P.E.R.C. NO. 78-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LAUREL SPRINGS BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-76-3-31

MARY BECKEN,

Charging Party.

SYNOPSIS

The Commission affirms the findings of fact and conclusions of law of the Hearing Examiner that Ms. Becken failed to prove by a preponderance of the evidence that the Board discriminatorily transferred her from a position as a first grade teacher to a teacher of the fifth grade in retaliation for Becken's activities as chief negotiator and spokesperson for the Laurel Springs Education Association. The Hearing Examiner had determined that Becken was transferred for educational policy reasons based upon the Board's judgment of what was best for the educational process in the Laurel Springs school district. The Commission therefore ordered that the particular section of the complaint which alleged that the Board of Education engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(1) and (a)(3) with regard to Ms. Becken's transfer be dismissed.

The Commission concludes that the Board violated N.J.S.A. 34:13A-5.4(a)(1) in consideration of the totality of the Board's conduct toward Ms. Becken subsequent to the transfer in question, including the transmittal of messages designed to restrain and coerce her in the exercise of protected rights, i.e., the right to press publicly a grievance or disagreement over a negotiations issue such as the transfer matter, and the refusal to permit Becken to speak to Association matters at a public hearing.

The Commission orders the Board to cease and desist from interfering with, restraining or coercing Ms. Becken or any other employee in exercising rights guaranteed to them by the New Jersey Employer-Employee Relations Act, including their right to participate in valid activity intended to inform and convince the public on a labor relations issue involving the Board and the Association, and from prohibiting Mary Becken or other employees from speaking at public Board meetings on such issues; and affirmatively orders the Board to post appropriate notices and to notify the Chairman, in writing, of the steps taken to comply with the Order.

P.E.R.C. NO. 78-4

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

LAUREL SPRINGS BOARD OF EDUCATION,
Respondent,

Docket No. CI-76-3-31

-and-

MARY BECKEN,
Charging Party.

Appearances:
For the Respondent, Charles J. Clarke, Jr., P.C. (Mr. Allen S. Ferg, of Counsel)

For the Charging Party, Goldberg, Simon & Selikoff, Esqs. (Mr. Joel S. Selikoff, of Counsel and Mr. Jeffrey S. Laden, on the Brief)

DECISION AND ORDER

On August 13, 1975 Mary Becken filed an unfair practice charge with the Public Employment Relations Commission (the "Commission") alleging that the Laurel Springs Board of Education (the "Board") had engaged in certain prohibited conduct within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The unfair practice charge was processed pursuant to the Commission's Rules and, it appearing to the Commission's then Executive Director[1/] that

1/ On June 3, 1976 the then Executive Director, Jeffrey B. Tener, was appointed the Commission's first full time Chairman. See N.J.S.A. 34:13A-5.2. /The position of Executive Director was eliminated as the Chairman is the Commission's chief executive officer./ The functions previously performed by the Executive Director in unfair practice proceedings were transferred by the Commission to the Director of Unfair Practice Proceedings.

the allegations, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 30, 1975.

Subsequent to the issuance of the Complaint, but prior to the hearing, the Charging Party, Mary Becken made a motion to amend the Complaint. That motion was granted. As amended, the Complaint alleges that the Board violated N.J.S.A. 34:13A-5.4(a) (1) and (3) [2/] by involuntarily transferring Mary Becken from her first grade teaching assignment to a fifth grade teaching assignment as retaliation for her activities as chief negotiator and spokesperson for the Laurel Springs Education Association (the "Association"). Pursuant to this amended Complaint and Notice of Hearing, the matter was heard before Commission Hearing Examiner Robert T. Snyder. The hearing took place on January 21, January 22, March 24, March 25, and August 3, 1976. All parties were represented and were given full opportunity to introduce relevant evidence, to examine and cross-examine witnesses and to argue orally. Following the close of the hearing post-hearing briefs were submitted by the Respondent and Charging Party on October 29 and November 23, 1976 respectively.

2/ 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."

Based upon the entire record including his observations of the witnesses and his review of the arguments of counsel made both orally and in their briefs, the Hearing Examiner issued his Recommended Report and Decision on May 2, 1977. In that report he reviewed all the evidence and concluded that the Board had not transferred Ms. Becken from her first grade teaching assignment to a fifth grade assignment as retaliation for her Association activities but rather for educational policy reasons based upon its judgment of what was best for the educational process in the Laurel Springs school district. He, therefore, recommended that the allegation of a violation of N.J.S.A. 34:13A-5.4(a)(3) be dismissed. The Hearing Examiner did find, however, that the Board did engage in certain conduct intended to interfere with, restrain or coerce Ms. Becken in the exercise of the rights guaranteed to her by this Act and he therefore found that the Board had violated N.J.S.A. 34:13A-5.4(a)(1).

The Hearing Examiner caused his Recommended Report and Decision to be filed with the Commission and to be served upon all parties. Initially, the attorney for the Board of Education requested an extension of time in which to study the Report and perhaps prepare exceptions to it. This request was granted; however, the time for such exceptions is now well past and neither party has filed any exceptions to the Report or Recommended Order.[3/] The Recommended

3/ N.J.S.A. 52:14-10(c) provides for the filing of exceptions to the report of a hearing examiner in administrative proceedings. This statutory requirement is implemented by N.J.A.C. 19:14-7.2 and 7.3 of the Commission's Rules. However, N..J.A.C. 19:14-7.3(h) provides that: "No matter not included in exceptions or cross-exceptions may thereafter be urged before the Commission, or in any further proceeding."

Report and Decision is attached to this Decision and Order and is hereby made a part hereof.

The Commission has reviewed the Hearing Examiner's Recommended Report and Decision and the entire record in the case. See N.J.A.C. 19:14-7.2. The factual and procedural history of this matter is set forth in detail in the Hearing Examiner's Report and thus need not be reiterated at length in this decision. As stated earlier, the Hearing Examiner found that Ms. Becken's transfer was not motivated by or in retaliation for her activities as a chief spokesperson for the Association during contract negotiations. Rather, he discusses at length the educational policy reasons which he finds were the Board's basis for transferring Ms. Becken's teaching assignment. We agree with the Hearing Examiner's findings of fact and conclusions of law in this regard and adopt them.[4/] Therefore, we dismiss that portion of the Complaint which alleges a violation of N.J.S.A. 34:13A-5.4(a)(3).

The Hearing Examiner did, however, find that the Board's conduct subsequent to the announcement of the transfer did interfere with and did attempt to restrain and coerce Ms. Becken in the exercise of the rights guaranteed to her by the Act. In reaching this conclusion he analyzed as separate and distinct conduct the actions

4/ We wish to note our specific agreement with the Hearing Examiner's discussion of the standards and analysis to be utilized when evaluating conduct to see if it constitutes a violation of N.J.S.A. 34:13A-5.4(a)(3). See page 24 of the attached Hearing Examiner's Report.

of certain Board members in sending messages to Ms. Becken that she should refrain from making her dispute with the Board concerning her transfer a public issue;[5/] and the action of the Board President in prohibiting Ms. Becken from speaking at a Board meeting when she was raising a point as Association spokesperson concerning the ratification of the new collective negotiations agreement. We do not see these as necessarily separate and distinct conduct, but rather as a course of conduct which taken together does constitute interference, restraint and coercion of Ms. Becken in her exercise of rights protected by the Act.

As discussed by the Hearing Examiner, it is the intent of the Act to protect public employees in their proper activities in support of their majority representatives. This includes activities designed to inform the public of their view of a particular dispute or issue as well as their activities at the negotiating

5/ While the gravamen of the issue as it developed in the community focused on the transfer of Ms. Becken specifically, it also included the right of all teachers to prior notice before a transfer and other rights with regard to such transfers. Moreover, the letters written by Ms. Becken to the Board, which were admitted into evidence, base her claim on rights allegedly derived from the collective negotiations agreement as she understood it. To the extent that she was pressing a claim under the contract, her dispute amounted to a contractual grievance or a disagreement over the proper interpretation of the agreement and thus constituted protected activity.

The Hearing Examiner does note that if he were to find that Ms. Becken's activities involved improper conduct, such as utilizing the school children in an attempt to press her point of view, he might not find that her activity was protected. See note 32. See also Pietrunti v. Board of Education of Brick Township, 128 N.J. Super 149 (App. Div. 1974), cert. denied 65 N.J. 573, U.S. cert. denied 419, U. S. 1975.

table. Similarly, a public employer is not prohibited from proper activities designed to inform the public of its reasons for a particular position taken. However, under the facts of this case we find it unnecessary to rule specifically on each action taken by the Board toward Ms. Becken. We therefore base our finding that the Board violated N.J.S.A. 34:13A-5.4(a)(1) in the totality of the Board's conduct toward Ms. Becken including the transmittal of messages designed to restrain and coerce her in the exercise of her rights and the refusal to permit her to speak to Association matters at a public meeting. We do not rule at this time on whether each action of the Board standing by itself in the context of this case would constitute a violation of N.J.S.A. 34:13A-5.4(a)(1).

With this modification we adopt the findings of fact and conclusions of law of the Hearing Examiner.

ORDER

Accordingly, for the reasons set forth above and pursuant to N.J.S.A. 34:13A-5.4(c), the Public Employment Relations Commission hereby orders the Laurel Springs Board of Education, its officers, agents, successors or assigns to:

1. Cease and Desist from interfering with, restraining or coercing Mary Becken or any other employee in exercising their rights guaranteed to them by the New Jersey Employer-Employee Relations Act including their right to participate in valid activity intended to inform and convince the public on a labor relations issue between the said Board and the Association and from prohibiting

Mary Becken or other employees from speaking at public Board meetings on such issues.

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 in the Borough of Laurel Springs, New Jersey, copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Chairman of the Public Employment Relations Commission, shall, after being duly signed by Respondent's representative, be posted by Respondent from September 1, 1977 to October 30, 1977 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 other material.

(b) Notify the Chairman, 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 section of the Complaint which alleges that the Laurel Springs Board of Education engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(1) and (3) with regard to Mary Becken's transfer from first grade teaching assignment to fifth grade teaching assignment be dismissed.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Forst and Parcells voted for this decision. Commissioners Hipp & Hurwitz abstained. Commissioner Hartnett was not present.

DATED: Trenton, New Jersey
July 13, 1977
ISSUED: July 14, 1977

"APPENDIX A"

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 directing any employee to cease what we believe to be that employee's participation in activity intended to influence public and voter perception of a labor relations or collective negotiations dispute, or by refusing to permit any employee or Association representative from speaking to a collective negotiations matter at our public meetings.

LAUREL SPRINGS 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, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780

H.E. No. 77-17

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

In the Matter of

LAUREL SPRINGS BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-76-3-31

MARY BECKEN,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner issues his Recommended Report and Decision in an unfair practice proceeding. The complaint alleges that the Board of Education discriminatorily transferred the Charging Party from her position as teacher of first grade to teacher of fifth grade because of her activities as head of the employee organization negotiating team in violation of N.J.S.A. 34:13A-5.4(a)(1) and (a)(3). The parties also litigated issues as to whether the Board unlawfully sought to restrict what it believed to be the Charging Party's solicitation of support among voters in the Borough to change the composition of the Board and its position regarding involuntary transfers of teachers, and as to whether the Board unlawfully prohibited the Charging Party, a non-resident of the School District, from addressing the Board on a negotiating subject at a public meeting - actions in violation of N.J.S.A. 34:13A-5.4 (a)(1).

The Hearing Examiner concludes that the Charging Party has failed to sustain her burden of proving by a preponderance of the evidence that the Board discriminatorily transferred her to punish her for her activities on behalf of the employee organization and he recommends dismissal of this allegation. With respect to the Board's alleged restriction of the Charging Party's advocacy of her opposition to her transfer and involuntary transfers in general among voters in the School District, the Hearing Examiner concludes that such activity is intimately related to collective negotiations matters, is protected under the Act, and the Board believing that the Charging Pary had engaged in such activity, violated her rights under the Act by acting on that belief to restrict her activity. As to the Board's alleged refusal to permit the Charging Party to speak at a public meeting on a negotiations issue the Hearing Examiner finds the Board had done so and that this conduct has restrained the Charging Party in exercising a right under the Act to assist the employee organization.

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 its 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.

H.E. NO. 77-17

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

In the Matter of

LAUREL SPRINGS BOARD OF EDUCATION,

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Docket No. CI-76-3-31

MARY BECKEN,

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Appearances:

For the Respondent, Charles J. Clarke, Jr., P.C.
(Allen S. Ferg, Esq. Of Counsel)

For the Charging Party, Goldberg, Simon & Selikoff, Esqs.
(Joel S. Selikoff, Esq., Of Counsel and Jeffrey S.
Laden, Esq., On the Brief)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge having been filed on August 13, 1975 by the Charging Party, Mary Becken ("Becken"), and it appearing to the then Executive Director, Jeffrey B. Tener that the allegations, if true, may constitute unfair practices within the meaning of N.J.S.A. 34:13A-1 et seq. ("Act") on the part of the Respondent, Laurel Springs Board of Education ("Board" or "Respondent"), a Complaint and Notice of Hearing issued on October 30, 1975. 1/ Subsequently, prior to hearing, upon a motion made by Becken, I granted leave to her to amend the existing Complaint. The amended Complaint alleges that the Board violated N.J.S.A.

1/ An application for interim relief by the Charging Party brought on by Order to Show Cause pursuant to N.J.A.C. 19:14-9.1 and heard by The Commission's then Executive Director, Jeffrey B. Tener, on October 22, 1975, was denied on the record "without regard to the final disposition of the merits," the said Director concluding he was "not persuaded at this time, that this matter if true, cannot be fully remedied at the end of the case by the Commission." Transcript of proceeding, pp. 31 - 32.

34:13A-5.4(a)(1) and (3) [2] by involuntarily transferring Becken from first grade teacher to fifth grade teacher in retaliation for her activities as chief negotiator for the Laurel Springs Education Association ("Association"), [3] the majority representative of all classroom teachers employed by the Board. During the presentation of Charging Party's case, evidence was adduced, without Respondent objection as to its materiality [4] alleging conduct by Respondent toward Becken in violation of the Act under subsections alleged in the Complaint intimately related to and growing out of its initial determination to transfer her. The evidence thus introduced raises issues as to whether Respondent violated subsection (3) by refusing and failing to reassign Becken to first grade on the occasions that the first grade position became vacant following her initial transfer to fifth grade and prior to the commencement of the next school year, and, further, as to whether Respondent violated subsection (1) by addressing alleged coercive statements to her and by refusing to permit her to speak to a negotiation subject at a public Board meeting. The Respondent filed an answer and amended answer denying the commission of unfair practices and during the hearing cross-examined Charging Party and her witnesses and introduced its own testimony with respect to the issues raised during hearing seeking to establish that it did not commit the unfair practices thus alleged.

The case was heard on January 21, January 22, March 24, March 25 and August 3, 1976. All parties were given full opportunity to introduce relevant evidence, to examine and cross-examine witnesses and to file briefs.

2/ 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."

3/ The parties stipulated and I find that the Association is a representative for the purpose of collective negotiations of employees within the meaning of N.J.S.A. 34:13A-3(e). It was also stipulated and I find that the Board is a public employer and Becken is a public employee within the meaning of the Act.

4/ Respondent counsel did interpose objections to two lines of inquiry related to alleged coercive remarks made to Becken on the grounds that the proffered testimony was hearsay.

Briefs were submitted by the Respondent and Charging Party on October 29, and November 23, 1976 respectively, and have been carefully considered.

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 Alleged Unfair Practices

A. Background and Relevant Contract Provisions

The Respondent operates a school district located in the Borough of Laurel Springs comprising one elementary school, grades kindergarten to six ("K to 6"). The Respondent employs seven classroom teachers and other professional employees. At least since 1968, the Association has been the voluntarily recognized majority representative of the Board's teachers and other professional employees. Since that time successive collective negotiation agreements have been negotiated and executed. For the year July 1, 1974 to June 30, 1975 the Board and Association entered an agreement providing, inter alia, a grievance procedure of four successive steps culminating in a decision by the Board, which, if not rendered within ten school days of submission to it, or if not satisfactory, may be presented to the Commissioner of Education "for review" at the option of an aggrieved employee. Each step after the first (a discussion with the Principal) requires action on the grievance within three, five or ten school days. A grievance is defined to include a complaint of violation, misinterpretation or inequitable application of any contract provision or unfair or inequitable treatment by reason of any act or condition contrary to established Board policy or administrative practice governing or affecting employees. Certain matters, not here germane, are excluded from the process. The 1974-75 agreement also contained clauses; requiring the Administrative Principal to make known to the teaching staff vacancies which shall occur during the following school year; authorizing teachers who desire a change in grade and/or subject assignment to file a written statement of such desire with the said Principal not later than two weeks after being informed of a vacancy and requiring that in the determination of requests for voluntary reassignment, the wishes of the individual teacher shall be honored to the extent

that the transfer does not conflict with the instructional requirements "and best arbitrarily, capriciously, or without basis in fact." [sic] 5/

The same agreement also provided that teachers planning to leave the school system should notify the Board in writing prior to the March Board meeting and that teachers shall be notified of their contract and salary status for the ensuing year no later than five days after the April Board meeting and that all teachers presently employed shall be given written notice of their class and/or subject assignments, room assignments for the forthcoming year not later than May 15, absent unusual circumstances.

A Teacher Rights clause protected teachers in such rights as they may have under New Jersey School Law or other applicable laws and regulations. A separate written condition required that all communications between the teachers and the Board and the Board and the teachers shall be via the Administrative Principal.

The agreement which the parties entered on October 20, 1975, effective July 1, 1975 for the two year period ending June 30, 1977 contained certain changes in the above-cited provisions. Grievances are identically defined but must be lodged within sixty (60) days of the date the event took place or should have been known to the grievant or the Association. A five step process now culminates in arbitration 6/ to which only the parties, not an individual teacher or group of teachers, may proceed. Further, the Teacher Rights clause has been expanded, inter alia, to provide employee protection for membership or participation in the Association, collective negotiations with the Board or institution of any grievance, complaint or proceeding under the agreement or otherwise with respect to any terms or conditions of employment. The 1975-77 agreement also adds a Class Size article recognizing that no class shall be so large as to jeopardize effective

5/ The 1975-77 agreement clarifies that apparent typographical error - it reads "and no such request shall be made arbitrarily, capriciously or without basis in fact."

6/ The arbitration clause does not state that an arbitrator's decision is binding. It does provide that an arbitrator's decision shall be in writing and that if the parties cannot agree upon a mutual acceptable arbitrator, either party may request a list of arbitrators from the American Arbitration Association and both parties shall then be bound by its rules and procedures.

education and supervision nor the safety and health of the pupils, as determined by the Board. The new agreement also adds an article prohibiting involuntary transfer or reassignment if there is a then qualified staff volunteer available to fill said position. It retains the provisions that all communications between teachers and Board and Board and teachers be via the Administrative Principal and, apparently, requiring notices of vacancies.

Shortly before her hire in 1971, Mrs. Becken filed an employment application seeking a position as teacher of primary - first grade. 7/ Her application listed three full prior years primary grade teaching experience including one year teaching mentally retarded and the most recent two years substitute teaching, the last in grades K to 5. Becken also noted on the form that her main concern was to teach children - not a grade. She possesses a State certificate to teach grades K to 8 issued February 1972. Becken who became tenured after the 1973-74 school year, taught first grade for four consecutive years until September 1975 when she was involuntarily transferred to teach the fifth grade. In September 1976 she was transferred back to the first grade where she continues to teach.

B. Protected Activities Prior to the Transfer to Fifth Grade

Becken was a member of the Association negotiating team during her first and second years of employment. She was selected to head the team for her third, fourth, and fifth years. In this capacity she was the Association's chief spokesman for the negotiations from the fall of 1973 to February 1974 looking toward a collective agreement for the year July 1, 1974 to June 30, 1975. In February 1974 Becken told William P. Kiernan, Adminstrative Principal, that the Association had requested the New Jersey Education Association ("NJEA"), its parent State wide organization, to assign a staff representative to assist it in continuing negotiations. In a subsequent conversation Mr. Kiernan informed Mrs. Becken that the Board objected to the presence of an NJEA consultant on the ground that Board counsel could not be present at the

7/ During the course of the hearing Becken sought to draw a distinction accepted by the teaching and educational professions between primary (1 to 3) and intermediate grades (4 to 6).

next scheduled meeting. Becken then agreed that the Association would attend without the NJEA representative. At the February 1974 meeting, Becken voiced the opinion that the Board by objecting to the presence of an NJEA representative had violated State bargaining rules and also the then current agreement [8/] and she did not want to have this type of thing happen again. According to Becken, the Board's President, Dorothy Johnson then picked up all her books, slammed them down on the desk and said to Becken "the attitude in this room stinks, and it is not on the part of the Board." [9/] Negotiations then continued and were apparently amicably resolved that month.

The next round of negotiations commenced in the late fall of 1974. Mrs. Becken introduced a Mr. William Figga from the NJEA as the Association's consultant to negotiate on its behalf. The Board retained a Mr. Charles Prato as its negotiator. Seven sessions were held between December 10, 1974 and February 25, 1975 without agreement being reached. Mrs. Becken, as chief of the Association's three member employee negotiating committee, from time to time at the table consulted with Figga, provided him with information, answered questions raised by both sides and participated in separate caucuses called by the parties as the occasion arose. [10/]

During the course of the meeting held the evening of February 25, 1975 [11/] Mr. Prato recommended that an impasse be declared, thus triggering the Commission's impasse procedures. Mr. Figga asked if the

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8/ Apparently this was a reference to a clause in the 1973-74 contract prohibiting either party from having any control over the selection of the negotiating representatives of the other party.

9/ Mrs. Johnson, called as a Respondent witness, did not recall these events but noted that it was very possible she had slammed her books down "because there was a bit of feeling concerning a representative up until this point." I credit Becken's recollection of the incident.

10/ While there was some dispute as to Mrs. Becken's role in the negotiations once the parties had retained outside negotiators, Respondent witnesses who disputed Mrs. Becken's continued participation in the sessions could not recall her actual role in this regard. I credit Mrs. Becken's version that she spoke at the table from time to time in the presence of both parties although she did not carry the main negotiating burden.

11/ All subsequent dates are during calendar year 1975 unless otherwise noted.

the Commission's Notice of Impasse could be submitted mutually. According to Mrs. Becken, Mrs. Johnson and Charles J. Clarke, Jr., the Board's solicitor, then reviewed a calendar and in a discussion held in the presence of the Association representatives, determined that since an election of Board members would shortly be held, they could not then agree to a joint submission. 12/ At that point, Mrs. Becken asked Mr. Figga for a caucus. A caucus followed during which Becken asked Figga to declare an impasse. The other team members agreed. Upon returning to the table Figga advised the Board representatives that the Association would declare an impasse. Mrs. Becken testified there was no noticeable reaction from the Board's representatives. During subsequent contacts between the negotiators the Board agreed to a joint declaration of impasse and the appropriate Commission Notice, signed by Figga on March 6 and by Prato on March 10 was submitted to the Commission.

A mediation session was held on April 17 during which the parties caucused separately half the time. Mrs. Becken did not testify to any special participation by her in the session. On April 24, without any prior notice, Mrs. Becken was informed by Kiernan that he had been instructed to tell her that she had been transferred to the fifth grade for the upcoming 1975-76 school year.

C. The Events Surrounding, and Board Determination of the Transfer

The class to which Mrs. Becken was transferred in April 1975, effective September 1975, was the fourth grade class during school year 1974-75. It was the single largest class in the school, 13/ comprising some 34 to 36 pupils. (The next largest, Mrs. Becken's own first grade class, had 26 pupils). In addition, its students had an extremely wide range of achievement, with a third reading a grade or more below grade level. As a consequence of its size and diversity in academic achievement

12/ The Respondent's witnesses either did not recall or were imprecise and inconsistent in their versions of these events. I credit Mrs. Becken's testimony.

13/ The then fifth grade class, because of its large size, had been split in 1972, and in 1974-75 was the only grade being taught in two sections.

and perhaps for other reasons, discipline and behavior problems were serious. These problems led Kiernan privately with the Board over the school year, and various parents, at public Board meetings during the latter portion of the year, to raise the question of splitting the class into two sections, just as the then fifth grade class had been split and taught in two sections since 1972. The Board, for reasons of economy, and because in its judgment, the fourth grade class was not so large as to require its separation into two sections, among other reasons, refused to split the class for fifth grade.

While the Board rejected a split it was nonetheless concerned during 1974-75 with the problems in the then fourth grade class. The two fifth grade teachers were Mrs. Daisy Rock and Miss Marge Hutchinson. Mrs. Rock, a tenured teacher then in her fourth year of teaching in the district was judged by the Principal and Board members as a sympathetic teacher with a warm personality, somewhat gentle in nature who bent over backward to accommodate the children. The record contains little evaluation of Miss Hutchinson's teaching record other than the fact that she was in her third year in 1974-75, had taught the sixth year class for her first two years and had shown drastic improvement in class control and discipline during her second year.

During the Spring of 1975, prior to the contractual deadlines to notify teachers with respect to their renewal and class assignments for the succeeding year, the Principal and Board learned that Mrs. Kane, the then fourth grade teacher, would be taking a maternity leave the following year and that Mrs. Rock in fifth grade would most likely not be returning but could not then resign because her decision was dependent upon her husband's probable reassignment as naval officer. Given these developments, the Board considered 1975-76 teacher assignments at an April 7 caucus following the March public meeting. According to Kiernan, a witness called by Becken, and not disputed by Respondent, in accord with his recommendations, tentative agreements were reached on retaining Becken in first grade and placing a Mr. O'Brien, the then sixth grade teacher, in fifth grade. Kiernan further testified that a general discussion took place with respect to Kane's non-return and the probability of Rock's non-return. Kiernan also recommended that both be tenatively placed in sixth grade, following the then two

section fifth grade, with the idea, on their leaving, of bringing in two new teachers for sixth grade and giving the children there a fresh start in school. The problems in fifth grade were also discussed. The Board also heard Kiernan's teacher evaluations. Rock's was as previously characterized. In addition, the Board was apprised that Rock had disciplinary problems in her fifth grade class, some generated by her own classroom manner. Becken's evaluations consistently showed an outstanding teacher, strong, in complete control of her classes and able to handle all behavior problems. Board member John Zimmerman suggested placing Mrs. Becken in fifth grade. While the Board members present did not pick up this suggestion at the time, in fact Board President Johnson voiced a reservation about removing her from first grade in response to it, the proposal came up again at another Board caucus held a week or two later on a Sunday evening among members at a member's home, to which Kiernan was not invited. 14/

On that Sunday, Board member Nancy Louise Matchett who had asked Kiernan for his teacher evaluations at the April 7 caucus, particularly those of Becken and Rock, raised the question of Mrs. Becken's placement for the following year. 15/ At the April 7 caucus Mrs. Matchett had asked Kiernan for the relative strengths of Becken and Rock. When Kiernan replied that he would rather not get involved with personalities, Mrs. Matchett testified that she came to her own decision. Mrs. Matchett disclosed that Mrs. Becken had been in her home many times; that Mrs. Becken had taught her children in a Sunday School group and had helped her eleven year old child who had problems in school. Mrs. Matchett suggested, as Mr.

14/ According to Zimmerman, who lived in Medford, Kiernan would have had a 40 mile drive to attend. Furthermore, the Board already had his recommendations for teacher placements for next year, and wanted to further consider the matter informally among themselves.

15/ There was some confusion as to when, where and who among Board members first proposed Mrs. Becken's transfer. I have drawn factual conclusions based upon a close review of the testimony and synthesis derived from the testimony of Board members Zimmerman, Matchett, Jean Schmidt, Barbara Hawk and Board President Dorothy Johnson. In any event, I do not believe that the originator of the proposal nor the locale, nor the timing - whether early, mid or late April - is significant.

Zimmerman had done on April 7, that Becken be reassigned to fifth grade. All but one of the Board members were present and only one of those disagreed. The group also agreed upon a transfer of Mrs. Rock to first grade on the theory that as she was probably leaving, the Board would prefer to replace her from that grade. Also, as noted by Zimmerman, first grade students, being young, prefer a kind, gentle teacher like Mrs. Rock. Each of the Board members who testified stressed that their judgment with respect to Mrs. Becken's reassignment was dictated by her fine qualities as a teacher; that based upon her record and the Board's knowledge of her strengths, in handling behavior problems in particular, they believed that she was capable of handling a class about which there had been so much concern because of the range of its members' academic achievements, and its behavioral problems. In the Board's view, particularly for a problem grade, working with a teacher whose qualities it knew and could rely upon was far superior than bringing in a new teacher from the outside with whom the Board would have to live for the following year, regardless of performance.

In addition to the reassignments of Becken and Rock, who were essentially changing places between fifth and first grades, the Board members also determined to transfer Kane, who was taking leave, from fourth to one of the sixth grade slots, and to move Miss Hutchinson from fifth grade to fourth. 16/

At the Board's next regularly scheduled caucus held immediately prior to the April 21 public Board meeting, the Board, in Mr. Kiernan's presence, announced the new teacher assignments for the following year. Board member Richard Youngberg, apparently Chairman of the Board's Personnel Committee, took out a paper with assignments noted and read the following placements: K - Nobel, first - Rock, second - Murray, third - Prince, fourth - Hutchinson, fifth - Becken, sixth - O'Brien and Kane. Mr. Kiernan expressed suprise. Youngberg asked Kiernan if he had any objections.

16/ While Becken testified that Hutchinson had been present as an Association negotiating team member at the negotiation session of February 6, 1974, she apparently did not continue as a member of the Association's team which negotiated during the 1974-75 school year.

Youngberg continued that Kiernan had made known to the Board that Mrs. Becken was an outstanding teacher and the present fourth grade class was a large one, needed a good disciplinarian and that the Board was not going to split the class at this time. As the meeting had convened late, approximately 7:55 p.m. and as the Board's public meeting was required to open at 8 p.m. the discussion regarding Becken's transfer and Kiernan's opposition was not continued at the time.

The following week, on or about April 24, Mr. Kiernan advised Mrs. Becken of the transfer. Kiernan informed her that the Board had met on staffing and that he had been directed to assign her to the fifth grade and in response to her question told her that it had not been his recommendation. Kiernan continued that the Board had felt, based upon his evaluations, that she was an outstanding teacher and was a strong disciplinarian and because it did not intend to split the fifth grade for the next year she would be assigned there. Kiernan added that while it was not his recommendation to reassign her he could support the reasons upon which the Board had predicated its decision. During his testimony Kiernan noted that such a transfer, reassigning a teacher from elementary to intermediate grade, was unusual. He also noted that Mrs. Becken was one of the best, if not the best teacher in terms of discipline and maintaining classroom control, and further, that the present fourth grade was acknowledged to be the most difficult class to teach in the school. He further noted that the biggest problems in that class were academic ones, apparently because of the wide disparity in educational levels of achievement.

D. Protected Activities After the Transfer, Subsequent Board Assignments to First Grade Class and Alleged Coercion of Becken

Becken was upset at the Board's transfer of her to the fifth grade. She testified on cross-examination as follows:

> "Q. You want to go back to the first grade now, isn't that right Mrs. Becken?
>
> A. It is not.

Q. It's not the thrust of the complaint?

A. The thrust of my complaint is not that I want to go back to the first grade. I feel that I've been dealt with unfairly. That's the charge against this Board."

Mrs. Becken testified further:

"A. I would like to teach in the primary area again. I would like first grade, yes.

Q. Okay, and you don't want to teach -- is it true that you don't want to teach any other grade but first grade?

A. No. That's not true. I don't want to be involuntarily transferred without at least being spoken to and given reasons."

Mrs. Becken's feelings with respect to the Board's transfer of her, as well as the facts regarding her involuntary transfer without prior discussion or notice, soon became the subject of heated discussion and controversy among the citizens of the Laurel Springs School District. The conflict first surfaced between the Principal and Board.

On being notified of the transfer, Becken asked Mr. Kiernan to obtain in writing the reasons from the Board. 17/ Kiernan then forwarded a note to Board President Johnson after the April Board meeting asking her to forward to him a statement of the reasons in writing. During May, Kiernan called a meeting of two Board committees, apparently the Personnel Committee and one other. At the conclusion of the meeting Kiernan raised the subject of the transfer of Becken. He said he was going to include something in his report to the Board for the following week's public meeting and that he did not want them to be surprised by it. He continued that one of the requests in his report asked the Board to reconsider the staffing assignments for the following year and to permit him to assign staff where he felt they could best be utilized in serving the needs of the children. A lively debate followed. Mrs. Johnson, who was present, asked why he had not

17/ Becken testified she asked for the reason for the transfer in writing as a predicate to filing a grievance under the contract with respect to the transfer. No grievance was ever filed.

brought this matter up before and Kiernan noted that he had no opportunity, as the April caucus discussions took place a few minutes before the public meeting was to commence. Kiernan next recounted the history that tentative agreements had been reached on assignments at a caucus in early April and he then learned that the Board had met secretly without him to change assignments. At this point Mr. Youngberg asked, "Do you mean that Mr. Kiernan had not been invited to that meeting?" Board President Johnson then replied that as it had been a Sunday afternoon and Mr. Kiernan lived in Medford and had two young children, she didn't believe he would come. Kiernan asked why he would not come"for something so important as this."

At the Board caucus prior to the May 19 public meeting Kiernan raised the subject again. He reiterated that he would like to note at the public meeting his request for Board reconsideration of teaching assignments and that they be left in his discretion. Mrs. Johnson said she would not dream of stopping him from reading anything he wanted to submit. Mr. Kiernan next described three proposals for staffing he had included in his report. Plan A was his initial recommendation. Plan B comprised tentative staffing agreements between himself and the Board on April 7 and Plan C comprised new Principal recommendations of May 16. On all three of them Mrs. Becken remained as first grade teacher and on the second and third plans, Mrs. Rock would be placed in sixth grade to teach one of the two sections. At this juncture, Board member Youngberg noted that the Board had transferred Rock to first grade so that when she resigns, Miss Nobel, the tenured kindergarten teacher, could be offered the position.

At the public meeting Mr. Kiernan read his request asking the Board to reconsider their assignments and permitting him to make the decisions. He did not detail his proposals nor mention anything discussed at the caucus. On a motion made from the floor Kiernan's request was formally denied. At the conclusion of the public meeting of May 19, Ray F. Kane, Jr., a teacher in the Cherry Hill School District and husband of Laurel Springs teacher Kane, had a discussion with Mrs. Johnson. Kane offered his services as an educator in resolving the conflict in the community with respect to Becken's transfer. Kane said he could not see moving someone who had taught first grade for four years and had active tenure there. Mrs. Johnson stated that

Mrs. Rock could not handle the present fourth grade. At that point in the discussion and in the context of Mrs. Johnson's comments with respect to Mrs. Rock, Mrs. Johnson stated, "What else could you do to a tenure teacher?"

At the next public meeting in June someone in attendance requested that Kiernan read his Plans A, B and C which he had previously so described at the May meeting. Kiernan responded from the floor that Plan A is what he recommended, Plan B was what the Board and he had tentatively agreed to and Plan C was his new recommendations. Kiernan was asked if he objected to the Board's assignments and he responded that he did object. 18/ He was then asked by Board President Johnson the reasons for his objections and he responded that since these plans were known only to the Board and himself he believed that it should not be discussed prior to a preliminary discussion with the Principal.

During the May caucus prior to the Board public meeting Kiernan asked Mrs. Johnson if she still had the written request for the reasons for Mrs. Becken's transfer. Mrs. Johnson replied that she did. Sometime later during May, Kiernan received a telephone call from Mrs. Johnson. Mrs. Johnson told Kiernan to tell Mrs. Becken "To knock it off"; that she had been stirring up the town and that the Board would be willing to sit down with her on it to stop whatever she was doing to stir up the town. Kiernan continued that Mrs. Johnson explained that a couple of the Board members had told her that people had told them that Mrs. Becken had visited them, apparently with respect to either her transfer or the Board's reaction to it at public meetings. Mrs. Johnson in testimony did not recall using such language, but did admit that she had been upset, noting that it was "disturbing to hear all of this in the town...". 19/ Mrs. Johnson's comments intended for Mrs. Becken were relayed by Mr. Kiernan to Mrs. Becken shortly thereafter. Kiernan told Mrs. Becken that he had a message to her

18/ Kiernan testifed that this was the very first occasion that the Board had made a decision on teacher assignments over his continued objection.

19/ Board member Schmidt testified that Mrs. Johnson had told her that she had contacted Becken, told her to knock it off and for Becken to see her if she had something to be cleared up. According to Schmidt, "We wanted it cleared up and Becken did not respond."

from Mrs. Johnson to "Cool it and knock it off". 20/ According to Mrs. Becken, Kiernan added he did not know what it meant.

While these developments were taking place, negotiations and meetings to complete a new contract continued following an unsuccessful mediation session on April 17. On June 5 a hearing was held before a Fact-finder, Francis X. Quinn, assigned by the Commission. That hearing was attended for the Board by Prato and Clarke and for the Association by Figga and three members of its negotiation team, Becken, Murray and Sandt. The record does not contain any evidence of any outstanding participation or involvement by Becken at the hearing. The Fact-finder's report of June 12 notes that of four items presented by the Board for consideration two were agreed upon. The report further notes that of six items of impasse listed by the teachers, after six hours of mediation - fact-finding the pivotal issues were reduced to salary and preparation time. Fact-finder Quinn made recommendations with respect to these issues in his report. Following the report the parties reached agreement on the remaining outstanding issues and Board Solicitor Clarke commenced preparation of the final agreement and submitted a copy of the draft agreement to Mrs. Becken.

At the end of June Mrs. Rock submitted her resignation to Mr. Kiernan and on July 11, Kiernan read the resignation to the Board and reminded the Board members that the collective agreement required notification to the teaching staff of the vacancy. The Board advised Kiernan to notify the staff, noting that the vacancy would not be filled at the time because of a financial crisis. In a letter to Mr. Kiernan dated July 16, acknowledging her receipt of his letter of July 16 informing the teaching staff of the resignation of Mrs. Rock, Mrs. Becken requested to be transferred back to first grade. Mrs. Becken noted that a new collective

20/ Becken did not recall any invitation issued through the Administrative Principal to sit down informally with the Board. Becken acknowledged that Kiernan had advised her that if she wanted to go to the Board, she could, but the Board had no request for her to come.

agreement had been duly ratified by the Board on June 17 [21] containing a provision prohibiting involuntary transfer or reassignments if there is a qualified staff volunteer available to fill said position. Copies of the letter were also sent to Board Solicitor Clarke and the members of the Board's Personnel Committee, Matchett, Youngberg and Zimmerman. Mrs. Becken did not receive any reply from Kiernan or the Board. Kiernan testified he did not reply because to do so would have required him to accord approval to the Board's determination not to reassign Mrs. Becken to first grade.

Mrs. Becken had retained in her possession a mimeographed set of negotiated agreements which negotiators Figga and Prato had initialed during the course of the negotiations. At Mr. Figga's suggestion, she arranged to meet with the Board negotiator Prato for his review of the initialed agreements. These meetings took place between June 17 and mid-July at Prato's office in Camden County Regional High School prior to a trip to Italy by Mr. Prato from mid to late July. [22] According to Becken, Mr. Prato advised her that the agreement had been ratified by the Board on June 17. Mrs. Becken had at an earlier Board meeting taken issue with the proposed salary guide which was on the calendar for Board adoption. Among other items, Mrs. Becken raised with Prato alleged typographical errors in the Board's prepared salary guide and Becken and Prato exchanged copies of the corrected guide. Apparently Becken again met Prato after his return from Italy in early August at which time a final corrected agreement was initialed by both of them. However, on August 18, Becken wrote Clarke apologizing for not conforming with his request to have the agreement signed and in his office "by 12:00", August 18. According to Becken's letter, she did not receive it until August 16 and it not only contained typographical errors, e.g., with respect to the salary guide, but deletions and additions.

21/ Contrary to Becken's understanding Board ratification of the 1975-76 agreement did not take place until sometime in the fall of 1975. That agreement, however, containing the clause recited by Mrs. Becken was made retroactive to July 1.

22/ Prato did not dispute these meetings, only recalling one having taken place.

She closed by negating any implications that she was thereby rejecting the instrument and expressing an anxiety about signing the agreement. Becken objected to the Board's adoption of a salary guide and held a meeting with Clarke at the August 18 public Board meeting. The meeting was with Clarke, Ferg (attorney in the office of Solicitor Clarke), and Zimmerman. Becken objected to Clarke's meeting with Board President Johnson to go over discrepancies in the agreement in the absence of Mr. Figga. As a result of this meeting the Board made changes in the salary guide to conform with the negotiated initialed agreements.

At the August 18 public Board meeting members of the public in attendance raised the question whether Mrs. Becken's request for first grade reassignment had been acknowledged. Mrs. Johnson responded that she had never received such a letter from Becken. On subsequent questioning by Becken at the public meeting, Mrs. Johnson laughed and acknowledged she had heard about the letter and knew its contents. She also stated that Kiernan's letter to the Board requesting the reasons for Mrs. Becken's transfer written at Mrs. Becken's request had been given to a committee of the Board. At this same August 18 meeting, the Board publicly announced that it had hired Barbara Cavelerio as its first grade teacher to replace Mrs. Rock.

Mrs. Becken, who had been advised by a member of the public that a special meeting of the Board would be held on the evening of August 28 to hire a new first grade teacher because Cavelerio had not signed a teaching contract, attended that meeting. At the meeting the Board voted to hire an Ann Gilbert, a new applicant, for the position. Gilbert taught the first grade for the 1975-76 school year. Neither Becken nor any other of the teachers had been advised of the new opening by the Principal or the Board.[22a/]

Between the August 18 and August 28 meetings of the Board Mr. Kiernan submitted his resignation effective August 21. Prior to his leaving Kiernan had interviewed a number of applicants for the first grade position made vacant by Mrs. Rock's resignation, including Cavelerio. After interviewing the applicants, Kiernan referred those he believed to be acceptable to a Board committee for further interview. On August 20 shortly before

22a/ Becken did not file a grievance to contest the Principal's failure to provide notice.

Kiernan resigned he told Becken he had been given a message from Mrs. Matchett to tell Becken to shut her mouth. 23/ Mrs. Becken now telephoned Board Solicitor Clarke on August 20. When she did not receive a return call, she sent a two page letter to Clarke on August 21 forwarding a copy to new Administrative Principal Paul A. Leonardi. In it she noted that she had received two telephone messages from the Administrative Principal that instructed me to "cool it and knock it off" and yesterday "shut my mouth," that came from two members of the present Board of Education. Becken expressed her view that not only do these messages border on personal harassment but they insult the intelligence of an educator and do not enhance the appearance of a Board member. Becken said she preferred not to disclose the names of the two Board members involved, in this way permitting Clarke to make a request to the entire Board to avoid such harassment in the future. She requested that Clarke as Board Solicitor immediately ask that all further communication between any member of the Board and herself be sent via the Administrative Principal in written form. On August 22, Clarke replied by letter with copy to Board President Johnson, acknowledging receipt of Becken's letter and suggesting that hereafter any request she might decide to make to the Board or otherwise be directed through appropriate channels.

Because of the objections raised by Mrs. Becken at the June or July public Board meeting to approval of the salary guide as it had been prepared by Mr. Clarke and because of the subsequent corrections of typographical and other errors made as a result of the meetings between Mrs. Becken and Mr. Prato, Board ratification of a 1975-77 agreement was delayed until sometime in October 1975.

23/ Matchett corroborated Becken's testimony in this regard. She stated that she had heard that Becken had told school children who had asked her about her school assignment "When I get done with taking out the PERC I will no longer be teaching the fifth grade but I will be back in first grade." Matchett said she called Kiernan and told him " I do not want this problem discussed within our municipality or town," and to tell her to "Cool it, cause I've had it." Other witnesses such as Board member Schmidt testified that it had come to the attention of many of the Board members that Mrs. Becken had been going to different members of the community stating reasons for her transfer that were completely different from the reasons upon which the Board based its transfer.

That two year agreement contained a wage reopener for the 1976-77 school year. On September 19, Becken wrote the new Principal Leonardi requesting a meeting"to negotiate the contracts"and asking the Board to select a date. By letter dated September 22, Leonardi advised Becken that the Board was willing to meet on September 23 "For the purpose of opening negotiations for the 1976-77 school year." At the meeting held on September 23, Association negotiator Figga advised the Board representatives that the Association would not negotiate the salary for the second year of the agreement before Board ratification of the agreement. When Board member Zimmerman said "You did not come prepared," Becken responded "I have it" and patted a red envelope in her possession containing Association demands and other papers. At this point Mr. Zimmerman got up, excused himself and left the meeting. The rest of the meeting was devoted to ironing out the fine points of the basic agreements between the parties.

At the public Board meeting held in October 1975 after Becken had spoken at a number of prior Board meetings held that year, Mrs. Johnson refused to permit her to speak. At this meeting Becken had intended to ask a question from the floor regarding the Boards' action with respect to ratification of the salary guide, a question which the unit members had asked her, as chief negotiator, to raise. When Becken sought the floor, Board President Johnson denied her the opportunity to speak. Johnson testified that the Board had a policy that non-residents were not permitted to speak at the school Board meetings. Johnson also testified that the policy was not always enforced, but that since Mrs. Becken had failed to respond to her request as Board President, passed through Mr. Kiernan, to talk to the Board, she, as President, took advantage of the pre-existing policy that had not been enforced uniformly in the past to apply it to Mrs. Becken at this time.

While Mrs. Becken denied that she had approached citizens of Laurel Springs outside the contract and attempted to solicit their help in being returned to her first grade class, she did admit that she had been friendly with a number of citizens who comprised a group organized in April or early May to place Mrs. Becken back in the first grade which

called itself "Concerned Citizens of Laurel Springs." Furthermore, the record makes clear that Mrs. Becken did exchange comments with Laurel Springs citizens at public Board meetings and did have some contact outside of meetings with members of the public regarding Board conduct toward her. Becken testified that she knew a Mr. Morgan and met him in the month of August after the Citizens' Committee had been initiated by him and another person. Further, according to Becken, one of the purposes of the Committee was to stop involuntary transfers of teachers. The Board's concern with Becken's involvement with members of the public concerning her transfer surfaced a number of times during the course of the hearing. A number of those occasions have already been described, such as Mrs. Johnson's testimony that "It was disturbing to hear all of this in the town..." Mrs. Johnson also admitted strained feelings between herself and Mrs. Becken which arose after the towns-people were aroused following Mrs. Becken's transfer. Mrs. Johnson also testified that the Board learned of Mrs. Becken's discontent through the town and that only after talking with Board Solicitor Clarke did Mrs. Johnson call Mr. Kiernan to tell him to bring Becken in and tell her that if she had something to say regarding her transfer that she was to say it to the Board. Mrs. Johnson expressed concern that the public didn't want the Board to move Mrs. Becken to the fifth grade. These Board feelings were echoed in the testimony of Mrs. Matchett who expressed particular concern after hearing rumors from sources other than Becken that Becken had spoken to school children about her reassignment and in the testimony of Mr. Zimmerman that before the transfer few members of the public had attended Board meetings, but that afterward, "the place was overflowing with people."

As a result of elections held for a new Board of Education sometime in late April 1976, three members of the Concerned Citizens, Messrs. Morgan, Ivans and Williams were elected and shortly thereafter when Mrs. Matchett resigned, a Mr. Stanton, a fourth member of the Concerned Citizens group who had been in charge of their campaign, took her place on the Board. After the election, and members of the Concerned Citizens group comprised a majority of the Board, Mrs. Becken was notified that she was transferred back to first grade for the 1976-77 school year.

E. Analysis

A threshold question arises as to whether Mrs. Becken's transfer from first to fifth grade constitutes an act which affects her work situation and thus, if discriminatory, would be conduct "...in regard to hire or tenure of employment or any term or condition of employment..." within the meaning of c. 34:13A-5.4(a)(3).

The general consensus of Board members, administrators and Mrs. Becken, established from their testimony, was that the fifth grade class to which Mrs. Becken was transferred, effective September 1975, imposed greater professional burdens upon the teacher of that class than it did upon a teacher of first grade. For one thing, the fifth grade class was larger by eight to ten students. For another thing, the admittedly wide disparity in educational achievement and recurrent behavioral problems of its students required more sustained attention, control and imposition of discipline by the teacher assigned in order to achieve educational progress by the students. These two factors, when conjoined with the fact of the age of the fifth grade children -- normally ten years to twelve years -- constitute in the view of the undersigned, sufficient grounds for concluding that the transfer was to a more onerous position[24/] and, if motivated by discriminatory considerations, would be conduct prohibited by N.J.S.A. 34:13A-5.4(a)(3).[25/]

24/ See, e.g., Trumbull Asphalt Co. of Delaware v. NLRB, 314 F.2d 382, 52 LRRM 2570 (CA7, 1963), cert. den. 374 U.S. 808, 53 LRRM 2468 (1964).

25/ The undersigned is not unmindful of a view embraced by some judges that involuntary transfers and reassignments of public teachers is a non-negotiable subject, ultra vires the board of education, contract provisions with respect to which are unenforceable. See Englewood Teachers Association v. Englewood Board of Education, Appellate Division, Docket No. A-1473-75, 12/10/76, concurring opinion of Allcorn, J.A.D. But see dissenting opinion of Judge Halpern, P.J.A.D. and Board of Education of the City of Trenton, P.E.R.C. #77-24, 11/24/76 (Commission determines involuntary transfer is a permissive, not a mandatory subject of negotiations). The Englewood decision, unlike the case sub judice, involved a question of negotiability and arbitrability of a contract clause allegedly governing involuntary transfers. Here, the question is whether the transfer was made discriminatorily under 5.4(a)(3). The court in Englewood thus did not reach the question of whether an involuntary transfer, if made discriminatorily, could be reached by the unfair practice provision cited. I conclude that such a transfer may be violative of 5.4(a)(3) for the same reason that a discriminatory discharge may not be held to be beyond the reach of 5.4(a)(3) merely because, e.g., the subject of

(continued)

This conclusion is buttressed by the events which transpired in Mrs. Becken's fifth grade class during the 1975-76 school year. Mrs. Becken testified, without contradiction, that not one substitute employed in her fifth grade class during the year returned for a subsequent assignment. Mrs. Becken reported that she had all kinds of behavioral problems. Some were serious and some were problems which she felt were related to frustrations related to the size of the class and its academic problems. In her view the behavior problems were severely different in first grade than they were in the fifth. Since September 1975 one student from the fifth grade class was suspended on two different occasions by the Administrative Principal and since had left the school. Further, Mrs. Becken, after review of the folders of the children in her class, noted that some of them were grossly below fifth grade level on many different levels including vocabulary, map skills, language areas and related skills. In her view she encountered great difficulty and frustration in teaching such a large, unwieldy and academically deficient class.[26/] Mrs. Becken also noted that her preparation time had increased simply by virtue of the fact that with an added number of students and the homework they generated, many additional papers -- to the point of almost doubling the amount -- were required to be reviewed on a daily basis.

25/ Continued... termination of an employee teacher is governed by Title 18A and may not be collectively negotiated. See Union County Regional High School Board of Education, P.E.R.C. No. 76-43, 2 NJPER 221 (1976), rev'd, sub nom. Union County Regional High School Teachers Assn. Inc. v. Union County Regional High School Board of Education, ___ N.J. Super ___ (App. Div. 1976), petition for certification denied 3/1/77, Docket No. 13,298. The contrary conclusion would mean that a public employer could take discriminatory action with respect to tenure and job placement with impunity, surely results which the Legislature could not have intended in prohibiting employer discrimination "in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4(a)(3). See also the language of 5.4(a)(4) "Discharging or otherwise discriminating against any employee..."

26/ In spite of the problems Mrs. Becken faced and, in part because of her strongly held views as a teacher, she and Principal Leonardi decided by October 1975 that, if at all possible, she would handle disciplinary problems in her class in the future.

Apart from the foregoing preliminary matter, two basic issues are presented for decision in this case. One is whether or not Becken was transferred from first to fifth grade teaching assignment because of activity protected by the Act in violation of 5.4(a)(3). A related and subsidiary issue is whether Becken was denied reassignment to first grade on her application made after the announcement of her transfer but before the transfer actually took effect because of continued protected activity. The second issue is whether the Board's conduct toward Becken after the announcement of her transfer, seeking to limit her solicitation of support from among members of the community in her dispute with the Board and denying her the opportunity to speak to Association matters at a public Board meeting, independently interfered with her protected rights under the Act in violation of 5.4(a)(1).

The evidence which Becken submitted in support of her allegations of discriminatory transfer may be briefly summarized. Becken was an active Association member and adherent. For some years she had headed the Association's negotiating team, and, in this role in the year before her transfer had conducted negotiations for the Association as its main spokesman. Near the completion of the negotiation process in the year prior to the decision to transfer her Becken aroused the enmity of the Board's president by voicing her disapproval of the Board's refusal to meet with the Association's newly designated outside negotiator when the Board could not make timely arrangements for its attorney to appear at the scheduled meeting. Even after the parties utilized outside negotiators commencing the year following this incident, Becken continued as an active participant in negotiations, aiding and assisting the Association's negotiator and supplying information to the Board's negotiator. Two months before she received notice of her transfer, Becken was instrumental in bringing about the first impasse experienced by the parties in the history of their negotiations relationship. She did this by calling a caucus of the Association's team which, upon its return to the table, announced that there was an impasse and that it would file a notice with the Commission -- a position it persisted in even after the Board sought

a delay in the filing of a joint notice of impasse because of the imminence of Board elections. After her transfer notice, Becken argues that the Respondent evidenced its intention to punish her when Board President Johnson voiced approval of a forced transfer in dealing with another tenured teacher who had experienced some difficulties in the classroom.

Becken further argues that when she learned that the teacher assigned to her first grade class had resigned and she applied for reassignment to that position, she was ignored by the Board for the same discriminatory reasons which motivated her transfer in the first place. The argument concludes that the Board continued in this vein when it made a third assignment of a first grade teacher after the teacher ostensibly hired to replace the teacher who left the system herself did not accept the offer of employment.

I am not persuaded that the Charging Party by the foregoing recital of evidence has met her burden of proof to establish that the Board's transfer of her and refusal to reassign her were motivated in whole or in part[27/] by discriminatory considerations. There can be no dispute that Becken was exercising rights guaranteed to her by the Act both prior to and subsequent to notice of her transfer. Nor is proof lacking that the Board had actual knowledge of her activities.[28/] Those considerations, however, are normally only a necessary predicate to a determination that employer conduct violated the section of the Act here involved.[29/] The fact that the Charging Party makes a showing that these elements exist does not establish that a violation has taken place. More is required. That more is a showing of a nexus between these necesary elements of proof and the employer's subsequent conduct. The question then is was the employer motivated in whole or in part by the exercise of the rights guaranteed by the Act of which he had knowledge. Here, it is abundantly clear that the Board had a basic educational problem, persistent in nature, which required a solution short of the hiring of an addi-

27/ See Board of Education of the Borough of Haddonfield, Camden County and Haddonfield Supportive Staff Association, a/w New Jersey Education Association, P.E.R.C. No. 77-36 (1/27/77) at page 3 of the Commission's Decision and Order.

28/ Board member Zimmerman even referred to Becken as the driving force of the Association and noted, as well, the growing disenchantment among Board members as to the relationship between the Association and the Board.

29/ See Bd. of Educ. of the Boro of Haddonfield, et al., supra, at page 4 of the Commission's Decision and Order.

tional teacher. The fourth grade class was a problem class. Becken, admittedly, was probably the strongest and most mature teacher in the school. The Board had Becken's application which made reference to prior intermediate grade experience.[30] The Board exercised its educational judgment in determining that Becken, under all the circumstances, including the Board's reluctance to employ a new outside teacher for the problem class, was the most suitable teacher to assign to the class for the succeeding year when it entered fifth grade. In doing so the Board also achieved a related objective of reassigning to first grade a teacher who was probably unsuitable for fifth grade teaching assignment and who could much more easily be replaced on her probable leaving, in a first grade setting.

I find also that the weight which the Charging Party sought to place upon her conduct in declaring an impasse as the trigger for the Board's transfer of her has not been sustained by the record evidence. As Becken herself testified, there was no immediate visible Board reaction to the Association's declaration of an impasse. Furthermore, while the Board was aware that Becken called a caucus, it had no way of knowing, and the record fails to establish, that the Board knew that Becken had strongly urged the declaration in the caucus and that her recommendation had been adopted by the team. Thus, there was insufficient evidence on which to ground a hostile reaction by the Board to Becken's protected conduct in the months immediately preceding her transfer, particularly when the Charging Party also failed to offer any evidence that her participation in the intervening mediation session contributed in any way to an asserted Board hostility toward her. While evidence of annoyance, even immediate anger, was manifested toward her by Board President Johnson on at least one occasion the prior year, that evidence constitutes an insufficient basis for concluding that the full Board's determination more than a year later to cure an educational problem in the District was unlawfully motivated. Neither am I persuaded that President Johnson's frankness in her discussion with Ray Kane on May 19 evidenced a discriminatory

30/ It was only during the hearing for the first time that Becken publicly disclosed to the Board that her experience in teaching intermediate grades had been limited to one day's work as a substitute.

judgment. The statement in the conversation admittedly related solely to Mrs. Rock and dealt with educational shortcomings only. I am not prepared to infer from that remark that the Board would use or used a transfer as a device to punish Becken because of her negotiating and Association role. Neither do I consider Principal Kiernan's considered opposition to Becken's transfer to be of any persuasive weight. He admittedly did not dispute the Board's reasons for Becken's transfer nor did he dispute the prevailing view that Rock would not have been an appropriate teacher for the fifth grade class. His difference with the Board comes down to a difference of educational judgments as to how best to fill the fifth grade opening.

I find, further, that the Board's subsequent conduct in seeking and hiring other outside applicants for the first grade position was consistent with its initial nondiscriminatory decision to reassign Mrs. Rock to first grade at the time that Mrs. Becken was assigned to fifth and was in furtherance of the initial plan to obtain a new teacher outside the district for the less demanding position it deemed easier to fill, that of first grade teacher. The Board's failure to respond to Becken's application may have been unfortunate and not conducive to improving what appeared to be a deteriorating relationship with the Association or, at least, with the Association's head negotiator,[31/] yet such conduct does not warrant the conclusion

31/ In its brief, the Board claimed that it was precluded by law from agreeing with the Association to provide advance notice and opportunity for a statement of reasons on an involuntary transfer. Cf. Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974). While one concurring opinion in Englewood, supra, page 21, may be said to adopt such an approach, the holding in that case cannot be so interpreted since Judge Botter who wrote the opinion for the court concluded only that the agreement did not authorize binding arbitration of disputes concerning the Board's exercise of its managerial responsibility over the deployment of teachers in the district. Furthermore, it appears to be highly probable that had the Board provided Becken with some form of advance notice and educational rationale for its decision of even a far less extensive nature than it provided in its defense to the complaint during at least two days of hearing, no charge would have been filed and no complaint proceeding instituted. See pages 11-12, supra, where Becken, on the record, relates the gravamen of her complaint as the Board's failure to at least speak with her and give her reasons before involuntarily transferring her.

that the Board's refusal to consider her after it initially transferred her away from the class was discriminatorily motivated. The Charging Party's claim with respect to the Board's subsequent hiring of the third applicant is subject to the same infirmity.

The Board's conduct toward Becken following notice to her of a transfer presents a separate set of circumstances which must be analyzed. I do not find, as the Charging Party urges, that the remarks passed to Becken through the intermediary Kiernan manifests a discriminatory motive which underlay the Board's transfer of her in the first place. The record contains too much evidence of intervening events and Board members' reactions to them for me to seriously entertain that argument. Those intervening events were Becken's reaction to the transfer, notably her criticism of the Board's failure to discuss the matter with her prior to its decision, the concurrent enlargement of the dispute into a matter for broad consideration by the citizens of the School District, and the commencement of a dialogue on the matter between the citizens and the Board members as their elected representatives.

Citizens organized into a committee, one of whose purposes was the restoration of Becken to her first grade class and the renunciation of a policy of involuntary transfers of teachers within the District. While it is not altogether clear that Becken was a leader in the formation of the committee and the fanning of the dispute - she herself denies such a role - the record is clear enough that Becken had friendly relationships with one of the leaders of the citizens' committee and took the same position as various members of the public during public Board meetings. However, it is enough for the purpose of establishing Board motivation for its subsequent conduct that the Board honestly believed that Becken was a leader in the citizens' committee and in the opposition to its role in her transfer. See NLRB v. Clinton Packing Co. Inc., 468 F. 2d 953 (C.A. 8); Lizdale Knitting Mills, Inc., 211 NLRB No. 111; Superior Micro Film Systems, 201 NLRB No. 087; D.D. Bean & Sons, Co., 79 NLRB 724.[31a/] It is clear that the Respondent acted on its belief, which, if true, was designed to interfere with Becken's exercise of her rights as an employee and Association representative to seek vindication for her and the Association's position on involuntary transfers in the School District. Various comments of Board members

31a/ See also Bd. of Ed. of the Borough of Haddonfield,et al, P.E.R.C. No. 77-36 at page 4 of the Commission's Decision and Order.

already alluded to in this report make clear the Board's belief in this regard. The most telling comments came from Board member Zimmerman, a member of the Board's Personnel Committee, who testified, "Let me put it this way: At a public meeting, when there's 200 people, or 150 people jumping up and down and making cat calls, you know that it is coming from one person,because of one person,and it is very difficult to sit there and feel that these people on this Board do not assume she was responsible for that." Zimmerman later added: "After the transfer was made and the meetings became quite hectic because of the transfer - that's the only reason they became hectic, because of the transfer - of course, there were - this was after the transfer now - when we made the transfer, there was nothing, there was no discussion on anybody's part of punishing anyone or doing this out of vindictiveness or anything. She was transferred the same as two teachers or three teachers, whatever it would be, have to be transferred, for the good of the school. Then the meetings became quite hectic. Why did they become quite hectic? How did the word get around to every home, almost, in Laurel Springs? What split the town in half? Can you tell me?"

The Board acted on this belief. Both President Johnson and member Matchett sent word to Becken on different occasions during the months following her transfer when word of her activity had gotten back to the Board and the hectic public meetings had taken place, that Becken should refrain from such conduct. 32/ Recently, the Connecticut State Board of Labor Relations

32/ While President Johnson's message to Becken was based upon her belief as to Becken's conduct vis-a-vis the citizens in the borough, Board member Matchett's appears to have been based, at least in part, upon her view that Becken was improperly taking her case to school children, even if only responding to questions and not initiating a discussion with them. If Matchett's remarks were based solely on such conduct or if the report of them to Becken was so limited, I would have pause for thought, whether such conduct should be provided the same protections as Becken's believed involvement with the citizens' committee and other borough people. But see River Dell Education Assn. v. River Dell Board of Education, 122 N.J. Super 350 (Law Div. 1973, Pashman, A.J.S.C.). However, I do not believe that the question need be answered here, inasmuch as the record does not support the conclusion that either Matchett's instructions to Kiernan or Kiernan's report to Becken of the directions given him by Matchett, specify the limited concerns which, at least in part, may have motivated Matchett. As testified by Becken and Kiernan, I find that Kiernan's directions to Becken to shut her mouth were not directed to her conduct with children. Accordingly, Becken could reasonably conclude that her speech insofar as it related to members of the public-at-large was being interdicted and not her responses to questions from school children.

ruled that political activity by a public union directed at offices controlling collective bargaining with employees represented by the union is protected by the Connecticut Municipal Employee Relations Act. City of Stamford and Local 786, IAFF, Case No. MPP-3381, No. 673 GERR B-12-13(7/23/76). That Act, as does the New Jersey Act, prohibits interference, restraint or coercion of employees in the exercise of the rights guaranteed thereunder. See Connecticut Statutes, Ch. 113, §7-470(a)(1) (1965, P.A. 159. §4, eff. June 4, 1965). Among other rights protected are the rights of self organization, to form, join or assist any employee organization, to bargain collectively through representatives of their own choosing on questions of wages, hours and other conditions of employment and to engage in other concerted activites for the purpose of collective bargaining or other mutual and/or protection, free from actual interference, restraint or coercion, Id. at §7-468(a). The Connecticut Board relied in particular upon the right to bargain collectively. It found that in newspaper advertisements placed by the union after the union had been unable to conclude a new contract and its membership had directed the executive board to take steps necessary to secure one, voters were urged in the municipal election to vote against the incumbent mayor because of the city's conduct in the negotiations. The union also sent a letter to its members recommending they vote for the incumbent mayor's opponent. The Connecticut Board, in finding unlawful a suspension of the union president without pay for violating a city charter provision prohibiting political activity by fire and police department members and prohibiting participation in political affairs by civil service employees, stated that the activities claimed violative of the city charter constituted concerted activity for the purpose of collective bargaining. The Board stated in part, reported at No. 673 GERR, P. B-13:

> "...If the people control the purse strings in the last analysis, then it is part of the bargaining process to try to persuade the people to loosen them and under our system this is done through the ballot - by voting for officials and legislators who will be more likely to accede to or compromise with union demands...From this it follows that political activity may well be an integral part of the bargaining process. It is so where it is directed toward the election of officials and legislators who are thought to more or less be favorable to union demands in pending labor negotiations. When

> political activity is of this kind it is protected by the Act...From the above reasoning it becomes clear that the sections of the Stamford charter which forbid employees to engage in political activity and the attempts to enforce those sections which were made in this case constituted actual interference with an activity protected by the Act and, therefore, practices prohibited by the Act."

The New Jersey Act does not accord specific protection, as does the Connecticut Act, to the right to bargain collectively. The New Jersey Act provides, in pertinent part, in N.J.S.A. 34:13A-5.3:

> "...public employees shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from such activity..."

I find, however, that a close reading of the New Jersey Act, including its Declaration of Policy, and the encouragement of collective negotiations which it repeatedly enunciates as a cornerstone of achieving its stated policy of preventing or promptly settling labor disputes in the public sector, supports the conclusion that the right to negotiate collectively, while not spelled out in haec verba, is a right implicit in, and guaranteed to employees by, the New Jersey Act. The right to assist any employee organization would be meaningless without the basic right to engage in collective negotiations. Furthermore, activities in aid of collective negotiations must receive the Act's guarantee if it is to be made an effective instrument of New Jersey public policy and its mandate of reducing disputes is to be achieved. Finally, while 13A-5.3 speaks in the singular, of "the right", 5.4 (a)(1) speaks in the plural of "the rights guaranteed to them by the Act." Thus, even the Act's draftsman must have had in mind rights, such as the right to negotiate collectively, as necessary to protect the "right" enunciated in 13A-5.3. See also N.J.S.A. 34:13A-5.4(a)(5) specifically prohibiting the refusal "to negotiate in good faith with a majority representative of employees in an appropriate unit..."

There should be little question that Becken's conduct (or what the Board believed to be her conduct) was intimately related to collective negotiation matters, particularly the question of prior notice to transferees before

involuntary transfers are effected. That issue was a subject of the parties' collective negotiation agreement which became effective July 1, 1975. It was an issue which was embodied in one of the planks of the platform of the Concerned Citizens of Laurel Springs. In fact, the committee was successful in achieving its objective - its members were elected to the Board and upon a subsequent resignation its members became the majority of the Board and they were able to fulfill an apparent promise of returning Mrs. Becken to her first grade class. The principle at the heart of City of Stamford was thus made manifest and the voters in the District were able to register their view of a collective negotiations dispute in a way most favorable to Mrs. Becken, and she, and the Association, were able to achieve a negotiating objective in the political arena. Such is the way of collective negotiations at various times, particularly in the public sector. I conclude, as did the Connecticut Labor Board, that Becken's conduct (again, that which the Board may have erroneously believed she engaged in and on which belief it acted) is conduct protected by the Act. See also River Dell Education Association, supra, at page 28, and U.S. Supreme Court decisions therein relied upon in support of the court's conclusion that the Board's conduct there placed unconstitutional prior restraint on freedom of discussion. 33/ It follows that the Board's attempt to interfere with Becken's enjoyment of that activity by implied threats and directions to refrain from engaging in it are violative of N.J.S.A. 34:13A-5.4(a)(1).

I next turn to the Board President's refusal to permit Becken to speak to an Association concern at the October public Board meeting. President Johnson admitted that in ruling Becken out of order she invoked a rule prohibiting speaking by non-residents of the District which had been more honored in its breach than in its adherence in the past. She further admitted she did so because of pique at Becken's refusal to respond to the Board's invitation to discuss the dispute which had led Becken and other members of the public to take issue with the Board's conduct of her transfer. In a

33/ Even if Becken's conduct in the political arena is denied protection, since Johnson's and Matchett's directions to her were ambiguous at best and Becken could have reasonably believed she was being directed to refrain from any activity protesting the Board's transfer of her including grieving or otherwise disputing the Board's action, the Respondent's conduct thus interfered with Becken's assistance to the Association under N.J.S.A. 34:13A-5.3.

recent decision of the Commissioner of Education in Leonard V. Moore, et al, v. Board of Education of the Borough of Roselle, Union County, 1973 SLD 526, the Commissioner affirmed the right to speak at a board of education public meeting of a representative of former non-tenured employees and one current tenured employee not a resident of the borough. The Commissioner noted at pages 535-536:

> "...The right of a teacher's representative to speak in their behalf has been established by the Commissioner in Janice Bello v. Board of Education of the Borough of Haledon, Passaic County, 1966 S.L.D. 1; affirmed State Board of Education, April 5, 1967. In that decision the Commissioner commented as follows with respect to a non-resident's right to speak at a budget hearing:
>
> '***The Commissioner finds that the sense and interpretation of the expression'other interested persons' as used in R.S. 18:7-77.2, which best comports with the legislative intent is that which would include teachers employed in the district whether resident or non-resident therein. Such teachers are therefore entitled to present objections and to be heard with respect to the budget presented at the hearing required by the statute.
>
> * * *
>
> While recognizing that this act [Title 34 - Labor and Workmen's Compensation of the revised statutes] has no bearing upon the rights of persons in public employment, the Commissioner finds in this definition an indication of legislative intent applicable to the instant case:
>
> 'The term 'representative' is not limited to individuals but shall include labor organizations, and individual representatives need not themselves be employed by, and the labor organization serving as a representative need not be limited in membership to the employees of, the employer whose employees are represented.' R.S. 34:13A-3(d)***'
>
> Even though that decision spoke exclusively about a budget hearing, the Commissioner determines that the same principles apply herein, and that since the Board gave the citizens an opportunity to speak pursuant to the guidelines mentioned in Hockenjos, supra, it was then obligated to allow the teachers' representative to speak even though he was a non-resident of the school district." (emphasis supplied, case omitted)

The same principle applies with equal emphasis to the case sub judice. Becken sought to speak as a representative of the Association and she was denied that right. That right should not and cannot be abridged because of non-residence and surely it should not be abridged because of Becken's non-response to the Board President's prior coercive conduct. See also School District No. 8 v. WERC, ___ U.S. ___, 93 LRRM 2970, where the U.S. Supreme Court held that the Wisconsin Employment Relations Commission violated the First Amendment to the U.S. Constitution when it prohibited a school board from permitting any teacher, except those who are union representatives, to appear and speak at open board meetings on any matters subject to collective bargaining. The Board's conduct in this regard, like its conduct in restraining Becken in her solicitation in the borough, has violated N.J.S.A. 34:13A-5.4(a)(1). 34/

Certain matters remain to be dealt with. The first is an affirmative defense, 35/ asserted for the first time in Respondent's post-hearing brief, that the dispute regarding Becken's transfer must be decided in accordance with School Law decisions under the parties' agreements, which in 1974-75, provided for referral of unresolved grievances to the Commissioner of Education for his review, and in 1975-77 provided for arbitration.

While the Commission's Rules do not require affirmative defenses

34/ In neither case can Becken be restricted, as claimed by Respondent, to limit her communications with the Board "via the Administrative Principal" as provided in both the 1974-75 and 1975-77 agreements. See pages 4 and 5, supra. The language of the agreements cannot restrict public rights of employees to be free of interference and restraint as I have found practiced by the Board, through the conduct of its President at its October public meeting. As to Mrs. Becken's suspected communications with citizens, they were not intended to be directed to the Board. It is precisely for that reason - the employees' right under the Act and the U.S. Constitution to persuade voters through speech to change the officials or modify their negotiation of labor relations policies - that Becken's conduct in the borough is not reached by the contract provision, and could not be reached, even if such a provision addressed itself to the matter. Finally, sufficient divergent views on the meaning and intent of the contract provision were voiced during the hearing to raise considerable doubt that Becken's attempt to speak at the October Board meeting was a communication which the parties contemplated be covered by the clause.

35/ Defined in Black's Law Dictionary, 4th Edition (West Publishing Co.) as new matter which, assuming the complaint to be true, constitutes a defense to it.

to be pleaded by way of answer to the complaint, 36/ I rule that, at the very least the assertion of that defense, after the close of hearing and without opportunity provided the other party to respond, either by way of introduction of evidence and argument at the hearing or by way of post-hearing brief, 37/ is improper and violative of essential due process requirements. That defense is, accordingly, stricken. However, because my ruling is subject to Commission review, I will examine briefly the merits of Respondent's defense.

The argument concludes that since the Act requires grievance procedures "shall be utilized for any dispute covered by the terms of such agreement", N.J.S.A. 34:13A-5.3, the issues in the case, sub judice, should be decided in accordance with the substantive law of the forum the parties themselves selected, viz., the Commissioner of Education. This argument fails to take account of the fact that the Commission has "exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice listed in subsections a. and b. above." N.J.S.A. 34:13A-5.4 (c). That power, the Commission, in an appropriate circumstance, may in its discretion refrain from exercising. State of New Jersey (Stockton State College) and Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO, P.E.R.C. No. 77-31 (1/4/77) and cases cited at page 10, footnote 13 of the Commission's Decision and Order. Under the Commission's policy of deferral to binding arbitration, it is clear that the Commissioner of Education would not be deemed a proper neutral third party who could issue, expediously, an award binding on them, to whose special skills and experience in interpreting the parties' collective negotiation agreement and relationship the Commission would or should, properly defer. See Board of Education, East Windsor Regional School, E.D. No. 76-6 at page 5. With respect to the 1975-77 agreement's provision for arbitration, the main allegations of unfair practice - the transfer itself among them - accrued under the 1974-75 agreement. Furthermore, there is no

36/ Contrast R. 4:5-4(Civil Practice Rules) requiring that pleadings in civil actions in New Jersey shall set forth specifically and separately a statement of facts constituting an avoidance or affirmative defense.

37/ Briefs were required to be filed simultaneously. Respondent filed and served its brief some 25 days prior to Charging Party. Nothing in the record supports a conclusion that counsel for Charging Party read Respondent's brief before filing its own. Nor does assertion of the defense in a post hearing brief cure the violation of basic due process safeguards (continued)

assertion by Respondent that were the Commission to defer to arbitration under that agreement, it would waive the 60 day requirement for filing a grievance and thus permit the matter to be resolved timely in accordance with the Commission's deferral policy. Respondent in its brief does not even seek dismissal of the complaint while the issues are arbitrated under the 1975-77 agreement but relies solely on Commissioner of Education determinations in support of its claim that "Education Law" be applied. Finally, it is decidedly unclear whether the arbitration called for in the contract is binding at all. See page 4, footnote 6, supra.

The second matter is the impact, if any, of two recent Appellate Division decisions. In one, the Court vacated as moot a Commission order to negotiate collectively in good faith because of "the dissolution of respondent employee organization which was the majority representative of the seven secretaries employed by appellant Board of Education", In re Galloway Township Board of Education, P.E.R.C. No. 76-31, rev'd in part, aff'd in part, App. Div. Docket No. A-3015-75 (3/29/77), pet. for rehearing pending, App. Div. Motion No. M-2158-76. In the other, the Court held moot the Commission's order directing the employer to cease and desist from interference with or coercion of employees, from refusal to negotiate collectively in good faith and from unilateral alteration of the terms and conditions of employment because at the time of its issuance the parties had reached a negotiating agreement which complied with the affirmative provision of the order, In re Galloway Township Board of Education, P.E.R.C. No. 76-32, rev'd, order vacated, App. Div. Docket No. A-3016-75 (3/29/77), pet. for rehearing pending, App. Div. Motion No. M-2159-76. While the Commission's petitions for rehearing are pending and until the "mootness" question[37a/] is finally resolved, I am bound to follow the Commission's continuing policy in this matter. In any event, as to Respondent's alleged (a)(3) conduct, since I have concluded that there has been no violation, I deem a discussion of the issue of mootness related to Becken's return to first grade to be unnecessary. As to Respondent's (a) (1) conduct, I am convinced

37/ Continued...requiring any defense to the complaint to be asserted timely so as to permit appropriate response before close of hearing. In any event, my ruling striking an affirmative defense should not turn on the vagaries of the timing of filing of briefs, particularly where simultaneous filing was required. In fact, my ruling is made without the benefit of any response from the Charging Party.

37a/ Respondent in its brief also suggests that the transfer allegation was rendered moot upon Becken's return to first grade.

that neither decision, even if rehearing, and certification to the Supreme Court is denied, assuming the Commission determines to seek such review, compels a finding that Becken's return to first grade "moots" the Board's interference with her rights under the Act. Her return does not constitute compliance with the Act's requirement that her employer refrain from interfering with, restraining and coercing her in the rights guaranteed by the Act. Accordingly, having found that the Board has engaged in certain unfair practices 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 practices 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 hereto annexed. 38/

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

Conclusions of Law

1. By directing employee Mary Becken to cease what it believed to be her activity, including speech, in soliciting support in the Respondent School District for her position as employee and Association representative in a dispute involving her involuntary transfer as a teacher, from one grade to another, without prior discussion and notice, the Respondent, commencing on or about May 1975, has engaged in, and continues to

38/ The Charging Party, in its brief, requests the award of counsel fees. It cites Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975) in support of its claim. The Supreme Court there denied recovery of attorney fees, in reliance on the "American rule" that attorney's fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization. The Court did note that a court may assess attorney's fees, inter alia, when the losing party has "acted in bad faith, vexatiously, wantonly, or for oppressive reasons..." [citations omitted]. Alyeska Pipeline Service Co., supra, at pages 258-259. Putting aside the question of the Commission's authority to award counsel fees under its authority "to take such affirmative action as well effectuate the policies of the Act" N.J.S.A. 34:13A-5.4, I am not persuaded on this record that the Board's conduct was of such a nature ("brazen", "palpably without merit" or "manifestly unjustifiable") as to warrent an award of litigation costs. IUE v. NLRB (Tidee Products), 426 F. 2d 1243, 73 LRRM 2870 (continued)

engage in an unfair practice within the meaning of N.J.S.A. 34:13A-5.4 (a)(1).

2. By refusing to permit employee and Association representative Mary Becken to speak to a collective negotiation matter at its public meeting held in October 1975, even though a non-resident of the School District, the Respondent has engaged in and is continuing to engage in an unfair practice within the meaning of N.J.S.A. 34:13A-5.4(a)(1).

3. The Respondent, by its conduct in transferring employee Mary Becken from a teaching assignment in first grade to one in fifth grade, and by refusing thereafter to transfer Becken back to first grade assignment on her subsequent application, has not engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1) and (3).

RECOMMENDED ORDER

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

1. Cease and desist from:

(a) Directing any employee to cease what it believes to be that employee's participation in activity intended to influence public and voter perception of a labor relations and collective negotiations dispute and thereby influence its own response to an employee and Association demand regarding the subject in dispute.

(b) Refusing to permit any employee or Association representative to speak to a collective negotiations matter at its public meetings, even though a non-resident of the School District.

(c) Interfering with, restraining or coercing employees in any like or related manner in the exercise of the rights guaranteed to them by the Act.

38/ Continued...(D.C. Cir. 1970), cert den., 75 LRRM 2752 (1970); Tidee Products Inc., 194 NLRB 1234, 70 LRRM 1175 (1972), on remand; modified, 502 F.2d 349, 86 LRRM 2093; rehearing den., 502 F. 2d 349, 87 LRRM 2255, (1974). See also Heck's Inc., 215 NLRB No. 142 (were the defenses 'debatable' rather than 'frivious' notwithstanding a finding of 'clearly aggravated and pervasive misconduct'?).

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 in the Borough of Laurel Springs, New Jersey, copies of the attached notice marked "Appendix A". Copies of said notice on forms to be provided by the Director of Unfair Practice Proceedings of the Public Employment Relations 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 section of the complaint which alleges that the Laurel Springs Board of Education engaged in violations arising under N.J.S.A. 34:13A-5.4(a)(1) and (3) with regard to Mary Becken's transfer from first grade teaching assignment to fifth grade teaching assignment be dismissed.

Robert T. Snyder
Robert T. Snyder
Hearing Examiner

DATED: Trenton, New Jersey
May 2, 1977

"APPENDIX A"

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 direct any employee to cease what we believe to be that employee's participation in activity intended to influence public and voter perception of a labor relations or collective negotiations dispute and thereby influence our own response to an employee or Association demand regarding the subject in dispute.

WE WILL NOT refuse to permit any employee or Association representative to speak to a collective negotiations matter at our public meetings, even though a non-resident of the School District.

WE WILL NOT interfere with, restrain or coerce our employees in any like or related manner in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

Laurel Springs 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, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780