during the first drive; and that Artigliere and Hyland did not have any input into evaluations of Eilers. On this last point, Heine regularly met with his foremen to review employee performance (4T99-4T101). We also accept the Hearing Examiner's finding, based on the testimony as recorded in the transcript (4T94), that Hyland and Heine were close personal friends who would socialize on occasion. Finally, we note that Orlando asked Eilers to report dangerous conditions to the administration before mentioning them at public meetings; that Eilers was excluded from a 1987 meeting with Orlando since he was not a union official, and that upon regionalization, the District stopped dues deductions authorized by former Township employees.

In re Bridgewater Tp., 95 N.J. 235 (1984), sets the standards for determining whether an adverse personnel action violates subsections 5.4(a)(1) and (3). The charging party must prove, by a preponderance of the evidence on the entire record, that activity protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise of the protected rights. Id. at 246. If the charging party proves an illegal motive, the

burden shifts to the employer to prove, again by a preponderance of evidence on the entire record, that the adverse action would have taken place even absent the protected conduct. Id. at 242. See also Bogota Bd. of Ed., P.E.R.C. No. 91-105, 17 NJPER ____ (¶____ 1991); UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987).

At this juncture, it is undisputed that Heine's hostility towards Eilers' protected activity partially motivated his recommendation that Eilers be terminated. We will assume that Orlando's recommendation was tainted by his reliance on Heine's recommendation. But given our acceptance of the Hearing Examiner's credibility determinations and findings of fact, we agree with her that the District proved that it would have terminated Eilers absent his protected activity.

Eilers argues that the District's president, the superintendent and other officials knew of and were hostile towards his role in the second organizational drive. But the Hearing Examiner made specific and supported findings that these officials lacked such knowledge and hostility. We will not draw contrary inferences from the timing of the layoff or the small size of the workforce. We also reject Eilers' suggestion that the District shifted its reason for laying him off. Its reason never changed -- Eilers lost his job because of serious financial problems leading to a legitimate reduction in force. The District's letter informed Eilers of that reason. The District is not guilty of shifting

motives simply because the letter did not go on to inform Eilers of the standard -- "least valuable employee" -- used to select him as the maintenance employee to be laid off.

The District faced serious financial problems in preparing a budget for the 1989-90 school year. It made a non-discriminatory decision to eliminate 12 positions -- ten teaching positions, one custodial position, and one maintenance position. There being no contract requiring that seniority govern reductions in force, the administration decided, again without any discriminatory motivation, to lay off the maintenance employee it believed was the "least valuable".

Besides his illegal motive, Heine had many legitimate reasons for recommending that Eilers be the employee laid off. The Hearing Examiner credited extensive testimony validating Heine's complaints in his reprimand of Eilers and his recommendation to terminate him. Orlando viewed Heine's recommendation as confirming what Orlando already believed -- that Eilers was the "least valuable" employee. Two supervisors, Hyland and Artigliere, agreed that Eilers had the weakest skills among maintenance employees and was without question the employee they would have laid off. We conclude that the District has proven that Eilers would have been the employee laid off even absent his protected activity.

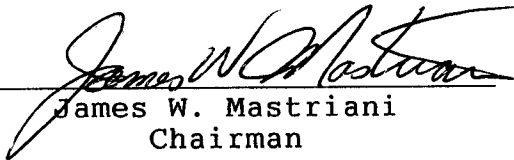
We reject Eilers' reliance on Mt. Olive Tp. Bd. of Ed., P.E.R.C. No. 90-66, 16 NJPER 128 (¶21050 1990). There, a superintendent discriminatorily recommended that the Association

president be transferred; the board accepted that recommendation and did not prove that it would have transferred the president or made any transfer absent the illegal recommendation. Here, the District confronted fiscal problems necessitating layoffs and it proved that, even absent Heine's hostility, Eilers would have been the maintenance employee laid off.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Johnson and Wenzler voted in favor of this decision. Commissioner Smith voted against this decision. Commissioners Bertolino and Regan abstained from consideration.

DATED: June 20, 1991
Trenton, New Jersey
ISSUED: June 21, 1991

H.E. NO. 91-22

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

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-and-

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KENNETH L. EILERS,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the School District of the Chathams did not violate (5.4(a)(1) and (3) of the Act when it selected the Charging Party for a reduction in force. Charging Party proved that the Board was motivated in part by Charging Party's protected activities, including his organizing activities and his grievance filing. However, the Board demonstrated that, because of his deficient performance, it would have rified the Charging Party as the "least valuable" maintenance employee even in the absence of his protected conduct.

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.

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HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On October 3, 1989, Kenneth L. Eilers ("Eilers") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") against the School District of the Chathams Board of Education ("Board"). Eilers alleges that the Board violated subsections 5.4(a)(1) and (3)^{1/} of the New Jersey

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et al. ("Act") when it terminated his employment in retaliation for his attempts to unionize the Board's custodial staff.

On October 11, 1989, the Director of Unfair Practice Proceedings issued a Complaint and Notice of Hearing on the Charge. The Board filed an Answer to the Complaint on October 31, 1989. It admitted Eilers was involved in a 1988 unsuccessful attempt to organize the districts' support staff, but denies knowledge of Eiler's subsequent organizing activities. The Board admits it terminated Eilers, but denies the termination was discriminatory.

At hearings conducted on January 23, January 25, March 20, March 21, March 22, and April 2, 1990, the parties examined witnesses and presented documents.^{2/} Both parties filed post-hearing briefs and reply briefs by August 6, 1990.

Upon the entire record, I make the following:

1/ Footnote Continued From Previous Page

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/ Charging Party's exhibits are identified as "CP-"; Respondent's exhibits are identified as "R-"; jointly submitted exhibits are identified as "J-". Transcript citations "1T, 2T, 3T, 4T, 5T and 6T" refer to the transcripts of hearings on January 23, January 25, March 20, March 21, March 22, and April 2, 1990, respectively.

FINDINGS OF FACT

1. Prior to July 1987, two separate school districts existed in Chatham: the Chatham Borough Board of Education ("Borough Board") and the Chatham Township Board of Education ("Township Board"). Through a voter referendum in 1986, the Borough Board and the Township Board merged, creating a new, regionalized district, School District of the Chathams. The new Board ("Regional Board or "Board") took over the operation of the Township's and Borough's schools on July 1, 1988. It absorbed most of the constituent districts' personnel.

2. Prior to the regionalization, the Borough Board's support employees did not have a collective negotiations representative. The Township Board's support staff were represented for collective negotiations by the Chatham Township Supportive Education Association ("Support Association"). A collective agreement (CP-5) covered the support employees for the period July 1, 1985 through June 30, 1987. The Township Board and the Support Association enjoyed an amicable eight-to-ten year relationship without grievances (1T34; 1T49; 4T124-4T125; 4T134).

3. In anticipation of the consolidation, the districts' employees formed a new organization, Association of Chathams Employees Support ("ACES") to represent all support employees who would be employed by the new Regional Board. With the help of New Jersey Education Association ("NJEA") Consultant Anton Schulzki, ACES conducted an organizing drive among support employees. Employees signed cards authorizing ACES' representation (CP-1) in October 1987 (1T48).

4. Kenneth Eilers, a maintenance employee of the Township Board, together with Ann Matyiku, the president of the Township Support Association, led the ACES organizing campaign. Eilers described himself as an "arm twister" for the ACES organizing effort. Eilers told employees that the Township Board employees had needed an Association because Rocco Orlando, then the Township Board Secretary, could not be trusted.^{3/} (1T48; 1T50; 1T71).

5. ACES selected John Hyland, the Borough Board Grounds Foreman, to chair the organizing committee because he was a longtime employee and could be persuasive with Borough employees. Several organizational leaflets (CP-3, CP-4) distributed to employees between April and June, 1988, identified Matyiku, Eilers, Hyland and three other employees as members of the ACES organizing committee. Orlando, the Regional Board Secretary/Business Administrator, saw these leaflets (1T72).

6. ACES filed a Petition for Certification (J-1) with this Commission on October 15, 1987, seeking to represent the support staff employees--clerical employees, custodians, aides, maintenance employees, groundsmen, and van drivers--who were to be employed by the Regional Board beginning the following school year. ACES simultaneously asked the Regional Board to voluntarily recognize it as the support employees' majority representative.

^{3/} The record does not establish, nor do I infer, that Orlando knew he was the target of the representation campaign.

Steven Adamowski, the newly appointed Superintendent for the Regional Board, recommended to the Board that it reject ACES' request for voluntary recognition. Adamowski felt that because some of the employees had been represented before while others had not, the choice of representation should be left to the employees. The Board also had no indication a majority of the employees wanted representation. The Board declined to voluntarily recognize ACES as the support employees' representative (1T73; 5T77).

7. On April 4, 1988, the Board and ACES signed an Agreement for Consent Election (J-2). On May 10, the Board advised the Commission and ACES that it believed (then) Custodial Foreman Jay Clausen, Maintenance Foreman Orlando Artigliere, and Grounds Foreman John Hyland were supervisors and it intended to challenge their voting eligibility in the election (J-3, J-4, J-5).

8. On May 31, 1988, the Commission conducted a secret ballot election among the support employees. The employees rejected representation by a 26 to 19 vote (J-6).

9. During the election campaign, ACES assigned each organizing committee member a group of voters he or she was encouraged to vote. On the day of the election, Hyland attended a turf management meeting outside the district and did not participate in the election. The employees he was assigned to shepherd to vote also did not vote in the election. While Hyland retained his Grounds Foreman position when the districts regionalized, I find

that the Board did not coerce Hyland's abstention from voting.^{4/}
(1T75; 1T76; 1T140; 4T37).

10. According to Eilers, the Board's administrative staff took a "neutral attitude" in the election campaign. Before the election, Regional Board Superintendent Adamowski and Assistant Superintendent Joseph Schneider met several times with groups of support employees. Adamowski asked employees to give him a chance to run the district in a way that employees would not feel they needed a union. Adamowski and Schneider told employees the administration would have an "open door" policy. They encouraged employees to bring their concerns to Adamowski, Schneider, or Business Administrator Rocco Orlando on an individual basis. Adamowski also told employees that the Regional Board intended to equalize the salary and benefits of retained employees at the higher level of the two constituent districts (1T52; 1T74; 4T113; 5T73; 5T75; 5T79; 5T82-5T85; 5T86).

11. As a result of regionalization, most of the maintenance and grounds staff of the Township and Borough Boards were offered employment contracts with the Regional Board. Two Township Board custodians and two Borough Board maintenance

^{4/} Hyland and Superintendent Adamowski credibly denied that the administration discussed unionization with Hyland or that it promised him the foreman job in exchange for his voting abstention (5T94). Hyland learned the Board intended to challenge his right to vote because he was a supervisor (4T37). It is likely Hyland chose to take care of other business on the day of the election because he believed that his vote would not count anyway.

employees were laid off. The layoffs were based strictly on seniority in accordance with the Township's Support Association's contract, which the Regional Board chose to apply to the Borough's staff. In late May 1988, the Regional Board offered Eilers an employment contract. His salary was increased by \$4,000 to bring it into parity with Borough employees at the same level (1T39; 1T40; 1T62).

12. In the summer of 1988, the Regional Board created a new position, Supervisor of Buildings and Grounds to oversee the maintenance, grounds and custodial operations. The Board hired Charles Heine from outside the districts because it was unsatisfied with the performance levels of the Township and the Borough maintenance and custodial staffs. Hyland was appointed as Grounds Foreman; Jay Clausen, the former Maintenance/Grounds Foreman with the Township Board, was appointed Custodial Foreman; and Orlando Artigliere, the former Borough Maintenance foreman was appointed Maintenance Foreman. The three foremen reported to Heine. Immediately after regionalization, Eilers was assigned to work primarily under Grounds Foreman Hyland (4T141).

13. No organizing activities occurred over the summer of 1988. Just after the regionalization, Schneider set up "advisory councils" with the secretaries and with custodial and maintenance employees to provide opportunities for dialogue. Two or three advisory council meetings were held with the custodial and maintenance employees. During these sessions, Eilers raised

questions about terms and conditions of employment. During one such session in the summer of 1988, Schneider confirmed that the Board would equalize the salaries of the former Township Board employees with the former Borough Board employees sometime in the fall. Schneider again confirmed that employees could bring concerns not resolved by the advisory councils to him individually (1T57; 4T112-4T114; 4T120-4T121).

As a follow-up to Schneider's meeting, in August 1988, Eilers' went to talk to Schneider about his raise. When Heine learned that Eilers had done so, he became angry (3T9-3T10; 1T59; 4T82-4T83).

14. Shortly after the beginning of the 1988-89 school year, Heine and Eilers developed a dislike for one another.^{5/} Heine attempted to "get the dirt" on Eilers by asking several employees to "watch" Eilers and report back to him. He asked Rocco Passomato, a senior maintenance employee, to report Eilers' mistakes and the frequency of his breaks. Passomato refused. Heine told Passomato he wanted to "get the dirt" on Eilers because Eilers had gone "over his head" to Schneider. Heine also asked groundskeeper John McCafferty to "check up" on Eilers. McCafferty also refused.

^{5/} Eilers and Heine seldom spoke to one another. Eilers did not like Heine and Heine did not like Eilers (1T104).

I infer Heine also told Hyland to report Eilers' mistakes.^{6/} Many of the maintenance employees began having problems with Heine (3T6-3T7; 3T18-3T19; 3T28; 3T57).

15. Sometime in the fall of 1988, Eilers complained to Adamowski about Heine's treatment of maintenance employees, including himself (1T61; 2T4-2T5).

16. On October 24 and 26, 1988, respectively, Eilers was given a letter reprimanding him (J9) and a letter warning him that repeated incidents would result in his termination (J-10). (See fact no. 50).

17. After receiving the reprimand and warning letters, Eilers "set out to see what the feeling was about a union drive." (1T109-1T111). Because the employees resented Heine's management style, they began discussing unionizing in November or December of 1988. Eilers led the organizing effort. Eilers contacted NJEA Representative Anton Schulzki several times in the fall of 1988, suggesting that the organizing drive could be resurrected because the maintenance and custodial employees were dissatisfied (2T52; 3T37).

Eilers obtained authorizations cards from the NJEA office between Thanksgiving and Christmas. Meetings among interested

^{6/} While Hyland denied that Heine asked him to document particularly Eilers' mistakes, I do not credit his denial (3T83). Because Hyland was Eilers' immediate supervisor and Heine's "close personal friend", it is logical that Heine would look to Hyland for information about Eilers' performance.

maintenance and custodial employees were held in January 1989 at an out-of-town club.^{7/} After several meetings, Eilers and other employees solicited signatures on the authorization cards (CP-6); 20 of the 24 employees signed between March 16 and March 21, 1989 (1T80-1T81; 1T114; 1T118).

18. In a meeting with the maintenance employees sometime in the winter of 1989, Heine told the employees he disliked unions and warned that if the employees organized, he would make them work "by the book". Eilers responded to Heine that the last contract (with the Township Board) did not contain work rules but grievance procedures and benefits (1T112-1T113; 3T20; 3T38-3T39; 3T56).

Although the record established that Heine knew the employees were organizing and that Eilers' was leading the effort, it did not establish when Heine learned this. Clausen credibly denied that Heine spoke to him about the employees' unionizing drive. Clausen had heard "some rumors they were looking into it...." Heine once told employees in the shop that he "...didn't like Eilers, he's trying to organize something, you guys don't need it..." and that Heine said he would "get [Eilers'] ass."

(3T46).^{8/} During the winter of 1988-89, after Bruce MacDougall, a maintenance employee, had an accident with a Board vehicle, Heine

^{7/} Anton Schulzki testified that he thought the first meeting was held in November, while Eilers recalled the first formal meeting was in January. I credit Eilers on this point because he was more deeply involved at the local level than Schulzki.

^{8/} I credit the testimony of Bruce MacDougall's on this point.

told him it was unfortunate Eilers was not driving so he could fire him (3T39; 3T87; 3T122-3T123).

19. Orlando Artigliere, the Maintenance Foreman, credibly testified that Heine was "always on [Eilers'] back." When asked why, Artigliere replied "one time [Heine] did mention the union." Artigliere understood that Heine wanted to "get" Eilers, but was uncertain whether this was because of his union activities or because he just disliked him (5T17-5T18).^{9/} Heine asked Artigliere if he knew Eilers was trying to get the employees unionized. Artigliere did hear "through the grapevine" that Eilers was attempting to unionize the maintenance employees. He also heard Eilers discussing it in the shop. Heine told Hyland that he did not want a bargaining unit for the custodial and maintenance employees (2T73; 3T79; 3T80; 5T12; 5T14).

Hyland did not learn about Eilers' involvement in the union organizing activity until he saw an Association flyer on the bulletin board on April 17, 1989. He asked Heine, "Did you see what's happened?" Heine responded that he thought Hyland knew about it (4T39).^{10/}

^{9/} Artigliere was called as a witness for the Board. Based upon Artigliere's forthright, candid responses and his demeanor, I found him to be a most credible witness.

^{10/} I credit Hyland on this point. I do not credit Eilers' tenuous testimony that he thought Hyland was in the maintenance shop when the employees were discussing their dissatisfaction with Heine and the possibility of unionizing. Eilers was unsure Hyland was there or that he heard the conversation (2T69). No record evidence establishes that Hyland knew of Eilers' union activities before April 17.

From this accumulation of testimony, I conclude that Heine knew organizing activity was occurring and knew prior to March, 1989, that Eilers was involved.^{11/}

20. As a result of Heine's attitude, the men felt they needed union representation. Passomato wanted Assistant Superintendent Schneider to know how the men felt because Schneider had resolved employees problems before.

On March 28, 1989 Passomato went to see Schneider.^{12/} Passomato told Schneider that maintenance employees were attempting to organize because they were unhappy with Heine's treatment of them, because Heine did not permit input from the men concerning the work, and because the men were concerned about their positions in light of the way Heine treated Eilers.^{13/} Schneider responded that a union would not solve the employees' problem with Heine. This meeting was the first time Schneider knew of an organizing

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- ^{11/} Given the relatively small size of the district, it is likely Heine learned about the organizing activity. Both Artigliere and Clausen had heard "rumors". Heine would not be threatening to "get" Eilers after he wrote the March 3 recommendation to terminate Eilers.
- ^{12/} Schneider testified that, from indications in his calendar, he met with Passomato on March 28. Although Passomato was unsure when the meeting took place, he stated the cards had not yet been signed. I credit Schneider on this point because he had a clearer recollection (4T108).
- ^{13/} Schneider did not recall Eilers being mentioned during this meeting (4T117). Passomato specifically recalled mentioning Heine's harassment of Eilers, although both witnesses agreed the main focus of the meeting was Heine's treatment of all the men.

effort among the employees. At that time, he did not know who the leader was (3T10-3T11; 4T109-4T111).

Schneider told Adamowski and Orlando about the substance of his meeting with Passomato. Schneider suggested that Adamowski meet with employees (4T111).

21. On April 6, 1989, Adamowski called Passomato and Artigliere in to discuss the matter. Passomato and Artigliere cited the employees' unhappiness with Heine as the reason for the organizing effort. They also expressed concern that Heine was trying to get "anything he could" on Eilers. Adamowski wanted to resolve their problems before the employees unionized. He asked them what they felt should be done about the problems. They wanted Heine fired. Adamowski responded that he would be evaluating Heine soon. Passomato and Artigliere told Adamowski the men had signed union cards, but they did not mention Eilers in connection with the union organizing effort or card signing (3T14; 5T62; 5T102).

22. At Eilers' request, the NJEA office prepared and signed Eilers' name to a letter dated March 29 (J-7) to Board President Roger Hill, demanding recognition of the Association as the employees' majority representative. The record does not indicate when the letter was mailed (2T55).

Hill did not open the letter (J-7) until April 8.^{14/}
Hill did nothing with the letter until April 10 because he assumed it was an informational copy.

At the April 10 Board meeting, Hill mentioned the letter to Adamowski and they laughed about it, knowing Eilers had already been notified of his non-renewal.^{15/} The Board did not respond to the letter (5T64; 5T96-99).

The Board's Decision
to Terminate Eilers

23. In October 1988, the State advised the Board what its allowable operating expense budget maximum ("CAP") would be for the 1989-90 school year.^{16/} By November, the Board administration knew its 1989-90 operating expense budget "bottom line" and understood it would have to make reductions in staff.

^{14/} I base this finding on Hill's unrefuted and credible testimony. Hill picked up his unopened mail from the district office on Friday afternoons. Hill habitually reviewed the district mail on the weekend before a Board meeting. Hill testified with certainty that he did not open the district mail before April 8, because he was involved with visitors from France on a sister cities exchange program until April 6. The April 10 Board meeting was to be Hill's last meeting as Board President. I am convinced that he did not open the mail until after April 6, and would have done nothing with the letter until the Board meeting even if he had (5T28-38).

^{15/} Adamowski thought Eilers was presenting himself as a union president to save his job. He was surprised that Eilers would be leading an organizing effort since Passomato and Artigliere had recently been the unofficial spokespersons for the maintenance employees, and he had just met with them about the unionization effort (5T65; 5T90).

^{16/} The State CAP regulations set the maximum funding level for school districts' current expense budgets. The CAP was low because of the savings realized in 1988-89 as a result of the merger.

24. Superintendent Adamowski, Assistant Superintendent Schneider, and Business Administrator Orlando held several meetings with the school principals in November and December to decide which budget areas to cut. The Board wanted the cuts to be balanced and to impact as minimally as possible on academic instruction. Orlando vigorously opposed cuts in maintenance and custodial staff because he was concerned such cuts may impact on his ability to operate the department (5T45).

After several meetings, the administrators and principals agreed to recommend a budget which included significant reductions in materials and equipment expenditures and the elimination of 12 positions: ten teaching positions, one custodial position and one maintenance position (5T42-5T43).

25. When it became clear to Orlando in November or December that cuts in the maintenance and custodial staffs were inevitable, Orlando told Heine that the administration wanted to cut the "least productive" maintenance and grounds employee. Heine's first reaction was to recommend cutting Eilers. Based upon Orlando's own knowledge of Eilers' performance with the Township Board and Eilers' non-response to the October reprimand, Orlando also believed Eilers would be the likely choice. However, because Orlando had little direct contact with maintenance employees, he

asked Heine to consult with the foremen and make a formal recommendation on who was the least productive employee (4T174).^{17/}

26. On December 22, the administration presented a proposed budget to the Board finance committee. The committee accepted the administration's recommended budget, including the elimination of the 12 positions, and recommended it to the full Board for approval. The administration prepared 500 copies of a booklet (R-8) containing the budget together with explanations. R-8, which shows the elimination of one maintenance position, it was widely distributed in all schools and to residents.

27. At a Board meeting on February 15, 1989, the Board formally adopted the budget, including the recommended position reductions (4T162).

28. At a public hearing on the budget on March 17, 1989, the reductions in staff positions were discussed.^{18/} Although Eilers' attended most Board meetings, he did not recall attending the budget hearing.^{19/} Although Eilers likely knew the budget

^{17/} I attribute no union animosity to Orlando. He and Adamowski both testified credibly that Orlando preferred to have the support staff unionized because the resulting standardized salaries and work conditions facilitated the administration of the district's support operations (4T124-4T125; 5T96).

^{18/} I infer that the individuals to be rified were not discussed then.

^{19/} Eilers denied being aware the budget contained substantial staff position cuts. I discredit his denial. Because of the wide dissemination of the proposed budget (R-8) and the extent of the layoff, it is unlikely in a district this size that any employees were unaware by mid-March that staff reductions were being contemplated.

proposed a position reduction in the maintenance department, he did not know he was targeted for layoff at that point.^{20/}

29. During February and March of 1989, the central office administration discussed which 12 employees would be cut. Decisions as to tenured employees would be controlled by seniority and certification. Among the non-tenured employees, including the maintenance and custodial positions, the administration agreed to rely on supervisors' recommendations and performance evaluation to determine who was "least valuable" to the district (5T51).

30. Heine met weekly with his foremen to discuss the employees' performance. Beginning in January 1989, these meetings began to focus on the employees' performance evaluations. Heine prepared the evaluations and discussed each of them with Hyland and Artigliere. While Heine never specifically asked Hyland or Artigliere^{21/} for their recommendations on which maintenance employee was least valuable to the district, I find that they did have substantial input into the evaluations. On March 3, Heine submitted a written recommendation to Orlando that Eilers should be terminated. He attached a formal evaluation of Eiler's performance (R-6) (4T175).^{22/}

^{20/} Eilers credibly denied knowing he was considered for reduction until he received his non-renewal notice.

^{21/} Artigliere did not recall being asked for a recommendation concerning who should be cut. Since Heine did not ask Hyland for a recommendation, I infer he also did not ask Artigliere.

^{22/} Eilers never saw this evaluation.

31. Based upon Heine's evaluation and recommendation to terminate Eilers as well as Orlando's direct assessment of Eilers' performance and relative skill level, Orlando recommended to Adamowski that Eilers be cut from the staff. Adamowski was not surprised because he knew Eilers was "having difficulty and was problematic." (5T53).

Orlando also recommended that Steve Bronco be selected from among the custodial staff for layoff. Orlando recommended Bronco because he was graduating from college at the end of the school year and because his work was unsatisfactory. Adamowski passed along both recommendations to the Board.

32. On March 27, the Board voted on the specific individuals to be cut from the staff. The Board instructed the administration to notify the affected employees as soon as possible after the April 4 public election. If the budget did not pass the public vote, the Board understood it would have to review the budget to make further cuts (4T184; 5T54).

33. On April 3, Adamowski met with the employees to solicit their support for the budget in the public election. Copies of the proposed budget (R-8) were distributed. Of the maintenance employees, only Passomato attended. He asked Adamowski why the budget contemplated eliminating a maintenance worker rather than a foreman. Adamowski replied that the Board was eliminating a foreman--Clausen's position was being eliminated and Clausen was to be reduced in rank to that of maintenance staff. Passomato did not

discuss the position elimination with other maintenance employees (3T27; 5T66-5T68; 5T109).

34. On April 5, Eilers and Bronco were given letters advising them they would not be rehired for the following school year (J-12; R-10). Eilers' non-renewal letter indicated only that his contract was not being renewed because of staff reductions (J-12). He was never advised that his job deficiencies were part of the Board's consideration. Teaching staff were notified by letters on April 26 (R-9) after the Board passed a required formal resolution not to renew the teachers' contracts (1T140).

35. After Eilers received his non-renewal notice, he accelerated the organizing drive. Eilers distributed several organizational leaflets to employees. An election of officers was conducted in mid-April. The local newspaper announced the Associations' officers and its intention to petition this Commission for an election. Orlando first learned of Eilers' involvement with the organizing drive when he saw this newspaper article (J-16; 1T120; 4T189; 5T68).

When no employee stepped forward to replace Eilers as the Association leader, the organizational drive ended (1T85; 3T40; 3T45).

36. The 1989-90 budget contemplated an overall reduction in the maintenance salary account of \$63,950 (from the previous year), including cuts in the summer help and overtime budgets (R-8, p 35). While the Board was aware during the budgeting process that

the district was scheduled for State monitoring in March 1990, it did not know until the State performed a pre-monitoring inspection in December 1989, how much work would be required. The Board anticipated contracting out the repair projects. The State inspection revealed that the extent of the repair work was much greater than the Board anticipated. Of the twenty projects the Board contracted out in the 1989-90 school year, only two--totalling \$1,923--could have been done by the Board's maintenance staff (CP-7; 4T61-4T62; 5T46).

The Board budgeted \$15,000 for overtime for 1989-90, as it had done in the past year. It actually expended \$25,119 as of March 1990 (CP-8). However, \$16,000 of this overtime payment was paid to cover emergency maintenance situations. This overtime expenditure would have existed even if the maintenance staff had not been reduced (6T75-6T76).

The Board planned to realize significant savings by using temporary employees, paid on a flat rate, only on clear days in the spring and fall to help with the lawn maintenance. In October and November, a temporary agency supplied a few people to help prepare the fields for sporting events. Following a practice used by the Township Board, the Regional Board also hired college students in the summer of 1989 to assist with grounds maintenance (5T70-5T71).

Kenneth Eilers' Performance

37. Kenneth Eilers was hired by the Township Board as a maintenance worker in January 1986. He had no training or work experience in buildings or grounds maintenance.^{23/}

The Township Board's Buildings and Grounds Department operated as a single department and rotated its four or five employees between indoor maintenance work and groundskeeping work depending on the weather and workload demands.

Eilers worked under Building and Grounds Supervisor Al Festa until Festa's retirement in the spring of 1986. Jay Clausen then replaced Festa as Building and Grounds Supervisor (1T32-1T33; 4T129).

The Department had no formal training program. Employees came to the district with certain skills and learned from each other. Workers performed work as generalists but each had an area of specialization. While employed by the Township Board, Eilers did carpentry, electrical work, plumbing repairs, glazing, painting, welding, and groundskeeping work. He did virtually all of the light carpentry work. Eilers got along well with and was often complimented by school principals and teachers. The maintenance employees had a fair degree of discretion about how to perform an assigned task as long as work was performed in a safe manner and the job was finished properly (1T32; 1T43-1T46; 2T40-2T41; 3T60).

^{23/} Eilers' educational background includes doctorate degrees and post-doctorate work in chemical engineering. In the 20 years prior to his employment by the Township Board, he held positions in the chemical field (1T25-1T29).

The Township Board's management style in dealing with employee problems was limited to oral reprimands. No employee was ever formally disciplined (4T134-4T135).

38. Clausen once evaluated the employees in writing, but the evaluations were lost when the Board relocated its administrative offices. Eilers was never formally disciplined while employed by the Township Board. Clausen occasionally reprimanded him orally.^{24/} Eilers characterized his relationship with Clausen as a "personality clash." (2T7).

39. Shortly after Eilers started his employment with the Township Board, Festa reported to Rocco Orlando that he was having some problems with Eilers not following orders and questioning his decisions (4T128). Orlando told Festa to try to "work with [Eilers]" to straighten out the problems (4T129).

40. Clausen supervised Eilers in the Township Board's Maintenance and Grounds Department for more than two years. He characterized Eilers' performance as "sometimes okay and other times

^{24/} I do not credit Eilers' inconsistent testimony about his evaluations or discipline at the Township Schools. He first testified that he was never disciplined or evaluated by the Township Board (1T40; 2T7-2T8). Eilers later acknowledged he received one written evaluation from Clausen (1T123). Eilers initially testified that he could not recall ever being told his work was deficient. He later denied that he was ever criticized for his performance with the Township Board (1T40-1T47). He later stated Clausen occasionally reprimanded employees, but that his reprimands were "like water off a duck's back." (1T41). He admitted that there were "a few minor incidences" of criticism of his work, but Clausen did not criticize his work more than other employees.

I just had problems with him as far as he wanted to do things more or less his way....I've gotten a problem with him borrowing equipment and also unexcused absences." (3T68-3T69). Clausen talked to Orlando about his dissatisfaction with Eilers. He brought several problems to Orlando's attention.

41. Employees, including Eilers, knew the Board permitted employees to borrow district equipment or tools if they first asked permission, took reasonable care of the equipment, and returned the equipment the next working day.^{25/} Eilers borrowed a water pump from the district without permission. He returned it in inoperable condition and it had to be replaced. He also borrowed a high pressure cleaner without permission. Clausen reprimanded Eilers for this, but Clausen did not feel Eilers took the reprimand seriously. Clausen reported this to Orlando and asked Orlando to handle the problem (2T8-2T9; 2T43; 3T78).

Orlando called Eilers to his office and explained that employees must first ask their supervisors before taking district equipment. Orlando told Eilers that he himself asked Clausen's permission to borrow equipment even though he had a maintenance shop key. Eilers had difficulty understanding why he should ask

^{25/} Eilers admitted Clausen told him about this policy.

Clausen's permission to borrow things since Clausen did not tell employees when he borrowed things (4T130-4T131).^{26/}

42. Eilers handled equipment carelessly. Clausen frequently reprimanded Eilers for his mishandling of lawn equipment which resulted in a lot of damage and missing parts.^{27/}

On one occasion, Eilers used a classroom shop power saw without first informing Clausen pursuant to Clausen's policy. He broke the blade guard. Eilers did not tell anyone until the shop teacher complained to Clausen (3T76).^{28/}

On another occasion, Eilers broke the teeth off the maintenance shop saw blade by freehanding material through the saw without using the rip fence. The material kicked back and caught

^{26/} Eilers initially did not recall having a conversation with Orlando about borrowing equipment. Eilers later admitted Orlando told him that he (Orlando) always asked the forman's permission to borrow equipment (2T45). Accordingly, I base this finding on Orlando's credible testimony about this conversation.

^{27/} Eilers did not recall being reprimanded for loosing parts from lawnmowers (2T11). I credit Clausen's testimony on this point. I found Clausen to be a credible witness with no particular predisposition or stake in the outcome of this hearing. He seemed interested only in a recitation of the facts.

^{28/} Eilers had the shop instructor's permission to use the classroom power equipment. However, Clausen's unrefuted testimony was that the policy was to first check with a supervisor before using shop classroom equipment.

him in the stomach (3T77). Clausen reprimanded him for this unsafe practice.^{29/}

43. On the day of a heavy snowfall in January 1988, Clausen reprimanded Eilers for "sitting around" the shop for two hours while others, who had been called in early for overtime, were clearing snow. Eilers stated he was not clearing snow because no one had given him an assignment. Clausen criticized Eilers for lacking initiative (2T15; 3T81-3T82).

44. The Township Maintenance Department's practice was for the employee to tell the supervisor when leaving the assigned work area.^{30/} In February 1988, Eilers went to the Superintendent's office for about half an hour to interview for the Supervisor of Buildings and Grounds position being created by the Regional Board. Eilers did not first inform Clausen he was going (2T20).

45. According to Clausen, Eilers sometimes had problems following directions and "sort of had his own mind." (3T83). He required more supervision than other employees. Clausen recounted an incident when he assigned Eilers to repair a clogged fountain. Eilers attempted to remove the fountain from the wall rather than clean the trap. Clausen assigned someone else to finish the job.

^{29/} I find the facts surrounding this incident based primarily upon Clausen's credible testimony. Eilers did not recall an incident about damaged blades on the shop table saw, but admitted Clausen reprimanded him about proper use of the saw (1T134; 2T14).

^{30/} Eilers admitted this was a common practice.

Eilers acknowledged that he sometimes commented on the wisdom or methods of assigned work projects (2T24; 3T83; 3T85; 3T125-3T128).

Graduation Incident

46. In June 1988, Eilers and John McCafferty were working overtime for graduation ceremonies at Gladiator Field, less than five minutes away from the High School.^{31/} During the graduation ceremonies, it was realized that the diplomas had been left at the high school. Clausen sent Eilers and McCafferty back to the high school to get the diplomas. Eilers drove the truck. They picked up the diplomas and then went to a liquor store to get beer (3T102-3T103).^{32/} When they had not returned to the graduation in 20 minutes, Clausen went to look for them and found them in another area of town. When he arrived at the truck, he smelled alcohol. He asked them where they had been and who had been driving. He received no responses.^{33/}

^{31/} Witnesses gave varying estimates of the driving time from the field to the high school. I credit Clausen's testimony because he drove it on graduation day (3T71).

^{32/} McCafferty had once been in an alcohol rehabilitation program. Nevertheless, I make no inference about who was drinking the beer.

^{33/} I base these facts on the testimony of McCafferty and Clausen. While Eilers recalled being sent for the diplomas, he stated that he could not recall how long he had been gone, Clausen coming to look for them, where Clausen found them, Clausen reprimanding them, or the people running the graduation being upset because the diplomas were not there (2T21-2T22; 2T36; 3T61; 3T72).

Clausen was angry and reprimanded them. Clausen reported the graduation incident and his dissatisfaction with Eilers to Orlando. Clausen characterized this incident as the "straw that broke the camel's back," in that he no longer trusted Eilers to get a job done (3T72; 3T64; 3T85; 4T139).

Eilers' Performance with the Regional Board

47. Eilers was offered employment with the Regional Board in May 1988. He started working for the Regional Board on July 1, 1988. The Township Board divided its maintenance and grounds operations into separate departments. The Maintenance Department was headed by Foreman Orlando Artigliere, while the Grounds Department was headed by Foreman John Hyland.^{34/} Eilers worked under Grounds Foreman Hyland until about November or December, when he was shifted to the Maintenance Department under Artigliere's supervision (4T5-7). Eilers did not get along professionally with Hyland. Eilers felt Hyland "barked orders" and "got involved in the minutest detail of the work." (2T26).

48. Heine held weekly meetings with Artigliere and Hyland. Hyland regularly talked to Heine about the performance of his employees, including Eilers (4T84-4T85). (See fact no. 30).

^{34/} Jay Clausen was appointed as Custodial Foremen by the Regional Board in June 1988. At some point not clear in the record, the Board apparently abolished that position and "demoted" Clausen to Assistant Maintenance Foremen. The Board's reduction in force at the end of the 1988 school year eliminated that position and reduced Clausen to a maintenance worker (1T142-1T143).

49. In the beginning of the year, Orlando and Heine met frequently to discuss problems. During these meetings, Heine expressed concern about some of his employees' performance, but particularly about Eilers. Orlando suggested that Heine have his foreman talk to him. Orlando told Heine that if the situation could not be resolved, Heine should give him a formal recommendation to "do something about it." Thereafter, Heine wrote the letter of reprimand (J-9).

50. On October 24, 1988, Heine gave Eilers the letter of reprimand (J-9) stating:

Since July 1, 1988, I along with our immediate foreman, John Hyland, have observed your performance as a groundsman, and as a result of our observations, the following items are areas of very serious concerns to us, and grounds for dismissal...

The letter lists seven areas of deficiency: direct insubordination; misuse of equipment, reckless handling of grounds equipment; refusal to follow chain of command; failure to report absences; questioning of supervisors' decisions; and removal of Board property without authorization. The reprimand letter details specific instances of each infraction. The facts concerning these detailed incidents follow:

Insubordination

51. On August 30, 1988, Hyland directed a grounds crew to pull weeds in the high school courtyard. When Hyland returned,

Eilers was trimming trees. When Hyland asked him why, Eilers replied he thought "it had to be done." (4T9-10).^{35/}

Hyland testified that he frequently had to tell Eilers not to blow the grass on the streets and walkways when running power lawnmowers. Eilers did not deny the incident happened, but testified that it is unavoidable to blow grass on the street while cutting with large mowers but the problem is easily solved by going over the area and blowing the grass back up onto the lawn (2T28).^{36/}

Misusing Equipment

52. Hyland frequently had to tell Eilers to slow down while running groundskeeping power equipment.^{37/} Although Hyland also had to remind McCafferty to slow down, Hyland stated that he had more of a problem with Eilers on the machines (4T19).

^{35/} Eilers testified that he told Hyland he had stopped pulling weeds because his arthritis in his hands was bothering him (1T94; 2T26). Hyland denied this, and I do not credit Eilers. If he had so informed Hyland, Hyland would likely have asked him for a doctor's note.

^{36/} I do not credit Eilers' assertion that he was only told once about it (2T28).

^{37/} Hyland characterized these reminders as "daily". Eilers admitted Hyland told him "two or three times" to slow down on power equipment (2T29). Artigliere also testified that Eilers operated power equipment too fast.

Eilers was careless with grounds power equipment. He sometimes lost the wheels or other parts from lawnmowers, and jumped curbs with the mowers.^{38/}

Eilers was told more than once not to drive the front-end loader with the bucket raised. It was agreed this is an unsafe practice.^{39/}

Reckless Driving of Equipment

53. A contractor complained to Hyland that Eilers was cutting grass too close to the area the contractor was working on power lines. Hyland did not see the alleged incident (4T20). Eilers denied that he drove the tractor near the electrical contractors or caused any danger to them. In the absence of any direct evidence to support this incident, I cannot find as a fact that Eilers was recklessly driving the lawn equipment near the electrical contractors.

Refusal to Follow Chain of Command

54. Eilers went to see Schneider pursuant to his open-door policy on August 19, 1988. He did not inform Hyland or Heine that

^{38/} I credit Hyland's testimony about Eilers' carelessness with the equipment. Mowers were numbered so he would know who was using the machine for the day (4T16). Clausen had similar problems with Eilers' handling of power equipment when Clausen supervised Eilers.

^{39/} Eilers initially denied that he was told about this more than once (1T98, 1T99). He later admitted that he had been told on "one or two" occasions not to drive the front-end loader with the bucket in the air (2T30).

he was doing so.^{40/} There is no specific policy about informing the supervisor before leaving the work area, although Eilers knew it was common practice.^{41/} Hyland did not know of a specific policy about employees telling their supervisor when they leave the worksite (4T22). He saw the problem of Eilers' meeting with Schneider as his failure to follow the "chain of command" in not going to the supervisor first. Other employees also visited Schneider about problems during the school year (4T21-4T22).

Failure to Call In

55. Eilers admitted that on September 29, he did not call in absent because he was in Milwaukee and had missed a flight back. Heine found this explanation satisfactory. On October 17, Eilers did not call in until after 9 o'clock.^{42/}

Questioning Supervisors' Decisions

56. It is clear from Eilers' testimony that he resented specific instruction on how a task should best be accomplished. He

^{40/} Eilers did not recall whether he informed his foreman or Heine that he was going to see Schneider (2T16). Hyland testified that Eilers never asked him to leave the worksite for anything (4T23). Based upon Heine's reaction to this incident, it is unlikely Eilers told Heine he intended to see Schneider.

^{41/} Eilers denied that the Board had a policy about leaving the work site.

^{42/} Eilers testified that he called the shop at 7:20 and no one answered the telephone. When he also got no answer on Heine's telephone, he fell asleep. He reached the Board business office "sometime after 9 o'clock" (1T105). While I credit Eilers' unrefuted explanation, he still had an obligation to inform someone from the Board of his absence before 9 o'clock.

believed that the crew had several years of experience, knew what tools to take, and knew how to do the job. They did not need a lot of instruction about the work. Eilers admitted that he did state his opinions about how the assignments should be done. Hyland noted that Eilers was not the only one who questioned the appropriateness of projects (2T27; 2T41; 4T86-4T87).

In August 1988, Hyland, on Heine's orders, directed a grounds crew to plant flowers in planters at the high school. Eilers objected to the project and told Hyland he thought it was a waste of time and taxpayers money. Eilers also criticized the planter project to Heine. He told Heine it was a stupid idea (1T107).

Removal of Property without Permission

57. On October 20, Eilers cut a three-foot piece of galvanized fence from a pile of scrap fencing sections and took it home. He did not ask anyone's permission. Hyland did not see Eilers take the fence section. No one stopped him (1T108; 2T41).

* * *

58. Rocco Orlando and Heine met with Eilers on October 26, 1988, to discuss the content of J-9. Eilers was non-responsive. He offered Orlando no denial or explanation of the allegations. On October 28, 1988, Orlando sent Eilers a letter (J-10) advising him that repetition of the actions noted in the letter would result in his termination.

After this meeting and the reprimand, Eilers testified that he "cleaned up his act and tried to comply." (1T110).

59. On March 3, 1989, Heine submitted a memorandum to Orlando recommending Eilers be selected for the reduction in force. Heine attached an evaluation, which, according to his memorandum, indicates "poor work quality and work load ability for a maintenance man." Heine's memorandum also listed six areas of concern in which he felt Eilers was not improving:

1. Still doesn't follow direct supervision (wants to do things his way).
2. Refused to cooperate directly with senior maintenance men on job assignments.
3. Many job assignments must be redone to correct mistakes or sloppiness.
4. Appearance is often sloppy and reflects a poor general overview of our Maintenance Department.
5. All Foreman generally feel Mr. Eilers takes too many breaks during the work day.
6. All three Foreman in general would prefer not to have Mr. Eilers assigned to their crews.

The evaluation Heine attached to his March 3 memorandum rated Eilers "acceptable" in the the following areas: "health, attendance record, electrical repairs, and painting." It rated Eilers "unacceptable" in the following areas: "appearance, ability to get along with others, knowledge of techniques in use of materials, supplies and equipment; plumbing repairs, carpentry and hardware, groundskeeper, heating repairs, general repairs, and operation of power equipment." Heine completed the summary section of the evaluation with a recommendation for termination (R-6).

Although Heine did not specifically solicit a recommendation from Hyland or Artigliere concerning which employee should be terminated, Heine discussed the employees performance with his foremen at weekly meetings throughout the year. They discussed the employees' evaluations beginning in January (4T100). Artigliere and Hyland agreed with the evaluations Heine wrote (4T99-4T101).^{43/}

The substance of the recommendation's criticism are discussed below:

Failure to Follow Supervision

60. In one incident, Hyland told Eilers and McCafferty to line the fields for band practice. Eilers decided Hyland had incorrectly laid out the field lines and he relined the field his way. The field had to be redone. Another time, Hyland instructed Eilers to line the field in orange, and Eilers did the lines in white instead. The job had to be redone. McDougall testified that although he heard Hyland complain about Eilers wanting to do things his own way, he never observed this when he worked with Eilers in grounds. McCafferty testified that Eilers' work seemed satisfactory (3T49-50; 3T54-55; 4T13-4T14).

^{43/} While I cannot conclusively find that Heine showed R-6 or the attached evaluation to Artigliere or Hyland before he submitted it to Orlando, I do infer that the foremen had significant input into Heine's conclusions about Eilers' performance.

Refusal to Cooperate with Senior Employees

61. Hyland could not site any example of Eilers' refusal to cooperate with "senior" maintenance employees. Eilers was second only to Passomato in seniority among the five maintenance men (1T137; 1T143; 4T83).

Assignments Must be Redone

62. Artigliere cited a few occasions that Eilers did not follow directions or that his work had to be redone. Once during a job, Artigliere told Eilers not to touch a steam pipe. Eilers did and the pipe came apart and flooded. Another time, Eilers set a toilet that had to be redone by other employees (5T9-10).

Appearance

63. Hyland frequently had to tell Eilers to keep his shirt on, buttoned up and tucked in. Although Eilers denied Hyland ever told him about his appearance, he admitted that Heine once corrected him for not wearing a shirt outdoors during school hours (1T126; 2T48; 4T30-4T31).

Breaks

64. Eilers contended he took the fewest and the shortest breaks. During one period, Eilers took frequent breaks because of a change in medication. Heine reported this to Orlando, who told Heine to tell him to produce a doctor's note. Heine wrote Eilers a letter indicating that if frequent breaks were medically necessary, he would be required to produce a doctor's note. Thereafter, Eilers told Heine the medical problem was solved, and the frequent breaks would be unnecessary. Hyland felt that Eilers took too many breaks,

but knew Eilers took medication. Artigliere asked Hyland if he knew why Eilers took so many breaks, but Artigliere never reported that to Heine (1T138; 2T48-2T49; 2T92-2T93; 3T32; 4T152; 5T12).

Foremen's Reluctance to Work With Eilers

65. With regard to the criticism that "all three foreman would prefer not to have Eilers assigned to their crews", Eilers agreed that both Clausen and Hyland did not like him. They had personalities that clashed with his. Eilers got along well with Artigliere. Artigliere did not tell Heine he preferred not to have Eilers assigned to his crew (1T139; 2T26).

Comparison of Skills

66. Artigliere supervised Eilers from November, 1988, until March, 1989. He also supervised Rocco Passomato, Jay Clausen, George Blazier and Bruce MacDougall during this period. Artigliere rated Eilers' performance as acceptable in plumbing, electrical repair work, carpentry, general repair, and groundskeeping. He said at times Eilers was a little fast with the power equipment. Eilers did a good job and learned quickly on a special task with an outside contractor involving pneumatic controls (5T5-5T6; 5T14-5T15).

Artigliere rated Eilers' attendance record as very good, his ability to get along with the other men as good, and his appearance as satisfactory (5T17). He would recommend Eilers for maintenance employment (5T17).

67. Each maintenance employee has skill as a generalist and all have one speciality. Eilers felt that his "specialities"

were carpentry and laying out the sports fields. He acknowledged that Artigliere was more proficient in heating repairs, McCafferty excelled in grounds and landscaping, and Artigliere had greater expertise in carpentry (1T132).

Artigliere characterized Eilers' skill levels as "basic" in plumbing, electrical and other main work, but felt he was best in electrical repairs (5T7). When asked to compare Eilers' skills to the other employees, Artigliere replied, "I would not place him as high as the other men. No way." (5T8). Artigliere stated that if he had to select the weakest member of his department for a cut, he would have selected Eilers because the other men had more knowledge and experience than Eilers (5T9).

When asked what level of supervision Eilers required, Artigliere replied that he could trust Eilers with a few jobs, but would put another man with Eilers most of the time (5T10).

Rocco Passomato, the senior member of the maintenance staff, was also called as a witness for Eilers. Passomato worked with Eilers in the Maintenance Department for about three months in the winter of 1988-89. When asked to compare Eilers' abilities and knowledge of equipment with the other maintenance workers, Passomato observed that Eilers' skills were "about the same" as the other employees. Passomato stated that while Eilers was "pretty good" with carpentry, electricity, and plumbing, Clausen was better in electricity, and he (Passomato) and McDougall were better in plumbing and carpentry (3T30).

With regard to grounds maintenance, Hyland rated George Blazier as "a fairly good worker with a good attitude...." He characterized Passomato as an excellent employee. He observed that McCafferty needed some correction in how to operate equipment, but was always neat and listened to instruction. Hyland found McDougall, who was only occasionally assigned to grounds, to be "very good."

Hyland stated that, if asked to cut an employee from the work group, he would have unquestionably chosen Eilers because "he needed constant instruction and was unwilling to listen." Had there not been a budget cut, he would have recommended to Heine that Eilers be replaced." (4T33-4T34).

68. In May 1989, Heine evaluated the other employees, with input and approval from the foremen. The evaluations (R-5) show that, of the seven employees, other than Eilers, all employees were evaluated as "acceptable" in all specific areas, except one employee whose attendance was deemed "unacceptable". In addition, all seven employees were rated as "exceptional" in at least one area, and most employees were rated "exceptional" in three or four areas (R-5).

69. Heine's employment contract was not renewed at the end of the 1988-89 school year (1T141).

ANALYSIS

Eilers contends that the Authority discriminated against him because of his involvement in the union organizing drive when it failed to renew his employment contract.

Under Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

Here, the record evidence reveals both direct and indirect evidence that Eilers' protected conduct was one factor motivating certain personnel actions.

It is clear that Eilers engaged in protected activity. He participated in the 1988 unsuccessful ACES organizing drive to secure union representation for the Township Board's support employees. Orlando knew that Eilers' was one of six support employees leading that that organizing drive.

Eilers asserts that the Board's refusal to grant voluntary recognition to ACES, the Board's campaign against representation before the 1988 election, its promise of benefits prior to the election, are all evidence of hostility.

I do not find that any of these Board actions are evidence of animus. Rather, I find that the Board had a good faith doubt about whether a majority of its employees wanted ACES representation and it invoked its legitimate right to require ACES to proceed with a Commission-conducted secret ballot election. It then took advantage of its legal right to engage in pre-election campaigning by encouraging employees to vote against representation. Further, when it indicated to employees that salaries would be equalized between Township and Borough employees, this statement amounted to merely a confirmation of the new Regional Board's intention. There was no actual or implied nexus between between Board's announced intention to equalize salaries and the employees voting against representation.

Further, no objections to the election or unfair practices were ever filed concerning the Board's election conduct.

Therefore, I find that the Board evidenced no hostility toward Eilers or the employees' 1988 organizing activities. While the Board agents knew that Eilers and five other ACES organizing committee members, were involved in the attempt to organize the support staff, no threats were made and no retaliatory action was taken against any of the six employees identified as the ACES organizing committee.

Eilers next engaged in protected activity when he spoke to Assistant Superintendent Schneider in August 1988 about a contract matter. There is both direct and indirect evidence that this action motivated Heine to give Eilers the October 24 reprimand and seek his termination.

Eilers went to Schneider to address a "contract matter". I infer that the substance of this meeting concerned a term and condition of Eilers' employment. Eilers went to Schneider at his invitation. The Board administration twice told employees that it had an "open-door" policy and invited employees to bring problems that could not be solved through the councils to Schneider. By doing so, the Board created a procedure for maintenance employees to present their grievances to the employer for resolution. The presentation of grievances is an activity which is protected by Article 19 of the New Jersey Constitution and by our Act, even where the employees are unrepresented for collective negotiations. When Eilers took advantage of the Board's invitation to present grievances to Schneider, Heine retaliated against Eilers' action by reprimanding him.

The Board has attempted to characterize the portion of the October 24 reprimand letter asserting Eilers refused to follow the chain of command by going over [Heine's] head with reference to [his] contract" as Eilers' failure to notify his supervisors when he left the work site. However, Grounds Foreman Hyland, a witness for the Board, denied there is a Board policy requiring employees to so notify supervisors. Hyland agreed that Heine was angry because Eilers went to Schneider rather than coming to him first. However, Eilers merely followed the grievance procedure the Board established. Accordingly, Eilers has demonstrated by direct evidence that Heine's October 24 reprimand was motivated in part by Eilers' grievance through the established grievance procedure.

The record also establishes by indirect evidence that Heine's recommendation to terminate Eilers was motivated in part by protected activities. As a result of Eilers' grieving to Schneider, Heine also set about collecting information about Eilers performance. Heine asked both foremen and Eilers' coworkers to report Eilers' mistakes to him.

I have found that Heine knew that the maintenance workers were organizing and that he learned at some point prior to writing the March 3 recommendation to terminate Eilers, that Eilers was leading the effort. He told maintenance employees that Eilers was trying to "organize something" the employees did not need, and that he would "get" Eilers. The record establishes that Heine was hostile to union activity. He told Hyland and Artigliere he did not

like unions. He threatened the maintenance employees that he would strictly enforce workrules if they unionized. I conclude that Heine's March 3 evaluation and recommendation to terminate Eilers was partially motivated by Eilers' protected conduct in soliciting employees' support to an employee organization.

On the other hand, I find that Heine was also motivated to write the October 24 reprimand and the March 3 termination recommendations by his dissatisfaction with Eilers' performance. Other than Eilers' grievance to Schneider, the remaining infractions listed in the October 24 letter of reprimand were substantiated by credible evidence in the record. The record also shows that Heine's March 3 recommendation to terminate Eilers was based upon legitimate criticisms of Eilers' performance.

Based on the foregoing, I find that Heine had a dual motive--Eilers' protected conduct and Eilers' unsatisfactory performance-- to write the letter of reprimand and the recommendation to terminate Eilers. However, the inquiry into the Board's motives cannot end there. While Heine is an agent of the employer, his recommendation was not the sole basis of the Board's decision not to renew Eilers' contract. Rather, it was Business Administrator Orlando that effectively recommended Eilers' non-renewal to the Board. His recommendation was based on several factors: Heine's written recommendation and evaluation, Eilers' lack of defensive response to the October 24 reprimand, and Orlando's own knowledge of Eilers' performance problems, and Eilers' maintenance skills relative to other employees.

The inquiry must now focus on whether there was any direct or indirect evidence that Eilers' protected activities were a motivating factor in Orlando's and Adamowski's recommendations to the Board to lay Eilers off. Orlando knew about Eilers' activities as one of six members of the ACES organizing committee. However, Orlando demonstrated no union animosity towards the organizing effort. In fact, he favored having the employees represented. The record does not establish that either Orlando or Adamowski were aware of any organizing activity in the 1988-89 school year until Rocco Passomato met with Schneider on March 28--the day after the Board voted not to renew Eilers' employment contract--to warn him the employees were thinking of organizing. Even then, Adamowski did not know Eilers was behind the union drive. In fact, Adamowski did not learn about Eilers' involvement until Board President Hill told him about the recognition letter from Eilers' at the Board meeting on April 10. Orlando also did not learn about Eilers' involvement until mid-April. The record also does not show that Orlando or Adamowski knew about or condoned Heine's hostility toward the 1988-89 organizing activities.

The only protected activity Orlando knew about was Eilers' grievance with Schneider in August 1988. By supporting Heine's reprimand to Eilers for grieving to Schneider, Orlando showed knowledge and hostility toward Eilers' protected conduct of presenting his grievance. However, the entire reprimand, of which this incident was only a very minor part, was but one factor in

Orlando's decision to recommend Eilers for termination. Therefore, I do not find that Eilers' protected activities was a substantial motivating factor in Orlando's recommendation to select Eilers for layoff.

Even assuming the dual motive I have ascribed to Heine could be imputed to the Board, I find that the Board would have laid Eilers off even if he had not engaged in protected activities.

Eilers asserted that the Board's decision to lay off one maintenance employee was in itself pretextual. I disagree. The Board, faced with a serious budget shortfall, cut positions, the overtime budget, equipment and materials. Eilers was not alone in the layoff; 11 other employees were laid off as well. While the Board knew it was subject to State monitoring the following year, it could not anticipate the extent of needed repairs. The Board expended insignificant amounts of money on overtime, temporary employees and contractors over what it would have spent had Eilers not been laid off. Therefore, I find that the rationale in cutting one maintenance position was genuine and not a pretext to terminate Eilers.

Further, the Board decided it wanted to cut the "least valuable" employees from the staff. While the Board's method of deciding which employees to cut from the staff might be considered unusual, it is not illegal. Given the Board's criteria, it has proven that Eilers would have been selected as the "least valuable" employee even in the absence of his protected activities.

First, there were problems with Eilers' performance and attitude. Clausen made Orlando aware that Eilers developed problems shortly after he came to work for the Township. (See facts 38 through 46.) After the regionalization, Eilers was still a problem employee. While Heine's letter of reprimand to Eilers was motivated by animus, the record shows the content of the reprimand, except for the item concerning Eilers' grievance to Schneider, was based upon genuine incidents of Eilers' poor performance. I have found as facts that each of the items in the reprimand was based upon valid infractions. (See facts 47 through 57). Eilers himself validated the reprimand. He did not contest it, but rather "cleaned up his act and tried to comply..." thus, admitting that his performance needed improvement. (See fact no. 58).

I am aware that Heine's evaluation and the recommendation to terminate are tainted by union animus, and by themselves, cannot support the Board's decision to cut Eilers as the least valuable employee. However, Orlando's recommendation to cut Eilers was based on Heine's evaluation and Orlando's own independent assessment of Eilers' value to the district. The weight of the evidence establishes that Orlando's decision to recommend Eilers as the least valuable employee was valid.

Both Hyland and Artigliere, neither of whom are found to be tainted by animus, agreed that while Eilers was a satisfactory employee in some areas, he had the weakest performance levels and needed the most supervision. Both Hyland and Artigliere agreed that

he had the weakest skill levels in the maintenance and grounds departments. Both agreed that if asked to select the least valuable employee, they would have picked Eilers.

Eilers came to the Township Board with no training or experience. Employees performed work as generalists and possessed at least one speciality. Eilers felt his speciality was light carpentry, but agreed Artigliere was more talented in woodworking. Artigliere characterized Eilers skill level as "basic," with more expertise in electrical work, plumbing and carpentry. However, Artigliere and Passomato both named someone better in each area. Eilers did not have a speciality that was not exceeded by someone else's talent. The May evaluations of the other seven maintenance and grounds employees show that, when compared to Eilers, all employees exceeded Eilers' performance levels.

Based on the foregoing, I conclude that Orlando would have recommended Eilers to be laid off as the least valuable maintenance and grounds employee even if Eilers had not engaged in protected activity.

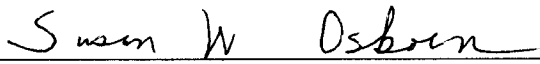
Accordingly, based upon the entire record and the analysis set forth above, I make the following:

CONCLUSIONS OF LAW

The School District of the Chatham Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1),(3) by laying off Kenneth Eilers.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the Complaint be dismissed in its entirety.



Susan Wood Osborn
Hearing Examiner

DATED: February 12, 1991
Trenton, New Jersey