

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DOVER BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-82-260-102

DOVER CUSTODIAN AND MAINTENANCE
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Dover Board of Education violated subsections 34:13A-5.4 (a)(1) and (3) of the New Jersey Employer-Employee Relations Act when one of its supervisors evaluated the president of the Dover Custodian and Maintenance Association as "unsatisfactory" because the president had threatened to file a grievance concerning another employee's overtime claim.

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Appearances:

For the Respondent, Green & Dzwilewski, Esqs.
(Allan P. Dzwilewski, of Counsel)

For the Charging Party, Katzenbach, Gildea & Rudner,
Esqs. (Arnold M. Mellk, of Counsel)

DECISION AND ORDER

On March 30, 1982, the Dover Custodian and Maintenance Association ("Association") filed an unfair practice charge against the Dover Board of Education ("Board") with the Public Employment Relations Commission. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1) and (3), ^{I/} when one of its supervisors, Vincent Marotta, gave the Association's president, John Palovitz, an "unsatisfactory" evaluation because the president had threatened to file a grievance concerning another employee's overtime claim.

I/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; and (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

On April 16, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Board filed an Answer admitting that Marotta evaluated Palovitz as an unsatisfactory employee, but denying that Marotta did so in retaliation for Palovitz's protected activities.

On June 14, 15, and 29, 1982, Commission Hearing Examiner Alan R. Howe conducted hearings at which the parties examined witnesses, presented evidence and argued orally.^{2/} The parties also filed post-hearing briefs.

On August 16, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 83-5, 8 NJPER ____ (¶ ____ 1982) (copy attached). He concluded that the Board violated subsections 5.4(a)(1) and (3) of the Act when Marotta gave John Palovitz an "unsatisfactory" evaluation in January 1982. Relying on the standards established in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981), the Hearing Examiner found that Palovitz's protected activity was a substantial or motivating factor behind the "unsatisfactory" evaluation. The Hearing Examiner further concluded that Marotta would not have given Palovitz the same evaluation in the absence of Palovitz's protected activity. The Hearing Examiner drew no conclusions with

^{2/} On the first day of hearing, a dispute arose as to the admissibility of evidence concerning a transfer of Palovitz from his Bus Driver/Mailman position to a custodial position (Tr. I, pp. 48-52). The transfer occurred in April 1982. As a result, Palovitz allegedly lost a \$200 stipend he had received for operating a special education bus. The Association's attorney alleged that the transfer and ensuing loss of stipend were part of a course of harassment, but did not move to amend the Complaint. The Hearing Examiner then allowed testimony concerning the transfer and loss of stipend.

respect to the alleged retaliatory transfer.

The Board and Association filed Exceptions, respectively, on September 13, and August 26, 1982. They filed further statements on September 7, 8, and 13, 1982.^{3/}

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact, except as modified hereafter. We conclude that the Board did violate subsections 5.4(a)(1) and (3) of the Act when Palovitz's supervisor gave him an "unsatisfactory" evaluation.

The Board excepts to several factual findings made by the Hearing Examiner. Several of the contested factual findings are irrelevant to the conclusions reached below and thus do not merit further consideration. The remaining contested factual findings concern the Hearing Examiner's judgment crediting Palovitz's testimony over clearly conflicting testimony by the Board's agents. In the absence of unacceptable inferences drawn by the Hearing Examiner in making credibility judgments, the Commission is reluctant to impose its own credibility judgments since it has not had the opportunity to observe the demeanors of the witnesses.^{4/} We have carefully checked all transcript references submitted by the Board and still conclude that the Hearing Examiner's credibility judgments should not be changed.

^{3/} The Board filed a response to the Association's Exceptions. The Association requested that the Board's response be disregarded under N.J.A.C. 19:11-7.3(a). The Board correctly noted that this rule is inapplicable to an unfair practice proceeding. Pursuant to N.J.S.A. 19:14-7.3, we have considered the Board's response.

^{4/} Committee of Interns and Residents and College of Medicine and Dentistry, P.E.R.C. No. 82-83, 7 NJPER 588 (¶11264 1981), appeal pending App. Div. Docket No. A-99-77-81-T3.

The Board also excepts to the Hearing Examiner's legal analysis. Specifically, the Board excepts to the Hearing Examiner's emphasis upon the evaluation in dispute.

We agree with the Hearing Examiner that the Association established that Palovitz's "unsatisfactory" evaluation was motivated by Marotta's desire to retaliate against Palovitz for his protected activity. For the six annual evaluations before January 1982, Palovitz's former supervisor had always rated him "satisfactory" or "very satisfactory." After Marotta became Palovitz's supervisor, Palovitz vigorously presented a grievance to Marotta. This presentation led Marotta to tell Palovitz that he intended to keep Palovitz on his "shit list." At Marotta's first opportunity to file an annual evaluation on Palovitz, he listed Palovitz's overall performance as "unsatisfactory" and brought his continued employment into question. Marotta gave this overall "unsatisfactory" rating, despite finding Palovitz's performance "unsatisfactory" in only two of eight specific categories. Further, on the back of the evaluation, Marotta wrote comments manifesting his displeasure with Palovitz's protected activity. For example, Marotta wrote: "...I think he should improve on his attitude and recognize that we are all here to do a job and work together not against each other." As a final example of evidence establishing improper motivation, Marotta stated that he did not believe an association was needed to represent the Board's employees. All these pieces of evidence, among others, establish an illegal motivation behind the "unsatisfactory" evaluation.

We now turn to the Board's argument that the Hearing Examiner erred when, applying the second half of the East Orange, supra, test, he found that Marotta would not have given Palovitz an "unsatisfactory" evaluation in the absence of his protected activity. The Board asserts that while Palovitz's previous evaluations did not reveal his shortcomings, his prior supervisor and Palovitz were aware of problems in Palovitz's job performance. The Board concludes that the previous evaluations of Palovitz were overly generous, and the contested evaluation was accurate and appropriate compensation for prior lenience.

We simply do not believe that Marotta would have given Palovitz an overall unsatisfactory rating, thus bringing into question Palovitz's continued employment, on the basis of only two "unsatisfactory" ratings in eight categories had Marotta not been motivated by a desire to retaliate for Palovitz's protected activity.^{5/} Further, we agree with the Hearing Examiner that Palovitz's evaluations prior to January 1982 were accurate reflections of his "satisfactory" or "very satisfactory" job performance, and that Palovitz's job performance did not deteriorate to an overall "unsatisfactory" level in the first year Marotta supervised him.

Finally, we turn to the Association's sole exception

^{5/} Once a charging party establishes that an illegal reason was a substantial or motivating factor in taking a personnel action, East Orange shifts the burden of proof to the employer to establish that it would have taken the same action in the absence of protected activity. In this case, we believe that even if the burden on this second issue remained with the Association, the Association carried that burden.

that the Hearing Examiner erred when he failed to recommend reinstatement of Palovitz to the position of bus driver/mailman and reimbursement of Palovitz for any pay differential between that job and the job to which he voluntarily transferred in April 1982. We assume arguendo that the legality of the transfer and the loss of the stipend were fully and fairly litigated before the Hearing Examiner, even though the Association never moved to amend the Complaint and the Hearing Examiner did not consider these issues. Cf. Commercial Township Bd. of Ed, P.E.R.C. No. 83-15, 8 NJPER ____ (¶ ____ 1982). (Commission may find violation, even though Complaint not amended, if issue fully and fairly litigated before Hearing Examiner and Hearing Examiner considers issue.) We cannot agree, however, that the Association met its burden of proving, by a preponderance of the evidence, that the transfer and loss of stipend resulted from the previous "unsatisfactory" evaluation and Marotta's desire to retaliate against Palovitz. Palovitz accepted the transfer, and the Board guaranteed the remainder of Palovitz's stipend for the 1981-1982 school year and afforded him the right to drive school buses on an overtime basis (Tr. II, pp. 105-110). Accordingly, we are not convinced that Palovitz's voluntary transfer was in effect a forced transfer stemming from the illegally motivated evaluation.

ORDER

IT IS ORDERED that:

A. The Respondent Dover Board of Education cease and desist from:

1. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the

Act, particularly by evaluating employees such as John Palovitz as "unsatisfactory" for engaging in protected activities on behalf of the Dover Custodian and Maintenance Association.

2. 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 the Act, particularly by evaluating employees such as John Palovitz as "unsatisfactory" for engaging in protected activities on behalf of the Dover Custodian and Maintenance Association.

B. The Respondent Board take the following affirmative action:

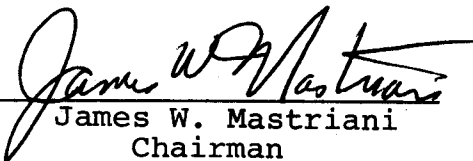
1. Forthwith remove from the personnel file of John Palovitz the "unsatisfactory" evaluation made by Vincent Marotta in January 1982. Any future evaluations of Palovitz are to be made without regard to the exercise by Palovitz of rights guaranteed by the Act and are to be free from discriminatory motivation.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. All other aspects of the Association's Unfair Practice Charge are dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch and Graves voted for this decision. Commissioners Hipp and Newbaker abstained. None opposed. Commissioners Hartnett and Suskin were not present at the time of the vote on this decision.

DATED: Trenton, New Jersey
November 17, 1982
ISSUED: November 18, 1982

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 employees in the exercise of the rights guaranteed to them by the Act, particularly, by evaluating employees such as John Palovitz as "unsatisfactory" for engaging in protected activities on behalf of the Dover Custodian and Maintenance Association.

WE WILL NOT discriminate 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 the Act, particularly, by evaluating employees such as John Palovitz as "unsatisfactory" for engaging in protected activities on behalf of the Dover Custodian and Maintenance Association.

WE WILL remove from the personnel file of John Palovitz the "unsatisfactory" evaluation made by Vincent Marotta in January 1982. We will make any future evaluations of Palovitz without regard to the exercise by Palovitz of rights guaranteed by the Act, free from discriminatory motivation.

DOVER 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 the Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

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Docket No. CO-82-260-102

DOVER CUSTODIAN AND MAINTENANCE
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when the new supervisor of John Palovitz, the President of the Association, gave Palovitz an "unsatisfactory" evaluation in January 1982. The Hearing Examiner found that the supervisor was discriminatorily motivated as a result of the exercise of Palovitz of rights guaranteed by the Act. Palovitz had in April 1981 threatened to file a grievance over the refusal of the supervisor to make payment of overtime to a custodian. The supervisor responded by the use of profanity, suggesting possible future retaliation. The Hearing Examiner also found that the job performance of Palovitz since April 1981 could not justify an "unsatisfactory" evaluation in January 1982, particularly in view of Palovitz having been rated "satisfactory" and "very satisfactory" since June 1977 by a former supervisor.

By way of remedy, the Hearing Examiner recommends that the "unsatisfactory" evaluation be removed from the personnel file of Palovitz and that any future evaluations be free of the taint of discrimination for the exercise by Palovitz of protected activities.

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 Dover Board of Education
Green & Dzwilewski, Esqs.
(Allan P. Dzwilewski, Esq.)

For the Charging Party
Katzenbach, Gildea & Rudner, Esqs.
(Arnold M. Mellk, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 30, 1982 by the Dover Custodian and Maintenance Association (hereinafter the "Charging Party" or the "Association") alleging that the Dover Board of Education (hereinafter the "Respondent" or the "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employees Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that Vincent Marotta, the supervisor of John Palovitz, a custodian and the President of the Charging Party, unfavorably evaluated Palovitz in January 1982, notwithstanding that Palovitz had been satisfactorily evaluated since 1977 by a prior supervisor, and which unfavorable evaluation in January 1982 is alleged to have been in retaliation for the exercise by Palovitz of protected activities as President of the Association, all of which is alleged to be a violation of N.J.S.A.

34:13A-5.4(a)(1) and (3) of the Act. ^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of hearing was issued on April 16, 1982. Pursuant to the Complaint and Notice of Hearing, hearings were held on June 14, 15 and 29, 1982 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by August 10, 1982.

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

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

FINDINGS OF FACT

1. The Dover Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Dover Custodian and Maintenance Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. John Palovitz is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

4. Although not material to the disposition of the issues raised by the Unfair Practice Charge, there was received in evidence the collective negotiations agreement effective July 1, 1978 to June 30, 1981 (J-1) and the Memorandum of

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."

Agreement extending and modifying J-1 from July 1, 1981 to June 30, 1983 (J-2).

5. Palovitz was hired as a Custodian in 1973. From 1975 through April 1982 Palovitz, while in the Custodian's department, served as a Bus Driver/Mailman. Effective April 19, 1982 Palovitz was transferred to the Middle School as a Custodian.

6. Palovitz has been a member of the Association and its President since 1977. As President he is responsible for enforcement of the agreement, the processing of grievances, etc. In administering the agreement during the time that Harry E. Ball was Chief Custodian of Buildings and Grounds, Palovitz encountered no problems. Ball retired as of March 7, 1981. He was replaced by Vincent Marotta, who had been hired January 16, 1981 and worked with Ball during an on-the-job training period.

7. The evaluations of Palovitz were received in evidence as Exhibits J-3 through J-9. All evaluations except J-9 (January 1982) were done by Ball, J-9 having been done by Marotta. A summary of all of the evaluations indicates the following.

- a. June 1977 - Palovitz was rated "satisfactory" in seven out of eight categories and "very satisfactory" in one category. (J-3).
- b. March 1978 - Palovitz was rated "satisfactory" in five out of eight categories and "very satisfactory" in the remaining three categories. (J-4).
- c. November 1978 - Palovitz was rated "satisfactory" in one out of eight categories and "very satisfactory" in the remaining seven categories. He was recommended for an "above average" pay increase and a special commendation was added to the evaluation, namely, that he was a very conscientious worker." (J-6).
- d. April 1979 - Palovitz was rated "very satisfactory" in all eight categories (J-7).
- e. (Undated) 1980 - Palovitz was rated "very satisfactory" in all eight categories (J-5).
- f. January 1981 - Palovitz was rated "very satisfactory" in all eight categories (J-8).
- g. January 1982 - Palovitz was rated "unsatisfactory" in two out of eight categories; "satisfactory" in five out of eight categories; and "very satisfactory" in one category. His "total evaluation" was deemed "unsatisfactory." This was the first evaluation done by the new supervisor, Vincent Marotta, who made an additional comment, indicating that he felt that Palovitz takes criticism and any change in his daily routine as a "personal assault" and on several occasions

Palovitz has become "very nasty and argumentive "(sic). He stated further that Palovitz would have to "improve on his attitude" if continued employment was to be recommended." (See J-9).

8. After Marotta became Chief Custodian in March 1981 Palovitz and Marotta had a confrontation over the payment of overtime to one Joseph Tozzi in April 1981. Tozzi had, on his own initiative, put in two hours of overtime on Easter Saturday, which involved the shutting off of a sump pump, and had sought payment for the overtime. Marotta concluded that Tozzi should take compensatory time off. Palovitz became involved and pointed out that this was not provided for in the agreement (J-1). Several days later Marotta agreed to pay the two hours overtime due to Tozzi. According to Palovitz, this change in Marotta's position resulted from Palovitz having stated that he was going to file a grievance if Tozzi was not paid the overtime. In a conversation between Palovitz and Marotta regarding this incident, Palovitz testified credibly that Marotta said "... he had a shit list and when anybody made the shit list they stayed on it" (1 Tr. 27). The Hearing Examiner does not credit Marotta's denial that such a statement was made by him to Palovitz, based on an overall appraisal of the demeanor of the respective witnesses and their testimony.

9. Palovitz also testified without contradiction that sometime in April 1981 Marotta stated, in the presence of a group of Custodians, that other school districts do not have associations and that one is not needed at "our schools" (1 Tr. 29).

10. After Easter 1981 Marotta commenced complaining that Palovitz was wasting too much time on his job, a complaint that Palovitz said had never been made by Ball.

11. Other than the Tozzi overtime incident, supra, there were no significant problems between Palovitz and Marotta during the balance of 1981 with the exception of some friction over Marotta's having ordered Palovitz to paint a snow plow in late November or early December, which Palovitz claimed interfered with the performance of his Bus Driver/Mailman duties.

12. As noted above, the "unsatisfactory" evaluation of Palovitz occurred in January 1982 (J-9). Before and after there occurred several incidents of friction

between Palovitz and Marotta. For example, early in January 1982 Palovitz sought to take a "sick day" for January 4, 1982 when Palovitz had to take off a day to meet a plumber regarding the repair of a furnace at his home. Marotta stated that he was not "sick" and, therefore, would have to take a "personal day." This incident escalated to the point where R. Paul Muni, the Assistant Superintendent and Secretary of the Board, was called in to settle the matter. Thereafter, in February 1982, there was an incident regarding whether or not Palovitz had taken a tape recorder from a school illegally. There were also several other minor incidents.

13. As of March 1, 1982 Marotta directed Palovitz to commence keeping a daily log in the same manner in which two employees in maintenance had been keeping such logs since July 1, 1981. Palovitz claimed that he was being "singled out."

14. In April 1982 Muni and Palovitz discussed the latter's problems with Marotta and Muni suggested that, since there was a Custodian vacancy in the Middle School, it would be best for Palovitz to accept a transfer. Certain stipends, which Palovitz had been receiving as a Bus Driver, were continued through June 1982 after Palovitz was transferred to the Middle School as a Custodian on April 19, 1982.

15. The Hearing Examiner does not credit the testimony of Marotta that Ball told him that Palovitz was a "problem" and that he resisted change. Ball was called as witness by the Respondent and did not corroborate Marotta in this regard. Ball testified only that, in his opinion, Palovitz was not completing his runs on time. Ball said that was all that he discussed with Marotta regarding the job performance of Palovitz.

16. Regarding Ball's evaluations of Palovitz (J-3 through J-8, supra) Ball testified without contradiction that while he was inclined to be more lenient in his evaluations of all employees, including Palovitz, he used his best judgment and found Palovitz to be a good employee.

17. Palovitz was given an employment contract for the 1982-83 school year

under date of May 25, 1982 (R-3). His annual salary will include separate stipends for a bus driver's license and a "Black Seal" boiler license. He will not receive the \$200 per year stipend for operating the Special Education bus since his duties will be those of a Custodian.

THE ISSUE

Did the Respondent Board violate Subsections(a)(1) and (3) of the Act when Vincent Marotta, the supervisor of John Palovitz, gave Palovitz an "unsatisfactory" evaluation in January 1982?

DISCUSSION AND ANALYSIS

The Respondent Board Violated
Subsection(a)(1) And (3) Of The
Act When Vincent Marotta Gave
John Palovitz An "Unsatisfactory"
Evaluation In January 1982

In order for the Charging Party to prevail it must prove by a preponderance of the evidence that the action of Vincent Marotta in giving John Palovitz an "unsatisfactory" evaluation in January 1982 was "discriminatory" and was motivated, in whole or in part, by anti-union animus, the effect of which was to discourage employees in the exercise of rights protected by the Act: Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71, 72 (1977); City of Hackensack, P.E.R.C. No. 77-49, 3 NJPER 143, 144 (1977), rev'd. on other grounds, 162 N.J. Super. 1 (App. Div. 1978), aff'd. as modif., 82 N.J. 1 (1980); and Cape May City Board of Education, P.E.R.C. No. 80-87, 6 NJPER 45, 46 (1980).

Further, it appearing to the Hearing Examiner that this is a case of "dual motive," the Charging Party must meet the "causation test" enunciated by the National Labor Relations Board (NLRB) in Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980).^{2/} In Wright Line the NLRB adopted the analysis of the United States Supreme

^{2/} The Appellate Division adopted the Wright Line analysis in "dual motive" cases in East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981), which the Commission has followed in cases beginning with Madison Board of Education, P.E.R.C. No. 82-46, 7 NJPER 669 (1981).

Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), which involves the following requisites in determining employer motivation: (1) the General Counsel (Charging Party) must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline; and (2) once this is established, the employer has the burden of demonstrating that the same disciplinary action would have taken place even in the absence of protected activity.

Based on the Haddonfield line of cases, supra, and the Wright Line - Mt. Healthy analysis, supra, the Hearing Examiner finds and concludes that the Charging Party has demonstrated by a preponderance of the evidence that the Respondent Board by its agent, Vincent Marotta, violated Subsection(a)(3), and derivatively Subsection(a)(1), of the Act. It should be noted that the Charging Party alleged and proved only that the "unsatisfactory" evaluation of Palovitz by Marotta in January 1982 was violative of the Act, there being no allegation or proof that the transfer of Palovitz by R. Paul Muni in April 1982 was illegally motivated.

Palovitz has been an employee of the Respondent Board since 1973. He has been a member of the Association and its President since 1977. His evaluations from June 1977 to November 1978 improved steadily in the categories of "satisfactory" "very satisfactory" (J-3, J-4 & J-6). Beginning in April 1979 and continuing through January 1981 Palovitz received "very satisfactory" evaluations in all eight categories (J-5, J-7 & J-8). During the foregoing period from June 1977 to January 1981 Palovitz was evaluated by Harry E. Ball, the Chief Custodian of Buildings and Grounds, who retired as of March 7, 1981. Ball testified that while he was inclined to be more lenient in his evaluations of all employees, including Palovitz, he used his best judgment and found Palovitz to be a good employee. In fact, Ball's only qualifying comment was that Palovitz had a problem of not completing runs on time as a Bus Driver/Mailman.^{3/} Palovitz, as President of the Association,

^{3/} Ball did not corroborate Marotta's testimony that Ball told Marotta that Palovitz was a problem and resisted change.

had encountered no problems with Ball in the administration of the collective negotiations agreement. (See Findings of Fact Nos. 6, 7, 15 & 16, supra).

Shortly after Marotta succeeded Ball as Chief Custodian in March 1981 he had a confrontation with Palovitz in April 1981 regarding the payment of overtime to Joseph Tozzi. Marotta initially offered Tozzi compensatory time, which was not provided for in the agreement. Marotta only agreed to the payment of overtime to Tozzi after Palovitz stated that he was going to file a grievance. (See Finding of Fact No. 8, supra).

The Hearing Examiner has credited the testimony of Palovitz that Marotta, in a conversation regarding the Tozzi incident, said to Palovitz that "...he had a shit list and when anybody made the shit list they stayed on it." Palovitz also testified without contradiction that in April 1981 Marotta, in the presence of a group of Custodians, said that other school districts did not have associations and that one is not needed at "our schools." (See Findings of Fact Nos. 8 & 9, supra).

From the time of the Tozzi incident in April 1981 until Marotta's "unsatisfactory" evaluation of Palovitz in January 1982, the only problems which occurred between Marotta and Palovitz, which were the subject of testimony, were as follows: (1) after Easter 1981 Marotta commenced complaining that Palovitz was wasting too much time on the job; (2) some friction occurred over Marotta's having ordered Palovitz to paint a snow plow in November or December 1981, which Palovitz claimed interfered with his Bus Driver/Mailman duties; and (3) that in early January 1982 Palovitz and Marotta had a dispute over whether Palovitz should take a sick day or a personal day for meeting a plumber regarding the repair of a furnace. (See Findings of Fact Nos. 10, 11 & 12, supra).

It is in the context of the foregoing recital of events that one must view Marotta's decision to give Palovitz an "unsatisfactory" evaluation in January 1982 (see Finding of Fact No. 7g and J-9, supra). An examination of this evaluation is most interesting. While Palovitz was rated "very satisfactory" in one category,

"satisfactory" in five out of eight categories and "unsatisfactory" in only two out of eight categories, Marotta elected to denominate the "total evaluation" as "unsatisfactory." A category-by-category examination of Exhibit J-9 discloses the following: Palovitz was rated "very satisfactory" for dependability; Palovitz was rated "satisfactory" for attendance, production, quality of work, ability to learn and personality; and Palovitz was rated "unsatisfactory" for attitude (willing worker - cooperative) and emotional stability (accepts criticism and makes an effort to improve).

As noted previously, the "total evaluation" was deemed by Marotta to be "unsatisfactory." Nevertheless, Marotta recommended that Palovitz be continued in employment with the notation of several written comments, inter alia: Palovitz "...takes criticism and any change in his daily routine as a personal assault against him. On several occasions he has become very nasty and argumentive (sic) with me so much that Mr. Muni had to get involved..." Marotta concluded his comments by stating that Palovitz would have to "...improve on his attitude..." if continued employment was to be recommended.^{4/}

In support of his conclusion that the Respondent Board violated Subsection(a) (3) of the Act by the conduct that Marotta, the Hearing Examiner first notes that the Charging Party has established preliminarily that Palovitz was engaged in protected activities as President of the Association in April 1981, at the time of the Tozzi incident, and that the Respondent expressly or impliedly knew that Palovitz was so engaged: Haddonfield, supra (3 NJPER at 72). Notwithstanding that Palovitz did not actually file a grievance, but merely threatened to do so if Tozzi was not paid the overtime, the Commission has recognized that:

^{4/} Although the Hearing Examiner has made several findings of fact regarding events that transpired after the "unsatisfactory" evaluation in January 1982, they are not germane to a decision as to whether or not the conduct of Marotta violated the Act and, thus, will not be discussed further.

"...individual employee conduct, whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employees in a recognized or certified unit, constitute protected activities under our Act..."

North Brunswick Township Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451, 454 (fn. 16) (1978)

Further, the Hearing Examiner concludes that Marotta manifested anti-union animus toward Palovitz and the Association since becoming Chief Custodian, both by his "shit list" statement to Palovitz at the time of the Tozzi overtime incident, and by his statement, in the presence of a group of Custodians, that other school districts did not have associations and one is not needed at "our schools." Clearly, the logical effect of these utterances by Marotta was to discourage employees in the exercise of rights protected by the Act. See City of Hackensack and Cape May City Board of Education, supra.

Now moving to the Wright Line - Mt. Healthy analysis, the Hearing Examiner is clear in his conclusion that the Charging Party has established a prima facie showing that the protected activities engaged in by Palovitz, supra, were a "substantial" or a "motivating" factor in his having received from Marotta an "unsatisfactory" evaluation in January 1982. The causal nexus between the events of April 1981 and the evaluation of January 1982 is evident from the fact that nothing of significance transpired during these months, which could rationally justify an "unsatisfactory" evaluation in January 1982. This is particularly so in view of the history of favorable evaluations by Ball since June 1977.

Likewise, given the foregoing, the Respondent has failed to meet the burden of demonstrating to the satisfaction of the Hearing Examiner that the same "unsatisfactory" evaluation would have occurred even in the absence of the exercise of protected activities by Palovitz as President of the Association. It can be fairly concluded from the analysis of the evaluation (J-9, supra), that Marotta engaged in "overkill" in denoting that the "total evaluation" was "unsatisfactory"

when Palovitz was rated "unsatisfactory" in only two out of eight categories.

The personal written comments of Marotta annexed to the evaluation are a further indication that Marotta was discriminatorily motivated against Palovitz and that this motivation was causally related to the events of April 1981, supra. The Hearing Examiner finds it plainly implausible that the job performance of a long-term employee such as Palovitz could precipitously plummet in such a short span of time given the record in this case. The logical explanation, as noted above, is that Marotta was discriminatorily motivated against Palovitz and that this motivation tainted the January 1982 evaluation.

Based on all of the foregoing, the Hearing Examiner finds and concludes that the Respondent Board has violated Subsection(a)(3), and derivatively Subsection(a)(1), of the Act by its conduct herein. Accordingly, an appropriate remedy will be recommended hereinafter.

* * * *

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

CONCLUSION OF LAW

The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(3), and derivatively 5.4(a)(1), when Vincent Marotta in gave John Palovitz an "unsatisfactory" evaluation in January 1982.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent cease and desist from:

1. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by evaluating employees such as John Palovitz as "unsatisfactory" for engaging in protected activities on behalf of the Dover Custodian and Maintenance Association.

2. 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

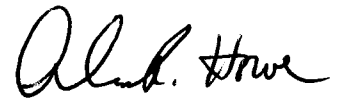
the rights guaranteed to them by the Act, particularly, by evaluating employees such as John Palovitz as "unsatisfactory" for engaging in protected activities on behalf of the Dover Custodian and Maintenance Association.

B. That the Respondent Board take the following affirmative action:

1. Forthwith remove from the personnel file of John Palovitz the "unsatisfactory" evaluation made by Vincent Marotta in Janaury 1982. Any future evaluations of Palovitz are to be made without regard to the exercise by Palovitz of rights guaranteed by the Act and are to be free from discriminatory motivation in connection therewith.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty(60) consecutive days. Reasonable steps shall be taken by the Respondent Board to insure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent Board has taken to comply herewith.



Alan R. Howe
Hearing Examiner

Dated: August 16, 1982
Trenton, New Jersey

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 Act, particularly, by evaluating employees such as John Palovitz as "unsatisfactory" for engaging in protected activities on behalf of the Dover Custodian and Maintenance Association.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly, by evaluating employees such as John Palovitz as "unsatisfactory" for engaging in protected activities on behalf of the Dover Custodian and Maintenance Association.

WE WILL forthwith remove from the personnel file of John Palovitz the "unsatisfactory" evaluation made by Vincent Marotta in January 1982. Any future evaluations of Palovitz are to be made without regard to the exercise by Palovitz of rights guaranteed by the Act and are to be free from discriminatory motivation in connection therewith.

DOVER 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 James Mastriani, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780