

P.E.R.C. NO. 80-37

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAPE MAY CITY BOARD OF EDUCATION,

Respondent,

Docket No. CO-79-58-26

-and-

CAPE MAY CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

In an unfair practice proceeding, the Commission affirms the Hearing Examiner's finding of an (a)(1) violation and the dismissal of an (a)(3) violation. The basis of the (a)(1) violation was interrogation by the Administrative Principal of the District concerning the loyalty of two teachers to the Association and the telephoning of parents. The (a)(3) violation was dismissed for failure to prove the knowledge on the Board's part of protected activity by the two teachers who did not receive tenure.

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CAPE MAY CITY EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Pachman, Aron, Till & Salsberg, Esqs.
(Mr. Martin R. Pachman, of Counsel)

For the Charging Party, Greenberg & Mellk, Esqs.
(Mr. Williams S. Greenberg, of Counsel; Mr. Ezra D.
Rosenberg, on the Brief)

DECISION AND ORDER

On September 11, 1978, an Unfair Practice Charge was filed with the Public Employment Relations Commission by the Cape May City Education Association (the "Association") alleging that the Cape May City Board of Education (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act (the "Act"), specifically N.J.S.A. 34:13A-5.4(a)(1), (2) and (3). It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 16, 1978. Hearings were held before Commission Hearing Examiner Robert T. Snyder on December 5 and 6, 1978, January 11 and 12 and March 12, 13, 14, 15, 19 and 20, 1979. Following the receipt of briefs, the Hearing Examiner issued his Recommended Report and Decision on

July 31, 1979. H.E. No. 80-4, 5 NJPER ____ (¶ ____ 1978). The original of this report was filed with the Commission and copies were served on the parties. A copy of that report is attached to and made a part of this decision and order.

On September 11, 1979, the Commission received a one-page letter from the Association. That letter sets forth what it labels "exceptions" to the Hearing Examiner's report which are quoted in full: "(1) the Commission should find that violations of N.J.S.A. 34:13A-5.4(a)(1) requires reinstatement and back pay; (2) the Commission should find that the Hearing Examiner having found a violation of N.J.S.A. 34:13A-5.4(a)(1) must find a violation of N.J.S.A. 34:13A-5.4(a)(3) based upon the specific findings of fact, with regard to the violation of N.J.S.A. 34:13A-5.4(a)(1)";. Additionally, the letter contains a request for oral argument before the Commission. By letter dated September 12, 1979, the Board urged us to deny the request for oral argument and objected to our consideration of the untimely exceptions.

The exceptions were not filed within the time period prescribed by our Rules and they do not comply with the requirements for specificity set forth in the Rules. See N.J.A.C. 19:14-7.3(a) and (b). The exceptions, quoted above, dispute the Hearing Examiner's legal conclusions and we have fully considered these matters in our deliberations. The Association's request for oral argument is denied. There is no need for oral argument where the matter has been fully litigated (in ten days of hearing). The parties had an opportunity to argue orally before the Hearing Examiner and to submit their arguments to us in writing. See N.J.A.C. 19:14-7.3.

The Association alleges that the Administrative Principal of the District unlawfully interrogated two teachers with respect to their Association sentiments and other alleged protected activity in the course of interviewing each of them in connection with their tenure applications for the next school year. The Association maintains that such interrogation led to a discriminatory recommendation of denial of tenure and non-renewal of these two teachers. These two teachers were in fact denied tenure and their contracts were not renewed for the following school year.

The Hearing Examiner found an independent (a)(1) violation and no (a)(2) or (a)(3) violation. With respect to the (a)(1) violation, the Hearing Examiner found that the questions in the context of tenure interviews by the Administrative Principal concerning the loyalty of the two teachers to the Association and specific telephone calls to parents^{1/} had a chilling and coercive effect on rights

1/ The Board had decided to make certain library and physical education cutbacks, both of which were opposed by the Association which attempted to motivate the community to oppose the cutbacks. Allegedly, parents of students were notified by certain teachers to attend Board meetings to protest the cutbacks. The Administrative Principal questioned the two teachers as to whether or not they called any parents.

protected by the Act. These inquiries were part of a "course of conduct" violative of the Act.^{2/}

Regarding the alleged (a)(3) violation, the Hearing Examiner applied the standard developed in In re Board of Education of the Borough of Haddonfield, P.E.R.C. No. 77-36, 3 NJPER 71 (1977). Two elements which a charging party must prove preliminarily are that an employee was exercising rights guaranteed by the Act and that the employer had knowledge, actual or implied, of such activity. The Hearing Examiner found that the Association failed to prove by a preponderance of the evidence that the two teachers' support of the Association was part of the decision to deny tenure to the two teachers. The Hearing Examiner concluded that the record in this matter was devoid of evidence that could tend to establish the employer's knowledge of the actions taken on behalf of the Association by the two teachers. The teachers themselves testified that they lied when questioned as to the extent of their Association activities and indicated that they were not supporters. No other evidence was presented by the Charging Party which established knowledge by the Board or its agents of their activity or support of the Association nor was evidence presented that the Administrative Principal did not believe the denials of activity by the two teachers. Therefore, the Hearing Examiner recommended dismissal of the (a)(3) charges. Based upon an independent review

^{2/} In re Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228, 229 (1974).

of the record herein, the Commission adopts the findings of fact, conclusions of law, and recommended order of the Hearing Examiner regarding the violation of N.J.S.A. 34:13A-5.4(a)(3).

Turning now to the independent (a)(1) charge, the Commission, in In re New Jersey State College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (14189, 1978) set forth the standard for a finding of a violation of (a)(1). That standard is:

The Commission in determining whether N.J.S.A. 34:13A-5.4(a)(1) has been violated applies the following general rule: It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce a reasonable employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial "business" justification. If an employer, pursuant to the above standard does establish such justification, no unfair practice will be found under Section 5.4(a)(1) unless the charging party proves anti-union motivation for the employer's actions. In determining initially whether particular actions tend to interfere with, restrain or coerce a reasonable employee in the exercise of rights protected under the Act we will consider the totality of evidence proffered during the course of a hearing and the competing interests of the public employer and the employee organization and/or affected individuals.

In agreement with the Hearing Examiner, the Commission finds that the totality of conduct by the Board through its Administrative Principal tended "...to interfere with, restrain, to coerce a reasonable employee in the exercise of rights guaranteed by the Act..." In the context of a tenure interview when an employee's continued employment is at stake, the Act must protect against

conduct such as that engaged in by the Administrative Principal here. It is entirely reasonable to assume from the record that his questions had the effect of intimidating the two teachers. This is supported by the finding of fact by the Hearing Examiner that the two teachers lied in response to these questions to protect themselves. Noting the lack of exceptions as well as the lack of a proof of any legitimate and substantial business justification, the Commission affirms the Hearing Examiner's finding of an independent violation of (a)(1).^{3/}

To summarize, concerning the (a)(3) violation, the Commission affirms the application and the findings pursuant thereto of the standards for violations of Subsection (a)(3). The Hearing Examiner found that the Board had no knowledge of the exercise of protected activity by the two teachers. The record herein supports the lack of proof of this essential element. The Commission further affirms the Hearing Examiner's finding that there was no (a)(2) violation committed by the Board but that there was an independent (a)(1) violation.

ORDER

Accordingly, for the reasons set forth above, it is hereby ORDERED that the Cape May City Board of Education:

1. Cease and desist from interfering with, restraining

^{3/} The Commission affirms this finding based on the totality of the conduct standard, although it is arguable that the questions concerning the loyalty of the two teachers could alone support an independent (a)(1) violation. Noting the lack of exceptions to the finding of the (a)(1) violation, the Commission need not find that the "loyalty question" alone is sufficient to support a violation of the Act.

or coercing any employees in the exercise of the rights guaranteed them by the New Jersey Employer-Employee Relations Act by interrogating employees as to their loyalty to the Association and by interrogating any employee in a tenure interview as to his or her actions and the actions of other employees taken to influence public and parent sentiment in opposition to proposals made by Respondent affecting programs and employees.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Post at its central offices in the School District of Cape May City, New Jersey, copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Commission shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notice to its employees are customarily posted. Reasonable steps shall be taken by said Respondent to ensure that such notices are not altered, defaced or covered by any other material.

(b) Notify the Chairman, in writing, within twenty (20) days of receipt of the Order what steps said Respondent has taken to comply herewith.

3. IT IS FURTHER ORDERED that the particular sections of the Complaint which allege that the Cape May City Board of

Education engaged in violations arising under N.J.S.A. 34:13A-5.4 (a) (1) and (3) with regard to the denial of tenure of Ellen Bringhurst and Susan Kornacki and violations arising under N.J.S.A. 34:13A-5.4(a)(2) be dismissed in their entirety.

BY ORDER OF THE COMMISSION



Jeffrey B. Tener
Chairman

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

DATED: Trenton, New Jersey
September 20, 1979
ISSUED: September 21, 1979

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing any employees in the exercise of the rights guaranteed them by the New Jersey Employer-Employee Relations Act by interrogating employees as to their loyalty to the Association and by interrogating any employee in a tenure interview as to his or her actions and the actions of other employees taken to influence public and parent sentiment in opposition to proposals made by Cape May City Board of Education affecting programs and employees.

CAPE MAY CITY BOARD OF EDUCATION

(Public Employer)

Dated _____

By _____

(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

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CAPE MAY CITY EDUCATION ASSOCIATION,

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SYNOPSIS

A Hearing Examiner recommends that the Commission find the Cape May City Board of Education committed an unfair practice when it interrogated two teachers with regard to their loyalty to the Association in their respective tenure interviews and further questioned them about actions taken by themselves or by other teachers in opposition to Board proposals in these same interviews.

Cape May City Education Association charged that the two teachers had been denied tenure in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) because of their activities in and support of the Association. The Charging Party alleged in a post-hearing brief that the two teachers had been discriminated against because of their "alignment" with active members of the Association, as well as for their own Association activity. The Charging Party also alleged independent violations of N.J.S.A. 34:13A-5.4(a)(1) by reason of the interrogations described above which took place in the course of tenure interviews with each teacher.

The Hearing Examiner concludes that the Charging Party has failed to sustain its burden of proving by a preponderance of the evidence that the Board discriminatorily failed to grant tenure to these two teachers. In particular, the Charging Party failed to establish knowledge on the part of the administrative principal and the Board of any actions taken by complainants in support of the Association or in support of active Association members. The Charging Party failed to create a record supporting the allegation made in its brief that animus was directed at two other teachers, both active Association officers and that animus against the two teachers involved herein could be inferred from general knowledge of their "alignment" with the two activists.

With respect to the alleged interrogations during their tenure interviews, the Hearing Examiner concludes that the rights of both teachers under the Act were violated by the questioning of their loyalty to the Association. The Hearing Examiner further finds that questioning the teachers as to their actions undertaken in order to create public and parental opposition to proposed cutbacks by the Board, constituted, in the context of the tenure interviews, a course of conduct interfering with restraining and coercing them in the free exercise of rights under the Act.

As for the violations found, the Hearing Examiner recommends a cease and desist order and the posting of an appropriate notice by the Board to advise employees of its undertakings required by the order.

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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Appearances:

For the Respondent

Pachman, Aron, Till & Salsberg, Esqs.
(Martin R. Pachman, Esq., Of Counsel)

For the Charging Party

Greenberg & Mellk, Esqs.
(William S. Greenberg, Esq., Of Counsel; Ezra D. Rosenberg, Esq.,
On the Brief)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On September 11, 1978, the Cape May City Education Association ("Association" or "Charging Party") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Cape May City Board of Education ("Board" or "Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), as amended, N.J.S.A. 34:13A-1 et seq. Specifically, the Association alleges that the Board's Administrative Principal, John Demarest, on February 13 and 15, 1978, unlawfully interrogated two teachers, Susan Kornacki and Ellen Bringhurst, with respect to their Association sentiments and other alleged protected activity in the course of interviewing each of them in connection with their tenure applications for the next school year, and subsequently discriminatorily recommended denial of their tenure and non-renewal for the next school year which recommendation was affirmed by the Board in a Memorandum to the two teachers dated March 10, 1978 and later ratified on April 7, 1978 by formal notice of non-renewal following an informal

hearing held before it on April 5, 1978, all allegedly in violation of N.J.S.A. 34:13A-5.4(a)(1)(2) and (3). ^{1/} It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued thereon on October 16, 1978. By Answer served and filed on November 3, 1978, the Respondent denied the material and conclusionary allegations of the Complaint and interposed four separate affirmative defenses, three of which were made the subject of oral motions made at the opening of hearing in this proceeding on December 5, 1978. ^{2/}

Hearings were held on December 5 ^{3/} and 6, 1978, January 11, 12, March

^{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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

^{2/} In the first, Respondent moved to stay further proceedings because of a conflict with, and pending disposition of, a companion proceeding brought by the two teacher complainants before the Commissioner of Education which similarly challenges the teachers' non-renewal but under the Education Law. (Transcript ("T") Vol. 1, pp. 2-7). That motion was denied by the Hearing Examiner for the reasons therein stated at T. Vol. 1, pp. 24-28 and reaffirmed at pp. 41-42. Subsequently, the Commission denied special permission to appeal the Examiner's ruling in a Decision On Request For Special Permission To Appeal, P.E.R.C. No. 79-37 (1/ 8/79)(Comm. Ex. No. 10). On Respondent's application to the Superior Court of New Jersey, Appellate Division, John W. Fritz, P.J.A.D., granted the Board's motion for leave to appeal the Commission's Ruling, remanded the matter for conclusion of the hearing before the Commission, continued a stay of proceedings in the New Jersey State Department of Education or before the Commissioner of Education appearing in an order of January 10, 1979, with, however, provision for vacation of that stay thirty days after the conclusion of the PERC hearings or upon the handing down of its determination whichever occurs first, Cape May City Board of Education vs. Ellen Bringhurst, App. Div. Docket No. AM-339-78, Motion No. M-2010-78, decided 1/19/79 (CO-11). The second motion made was to dismiss for lack of jurisdiction in the Commission and because of time bar of the Complaint under N.J.S.A. 34:13A-5.4(c). (T. Vol. 1, pp. 42-47). This motion was denied on the merits (T. Vol. 1, pp. 62-64). In view of Respondent's failure to raise this matter in its post-hearing brief, the record is sufficient on this issue. The third motion made was to dismiss for failure of the Complaint to state a cause of action (T. Vol. 1, pp. 65-67). This motion was likewise denied for the reasons stated on the record (T. Vol. 1, pp. 71-73). In each case, Respondent was denied a stay of further proceedings to seek leave to appeal the rulings on these motions to the Commission.

^{3/} At the opening of hearing, a proceeding involving the same parties entitled Cape May City Board of Education and Cape May City Education Association, Docket No. CO-79-60-27, alleging discriminatory treatment of George Loper, another
(Continued next page)

12, 13, 14, 15, 19 and 20, 1979. Both parties were given full opportunity to examine witnesses, present evidence and to argue orally. Both parties filed post-hearing briefs, the Charging Party on May 16, 1979, the Respondent on May 29, 1979, and the Charging Party filed a supplemental letter memorandum on June 7, 1979.

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

FINDINGS OF FACT

I. The Parties

1. The Board operates a school district located in the City of Cape May comprising grades K through 6. For some years, the Association has been the exclusive representative for collective negotiations concerning the terms and conditions of employment of the certified teachers employed by the Board. Over the years, the parties have negotiated and entered successive collective agreements covering these employees. I find and conclude that the Board is a public employer and the Association is an employee organization and majority representative of employees in an appropriate unit, respectively, within the meaning of the Act.

II. The Unfair Practices

The Evidence

Negotiations between the Board and Association for a two year contract covering 1976-77 and 1977-78 began in Spring 1976. Agreement was reached late in January, 1977. John Demarest, Administrative Principal, testified that the lengthy negotiations affected relationships among the teachers (T. 235). Factions formed (exactly when is undetermined), one consisting of George Loper, Charles McCarty, John Mathis, Karen Ann Slack, Bringhurst and Kornacki, the first three being active members of the Association holding a variety of offices. ^{4/}

3/ (continued)

teacher employed by the Board, which had previously been consolidated for hearing with the instant case by Order of the Commission's designee, Carl Kurtzman, its Director Unfair Practice Proceedings, on October 16, 1978, was ordered severed from the instant proceeding by the undersigned Examiner upon the stipulation of the parties (T. Vol. IA, pp. 2A-3A). A subsequent motion by the Charging Party to reconsolidate Docket No. CO-79-60-27 with the instant proceeding made before Carl Kurtzman, D.U.P, in Docket No. CO-79-60-27 will be discussed, infra, p. 18 and footnote 4, thereat.

^{4/} Neither Bringhurst nor Kornacki were truly Association activists, i.e., they did not hold office at anytime, nor had they brought any grievance against the Board as had McCarty and Loper. Kornacki had served on the PR&R (grievance)

(Continued next page)

The other faction is approximated by those teachers who signed a Statement of Disavowal of Involvement (CP-64), submitted to the Board in connection with Bringhurst's and Kornacki's Donaldson hearing. Two of the signers, Keela Englert and Kathleen M. Bogle, were to come up for tenure at the same time as Slack, Bringhurst and Kornacki.

Around the time agreement was reached, McCarty's teaching evaluations by Demarest became negative. The Board voted to withhold his salary increment. The Association voted 20 to 0 (with one abstention by Levin) to support McCarty's grievance on this matter (CP-82, dated 4/21/77). There was no evidence that Demarest or the Board knew who was present or how anyone voted. The vote was presented as unanimous.

On December 6, 1977, Demarest notified the Association that it would have to pay a maintenance fee if it wished to hold meetings on school property (CP-85). That same day, the Association met "on the sidewalk" some blocks from the school, and with 13 or 14 members present voted to grieve the matter. No evidence was presented that Demarest or the Board knew who was present at this meeting. Again, the vote was given to the Board as a unanimous one.

The Board voted on January 23, 1978 to cut back two programs: the library and physical education. The following day the Physical Education teacher, Loper, then Grievance Chairman, asked Bringhurst and Kornacki to make phone calls to parents to inform them of the Board meetings at which the cutbacks would be discussed.

On January 26, 1978, the Association, with 13 or 14 members voting, unanimously passed a resolution to oppose the cutbacks. The telephoning of parents to alert them to the cutbacks was discussed at this meeting. Bringhurst and Kornacki both made calls to parents about the Board's upcoming budgetary meetings. Both testified that they had no reason to think that Demarest or the Board knew that they had made such calls until each admitted it in the course of this hearing. Several angry parents attended the Board meetings (T. 657), and the library budget was subsequently restored.

The five teachers came up for tenure consideration in Spring of 1978

4/ (continued)

committee, but was never in a confrontational posture with the administration or the Board. Neither of them were involved in the negotiations for the 1976-78 agreement (T. 939, 949). They were, however, aligned with the activist faction, at least in Demarest's view, as was Slack who did receive tenure along with the two "non-activists", Englert and Bogle.

after almost three years of employment by the Cape May Board of Education. Demarest interviewed each of them. ^{5/}

The first to be interviewed was Bringhurst. On February 13, 1978 she had two meetings with Demarest. The morning meeting concerned the latest in a series of evaluations which all teachers underwent subsequent to classroom observations. At this meeting Demarest told Bringhurst that he wanted "to pick her brains" as to her feelings about the school. He "didn't want any more Charlie McCarty's"(T. 664). ^{6/}

As in prior evaluation meetings, Demarest read Bringhurst's evaluation to her (CP-13). There is conflicting testimony as to whether he discussed his comments with a negative emphasis or whether there was any discussion at all of the written evaluation. Bringhurst was under the impression that all her evaluations were good, that Demarest was "very pleased" with her performance (T. 663). ^{7/} In view of Demarest's admissions that he mentioned nothing negative in his tenure meetings with Bringhurst and Kornacki, despite his recognition of the importance of letting teachers know what result he contemplated (T. 199), I credit Bringhurst's testimony that Demarest mentioned nothing negative in the evaluation meetings beyond that which is clear on the face of the written evaluation.

One of the most serious criticisms of Bringhurst made by Demarest was her unsuitability to teaching very young children. Her evaluations mention that she is to move out of the second grade to a higher level, that she is "less effective" at this grade level (CP-12). Demarest testified that she refused to consider moving into the fifth grade if Englert did not return the following year. Bringhurst testified that the subject of Englert's position never came up either on or before February 13, 1978. I do not credit this testimony by Demarest. The fifth grade teacher, Englert, testified that there was never a real

^{5/} The last time Demarest had used a "tenure" interview had been in 1973 when McCarty came up for review. Demarest had not recommended McCarty but the Board granted him tenure over the non-recommendation.

^{6/} This statement was never directly denied by Demarest, but he was not questioned as to its veracity. Bringhurst was firm about the statement on cross-examination. McCarty was, and still is, litigating his evaluations. See Cape May City Board of Education, Docket No. CO-78-13-57, H. E. Report pending. I credit Bringhurst that Demarest referred to McCarty as she claimed. As to the meaning and impact of this statement, see Conclusions Section, infra at p. 17 and footnote 38 thereat.

^{7/} Kornacki made a similar statement that she felt no need to respond to her evaluation.

possibility of her leaving the school. The possibility of Bringhurst teaching another higher grade must have been discussed at some time, however, since it appears more than once in her evaluations. Demarest himself ultimately admitted that no offer of Englert's position was made (T. 1483).

The afternoon of this same day, Bringhurst met with Demarest to discuss her tenure. Demarest had a typed list of statements and questions before him. (CP-16, incorporated herein as Appendix "A".) He began by reading items from the list. Later in the interview Demarest asked to whom she was loyal: to the Board, to the Association, or to the administrator, i.e., to himself (T. 655). Her reply was that she was loyal to herself, to which Demarest responded that it is good to look after "number one" (T. 656).

Demarest denies questioning anyone's loyalty other than as phrased in CP-16, Item #5:

How can you be loyal to your peers when they are so split
on every issue?

Testimony by Slack (T. 1362), and Englert (T. 1329) ^{8/} belies this denial. Slack responded to Demarest's question by describing how she was loyal to all three groups. Slack did not deny her loyalty to the Association. Testimony by Board members, particularly John Carr (T. 1176, 1190) and Joan Pomykacz (T. 1221) also indicate that loyalty was questioned in the tenure interviews. Carr testified that another member of the Board, Mr. Daly, had found the "loyalty" question objectionable (T. 1190).

The Hearing Examiner finds as a fact that Bringhurst and Kornacki, as well as Slack and Englert, were asked about their loyalty to the Association as compared to their loyalty to the Board and administrator during their tenure discussions.

During the tenure interview, Demarest took out his operations manual, turned to Bringhurst's class list and asked her how the parents of certain students had been contacted about the Board meetings concerning the library and physical education cutbacks. ^{9/} Bringhurst told him that the names he referred to ^{8/} Englert backed off under cross-examination and said that Item #5 could be the way loyalty came up in her interview, but her earlier testimony on direct, supported by her deposition is more credible.

^{9/} Both Bringhurst and Kornacki testified that they were interrogated about parents of students whose names on the class list had check marks next to them. Demarest did point out that all Coast Guard children have check marks next to their names because special government funding depends on their numbers. The check
(continued next page)

were all Coast Guard families and that they had probably called each other. Bringhurst denied making any such calls (T. 673). She testified that she lied about her telephoning the parents out of fear engendered by the "loyalty" question (T. 667).

Demarest denies questioning how parents were contacted about the Board meetings. He testified that the appearance of angry parents at the Board meetings was the subject of a casual comment on his part which received a response denying calls to the parents. He could not remember when and to whom he made the remark and who so responded. ^{10/} Slack testified that there was a discussion of "feedback" from the community on the cutbacks. She did not recall any question specifically on phone calls to parents. Demarest did not indicate to Bringhurst that he disbelieved her answers to the loyalty question or to the question of how parents knew about the Board meetings. Bringhurst testified that she had no reason to think that Demarest knew that she had lied about calling parents (T. 673), nor did she think that he knew that Slack had not made any calls (T. 679). She was also unaware of whether Demarest knew how she voted on McCarty's grievance (T. 676). At no time did Demarest indicate to Bringhurst that he would make an unfavorable decision on tenure.

On February 15, 1978, Kornacki had her tenure meeting with Demarest. In the course of the meeting, Demarest asked substantially the same "loyalty" question that he had asked of Bringhurst. When Kornacki was unable to respond promptly, he illustrated the question with his tri-colored operations manual: one color represented the Board rules, one the Union rules, and one the administration rules. He asked to which color she was loyal (T. 733). Kornacki's reply was that she was loyal to her friends, Bringhurst and Slack, both of whom taught in the

9/ (continued)

marks did not indicate those parents who attended the Board meetings to protest the cutbacks. That Bringhurst and Kornacki thought that this was the significance of the check marks does not refute their testimony that Demarest questioned them about notifying the parents of the meetings.

10/ The comment was: "Boy, they sure were angry." (T. 1488). I do not credit this testimony. It does not seem realistic that Demarest would not recall the identity of a teacher who made such an unexpected and defensive response to his purportedly unstudied comment. I conclude that Demarest in fact questioned Bringhurst as to whether certain parents had been contacted about the upcoming budget meetings.

primary grades with her. ^{11/} Kornacki testified that Demarest told her some teachers could be trusted and some could not (T. 733). He then opened his operations manual to Kornacki's class list and pointed to certain names (see f.n. 9, supra) asking how these parents had heard of the Board meetings on the budget. Kornacki reminded him that one of the parents had been substitute teaching the day the announcement of the meetings was put in the front office and that this woman had probably gotten the information at that time. Demarest then asked about the other parents who had attended the Board meetings. Specifically, he asked if Kornacki had called them and told them of the budget cuts to be discussed. Kornacki denied making the phone calls because she was afraid that the truth would create problems with her tenure (T. 746).

Demarest denied asking Kornacki the "loyalty" question and the questions about calling parents for the budget meetings. ^{12/} At no time during this interview did Demarest indicate that Kornacki might not receive a favorable recommendation for tenure (T. 1451).

After each interview with the five teachers considered for tenure, Demarest took notes. He had these notes with him two weeks later at a crucial March 2 Board meeting when he referred to these notes or read them during his presentation to the Board on his recommendations for tenure. He subsequently disposed of the notes despite the likelihood of further proceedings after the Board voted against tenuring Bringhurst and Kornacki. ^{13/}

The evening of March 2, the full Board met instead of the Personnel Committee. The Board moved immediately into closed session for Demarest's presentation on recommendations for tenure.

Demarest rated the five teachers on a 1 to 10 scale for four qualities

^{11/} Note that Slack, who was granted tenure, was identified to Demarest not only as a member of the McCarty-Loper faction (T. 237), but also as a personal friend of Kornacki's and impliedly Bringhurst's as well.

^{12/} I do not credit his testimony on these matters for the reasons given in the discussion of Bringhurst's interview.

^{13/} Demarest was certainly aware of the Donaldson requirements, despite some evasiveness on the stand (T. 1465), but claims he thought the notes were of no value. This is difficult to credit in view of the fact that he thought enough of them to keep them for two weeks and make them part of his presentation to the Board on March 2.

prescribed by Board Policy 5005. The ratings were:

Efficiency	4	6	6	5	9
Health	9	9	9	8	9
Cooperation	9	5	9	5	9
Conduct	<u>9</u>	<u>4</u>	<u>9</u>	<u>4</u>	<u>9</u>
	Bogle	Bringhurst	Englert	Kornacki	Slack
Total	31	24	33	22	36

He had never used such a scale to rate teachers before. He averred that it was intended to clarify matters for the lay members of the Board. The categories, however, were never clearly defined or differentiated. In response to questioning about Bogle's low efficiency rating, Demarest testified that efficiency was rated in different contexts depending on the duties of the teacher. He admitted that no provision was made for bringing the different contexts to the attention of the Board (T. 142-143). "Cooperation", he testified, referred mainly to the carrying out of administrative regulation and Board policy. Demarest illustrated Kornacki's failure to cooperate by describing her refusal to fill out the papers necessary to refer a child to the Study Team 14/; her failure to send a written notice to Demarest when she put children out of her classroom for disciplinary reasons 15/; her failure to bring children's deficiencies to the attention of parents 16/; her failure to clear up problems with other teachers 17/;

14/ Kornacki originally recommended that the child in question be referred to the Study Team. She denied refusing to fill out forms and testified to the parents' opposition to the referral and to the Learning Disability Specialist's recommendation which was not one of referral. Her testimony is credible. Demarest attributed a motive to Kornacki, that she wanted the parents as allies and therefore did not go through with the referral. This must be discounted because of her original recommendation and because it was mere speculation on his part.

15/ Kornacki denies this, but there is a letter in evidence, CP-38, which describes one incident when a child was sent to sit in an office unsupervised.

16/ There is no evidence of this. Demarest mentioned one child (R. H.) whose test scores, received after the tenure decision was made, did not support Kornacki's positive discussions of him. Demarest explained that he was referring more generally to Kornacki's students' test scores, which were not completely satisfactory. He seemed to infer that if the students' scores in general were not good and Kornacki's communication with parents in general were positive, that she must be less than truthful with parents.

17/ The existence of "problems" with other teachers was denied by Kornacki and by all other teachers testifying. Demarest particularly mentioned problems with
(continued next page)

and her failure to clean up after the animals in her classroom. ^{18/}

Demarest was also concerned with Kornacki's high pitched voice, apparently a loud one. He made note of it on several of her evaluations. Perhaps the most serious complaint against Kornacki, and it is supported by one evaluation, is that her students' SRA test scores were not up to their abilities. ^{19/} Still, in his final evaluation of her, (CP-28), Demarest attributes improvement in housekeeping, voice control, and is optimistic about the academic success of her students. ^{20/}

Demarest's illustrations of Bringhurst's uncooperativeness were that she "dumped" problem students to Bogle's class on a regular basis ^{21/}; that she refused to consider leaving the second grade to teach the fifth grade ^{22/}; and that

^{17/} (continued)

Bogle, who was one of the teachers who denied having any problems with Kornacki or Bringhurst. Discussing discipline problems in Kornacki's classroom, Demarest stated that she "dumped" problem students in Bogle's remedial class and that Bogle complained of this. Bogle contradicted this testimony (T. 259-260). Bogle said Kornacki sent an "over achiever" in math to her class to do advanced work and that she had no objection to it, but Demarest put a stop to it (T. 1384). In the absence of any evidence of such complaints, Demarest's charge must be discounted.

^{18/} Kornacki testified that she diligently cleaned up after the animals kept in her classroom. One of her evaluations commends her use of animals in the classroom. One evaluation does mention a soiled carpet and animal droppings. Several of her evaluations mention "housekeeping" problems, but comments were generally confined to the utilization of storage space.

^{19/} Demarest later testified that the scores were not a major factor in his negative tenure recommendation (T. 1450-1451). At least one Board member, however, testified that she voted against Kornacki's tenure on the basis of her students' test scores (T. 1291, 1311). The issue of whether the students' scores were accurately interpreted as being below their abilities is not relevant to the charges made herein. The Hearing Examiner finds on the basis of Kornacki's evaluations and testimony by Board members, that Demarest and the Board were concerned with the scores and perceived them as unsatisfactory.

^{20/} This was borne out by the improved test scores of April, 1978, after the recommendations for tenure were made. Her last written evaluation closed with the words, "We are pleased by the teacher's progress." (CP-28, 1/23/78).

^{21/} The child in question did advanced work while in Bogle's remedial class. He was allowed to go only if he had behaved himself. Bogle had no objection to it. Demarest himself knew of the "unauthorized transfer" yet he did nothing about it and did not so much as mention it to Bringhurst at any time.

^{22/} While the evidence is lacking as to Bringhurst's refusal, both Bringhurst's evaluations and testimony by Board members support Demarest's assertion that Bringhurst was perceived as not suited to teaching younger children. She was sometimes abrupt with them. See pp. 5-6, supra.

she was a poor speller. ^{23/} In earlier testimony, Demarest also charged Bringhurst with giving erroneous information to parents ^{24/} and having difficulties with other teachers, ^{25/} including "emotional problems."

Demarest described "conduct" as a manifestation of cooperation. He drew no further distinction between the two. At one point he stated that "conduct" includes achievement of students (T. 469). The only frame of reference discussed in this record concerning student achievement was the SRA test scores. Both Bringhurst and Kornacki received identical low ratings for "cooperation" and "conduct" despite the fact that Bringhurst's students' scores were fine and Kornacki's were considered unsatisfactory.

Bogle was presented as a model of cooperation and conduct, yet she accepted the students whom Demarest alleged should not have been in her class. She was the only teacher whose "emotional problems" were corroborated by Board members' testimony. It was said that she "loved the children too much" and she felt ostracized by her peers. Demarest made clear to the Board that Bogle's problems were improving, despite the low rating in efficiency he felt compelled to give her. ^{26/}

Various Board members testified as to their responses and reactions to Demarest's presentation on March 2. Board member John Carr testified that divided

^{23/} Bringhurst did make frequent spelling errors, almost all of which were "corrected" during the course of the hearing. Several of Demarest's spelling errors were brought to light in rebuttal.

^{24/} This referred specifically to Bringhurst's alleged refusal to "shoot from the hip" and tell a member of the Board, Mrs. Blomkvest, that her child was doing poorly in math. Under protest by Bringhurst, the child was taken from her class and put in Bogle's remedial class. This does not square with Bringhurst's alleged alacrity in putting other children in Bogle's class, but it is credible that Mrs. Blomkvest felt that she had been given erroneous information about the progress of her child.

^{25/} As noted in footnote 17, supra, all other testimony refuted this charge. Demarest also mentioned Bringhurst's "emotional" problems in dealing with certain tensions between the teachers in the school. This was denied by Bringhurst and remained uncorroborated. Board members testified on emotional problems of Bogle. (See p. 11, above).

^{26/} The reason for Bogle's low efficiency rating is unclear; the "different contexts" for efficiency remained unexplained. Yet, it appears strange that her deficiencies did not spill over into "cooperation" and "conduct" since the categories were so overlapping and amorphous.

loyalties were discussed at the March 2 meeting. He stated that the issue was irrelevant to him. He had decided to vote according to Demarest's recommendations without even hearing them, believing that the Principal should be able to choose teachers as he sees fit.

Carr also testified that one Board member, a Mr. Daly, had objected to the loyalty question, asserting that it was improper to consider in the tenure context.

Joan Pomykacz also testified that tripartite-loyalty was discussed at the March 2 meeting. The issue was not important to her. She had heard from Mrs. Blomkvist that Bringhurst had trouble with small children (T. 1205) and she weighed this in registering her negative vote. ^{27/}

Mildred Blomkvist corroborated the consideration of Slack's loyalty (T. 1269). She testified that Slack's teaching was thought to be excellent (T. 1292) and that Kornacki's teaching was considered somewhat deficient in that her students were not up to their abilities (T. 1291).

Anita de Satnick, another member of the Board during this period, planned to vote against Bringhurst's and Kornacki's tenure based solely on her reading of the teacher evaluations. Her concerns were that Bringhurst was not suited to teaching young children and that Kornacki kept a messy classroom.

Neither Bringhurst nor Kornacki knew that Demarest would not recommend their tenure until March 2, when all five teachers received a form letter informing them of the Principal's recommendation as to tenure. Bringhurst and Kornacki first brought the substance of their tenure interviews to the attention of George Loper, one of the "active" Association officers, at this time.

At a public meeting on March 9, 1978, the Board voted to confirm the "straw vote" taken at the March 2 meeting. This vote granted tenure to Slack, Bogle and Englert and denied tenure to Bringhurst and Kornacki.

At this meeting Loper was the only teacher to speak on behalf of Bringhurst and Kornacki. He did not mention the questioning of their loyalties

^{27/} On cross-examination Pomykacz contradicted her testimony on direct, saying that nothing specific about the Association was mentioned at the March 2 meeting, except for a discussion of Slack's loyalty to the Association. I discount the assertion that only one teacher's loyalty was discussed, particularly in view of the other Board members' testimony and the evidence of Mr. Daly's objection. It should be noted once again that Slack did receive tenure and had received the highest ratings from Demarest.

or their Association activities as a factor in the denial of tenure. ^{28/}

In mid-March the Association met with 14 members present and voted to support Loper, McCarty, Bringhurst and Kornacki. The result of this vote was not make known to the Board (T. 998).

On April 5th the Board reaffirmed its denial of tenure to Bringhurst and Kornacki, after a Donaldson presentation by both teachers. According to Loper's uncontested recollection, the Board had received at the beginning of the meeting ^{29/} a "Statement of Disavowal of Involvement" signed by eight teachers (CP-64). Among those signing were Englert and Bogle. Slack did not sign this document. It contained a brief statement that the undersigned disclaimed any representations by any person or group of involvement in the "personnel matters" before the Board, i.e., the reconsideration of the tenure decisions on Bringhurst and Kornacki.

At a Board meeting on April 13, Levin and Bogle read into the minutes the contents of the "Statement of Disavowal".

Bringhurst and Kornacki completed their teaching duties for the 1977-78 school year, and having been denied tenure, have not been employed thereafter by the Respondent.

Conclusions

The Independent (a)(1) Violation

Demarest's denial that he questioned Bringhurst and Kornacki about their loyalty to the Association during an interview affecting his recommendations for tenure must be discounted. Both Bringhurst's and Kornacki's testimony on this point was specific and credible in comparison to Demarest's assertion that he discussed only the items on his list. Slack's testimony, that she was asked specifically about her loyalty to the Association as compared to the Board and to Demarest, provides additional corroboration to support the complainants' testimony and

^{28/} Loper had by this time filed suit in Federal District Court in the matter of cutbacks of the physical education program. There was subsequently a stipulated dismissal of the suit with prejudice to further pursuit in Federal Court, but without prejudice to an administrative hearing. Because of his experience in discrimination charges, I credit his testimony that the omission in his presentation to the Board on March 9 was strategic rather than evidence that the charge was only later fabricated.

^{29/} It is unclear from the record whether this refers to the Donaldson hearing or the regular Board meeting which followed it.

the charge of interference on this matter. Furthermore, Board members corroborated Demarest's discussion of divided loyalties at the March 2 meeting when he made his tenure recommendations. As lay persons, the Board members were generally not focused on the issue of loyalty to the Association. The subject could only come up at Demarest's initiation.

Only in very limited circumstances may an employer or its representative legitimately question an employee about her union. ^{30/} Inquiries directed at loyalty to the Association, particularly in a tenure interview, fall well outside this limited category. It is hard to imagine an interrogation more clearly violative of N.J.S.A. 34:13A-5.4(a)(1) than Demarest's conduct in the tenure interviews.

In general, Kornacki was an especially credible witness. Her responses were always direct, concise yet detailed. I credit her version of the portion of the tenure interview in which Demarest asked how certain parents had found out about the Board meetings on the program cutbacks.

For reasons cited in footnote 10, supra, I do not credit Demarest's testimony that a casual remark by him about angry parents at the Board meetings elicited a denial of notifying parents from some unspecified teacher. I do not believe that he meant the comment, "Boy they were angry," to be a positive one, that it was "fine" for the parents to be angry so far as he was concerned (T. 1489). I find, therefore, that Demarest questioned both Bringhurst and Kornacki about whether they or anyone else had notified parents about the cutbacks and relevant Board meetings.

Demarest's inquiries into how parents had been notified of the Board meetings on cutbacks, immediately after probing into loyalty to the Association, caused Bringhurst and Kornacki to become defensive about their action and concerned that the truth would affect their tenure. In another context, such inquiries might not violate N.J.S.A. 34:13A-5.4(a)(1). The Association did not require teachers to notify parents. The evidence suggests that Bringhurst and Kornacki may have made the calls as a personal matter in response to a request made by Loper as a teacher and a friend rather than as a representative of the Association. Nevertheless, in the context of a tenure interview, juxtaposed with the loyalty question, Demarest's inquiries are part of a "course of conduct" violative of N.J.S.A. 34:13A-5.4(a)(1). ^{31/}

^{30/} See e.g. Bok, The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act, 78 Harv. L. Rev. 38 (1964), on the necessity for communicating a valid purpose for the inquiry and making assurances to employees that no reprisals will occur as a result of their responses.

^{31/} See In re Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228, 229 (1974).

Whether the complainants at the time they made the calls were engaged in protected activity, and whether or not Demarest thought any Association activity was involved, his inquiries in the context of the tenure interviews clearly had a chilling and coercive effect. ^{32/}

The (a)(3) Violation

Weighing a charge of employee discriminatory conduct in In re Board of Education of the Borough of Haddonfield, P.E.R.C. No. 77-36, 3 NJPER 31 (1977) the Commission set out a two-fold standard:

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

Application of this two-fold standard will normally involve a preliminary showing by the Charging Party of two essential elements. There must be proof that the employee was exercising the rights guaranteed to him by the Act, or that the employer believed said employee was exercising such rights, and proof that the public employer had knowledge, either actual or implied, of such activity...the two-fold test upholds the employer's legitimate prerogative to discharge, suspend or refuse to promote employees for reasons unrelated to union activities. The employer may take such action for any cause or no cause at all as long as it is not retaliatory. It is the Charging Party that must prove its case by a preponderance of the evidence."

The reasons given by Demarest for not recommending tenure for Bringhurst and Kornacki are often flimsy and inconsistent. ^{33/} He did not bring problems he perceived in their performance to their attention and his evaluations of them are

^{32/} It is not even necessary to reach this conclusion to find such a violation. The test is not whether the conduct was actually coercive but whether it had a "reasonable tendency in the totality of circumstances to intimidate." NLRB v. Association of Naval Architects, Inc. 355, F.2d. 788, 791 (4th Cir. 1966). cited in Carrie Corp. of Charleston v. NLRB, 375 F.2d. 149, 153 (4th Cir. 1967). See Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Educational Secretaries, 78 N.J. 1 (1978) for the weight to be accorded federal authorities in interpreting the unfair practice provisions of the Act.

^{33/} The facts contained herein may constitute part of the record before the Commissioner of Education for determination of issues raised by them under the Education Law. See footnote 2, supra.

often misleadingly good, if indeed he did not mean them to be so. After deciding to refuse to recommend them, it was questionable at best to have a tenure meeting with them and probe into factionalism in the school while avoiding all clues as to his decision. If the "problem" at the school was not one of union activities, but of failure of open communication, as Demarest described it, his conduct, as displayed in the tenure interviews, was designed to aggravate rather than mitigate it. There was no credible testimony that factionalism was central to Bringhurst's or Kornacki's unsatisfactory performance. Demarest claimed that they did not cooperate with other teachers, but this was refuted by the testimony of three teachers, as well as the denials by Bringhurst and Kornacki.

His explanation of how he rated the teachers and what the categories mean is shot with contradictions. Bringhurst and Kornacki lost points for the same "faults" in three different categories. Bogle's faults were confined to one category. The suspicion could arise that "cooperation and conduct" included loyalty to the Board over the Association. Demarest also testified about an "emotional" problem of Bringhurst, but this was uncorroborated. If factionalism affected a teacher's performance it was Bogle's performance that suffered. ^{34/}

There is no evidence however that Demarest's actions were motivated by anti-union animus rather than some other equally unjustifiable but for our purposes irrelevant personal dislike. ^{35/} Contrary to the Charging Party's assertion, Demarest's inability to present coherent reasons for his failure to recommend tenure is not conclusive evidence of an unfair practice. The complainants by their own testimony admitted that Demarest might not know how they voted on any Association matters or whether they had made calls to the parents. They testified that

^{34/} See page 11 and footnote 25, supra.

^{35/} The Charging Party in a supplemental brief calls to my attention the recent decision In the Matter of Salem County Board for Vocational Education and Daniel McGonigle, P.E.R.C. No. 79-99, 5 NJPER ____ (1979). It seeks to show that the Board's desire to avoid an assertive person who had been complaining about working conditions, could be sufficient to support a finding of an (a)(3) violation. This however presumes the existence of an element unproved in the instant case: knowledge on the part of Demarest and/or the Board of any "assertive" behavior on the part of Bringhurst or Kornacki as Association members. There is nothing in the record to show that anyone thought of Bringhurst or Kornacki as active Association members. They were merely "aligned" with the activists, Loper and McCarty, as was Slack who received tenure.

they had no reason to think Demarest knew that Slack did not make calls to parents.

Generalized, anti-union animus may be inferred from the "loyalty" question that Demarest asked in his tenure interview. It is significant, however, that Demarest questioned the loyalty of Slack and Englert as well as Bringhurst and Kornacki. One cannot further infer that the animus was directed to Bringhurst and Kornacki from the "loyalty" questioning. ^{36/} In view of Slack's admission of her loyalty to the Association, and the absence of any similar admissions by Bringhurst and Kornacki in their interviews, ^{37/} it cannot be found that Demarest's generalized animus focused on Bringhurst and Kornacki after his tenure interviews with them.

The Charging Party makes much in its post-hearing brief of animus alleged against McCarty and Loper. It asserts that the animus against these two Association activists is so great that one may infer animus directed at anyone even "aligned" with them, though not active in the Association. There are two problems with this argument.

One is that the record contains no evidence of animus directed at McCarty and Loper. It is clear that Demarest is concerned that McCarty was granted tenure by the Board after Demarest failed to recommend him. One may infer animosity toward McCarty from the record, but not animus. ^{38/} The subsequent litigation of McCarty's evaluation is a separate proceeding ^{39/} and not incorporated in this

^{36/} General animus is not sufficient to support a finding of discrimination here. In re Borough of Pine Hill Board of Education, P.E.R.C. No. 79-98, 5 NJPER (1979).

^{37/} This is not to suggest that Bringhurst and Kornacki were untruthful in their answers to the loyalty question. Neither was an activist in the Association although both were aligned with the active "faction". Being loyal to oneself and one's friends may well have been the most honest responses on their part. To find that Demarest disbelieved these answers and read into them a loyalty to the Association would be to make an inference unsupported by anything in the record.

^{38/} Demarest's comment that he "didn't want anymore Charlie McCarty's", for example is ambiguous. It could reflect Demarest's discomfort at having the Board supercede his tenure recommendation, or it could refer to McCarty's activism in the union. There is no proof of discrimination against McCarty in this record.

^{39/} The McCarty case (Docket No. CO-78-13-57) is still pending determination before another Hearing Examiner after close of record. After the motion for consolidation of the Loper case was denied, the Hearing Examiner in this proceeding offered to keep open the record until a final determination of the McCarty case was reached and to receive as part of the record in this proceeding findings of fact therein (T. 898-900). Counsel for the Charging Party chose to withdraw his offer of evidence on McCarty's evaluations at that point (T. 901-903).

record although there is reference to the Association's 20 to 0 vote to support McCarty's grievance. This could not distinguish Bringhurst and Kornacki as especially pro-union in sentiment.

Loper's case originally filed as a separate unfair practice charge was consolidated with the instant case and subsequently severed at the parties' stipulation. ^{40/} A motion by the Charging Party to reconsolidate was denied. ^{41/} Thus, any argument that the Charging Party might urge to bolster its contention that the consequences of animus directed at McCarty and Loper affected Bringhurst and Kornacki, remains unsupported in this record.

A second problem with the Charging Party's argument, never addressed in its brief, is Demarest's recommendation of Slack for tenure. The record is clear that Slack was recognized as a supporter of Loper, McCarty and the Association. The Board members were aware of Slack's loyalty to the Association (T. 1234, 1269). If mere alignment with the Loper-McCarty group were enough to focus animus on Bringhurst and Kornacki, then Demarest would not logically have given his highest rating for tenure to Slack.

The record does not reveal that Demarest questioned anyone other than Bringhurst and Kornacki about how the parents were made aware of the cutbacks and the Board meetings at which they would be considered. This could give rise to the suspicion that Demarest had focused on the two teachers and attributed to them activity on behalf of the Association. "It is not sufficient that the proof be based on suspicion or surmise." ^{42/} The Charging Party insists that Demarest knew who made the phone calls to parents because he had a general knowledge of factions at the school (C. P. Brief, p. 8) leaning, at least impliedly, on the so-called "small

^{40/} See footnote 3, supra.

^{41/} After the Charging Party objected to the consolidation for reasons counsel could not recall, the parties agreed to stipulate to the severance of the Loper case from that of Bringhurst and Kornacki. After six days of hearing on the Bringhurst-Kornacki case, the Charging Party moved to reconsolidate the Loper case on grounds of judicial economy. Addressing the question of the necessity or advantage of reconsolidation in making the Bringhurst-Kornacki case, counsel for the Charging Party reiterated that the motion was made solely for reasons of judicial economy and that he did not care one way or the other if the case was consolidated or not. (T. 13 of hearing in Cape May City Bd. of Ed. (Loper), Docket No. 79-60-27, March 14, 1978).

^{42/} NLRB v. Shen-Valley Meat Packers, 33 LRRM 2769, 2772 (4th Cir. 1954).

plant" doctrine. Even were this analysis to explore the "small plant" implication, it is still necessary for the activities in question to have been "carried on in such a manner or at such time that in the normal course of events, Respondent must have been aware of them." 43/ The record herein is devoid of even circumstantial evidence on Demarest's knowledge of Bringhurst's and Kornacki's actions. Beyond admitting the possibility that Demarest suspected the two of notifying parents of the Board meetings, one would have to put aside other possibilities (e.g. that his purpose was to find out who called the parents, not to get Bringhurst and Kornacki to make an admission) and create a string of inferences to reach the conclusion that Demarest failed to recommend their tenure in retaliation for their support of the Association. First, one would have to infer that Demarest did not accept the reasonable possibility that no teachers called the parents, as Bringhurst and Kornacki suggested to him in their answers to his inquiries. Secondly, one must then infer that Demarest did not believe their specific denials of personally contacting parents on this matter. Finally, one would have to infer from these inferences that Demarest acted on this suspicion in refusing to recommend them for tenure. The evidence on the record will not support such a finding, derived from a series of inferences. There was no showing of knowledge on the part of Demarest that Bringhurst and Kornacki contacted parents about the Board meetings.

The Charging Party has thus failed to prove by a preponderance of the evidence that Bringhurst's and Kornacki's support of the Association played a part in the denial of their tenure and I will recommend dismissal of these allegations. 44/

Having found that the Board has engaged in a certain unfair practice I shall recommend it to cease and desist therefrom and to take certain affirmative action necessary to remedy and remove the effects of the unfair practice and to effectuate the policies of the Act. Affirmatively, I shall recommend that the Respondent post an appropriate notice to the employees in the form annexed hereto.

Upon the basis of the foregoing evidence, including findings of fact and the entire record in this case, I make the following recommended:

CONCLUSIONS OF LAW

1. By interrogating Bringhurst, Kornacki, Slack and Englert about their loyalty to the Association during their respective tenure interviews, and by questioning the former two about the mobilization of parents in opposition to cutbacks during these

43/ Mantac Corporation, 231 NLRB 858 (1977).

44/ In the absence of any evidence supportive of the allegation of violation of N.J.S.A. 34:13A-5.4(a)(2), I will also recommend its dismissal.

same interviews, the Respondent, on February 13 and February 15, 1978 engaged in a course of conduct constituting an unfair practice within the meaning of N.J.S.A. 34:13A-5.4(a)(1).

2. Respondent by its denial of tenure of Ellen Bringham and Susan Kornacki, has not engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (3).

3. Respondent has not engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(2).

RECOMMENDED ORDER

Respondent, its officers, agents, successors or assigns shall:

1. Cease and desist from interfering with, restraining or coercing any employees in the exercise of the rights guaranteed them by the New Jersey Employer-Employee Relations Act; (a) by interrogating employees as to their loyalty to the Association; (b) by interrogating any employee in a tenure interview as to his or her actions and the actions of other employees taken to influence public and parent sentiment in opposition to proposals made by Respondent affecting programs and employees.

2. Take the following affirmative action which is deemed necessary to effectuate the policies of the Act.

(a) Post at its central offices in the School District of Cape May City, New Jersey, copies of the attached notice marked "Appendix B". Copies of said notice on forms to be provided by the Commission, shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by said Respondent to ensure that such notices are not altered, defaced or covered by any other material.

(b) Notify the Commission, in writing, within twenty (20) days of receipt of the Order of the steps the said Respondent has taken to comply herewith.

3. IT IS FURTHER ORDERED that the particular sections of the Complaint which allege that the Cape May City Board of Education engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(1) and (3) with regard to the denial of tenure of Ellen Bringham and Susan Kornacki and violations arising under N.J.S.A. 34:13A-5.4(a)(2) be dismissed in their entirety.

DATED: Newark, New Jersey
July 31, 1979

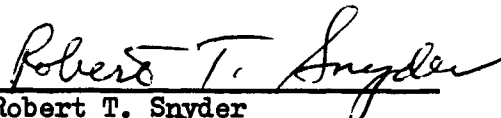

Robert T. Snyder
Hearing Examiner

EXHIBIT "A"

TENURE DISCUSSIONS

2/13/78

1. Policy 5005...The administrator shall make recommendations based on efficiency, health, cooperation and conduct.
2. Do you enjoy working at Cape May City School? Working for me?
3. Why do you think it necessary to reduce services in the school? How would you handle the falling enrollment problem?
4. Do you understand the uniqueness of my position as a principal and superintendent of school? How can a principal have good relations with teachers when mandated to participate in negotiations? How would you play the role?
5. How can you be loyal to your peers when they are so split on every issue in the school? How do you remain neutral?
6. Why are there so many problems among teachers? What is the problem? How would you solve them?
7. Tell me why you think the board should offer you tenure?
8. What assurances can give me that you will be accountable for your childrens' success after you receive tenure?
9. Do you have any questions you want to ask me? Do you have any questions about tenure?
10. I shall make my recommendations prior to March 9th, 1978 and will inform you of my recommendations in writing.

Thank you for your time.

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act by interrogating them as to their loyalty to the Cape May City Education Association or by interrogating them in a tenure interview as to their participation in activities designed to encourage public and parent opposition to our proposals for cutbacks in services and employees.

CAPE MAY CITY BOARD OF EDUCATION

(Public Employer)

Dated _____

By _____ (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State Street, Trenton, New Jersey 08608 (Telephone) (609) 292-6780