

P.E.R.C. NO. 86-14

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PINE HILL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-85-139-76

PINE HILL EDUCATION ASSOCIATION  
AND VANESSA CLAX,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands an unfair practice charge to the Hearing Examiner for further proceedings. The Hearing Examiner found that the Pine Hill Board of Education violated the New Jersey Employer-Employee Relations Act when it withheld a teacher's increment and ordered a psychiatric examination because she filed a grievance. The Commission holds, however, that the Hearing Examiner mistakenly excluded certain evidence relevant to the Board's motivation.

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Appearances:

For the Respondent, Maressa, Goldstein, Birsner,  
Patterson and Drinkwater, Esqs. (Robert E. Birsner,  
of Counsel)

For the Charging Party, Selikoff & Cohen, Esqs.  
(Steven R. Cohen, of Counsel)

DECISION AND ORDER

On November 29, 1984, the Pine Hill Education Association ("Association") and Vanessa Clax filed an unfair practice charge against the Pine Hill Board of Education ("Board"). The charge alleges that the Board violated subsection 5.4(a)(1), (2), (3) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A.

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<sup>1/</sup> These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith  
(Footnote continued on next page)

34:13A-1, et seq. Count one specifically alleges that the Board withheld Clax's increment and ordered her to undergo a psychiatric examination in retaliation for a grievance the Association filed on her behalf. Count II alleged that the superintendent circumvented the negotiated grievance procedure by submitting the grievance directly to the Board without first issuing a written decision.

On December 7, 1984, a Complaint and Notice of Hearing was issued. The Board then filed an Answer. With respect to Count I, the Answer admitted that the Association had filed a grievance on Clax's behalf and that the Board had withheld Clax's increment and ordered a psychiatric examination, but denied that the former motivated the latter. The Board specifically denied that the superintendent told Clax that the matter was being reopened because the Association had filed a grievance on Clax's behalf and neither admitted nor denied that its president criticized Pine Hill Education Association for bringing its grievance. With respect to Count II, the Board denied that it circumvented the grievance process or otherwise violated the Act when the superintendent informed it of the Association's grievance on behalf of Clax.

On March 13, 14, and 15, 1985, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and

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with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

introduced exhibits. They waived oral argument, but submitted post-hearing briefs by May 6, 1985.

On May 20, 1985, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-44, 11 NJPER \_\_\_\_ (¶ \_\_\_\_ 1985). He found that the Board retaliated against Clax because of the Association's grievance when it withheld her increment and ordered a psychiatric evaluation and that the Board had violated the negotiated grievance procedure. He recommended that we order the Board to restore Clax's increment, rescind its directive that Clax undergo a psychiatric evaluation, and post a notice of its violation and remedial action taken.

On June 3, the Board filed exceptions. It asserts that the Hearing Examiner erred in several respects, including his refusal to read the journal entries (R-2) which precipitated this controversy or to permit testimony concerning which journal entries allegedly motivated the board's actions.

On June 13, the Association filed a response to the Board's exceptions, including its assertion that it was not necessary to read R-2 or permit further questioning concerning its contents in order to assess the Board's motivation.

We have reviewed the record. Because an evidentiary ruling was incorrect, we remand for further proceedings. The facts relevant to this ruling, the ruling, and our analysis follow.

Vanessa Clax was a fifth grade teacher who required her students to write journals. She would read these journals and write responsive comments on them.

At the end of the 1983-1984 school year, a teacher whose contract had not been renewed met with the superintendent and gave him a document (R-2) consisting of more than 30 pages. This document purported to contain photostatic copies of some correspondence with Clax and pages from the journals of four of Clax's students. The journal entries and the responses discussed and criticized other students and teachers, especially the teacher whose contract had not been renewed.

On September 10, 1984, the Board voted to reprimand Clax and order her to submit to a psychiatric examination. On September 25, following speeches in support of Clax from seven teachers, three parents and a former Board president, the Board voted to rescind the order of a psychiatric examination, but also voted to state in a reprimand that its previous decision to order one had been justified. On October 22, following a grievance the Association had filed on behalf of Clax challenging the second reprimand and following complaints from another former Board president and some teachers and parents about its September 25 decision, the board voted to reorder a psychiatric evaluation and to withhold Clax's increment.

The central issue is one of motivation: why did the Board reconsider its September 25 decision and vote to order a psychiatric evaluation and to withhold Clax's increment. The Association asserts it did so because it wished to retaliate against Clax for the Association grievance contesting her second reprimand; the Board

asserts it did so because it had received complaints that its September 25 decision was too lenient a punishment for the improper behavior manifested in the journal entries.

The Board introduced R-2, the journal entries, to show its motivation for disciplining Clax. The Association objected to the admission of R-2 on the grounds that it had not been authenticated or its contents verified. The Hearing Examiner admitted R-2 for the limited purpose of showing the Board's state of mind in disciplining Clax; he refused to admit R-2 for the purpose of proving the truth of its contents. He also refused to permit questioning concerning what portions of R-2 Clax had admitted writing, what portions the superintendent had discussed with the Board, and what portions the Board had found particularly disturbing. He also stated that he would not read R-2 because it might be prejudicial to Clax.

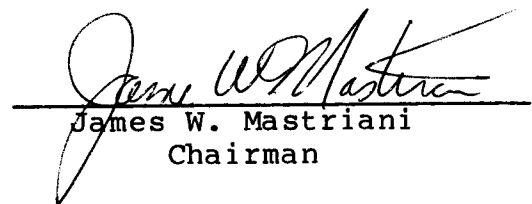
We agree with the Hearing Examiner's ruling that R-2 was admissible for the purpose of showing what the Board's state of mind was when it disciplined Clax, but not admissible for proving the truth of the journal entries or that Clax had written them. Our task is to assess the Board's motivation, not the severity or laxity of the discipline imposed. We disagree, however, with the decision not to read R-2 and to preclude further testimony concerning what portions of R-2 Clax had admitted writing, what portions the superintendent had discussed with the Board, and what portions the Board had found particularly objectionable. We believe R-2 and this testimony may be relevant and helpful in assessing the Board's

motivation. Accordingly, we reopen the record and remand this matter to the Hearing Examiner for additional testimony and a supplemental report.<sup>2/</sup>

ORDER

The record is reopened and this case is remanded to the Hearing Examiner for additional testimony and a supplemental report.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Butch, Suskin, Wenzler and Graves voted for this decision. None opposed. Commissioner Hipp abstained.

DATED: Trenton, New Jersey  
July 1, 1985  
ISSUED: July 2, 1985

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<sup>2/</sup> We also request the Hearing Examiner, when issuing the supplemental report, to clarify when the superintendent decided to place the Clax matter before the Board at its October 22 meeting: finding of fact No. 21 suggests he did so several weeks prior to this meeting; finding of fact 25 suggests he did so only after the grievance was filed.

STATE OF NEW JERSEY  
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PINE HILL EDUCATION ASSOCIATION AND  
VANESSA CLAX,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board violated §5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act by the action of the Board on October 22, 1984 when it voted to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directed her to undergo a psychiatric evaluation. The Hearing Examiner found that the Board was illegally motivated in its actions as to Clax since it acted in retaliation against the Association having filed a grievance on behalf of Clax several days prior to the October 22nd Board meeting. Additionally, the Hearing Examiner found that the Board also acted illegally when it departed from the normal grievance procedure by having its Superintendent present the Clax grievance to the Board directly on October 22nd without the Superintendent having made his response to the grievance under the grievance procedure.

By way of remedy, the Hearing Examiner directed that Clax's salary increment be restored and that she be made whole for any losses suffered since the withholding with interest at the rate of 12% per annum. Further, the Hearing Examiner directed that the requested psychiatric evaluation be rescinded.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.



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Drinkwater, Esqs.  
(Robert E. Birsner of counsel)

For the Charging Party

Selikoff & Cohen, Esqs.  
(Steven R. Cohen of counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on November 29, 1984 by the Pine Hill Education Association and Vanessa Clax (hereinafter the "Charging Party," the "Association" or "Clax") alleging that the Pine Hill Board of Education (hereinafter the "Respondent" or the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that, in Count I, it is alleged that after Clax received a letter of

reprimand, as a result of Board action on September 25, 1984, a second reprimand issued on September 27th, following which a grievance was filed by the Association on October 18, 1984, which grievance was the subject of Board response on October 22, 1984 wherein the Board reinstated an earlier order to Clax to undergo a psychiatric evaluation and decided, additionally, to withhold her annual increment for 1985-86; and, in Count II, it is alleged that on October 22, 1984 the Board through its superintendent circumvented the collectively negotiated grievance procedure by bringing the Clax grievance before the Board prior to the superintendent's decision on the issue; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act. 1/

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on December 7, 1984. Pursuant to the Complaint and Notice of Hearing, hearings

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

were held on March 13, 14 & 15, 1985 in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by May 6, 1985.

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

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

FINDINGS OF FACT

1. The Pine Hill Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The Pine Hill Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. Vanessa Clax is a public employee within the meaning of the Act, as amended, and is subject to its provisions.
4. As to Count I of the Unfair Practice Charge, all of the material allegations are admitted by the Respondent in its Answer

with the exception of the last sentence in Paragraph 18 and Paragraph 21. Further, in Count II the material allegations are denied.

5. The current collective negotiations agreement between the parties is effective during the term July 1, 1984 through June 30, 1986 (J-1). The grievance procedure is set forth in Article III and terminates in final and binding arbitration (J-1, p.8).

6. Clax has been employed as a teacher since April 1971 and, at all times material hereto, was a fifth grade teacher in the John H. Glenn School. She has served on the Executive Committee of the Association since 1983. Clax is among teachers who use "journals" for dialogue between students and the teacher. These are "copy books" where the students make entries for the teacher to read and the teacher reads and makes entries for the students to read.

7. Some time in January 1984, John Mansika, a teacher in the Glenn School, claimed that Clax was having her students keep notes on him in their journals. Clax responded that it was "just rumors." Mansika was not considered a satisfactory teacher, having had trouble with the females in his class, and his contract was not renewed for the 1984-85 school year. After January 1984 Mansika continued to claim that Clax was still involved with the remarks of students about Mansika in their journals.

8. During the last week of June 1984, after Mansika had not been renewed, he met with the superintendent, Charles M. Ivory, having previously met with the Glenn School principal, James H.

Mundy. Mansika said that he had information and materials to share with Ivory that would clarify his relationship with the District. Mansika handed a document, consisting of more than thirty pages, which purported to be photostatic copies of some correspondence with Clax and pages from the journals of four students (R-2).<sup>2/</sup> Ivory's reaction to R-2 was that the contents were inflammatory and supported Mansika's earlier claims against Clax. Ivory attempted on that day to obtain a copy of R-2 from Mansika but rejected Mansika's condition that Ivory give him a good recommendation in exchange for a copy of R-2. Mansika stated that he would, in the following week, bring in a copy but did not do so. Ivory then went on vacation for four weeks and, upon his return in August, attempted to obtain a copy of R-2 through his principals. In mid-August 1984 Ivory received a copy of R-2 from a staff member the day before he was scheduled to meet with Clax. That meeting with Clax was cancelled and thereafter Ivory made a copy of R-2 for Donald Shaw, an N.J.E.A. representative, who disclosed the contents to Clax.

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<sup>2/</sup> The Charging Party objected strenuously to the admission of Exhibit R-2 on the ground that it could easily have been fabricated and that there was no authentication of sources and verification of the accuracy of the contents. The Hearing Examiner permitted the document to be admitted on a qualified basis, namely, that there would be no examination permitted as to the substance of the document but that it would be considered in evaluating the state of mind of the superintendent and, ultimately, the Board in recommended actions and actions taken against Clax, infra.

9. On August 22, 1984 Ivory sent a letter to Clax, referring to the "Employee Rights" provision of the agreement (Article XVI), advising her that he had been presented with documents which constituted criticism of Clax's professional conduct (R-5).

10. On August 28, 1984 there was a meeting between Ivory and the Board's attorney, Robert E. Birsner, Shaw, Ann Volk, the President of the Association and Karen Vitola, a past president of the Association. The subject of the meeting was a discussion of the contents of R-2. Shaw asserted that the materials were torn in pieces from journals, cut and pasted, and stolen from students for the purpose of putting Clax in a bad light. Ivory stated that the document was without justification and that it was incredible that any teacher would deal with this kind of information and discuss the private lives of staff with students. Shaw responded that such things have happened elsewhere, also adding that Clax had seen R-2.

11. On September 5, 1984 Ivory wrote to Clax, advising her that at a special meeting of the Board, scheduled for September 10, 1984, the Board would discuss and might take action regarding her status of employment, which might or might not be detrimental (CP-1). Ivory stated that Clax could request a public discussion of the matter, otherwise the Board would consider the matter during a private caucus. Ivory referred to the document (R-2), which had been furnished to the N.J.E.A. representative.

12. Loraine Barnhart, the president of the Board, testified without contradiction that at the September 10th Board meeting the superintendent proposed four alternatives for Board action regarding Clax: (1) tenure charges; (2) the withholding of her increment; (3) a reprimand and/or; (4) a psychiatric evaluation. After Clax and Shaw addressed the Board in caucus, it was decided to direct that a psychiatric evaluation be undertaken and that a reprimand be issued, laying aside the other two recommended alternatives (J-5).<sup>3/</sup>

13. On September 17, 1984, Ivory sent to Clax a letter of reprimand regarding her inappropriate relationships with students, referring specifically to journal correspondence between Clax and certain students (CP-2). Ivory requested that Clax sign one copy of the letter, indicating her knowledge of the placement of the letter in her personnel file.

14. On September 20, 1984, Ivory again wrote to Clax, this time advising her of the caucus and business meetings of the Board, scheduled for September 24 and September 25, 1984, where the Board might take action regarding her status of employment (CP-3). Clax was again advised that she could request a public discussion of the matter.

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<sup>3/</sup> During the meeting with the Board and prior to its vote on September 10, 1984, Clax had acknowledged writing some of the items found in R-2, stating that it was a mistake and she would never again have journals in her classroom. The response of the Board members, who testified at the hearing, was that the journals were good for communication and should be retained.

15. During the week prior to the September 24th and September 25th meetings, supra, three grievances were filed at the informal level, which involved, seriatim, the letter of reprimand (CP-2), the disciplining of Clax without cause and the lack of proper notification to Clax under the agreement. Ivory met with Volk and Vitola on these matters prior to September 25, 1984.

16. On September 21, 1984, Joseph Miloszewski, a past-president of the Association and the Grievance Chairman since 1981, came to Ivory's office with two written grievances, which Ivory refused to accept. On September 24, 1984, Ivory met with Volk, Vitolo and Miloszewski but was never handed the written grievances. The Board ultimately became aware of these two meetings, supra, and the two grievances, at its meetings on September 24 and September 25, 1984.

17. On September 25, 1984, Ivory wrote to Clax, advising her that he was directing that she report for a psychiatric evaluation on October 2, 1984 in accordance with the decision of the Board at its special meeting on September 10, 1984, supra (CP-7).

18. At the regular business meeting of the Board on September 25, 1984, the Board by a vote of 4 to 2 with 1 abstention decided that: (1) the superintendent shall place a letter in Clax's file affirming that the communication between Clax and several students was inappropriate and that she should never again engage in critical commentary upon the personal life of a fellow professional; (2) its previous request for a psychiatric evaluation was



procedurally correct and substantively justified; and finally (3) Clax not be required to submit to a psychiatric evaluation (CP-6, p.5). This action of the Board was preceded by a public session where ten individuals, including seven teachers and three parents, made statements to the Board in support of Clax (J-3, a cassette tape, side 1).<sup>4/</sup>

19. On September 26, 1984, Carl Kerbowski, a former Board president and Chief Counsel to the New Jersey Association of School Administrators, called Ivory, stating that he was very upset over the Board's action of September 25th because it violated the obligation of Board members to protect the students. Kerbowski stated that he wanted Clax's increment withheld, a position which Ivory had recommended at all times since September 10th.

20. On September 27, 1984, Ivory sent to Clax a second letter of reprimand, in accordance with the Board's action on September 25, 1984 (CP-9) and on the same date Ivory sent another letter to Clax, requesting that she return the signed copy of the letter of reprimand of September 17, 1984 (CP-8). When Ivory had not received the signed copies of the reprimand from Clax by October 10, 1984, he wrote a follow-up letter, advising that he was placing the two letters of reprimand into her personnel file (CP-10). The

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<sup>4/</sup> Gloria Decker, a former president of the Board, also spoke in support of Clax and, because of her prior presidency of the Board, substantially swayed the vote of the four-member majority of the Board on September 25th, supra (See testimony of Elmira Narducci and Elena Lefkowitz: 2TY 104, 105, 138).

next day, October 11th, Clax returned to Ivory the two letters of reprimand with her signature and stated that the matter was being handled by the Association and NJEA (CP-11).

21. The next scheduled regular meeting of the Board was to take place on October 22, 1984. Ivory testified that several things had happened since the September 25th meeting, in addition to the call from Kerbowski, namely, that he had been contacted by several parents and four staff members, expressing disagreement with the Board's decision to withdraw the psychiatric evaluation. Ivory said that he also spoke to all of the members of the Board, many of whom questioned whether they had made the correct decision and some of whom deplored the role that Decker had played in her attempt to sway the Board in favor of Clax. Ivory decided to bring the Clax matter to the Board once again on October 22nd and several weeks prior to the meeting Ivory started to prepare a written statement for presentation by him to the Board (CP-15).

22. On October 15, 1984, representatives of the Association met with Ivory at the informal level of the grievance procedure to grieve the fact that Clax had received two letters of reprimand in addition to the specific content of the second letter (CP-9, supra). The representatives of the Association found Ivory's response unsatisfactory and on October 18, 1984 a written grievance was filed (CP-12).

23. On October 16, 1984, Ivory wrote to Clax, advising her that the Board would discuss, and might take action, regarding her status of employment, which might or might not be detrimental (CP-13). The next day, October 17th, Clax wrote to Ivory in

response to CP-13, in which she requested the specific reasons for the Board considering again the matter of her employment status (CP-14A). Clax requested a response by October 19, 1984. A meeting was arranged for 12:00 noon on October 19th in Mundy's office (CP-14B). The meeting took place with the following persons present: Ivory, Mundy, Clax and Eileen Donohue, a teacher and past Association building representative. Clax and Donohue testified credibly that Clax asked two questions of Superintendent Ivory, the first of which was why was the matter being discussed again, referring to the upcoming October 22nd Board meeting. Ivory replied by asking Clax if she was aware that the Association had filed a grievance and then stating that "...as a result of this grievance, this reopens the case..." (2Tr 18, 19, 26). Clax then referred to a September 14th conversation with Ivory on the parking lot where Ivory said: "...it would be over" (2Tr 18, 19). When Clax then asked what had happened since then, Ivory said that the Association had filed a grievance and the matter was reopened. Mundy denied hearing anything at the meeting regarding the grievance and Ivory on cross-examination did not deny having made reference to the grievance and that it reopened the matter. Accordingly, the Hearing Examiner accepts the testimony of Clax and Donohue as to what transpired at the meeting, particularly regarding the filing of the grievance as having reopened the matter. The meeting lasted about ten minutes.<sup>5/</sup>

<sup>5/</sup> Barnhart testified that she was glad that the grievance (CP-12) had been filed since it reopened the matter, something she had wanted to occur. Also, Barnhart had spoken to a number of people since the September 25th meeting, all of which reinforced her belief that the Clax matter should be reopened.

24. Between October 15 and October 22, 1984, Ivory told Kerbowski of the grievance (CP-12, supra) and that he was going to recommend the reopening of the Clax matter at the October 22nd Board meeting.

25. On October 16, 1984, Ivory met with Barnhart to prepare the agenda for the October 22, 1984 Board meeting. Clax was placed on the agenda under item 29, "Personnel Matter Update" (R-3). The Hearing Examiner does not credit Ivory's testimony that the grievance had nothing to do with placing the Clax matter on the agenda. His claim that it was Kerbowski and the dissenting staff members who caused him to place the matter on the agenda is not credited. This finding is strengthened by the fact that the grievance is clearly referred to in paragraph 4 of the statement prepared by Ivory to be read by him at the October 22nd Board meeting (CP-15, p.2). In CP-15 Ivory took note of the fact that the grievance filed on behalf of Clax: called for removing a reprimand letter (CP-9); the reversal of the Board's position on the psychiatric evaluation and; finally, the awarding to Clax of monetary compensation for the psychological and emotional stress placed upon her.

26. Ivory acknowledged that when he read his statement regarding the Clax grievance at the October 22nd Board meeting he had not yet responded to the grievance under the grievance procedure, having had fourteen calendar days from October 18, 1984 to do so. Ivory also acknowledged that he had not received authorization from the Association to move the grievance to the

Board level on October 22nd, asserting by way of defense that most grievances are filed at the superintendent's level and that he has presented such grievances to the Board before or after his written decision in response to the grievance under the grievance procedure. However, Miloszewski and Vitolo both testified that Ivory's handling of the Clax grievance was a total departure from the past in that Ivory presented the details of the grievance to the Board in a public session and did so in the absence of any request by the Association to move the grievance to the Board level (2 Tr. 51-56, 62-66). Since 1981 approximately 9 to 11 grievances have been filed by the Association (2 Tr. 53, 65). The Hearing Examiner credits the corroborative testimony of Miloszewski and Vitolo, supra, that Ivory's handling of the Clax grievance on October 22nd was a total departure from the past based upon their demeanor and the fact that there was no denial by the Respondent.

27. At the Board meeting on October 22, 1984, a number of public statements were made prior to Board action on Clax, one of which was by Kerbowski, who stated, inter alia, that he had read the documents and considered them to be filthy and urged the Board to maintain the recent reprimand letters in Clax's personnel file and take further action (1 Tr 50-52 & J-2A, side 1). Ivory read his prepared statement (CP-15, supra) and concluded with a recommendation that the Board withhold the entire salary increment for Clax for the 1985-86 school year. Barnhart stated that she had thought that the issue was settled but that by instituting another grievance "...the issue has been reopened..." (R-4, Page No. 675 of

the official minutes & 1 Tr. 54, 55). Barnhart also stated that she felt the psychiatric examination should be reinstated and urged the withholding of Clax's increment. Finally, she complained that the Board was tired of too many grievances (1 Tr 54-56; J-2A, side 2; 3 Tr. 131). The Board voted 6 to 1 to withhold Clax's entire salary increment for the 1985-86 school year and then by a vote of 7 to 0 the Board voted to require Clax to submit to a psychiatric evaluation (R-4, Page Nos. 675, 676).<sup>6/</sup>

28. On October 30, 1984, Ivory wrote to Clax, advising her of the Board's action on October 22nd in ordering the withholding of her entire salary increment for 1985-86 (CP-17). (This letter was placed in Clax's personnel file; CP-18).

29. On November 6, 1984, Ivory wrote to Clax, advising her of the Board's action of October 22, 1984 that she report for a psychiatric evaluation, which was scheduled for December 4, 1984 (CP-19).

30. At the behest of Kirkland the Association filed a grievance on November 26, 1984, alleging a circumvention of the contractual grievance procedure by Ivory in bringing the Clax grievance (CP-12) before the Board on October 22, 1984 prior to having communicated the superintendent's decision to the Association (R-1). Among the requested remedies was that the Board nullify all actions taken against Clax at the October 22nd Board meeting.

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<sup>6/</sup> Christine Kirkland, a N.J.E.A. UniServ Representative, protested that no grievance had been filed with the Board and that the superintendent had bypassed the grievance procedure in going directly to the Board on October 22, 1984.

DISCUSSION AND ANALYSIS

The Respondent Violated §§(a)(1)  
And (3) Of the Act When, On  
October 22, 1984, It Voted To  
Withhold Clax's Salary Increment  
For The 1985-86 School Year And  
Directed Her To Undergo A  
Psychiatric Examination.

In Bridgewater Twp. v. Bridgewater Public Works Assn., 95  
N.J. 235 (1984), the New Jersey Supreme Court adopted the test  
enunciated by the National Labor Relations Board in Wright Line,  
Inc., 251 NLRB 1083, 105 LRRM 1169 (1980) in "dual motive" cases  
where the following requisites in assessing employer motivation are  
utilized: (1) The Charging Party must make a prima facie showing  
sufficient to support an inference that protected activity was a  
"substantial" or "motivating" factor in the employer's decision to  
discipline; and (2) once this is established, the employer has the  
burden of demonstrating that the same action would have taken place  
even in the absence of protected activity (95 N.J. at 242).

The court in Bridgewater further refined the above test by  
adding that the protected activity engaged in must have been known  
by the employer and, also, it must be established that the employer  
was hostile toward the exercise of the protected activity (95 N.J. at  
246). The Hearing Examiner also notes that the Charging Party must  
establish a nexus between the exercise of protected activity and the  
employer's conduct in response thereto: Lodi Bd. of Ed., P.E.R.C.  
No. 84-40, 9 NJPER 643, 644 (1983).

The protected activity involved in this case is the processing of a grievance, which originated on October 15, 1984 when representatives of the Association met with Ivory at the informal level of the grievance procedure to grieve the fact that Clax had received two letters of reprimand in addition to the specific content of the second letter (CP-9).<sup>7/</sup> When the representatives found Ivory's response unsatisfactory, a written grievance dated October 18th was filed with Ivory on October 19, 1984 (CP-12). Although the grievance was filed by the Association on behalf of Clax, and not directly by her, it is clear that Ivory knew and understood that there was no distinction between the two (3 Tr. 97, 98). Thus, the Association and Clax were engaged in protected activity in the initiating and filing of the Clax grievance (CP-12) and the Respondent had direct knowledge of this activity as required by Bridgewater, supra.<sup>8/</sup>

Further, in accordance with the Bridgewater requirements, the Respondent through Ivory and Barnhart manifested a hostility toward the exercise of the protected activity of initiating, filing and processing the Clax grievance, supra. For example, Ivory told

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<sup>7/</sup> The filing of a grievance has been recognized by the Commission as protected activity: Lakewood Bd of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (1978) and Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (1984).

<sup>8/</sup> The Hearing Examiner need not consider further the cases on knowledge cited by the Charging Party at p. 21 of its brief.



Kerbowski of the grievance sometime between October 15 and October 22, 1984, stating that he was going to recommend the reopening of the Clax matter at the October 22nd Board meeting (see Finding of Fact No. 24, supra). Ivory had commenced preparing a statement to be read by him to the Board on October 22nd several weeks prior to the meeting. Ivory's statement makes clear that the filing of the Clax grievance, supra, was the reason that Clax was to be placed again on the agenda (see Findings of Fact Nos. 21 & 25, supra). Ivory told Clax and Donohue on October 19th that the filing of the grievance had reopened the "case," having earlier told Clax that the matter was "over" (see Finding of Fact No. 23, supra). Barnhart testified that she was glad that the grievance had been filed since it reopened the matter, something she had wanted to occur. Together, Ivory and Barnhart met on October 16, 1984 to prepare the agenda for the October 22nd meeting and Clax was placed on the agenda under "Personnel Matter Update" (see Finding of Fact No. 25, supra). The role that the Clax grievance played in the reopening of the matter before the Board on October 22, 1984 is confirmed by the comments of Barnhart at the meeting where, inter alia, she complained that the Board was tired of too many grievances (see Finding of Fact No. 27, supra).

From the foregoing it is clear that the Respondent through Ivory and Barnhart showed a clear hostility towards the initiating, filing and processing of the Clax grievance, supra. As a direct result of this hostility to the grievance filing the Board, following the strongly held views of Barnhart, voted 6 to 1 to

withhold Clax's entire salary increment for the 1985-86 school year on October 22, 1984 and, at the same meeting, voted 7 to 0 to require Clax to submit to a psychiatric evaluation, notwithstanding that the Board on September 25, 1984 had voted to rescind its September 10th decision by requiring such an evaluation (see Findings of Fact Nos. 18 & 27, supra).

Additionally, the timing of the Board's action on October 22nd is a significant factor in the opinion of the Hearing Examiner in assessing the Respondend's motivation, namely, the short span of time between the filing of the grievance on October 18 or 19, 1984 and the Board's action on October 22nd: Salem County Board for Vocational Education, P.E.R.C. No. 79-99, 5 NJPER 239 (1979), aff'd. in part, rev'd. in part, App. Div. Docket No. A-3417-78 (1980) and Twp. of Bridgewater, P.E.R.C. No.82-36, 7 NJPER 600, 602 (1981; appellate history omitted).

The Hearing Examiner concludes that the Association has, under Bridgewater, met the burden of establishing a prima facie case that the filing by the Association of a grievance on behalf of Clax (CP-12) was a "substantial" or a "motivating" factor in the decision of the Board on October 22, 1984 to withhold Clax's salary increment for the 1985-86 school year and to require her to submit to a psychiatric evaluation.

\* \* \* \*

The next question to consider is whether or not the Respondent established by a preponderance of the evidence that the Board's personnel action of October 22, 1984 with respect to Clax,

supra, would have occurred even in the absence of the protected activity of filing the Clax grievance. Put another way, has the Board demonstrated a legitimate business justification or reason for the personnel action of the Board on October 22nd?

There is no question but what Exhibit R-2, the Mansika documents, afforded the Board the managerial prerogative to take appropriate action against Clax. At its September 10, 1984 meeting Ivory presented the Board with four alternatives for action against Clax: (1) tenure charges; (2) the withholding of her increment; (3) a reprimand and/or; (4) a psychiatric evaluation. The Board decided on that date to direct that a psychiatric evaluation be undertaken and a reprimand issued, laying aside the other two recommended alternatives. See Finding of Fact No. 12, supra. In due course a reprimand letter was issued by Ivory on September 17, 1984 (CP-2), which resulted in the filing of three grievances at the informal level during the week prior to September 24th (see Finding of Fact No. 15, supra). The Board at its regular meeting on September 25, 1984 directed Ivory to place a letter in Clax's file affirming that R-2 was inappropriate. Significantly, however, the Board rescinded its previous request for a psychiatric evaluation. There the situation would have remained status quo but for outside agitation to Ivory and Barnhart from Kerbowski and others (see Findings of Fact Nos. 19 & 21, supra).

As discussed above, it was the Clax grievance, initiated on October 15, 1984, that triggered reconsideration by the Board of its earlier action. The psychiatric evaluation was reinstated on

October 22nd and a penalty never adopted by the Board previously, the withholding of the Clax increment, was adopted.

Note is taken of the fact that at the Board's caucus on September 10, 1984 the minutes indicate that its attorney advised the Board that "It would...be questionable to pursue withholding increment" (J-5, p. 5). If the withholding of an increment was "questionable" in the opinion of the Board's attorney on September 10, 1984 it strains credulity as to how it could have been less than questionable on October 22, 1984. Yet, the Board elected to proceed with that option and the reinstatement of the psychiatric evaluation. Clax had engaged in no repetition of the objectionable conduct represented by R-2 during the period between September 10th or September 25th and October 22, 1984. Thus, there appears to the Hearing Examiner to have been no legitimate basis for the matter having been reopened other than to punish Clax for having filed a grievance through the Association, or the Association having filed the grievance on behalf of Clax. All of the foregoing dictates the conclusion that the actions of the Board on October 22, 1984 were without a legitimate business justification and would not have taken place but for the exercise by Clax and the Association of the protected activity of filing a grievance with Ivory in writing on October 19, 1984.

The Respondent Board having failed to demonstrate by a preponderance of the evidence that it had a legitimate business justification for its actions against Clax on October 22, 1984, it violated §§(a)(1) and (3) of the Act under Bridgewater, supra.

The Respondent Board Violated  
§§(a)(1) and (5) Of The Act When,  
On October 22, 1984, It Cimcumvented  
The Negotiated Grievance Procedure  
In Connection With The Clax  
Grievance. 9/

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As found in Finding of Fact No. 26, supra, it is clear that when Ivory read his statement regarding the Clax grievance at the October 22nd Board meeting, he had not yet responded to the Clax grievance under the grievance procedure, having had 14 calendar days from October 18 or October 19, 1984 to do so. Further, Ivory acknowledged that he had not received authorization from the Association to move the grievance to the Board level. Miloszewski and Vitolo both testified credibly that Ivory's handling of the Clax grievance was a total departure from past practice in that he disclosed the details of the grievance to the Board in a public session. Both Miloszewski and Vitolo testified as to personal knowledge of nine to eleven grievances having been filed by the Association since 1981 and that never before had Ivory handled a grievance in the manner that he handled the Clax grievance. Ivory, in speaking of the practice he follows in informing the Board of written grievances, stated that if the grievance was in written form

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9/ The Hearing Examiner will recommend dismissal of the allegation that the Board violated §(a)(2) of the Act by its conduct herein since the proofs adduced by the Association failed to support this allegation: North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193, 194 (1980).

the Board would have received it "with my response so that they would be aware of the progress of that matter" (3 Tr. 111).

Obviously, Ivory did not follow the past practice he claimed in the handling of the Clax grievance.

The NLRB in Meilman Food Industries, Inc., 234 NLRB 698, 97 LRRM 1372 (1978) held that changing the procedure for the handling of grievances without notifying or bargaining with the union is a violation of §8(a)(5) of the National Labor Relations Act, which is directly analogous to §(a)(5) of our Act. As is apparent from the discussion ante, regarding the conduct of the Board at its October 22nd meeting, this departure from the grievance procedure in the case of Clax worked to the obvious detriment of Clax and the Association given the actions by the Board at that meeting with regard to the withholding of Clax's increment and subjecting her to a psychiatric examination, which had previously been rescinded.

Additionally, the Hearing Examiner finds some credence to the contention by the Association that the circumvention of the grievance procedure by Ivory on October 22, 1984 operated to chill the Association in its belated decision to file a grievance over the abrogation and circumvention of the grievance procedure. The testimony of Christine Kirkland that she encountered considerable difficulty in getting the Association to proceed with the grievance (R-1) is credited, the Hearing Examiner noting that the grievance was not filed until November 26, 1984 when the deadline for filing had almost expired.

However, the Hearing Examiner does not find that application of the "inherently destructive" doctrine is warranted. Cf. NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). It is sufficient, in the opinion of the Hearing Examiner, to find that the Board violated §(a)(1) and (5) of the Act by its unilateral departure from the contractual grievance procedure and past practice and the Hearing Examiner will so recommend.

Finally, the Respondent moved at the hearing to dismiss Count II of the Unfair Practice Charge on the ground that it was subsumed by the Association grievance over the conduct of the Board in connection with the Clax grievance (R-1). The Hearing Examiner reserved judgment and now declines to defer Count II to the parties' grievance procedure under Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931, (1971) for the reason that Count II and the record herein do not meet the Collyer deferral standard in that the arbitration clause does not appear to encompass clearly the dispute raised by R-1 (see J-1, pp. 6-8). See also State of N.J. (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (1984).

\* \* \* \*

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

CONCLUSIONS OF LAW

1. The Respondent Board violated N.J.S.A. 34:13A-5.4 (a)(1) and (3) when, on October 22, 1984, it voted to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directed her to undergo a psychiatric evaluation.

2. The Respondent Board violated N.J.S.A. 34:13A-5.4 (a)(1) and (5) when, on October 22, 1984, it circumvented the negotiated grievance procedure in connection with the grievance filed by the Association on behalf of Vanessa Clax.

3. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(2) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by voting to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directing her to undergo a psychiatric evaluation and, additionally, circumventing the negotiated grievance procedure in connection with the grievance filed by the Association on behalf of Vanessa Clax.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly, by voting to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directing her to undergo a psychiatric evaluation.

3. Refusing to negotiate in good faith with the Association by circumventing the negotiated grievance procedure in connection with the grievance filed by the Association on behalf of Vanessa Clax



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


1. Forthwith restore the salary increment of Vanessa Clax for the 1985-86 school year and make her whole for the loss of earnings incurred to date with interest at the rate of 12% per annum on the monies calculated to be due.

2. Forthwith rescind the directive that Vanessa Clax undergo a psychiatric evaluation.

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

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

C. That the allegations that the Respondent Board violated N.J.S.A. 34:13A-5.4(a)(2) be dismissed in their entirety.

  
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Alan R. Howe  
Hearing Examiner

Dated: May 20, 1985  
Trenton, New Jersey

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

AN ORDER OF THE

## PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

## NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by voting to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directing her to undergo a psychiatric evaluation and, additionally, circumventing the negotiated grievance procedure in connection with the grievance filed by the Association on behalf of Vanessa Clax.

WE WILL NOT discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly, by voting to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directing her to undergo a psychiatric evaluation.

WE WILL NOT refuse to negotiate in good faith with the Association by circumventing the negotiated grievance procedure in connection with the grievance filed by the Association on behalf of Vanessa Clax.

WE WILL forthwith restore the salary increment of Vanessa Clax for the 1985-86 school year and make her whole for the loss of earnings incurred to date with interest at the rate of 12% per annum on the monies calculated to be due.

WE WILL forthwith rescind the directive that Vanessa Clax undergo a psychiatric evaluation.

PINE HILL BOARD OF EDUCATION  
(Public Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_  
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08618 Telephone (609) 292-9830.