P.E.R.C. NO. 86-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DOWNE TOWNSHIP BOARD
OF EDUCATION,

Charging Party and Respondent,

-and-

Docket Nos. CE-84-22-29
CE-84-24-30, CO-84-315-31

DOWNE TOWNSHIP EDUCATION
ASSOCIATION,

Respondent and Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Downe Township Board of Education violated the New Jersey Employer-Employee Relations Act when it illegally retaliated against Downe Township Education Association by disciplining its leadership and refused the Association's request for information relevant for negotiations purposes. The Commission dismissed other aspects of the charges filed by the Association and the Board.

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Appearances:
For the Board, Ralph Henry Colflesh, Jr., Esq.

For the Association, Selikoff & Cohen, Esqs.
(Steven R. Cohen, Esq. and Carol F. Laskin, Esq.)

DECISION AND ORDER

On March 21, 1984, the Downe Township Board of Education ("Board") filed two unfair practice charges against the Downe Township Education Association ("Association"). The charges allege that the Association violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(b)(2) and (3).1/

1/ These subsections prohibit employee organizations, their representatives or agents from: "(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the
(Footnote continued on next page)

The first charge alleges that the Association's professional negotiator, Alan Holden, during reopener negotiations, refused to negotiate with Board Superintendent Webb and Principal Mary Ann Eber and demanded that Board members attend negotiations.

The second charge makes essentially the same allegations, but adds that Association representative Rose Garrison had previously agreed to a document entitled "Criteria for Informal Negotiations" pursuant to which Webb and Eber were to represent the Board and the Association would not use a professional negotiator.

On May 16, May 31 and October 30, 1984, the Association filed an unfair practice charge and amended charges against the Board. The charge, as amended, alleges that a series of acts and statements by the Board's representatives intimidated and coerced Association members, discriminated against them because of their protected activity and amounted to a refusal to negotiate in good faith. The charge specifically alleges that the Board violated N.J.S.A. 34:13A-5.4(a)(1),(2),(3) and (5)[2/] when Webb and Eber

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adjustment of grievances; and (3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

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; (2) Dominating or interfering with the formation, existence or administration of any employee
(Footnote continued on next page)

allegedly coerced the Association's negotiations committee (Rose Garrison, Yvonne Bennett and Anita Ferguson) into agreeing to "informal" negotiations; stated that negotiating over binding arbitration would be futile, and threatened reprisals if the Association requested "formal negotiations". After the Association made that request, the Board allegedly refused to provide data for negotiations, conditioned further negotiations upon receiving certain information not tied to negotiations; engaged in the surveillance of an official of the Association's affiliate; disciplined acting Association President Linda Schreier and all three members of the Association's negotiations committee and granted a prescription drug plan to certain employees solely because they were not represented by the Association.

On August 23, 1984, all charges were consolidated and a Complaint and Notice of Hearing issued.3/

The Association filed an Answer. As to the first charge, the Association admits that Holden wrote the Board, but denies all

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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 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."

3/ A Complaint did not issue with respect to one subparagraph and the second count in the Association's charge.

other allegations. As to the second charge, it admits that Garrison signed the "Criteria for Informal Negotiations," but denies all allegations relating to the demand to negotiate directly with the Board. The Association also pleads two affirmative defenses: (1) the Board had unclean hands; and (2) the Board was estopped because of its own unfair practices.

The Board filed an Answer and an Amended Answer. It denies all allegations of intimidation, coercion, discrimination and failure to negotiate in good faith. The Board also pleads two affirmative defenses: (1) the Association had unclean hands; and (2) the Association was estopped because of its own unfair practices.

On October 31, November 1, 2, 5, 7, 26 and December 17 and 20, 1984, Hearing Examiner Alan R. Howe conducted hearings. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by March 12, 1985.

On April 15, 1985, the Hearing Examiner issued his report and recommended decision, H.E. No. 85-36, 11 NJPER 245 (¶16094 1985). We attach a copy.

With respect to the Board's charges, he found that Holden had attempted to influence the Board in the selection of its negotiations representative by objecting to Webb and Eber's participation. To remedy this violation of subsection 5.4(b)(2) he recommended the Association be required to post a notice. He further found that Holden had not engaged in surface bargaining over the issue of binding arbitration and therefore, the Association had

not violated subsection 5.4(b)(3). Finally, he found that the "Criteria for Informal Negotiations" entitled the Association to use a professional negotiator and, therefore, it had not violated subsection 5.4(b)(2).

With respect to the Association's allegations regarding negotiations, the Hearing Examiner found that the Board did not illegally obtain agreement to the "Criteria for Informal Negotiations" or refuse to negotiate in good faith by hard bargaining over binding arbitration; stating that the Association's "old team" (Garrison, Bennett and Ferguson) did not know how to negotiate and should act "more responsibly;" requiring that negotiations data be requested and paid for through its secretary; or conditioning further negotiations upon receipt of information not tied to bargaining. He found, however, that the Board illegally granted its supportive staff a non-contributory prescription plan superior to the teacher's negotiated contributory plan. He recommended requiring the Board provide teachers an equivalent non-contributory prescription plan, reimburse expenses incurred because of the differences in the plans, and post a notice.

With respect to the allegations of unlawful reprisals against negotiations team members, the Hearing Examiner found that the Board discriminatorily disciplined Garrison regarding the Powell visit and Bennett regarding her use of students. He recommended removal of the reprimands and related materials from their files and a notice. He found the Board did not retaliate against Schreier or

Ferguson, discriminatorily lower Bennett's evaluation, engage in illegal surveillance, or otherwise interfere with the exercise of employee rights.

Both parties filed numerous exceptions and replies.[4/]

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 5-23) are generally accurate. We incorporate them with these additions, modifications and corrections.

The Association excepts to some findings of fact missing explicit credibility determinations. We do not believe it is necessary in every case to state specifically that the testimony of one witness was credited over the testimony of another.

We supplement finding of fact no. 9 to add that Webb perceived that his negotiations role had always been coordinator. This perception implies that the "formal" negotiations team had included Board members.

We modify finding no. 11 to add that although Webb testified that the Board did not consider the January 9, 1984 meeting a negotiating session, his January 26 letter to Garrison contradicts that testimony. Also, Garrison and Bennett testified that Webb had told Association representatives that Tomlin and Dichter had already agreed to "informal negotiations".[5/]

4/ They except to almost every recommendation against them. The Association also requested oral argument. We deny that request; the parties have thoroughly briefed the issues.

5/ The Hearing Examiner did not determine whether Webb did so.

We further supplement finding no. 11 to add that Garrison, Bennett and Ferguson testified that Webb made clear that he would perceive the Association as being "cooperative" only if it agreed to sign the "Criteria for Informal Negotiations." Webb denied that testimony.[6/]

We modify finding no. 12 to add that Webb denied Bennett's testimony that he stated that aide positions could be cut and that teachers in special programs could be back in regular classrooms.[7/] We supplement this finding to add that Ferguson was a special education teacher who could lose her aides and that Garrison was a special program teacher who could be laid off if cutbacks were implemented.

We supplement finding of fact no. 14 to add that Webb's January 26 memorandum expressed his hope that the Association was "ready to proceed with negotiations in a more cooperative atmosphere than in the past."

We supplement finding no. 15 to add that Webb testified that he could have easily provided the information Holden requested, but it was not his responsibility. Also, Holden and Garrison testified that Webb stated to the Association's negotiating team

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6/ The Hearing Examiner did not resolve this conflict.

7/ Because the Hearing Examiner found that Bennett testified without contradiction, he did not make a credibility determination.

that Holden did not have the best interest of the teachers in mind and that it would be financially advantageous for Holden to draw out negotiations. Further, even though the Hearing Examiner credited Webb's testimony that Holden stated he did not wish to meet with Webb, the second part of Webb's testimony was that Holden stated "that he wanted to meet with the Board." Holden did not mention excluding Webb. Webb responded if Holden wished to discontinue "informal" negotiations, he should write to the Board. Webb also testified that Holden was willing to meet twice with Webb alone although Holden believed the continuation of "informal" negotiations would be futile absent agreement on binding arbitration. Also, Holden's letter of February 13, 1984 begins: "In accordance with the wishes of Superintendent Webb, we...hereby request that Board of Education members join negotiations at the bargaining table...."

We supplement finding no. 18 to show that the Board's March 15 proposal increased its work year demand by one day.

We supplement finding no. 19 to add that Powell inquired whether she and Lindsey could wait in the faculty room and Webb directed his secretary to say no. Also, Eber questioned whether Powell and Lindsey were NJEA representatives and when they answered yes, Eber stated that Webb said they could not go down to the faculty room. At 3:30 p.m. the secretary said it was okay to go down and see Garrison. Webb testified it was neither his nor his secretary's decision to tell someone whether they could meet, even though he felt the "meeting" violated the contract. Webb also

testified that he directed his secretary to tell him what time the "meeting" concluded. We modify footnote 9 to clarify that Powell's visit was to arrange for, not to hold a meeting in Downe Township. That meeting was held on April 14, 1984. Footnote 10 incorrectly states there was no testimony indicating that an insurance agent was treated differently from Powell and Lindsey. Webb testified the agent has been permitted to see teachers during their duty-free lunch period because "that's their time."

We supplement finding no. 22 to add Webb's testimony that a copy of his March 28, 1984 letter to Garrison was not placed in her file.

We supplement finding no. 26 to add that Webb testified that students have been allowed, and would continue to be allowed, to go to the faculty parking lot and get something from a teacher's car. Bennett testified the students were sent out when the class was playing subject-related games rather than hearing a lecture.

We modify finding no. 27 to state that Eber, not Webb, wrote Bennett's Evaluation Report and Improvement Plan.

We supplement finding no. 28 to add that Schreier was the Association's acting president and treasurer when she attended negotiations and received the Conference Report. The Conference Report, the first one Schreier received in four years, was entitled "Parent Meetings: Student Confidentiality." The Report was allegedly issued because: (1) courtesy warrants that appointments be made before speaking to parents, and (2) confidentiality requires

that parent conferences be held in private. There was no allegation that Schreier failed to attend to bus duty. When Schreier had previously spoken to a grandparent about a child, the grandparent was a school employee and the child's parent was a Board member. Eber testified that she spoke to Schreier and told her that the conversation was inappropriate because it was a public place (she was on bus duty) and because teachers should discuss a child only with the child's parents or legal guardians. Bus duty involves waiting in the office for buses to arrive, after which the teacher rings the bells so that the students will be released from their classes. During the incident which generated the Conference Report, no buses arrived and Schreier was not required to ring the bells or supervise any students.

We modify finding no. 29 to clarify that Ferguson first became involved in negotiations in her third year of teaching. Also, Webb testified he told Ferguson that she was marginal at the same time he gave her an Annual Performance Report and a Job Description Evaluation Report; these documents, however, do not indicate marginal status. Webb testified that he retained Ferguson for the third year because her special education position is particularly tough to fill. He hired three new non-tenured special education teachers for the year following Ferguson's non-renewal. We add to footnote 13 that upon leaving the April 6, 1984 meeting with Webb, Ferguson found a letter from Webb in her mailbox rejecting as untimely her written response to her March 15th "Needs Improvement" evaluation.

We supplement finding no. 30 to add that Ferguson's mailgram requested that the Board postpone its decision on her renewal until after she conveyed her side of the story. We clarify that the Board considered several routine matters before its executive session. President Read testified that he had received the mailgram and had seen Ferguson in the audience before the Board's caucus. During the executive session, the Board discussed Powell's letter of March 26 and Webb's recommendation that Ferguson's contract not be renewed. The Board also voted at this meeting to give the supportive staff the non-contributory prescription plan. After the Board voted not to renew Ferguson's contract, NJEA representative Peraset asked to speak. Read responded that the situation was moot since the Board had already voted. Peraset insisted and Read then allowed him to speak for 60 seconds.

We modify finding no. 35 to clarify that although the supportive staff had traditionally received the same benefits as the teachers, in 1982 the Association had negotiated a cap on Board contributions for medical insurance premiums and the cap was not applied to the supportive staff. Also, the teachers enjoy two professional days leave annually that non-teachers do not. Although a prescription plan for aides was discussed as far back as the spring of 1982, the Board did not extend the plan to the aides until April 1984.

I. Board's Charges Against Association

We first consider whether the Association violated subsection 5.4(b)(2) through its negotiator Alan Holden. The Hearing Examiner concluded that it did. We disagree.

We have not decided a case involving subsection 5.4(b)(2). Therefore, it is appropriate to resort to federal cases interpreting section 8(b)(1)(B) of the Labor Management Relations Act, 29 U.S.C. §151 et seq.("LMRA"), the private sector counterpart, as an aid in interpreting our Act. See In re Bridgewater Township, 95 N.J. 235, 240-41 (1984).[8/] In order to establish a violation of this section, the charging party must establish a coercive pattern of union conduct designed to interfere with the employer's choice of representative for purposes of collective bargaining. Thus, in Union Independiente de Empleados de Servicios Legales de Puerto Rico, 249 NLRB No. 147, 104 LRRM 1433 (1980), the union obtained the discharge of the employer's personnel-relations officer through picketing, threats of strike and violence, and by directing its members not to fill out questionnaires the employer needed to obtain

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8/ Section 8(b) of the LMRA states that "[i]t shall be an unfair labor practice for a labor organization or its agents to (1) restrain or coerce...(b) an employer in the selection of his representative for the purposes of collective bargaining or the adjustment of grievances." Subsection 5.4(b)(2) parallels this language, but adds "Interfering with." Compare subsection 5.4(b)(2) in footnote 1, supra. Subsection 5.4(b)(1) also includes "Interfering with" which section 8(b) does not, but has not been interpreted differently. See Kaczmarek v. New Jersey Turnpike Authority, 77 N.J. 329, 345 (1978), (Pashman J., concurring).

financing. Similarly, in Teamsters Local 610 (Bianco Mfg. Co.), 236 NLRB No. 127, 98 LRRM 1406 (1978), the union threatened to make upcoming negotiations difficult unless the employer discharged a foreman; within 30 minutes the employer did so. See also, Local 259, UAW (Atherton Cadillac), 225 NLRB No. 55, 92 LRRM 1417 (1976) (union repeatedly demanded service manager's discharge; shortly after the discharge, union lowered its demands and agreed to negotiate past strike deadline); NLRB v. Local 964, Carpenters, 447 F.2d 643, 78 LRRM 2167 (2d. Cir. 1971) (strike and refusal to bargain until employers left multi-employer bargaining association); ITO Corp. (ILA Local 1329), 246 NLRB No. 122, 102 LRRM 1682 (1979), (work stoppage to force demotion of grievance representative). By contrast, in a case with facts closely tracking this case's facts, the NLRB found that the union had not violated section 8(b)(1)(B). Teamsters, Local 427 (Edward D. Sultan Co.), 223 NLRB No. 202, 92 LRRM 1144 (1976). There, the head of the union's Joint Council told the employer's president that his negotiations representative "doesn't know anything" and asked the president why he did not use a multi-employer association. The NLRB found no evidence that the union had refused to bargain.

Applying these principles, we hold that the Association's conduct was not coercive and therefore did not violate subsection 5.4(b)(2). Although Holden told Webb he did not want to meet with him, he added that he wanted to meet with the Board. Holden wanted to move negotiations from the "informal" to the "formal" stage, pursuant to the parties' understanding, and Webb understood that

desire. Webb told Holden that if he wished to discontinue "informal" negotiations, Holden should write the Board. Holden was also willing to continue "informal" negotiations with Webb and Eber for two additional sessions.

The Hearing Examiner found that Holden's letter of February 13, 1984 stated that the Association did not think it in the best interest of the District to send Webb and Eber to negotiations because they evaluate teachers. When, however, this statement is read in its proper context, just after a request that Board members "join" negotiations, it is apparent that Holden was merely expressing a dissatisfaction with "informal" negotiations and wished to exercise the Association's right pursuant to the parties' understanding to proceed to "formal" negotiations.

In his February 26 letter to Read, Holden wrote that the Association has "requested the presence of you and of the Board of Education at negotiations." We agree with the Hearing Examiner that this letter and Holden's actions at the negotiations sessions of March 8 and March 15, 1984 did not violate subsection 5.4(b)(2). Holden's actions, viewed in their totality, did not rise to the level of a refusal to negotiate or a threat of reprisals if Webb and Eber continued as either all or part of the Board's negotiations team. Again, Holden merely expressed a dissatisfaction with the "informal"
negotiations and a desire to move on to "formal" negotiations which meant the participation of Board members. In the eyes of Webb and

Eber, Holden's action may have seemed counterproductive, but under all the circumstances, we conclude that the Association did not violate subsections 5.4(b)(2) or (3).

The Hearing Examiner next concluded that Holden's demand that binding arbitration be incorporated into the collective negotiations agreement was not illegal surface bargaining. We do not rule on this issue because it was not pled. See New Jersey Dept. of Higher Education, P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985).

We next consider whether Holden's request to move on to "formal" negotiations violated the joint "Criteria for Informal Negotiations" and was an illegal refusal to negotiate. We agree with the Hearing Examiner that this document recognized the Association's right to bring in a professional negotiator and find no violation.[9/] We also find, based on this analysis, that the Association's conduct in light of the joint agreement did not violate subsection 5.4(b)(2) or (3).

Accordingly, we dismiss the allegations that the Association violated the Act.

II. Association's Charges Against The Board

A. "Informal" Negotiations-Related Allegations

(1) The Association alleges that Webb and Eber coerced the Association's negotiations committee into signing the "Criteria for

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9/ The Association's request to meet directly with the Board, not Holden's presence, was the gravamen of the charge.

Informal Negotiations." Conduct that coerces an organization into restricting the membership of its negotiations team violates subsection 5.4(a)(2). We agree with the Hearing Examiner, however, that the record does not support finding a violation.[10/]

In North Brunswick Twp. Bd. of Ed., P.E.R.C.. No. 80-122, 6 NJPER 193 (¶11095 1980), the Board's refusal to meet with a negotiations committee because it included members of the Board's other negotiations units violated subsections 5.4(a)(1) and (5), but not, absent other interference, 5.4(a)(2). Here, by contrast, the Board did not refuse to negotiate if the joint agreement was not signed. While some members of the Association's team may have felt pressured to sign the document, the record as a whole indicates they signed voluntarily. Webb made no threats and the Association members could have left and refused to sign.[11/]

The Association also alleges that the Board's conduct independently violated subsection 5.4(a)(1). New Jersey Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979), articulates the standard:

10/ The Hearing Examiner did not address whether the Board's conduct violated subsections 5.4(a)(1) and (5) and incorrectly found that the Association had not alleged a violation of subsection 5.4(a)(2).

11/ The Hearing Examiner did not determine whether: (1) Webb told the Association representatives that Tomlin and Dichter agreed to informal negotiations or (2) Webb referred to "cooperation" at this meeting. However, even if Webb made these statements, his conduct surrounding the signing of the document did not violate subsections 5.4(a)(1), (2) or (5).

> It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. Id. at 551, n. 1.

We have held that Webb's conduct was not coercive and that the Association representatives voluntarily agreed to "informal" negotiations. We find no independent violation of subsection 5.4(a)(1).

In sum, the Association has not proved that Webb, in obtaining agreement to the "Criteria for Informal Negotiations," violated the Act.

(2) The Association alleges that Webb violated subsection 5.4(a)(1) by threatening employees with cuts in pay, reductions in force and layoffs if the Association did not continue with "informal" negotiations. In finding of fact no. 12, the Hearing Examiner reported that Bennett testified without contradiction[12/] about the alleged threats, but nevertheless recommended dismissal of this Complaint. According to Bennett's testimony, the alleged threats, including the need to pay for the Board's negotiator out of the teachers' salary fund, were potential consequences of the Board's increased expenses

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12/ We note, however, that Webb did testify on this point, but denied making these statements. However, since we find no violation, it is not necessary to resolve this credibility issue.

in "formal" negotiations. While these statements may have hardened the parties' positions, in the context in which these statements were made, they would not quite have risen to the level of an unfair practice. We therefore find no violation.

(3) The Association alleges that the Board violated subsections 5.4(a)(5) and, derivatively, (a)(1) when Webb stated that if the Association requested "formal" negotiations, it would remove previously agreed-upon matters from the table. For the reasons we found no violation when the Association brought in Holden as its negotiator, we find no violation here. The mutually agreed-upon "Criteria for Informal Negotiations" provided that "[i]f a settlement is not reached within this framework, all proposals are withdrawn and formal negotiations will be scheduled." Webb's statements legally recited the Board's right to start afresh.

(4) The Association alleges that Webb's calling its demand for binding arbitration futile violated subsection 5.4(a)(5). The Hearing Examiner, however, correctly applied the test for determining whether an employer has engaged in bad faith or surface bargaining.

State of New Jersey and Council of New Jersey State College Locals, NJSFT-AFT/AFL-CIO, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (1976) stated:

> [i]t is necessary to subjectively analyze the totality of the parties' conduct in order to determine whether an illegal refusal to negotiate may have occurred....It is well established that the duty to negotiate in good faith is not inconsistent with a firm position on a given

> subject. 'Hard bargaining' is not necessarily inconsistent with a sincere desire to reach an agreement.
> 1 NJPER at 40. (footnotes omitted)

See also, Ocean County College, P.E.R.C. No. 84-99, 10 NJPER 172 (¶15084 1984).

During "informal" negotiations Webb stated that "hell would freeze over" before the Association would ever obtain binding arbitration, and that it was "spinning wheels" and "out in left field." During "formal" negotiations, however, McGinnis reopened discussions over binding arbitration. Thus, viewing the totality of the circumstances, we conclude that the Board merely engaged in hard bargaining.

The Hearing Examiner concluded that Webb did not violate subsection 5.4(a)(5) by telling Garrison that the Association should act "more responsibly" in the future or by stating that the "old team" did not know how to negotiate. We do not rule on this issue because it was not pled.

B. Alleged Reprisals

The Association alleges that after "informal" negotiations broke down, the Board took reprisals against the Association leadership. Timing is an important factor in assessing motivation and understanding the context of these events. See, e.g., Jim Causley Pontiac v. NLRB, 620 F.2d 122, 104 LRRM 2190, 2193 (6th Cir. 1980); NLRB v. Warren L. Rose Castings, Inc., 587 F.2d 1005, 100 LRRM 2303 (9th Cir. 1978); and NLRB v. Florida Tile Co., 557 F.2d 576, 95 LRRM 3009 (6th Cir. 1977). A chronology of important events follows:

January 25	Association informs Webb it wants "formal" negotiations.
February 1	Webb tells Morrissey that if Association pursues Tomlin matter "I'll stick it up your keister."
February 9	Holden enters negotiations
February 22	Board tells Holden he must comply with Board procedures for obtaining negotiations data.
March 8 & 15	Negotiations sessions break off with statement that Board's response would come from PERC.
March 19	Powell and Lindsey visit.
March 20	Webb and Garrison meet about this visit.
March 21	Board files charges.
March 26	Powell writes to Read complaining about Webb several days after telephoning.
March 27	Ferguson receives "Needs Improvement" evaluation from Webb.
March 28	Webb writes separately to Garrison, Powell and Lindsey about alleged contract violation.
April 2	Ferguson first learns of non-renewal.
April 3	Eber observes Bennett.
April 4	CCEA holds meeting in Downe Township.

	Schreier receives "Conference Report."
April 6	Webb tells Ferguson to follow proper procedure and refuses to accept her rebuttal.
April 9	Board meets and discusses Powell's letter, Ferguson's non-renewal, and prescription plan for supportive staff.
April 10	Webb tells Garrison not to deal directly with Board.
	Bennett receives "Satisfactory" evaluation.
April 12	Eber informs supportive staff of prescription plan.
April 16	Bennett receives "Conference Report";
	Giordano reception.

Some of the Board's conduct discriminated against some employees and interfered with their protected activity. Other conduct reflected a desire to play "hard ball" near but within the boundaries of the law. We first address the allegations of reprisals against the negotiations team and the Association's acting President.

(5) The Association alleges that Webb and Eber engaged in the surveillance of Powell when she and Lindsey visited Garrison at

the elementary school, thus violating subsection 5.4(a)(1). The Hearing Examiner found that the Association did not prove this allegation. We agree.

The sole evidence of surveillance was that Webb directed his secretary to note what time Powell and Lindsey left the school building. Webb had a legitimate, although ultimately incorrect, concern that the Association might have breached the collective negotiations agreement by meeting on school grounds. Compare NLRB v. Historic Smithville Inn, 414 F.2d 1358, 71 LRRM 2972 (3rd Cir. 1969).13/

We also do not find that Webb's conduct created the impression of surveillance. The knowledge about the "meeting" that Webb communicated to Garrison and Read does not appear any deeper than Webb's knowing the time that Powell and Lindsey left the school grounds. Accordingly, we find no violation of subsection 5.4(a)(1).

(6,7) The Association alleges that Webb and Eber's questioning, accusations, reprimands and threats of future discipline stemming from the Powell visit violated subsections 5.4(a)(1) and (3). The Hearing Examiner agreed. So do we.

In Black Horse Pike Regional Board of Education, P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), we set out the standard for analyzing whether a reprimand violates subsection 5.4(a)(1).

13/ While insurance agent Allen is allowed to visit with teachers during lunch, his visits do not raise the possibility of a contract violation and so this limited disparate treatment by Webb is not unlawful surveillance.

> The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity.
> Id. at 504.

While Webb may have been justified in initially questioning negotiations team member Garrison as to her role in the Powell visit, his actions following her explanation of the brief encounter tended to chill protected activity. In particular, Webb gave Garrison a written reprimand with copies to the Board; threatened her with insubordination if she defended her position to the Board and threatened to proceed with litigation against Garrison and the Association.

The Board points out that after being disciplined for her Association activity, Garrison was most concerned about her position as an employee. Subsection 5.4(a)(1) seeks to prevent precisely this result. An employee representative should not have to defend her employee status because of her protected activity. We find that Garrison was illegally put in that position.14/

(8) The Association alleges that Webb and Eber issued a Conference Report to Bennett for "Inappropriate Use of Students." The Hearing Examiner concluded the Board violated subsections 5.4(a)(1) and (3). We agree.

14/ We need not decide whether Webb's conduct violated subsection 5.4(a)(3) because the remedy would be the same.

In Bridgewater, the Supreme Court established a two-part test for considering allegations of discriminatory conduct. In assessing employer motivation, the charging party must first prove that protected activity was a substantial or motivating factor. If proved, the burden shifts to the employer to demonstrate that the same action would have taken place even absent the protected activity. 95 N.J. at 242. Because it is rare that direct evidence of hostility exists, the Supreme Court recognized that hostility can be inferred from circumstantial evidence that (1) the employee engaged in protected activity; (2) the employer had knowledge of this activity; and (3) the employer was hostile toward the exercise of protected rights. 95 N.J. at 246-247.

Applying these standards, we find that Bennett's protected activity was a motivating factor in the Board's decision. Bennett was one of three members of the Association's negotiating team during "informal" negotiations. Webb was unhappy with this team's performance and doubly unhappy that the Association pressed for "formal" negotiations. All members of this team became subjects of discipline or disputed personnel actions within a concentrated period of time. The Conference Report itself and Bennett's subsequent evaluations refer to her Association activity as the source of the discipline.

We now consider whether the Board has proved that Bennett would have been disciplined absent her protected activity. We find it did not. Bennett had been employed three years and had never

received a "Conference Report." She had sent students to the parking lot several times to get refreshments without incident. Webb testified that students had been allowed and would continue to be allowed to get things from cars in the faculty parking lot. The students were not missing any instruction or being asked to become involved in Association business. They merely went to their teacher's car as they had done in the past to bring in some refreshments. We therefore find that the Board did not establish by a preponderance of the evidence that it would have disciplined Bennett absent her protected activity. We thus find a violation of subsection 5.4(a)(3).15/

The language of the "Conference Report" is also overbroad since it states that Bennett "should refrain from participating in union activities during her regular work day." Such a restriction illegally tends to prohibit union activity during duty-free lunches and breaks. See, e.g., Our Way, 268 NLRB No. 61, 115 LRRM 1009 (1983). Accordingly, the Board violated subsection 5.4(a)(1) independently.

(9) The Association alleges that Eber discriminated against Bennett with regard to an observation and the satisfactory, rather than commendable, evaluation following that observation. Just before to the breakdown of "informal" negotiations Bennett received

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15/ We are not holding that teachers or school boards have a license to involve students in their disputes. Asking a student to bring in a cake is not asking a student to take sides.

two "commendable" evaluations. Just after, she was rated "satisfactory." In the end, though, Bennett received tenure and we find that the alleged discrimination did not result in any adverse consequences. Compare, Collingswood Bd. of Ed., P.E.R.C. No. 86-50, 11 NJPER ___ (¶_____ 1985). Accordingly, we need not address the merits of this allegation.

(10) The Association alleges that Eber retaliated against Schreier for her Association activity by reprimanding her for speaking to a parent. The Hearing Examiner, finding a lesser quantum of protected activity than in Mt. Holly Township Bd. of Ed., P.E.R.C. No. 85-81, 11 NJPER 94 (¶16040 1985), determined that it was not a substantial or motivating factor. Under Bridgewater, however, any level of protected activity could satisfy the first part of the test if that activity motivated the discipline.

Schreier was the Association's acting president when she received this reprimand, her first in four years. The incident occurred just before the CCEA meeting arranged during the Powell visit, a visit which precipitated illegal Board conduct. (See discussion of allegations (6,7)). Further, the Board shifted its reason for this discipline. Morris, The Developing Labor Law (2nd Ed. 1983) at 193; Coca-Cola Bottling Co., 232 NLRB No. 125, 97 LRRM 1290 (1977). Under all these circumstances, the first part of the Bridgewater test has been met.

The Board has not demonstrated it would have reprimanded Schreier absent her protected activity. Her conversation with the

parent was brief and did not interfere with her duties. As stated, the Board shifted its reasons for reprimanding Schreier and, in any event, either reason appears pretextual. Accordingly, the Board violated subsections 5.4(a)(1) and (3).

(11-12) The Association alleges that the Board and Webb discriminated against Ferguson because of her protected activity by rating her as "Needs Improvement" and failing to renew her contract. The Hearing Examiner found that the Association did not meet the first part of the Bridgewater test. We disagree. He also found that her contract would not have been renewed absent her protected activity. We agree.

Ferguson's protected activity was a "substantial" or "motivating" factor in Webb's decision to give her a "Needs Improvement" evaluation and in the Board's decision not to renew her contract. Again, all three of the members of the Association's negotiations team were disciplined within a concentrated period of time immediately following Webb's displeasure with their role in negotiations. Immediately preceding negotiations, she received two satisfactory evaluations. Just after the breakdown of "informal" negotiations she was rated "unsatisfactory." Further, the Board was unwilling to hear testimony on April 9 and May 21 concerning whether anti-union animus motivated Webb's non-renewal recommendation.

Nevertheless, the Board presented credible evidence that Ferguson would not have been renewed even absent her protected activity. Specifically, the Board showed that she had received five

"Needs Improvement" ratings out of ten, four of which preceded the troubled negotiations. We conclude, therefore, that the Board did not violate subsections 5.4(a)(1) and (3).

C. Alleged Interference with Employee Rights

We next address the Association's allegations of unlawful Board conduct directed at the Association during "formal" negotiations.

(13) The Association alleges that granting a non-contributory presciption plan to supportive staff violated subsections 5.4(a)(1) and (3). The Hearing Examiner instead found that the Board violated subsection 5.4(a)(5) based on American Lubricants, 136 NLRB No. 83, 49 LRRM 1888 (1962). We find a violation of subsections 5.4(a)(1) and (3), but not (5).

In American Lubricants, all employees had received bonuses every Christmas since 1949. A union was certified in August 1959 for one group of employees. At contract negotiations, the employer claimed a managerial prerogative to grant or deny bonuses. After executing the contract, the employer unilaterally discontinued bonuses to unit employees while continuing payments to non-unit employees.

The Trial Examiner in American Lubricants found that the employer violated section 8(a)(5) of the LMRA by acting unilaterally and section 8(a)(3) by treating represented and unrepresented employees disparately. The NLRB found a violation of section 8(a)(5) but declined to pass on the alleged section 8(a)(3)

violation because the remedy would be the same. Chairman McCulloch asserted that the employer also violated section 8(a)(3).

In our case, the Board did not refuse to negotiate over a prescription plan (not an issue in the reopener negotiations) and did not change unit member benefits. Thus, the section 8(a)(5) analysis of American Lubricants is inapposite. Its disparate treatment analysis, however, supports finding a violation of subsection 5.4(a)(3).

The Board relies on Borough of Avalon, P.E.R.C. No. 84-105, 10 NJPER 180 (¶15090 1984) aff'g H.E. No. 84-38, 10 NJPER 155 (¶15076 1984). There the employer granted a paid holiday to management personnel while denying it to unit personnel. Prior to the union contract, those unit employees had always had the same paid holiday. However, unit employees had other holidays which the non-union personnel did not have and employees in another unit had received more holidays than any other employees. Finding the difference between holiday benefits to be legally insignificant and absent other evidence of anti-union animus, the Hearing Examiner recommended dismissal of the Complaint. In the absence of exceptions, that result was adopted.

Borough of Avalon is distinguishable. Here, teachers and supportive staff have historically received similar benefits and other evidence suggests animus stemming from negotiations.16/

16/ The Board also relies on McCulloch Corp., 132 NLRB No. 24, 48 LRRM 1344 (1961) and Hemet Castings Co., 260 NLRB No. 60, 109 LRRM 1292 (1982). Both cases, however, were limited to allegations that the employers violated section 8(a)(5) and neither sheds any light on the issue of discriminatory motivation under subsection 5.4(a)(3).

Although it may have discussed the extension of plan benefits to the supportive staff in 1982, the Board did not present any evidence that these discussions contemplated that those benefits would have exceeded the teachers' benefits. To the contrary, the Board has traditionally granted benefits to its supportive staff similar to those negotiated for teachers. The Board decided to give the supportive staff greater benefits at the same meeting in April 1984 that it discussed Powell's letter complaining about Webb and the non-renewal of Ferguson's contract. Also, Eber told the supportive staff that the Board was granting them the greater benefits because it did not have to negotiate with the supportive staff. Therefore, it is reasonable to infer from the foregoing that the Board was suggesting that the teachers were being penalized for the Association's representation. Accordingly, we hold that anti-union animus motivated granting the supportive staff the non-contributory prescription plan and that the Board did not prove that, absent its animus toward the Association, it would have granted these employees a greater benefit than the teachers received. We therefore find that the Board violated subsections 5.4(a)(3) and, derivatively, (a)(1).

(14) The Association alleges that the Board violated subsections 5.4(a)(1) and (5) by refusing to give Holden data concerning tax rates and school budgets. He requested the information several times; each time he was referred to the Board's secretary. On February 22, Read sent Holden the Board's procedures for examining public records and obtaining copies at $1.00 per page.

The Hearing Examiner found that the Board's conduct did not violate subsection 5.4(a)(5). We disagree.

In Shrewsbury Bd. of Ed., P.E.R.C. No. 81-119, 7 NJPER 235 (¶12105 1981), following NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 LRRM 2042 (1956) and NLRB v. Acme Industrial Co., 385 U.S. 432, 64 LRRM 2069 (1967), we held that a complete refusal to provide relevant information violates subsections 5.4(a)(1) and (5). In City of Union City and Union City FMBA Local 12, P.E.R.C. No. 83-162, 9 NJPER 394 (¶14179 1983), we held that an employer which supplies budget, payroll records and all other requested financial data, but not budget "worksheets," did not refuse to negotiate in good faith.

In Cincinnati Steel Castings Co., 86 NLRB No. 83, 24 LRRM 1657, 1658 (1949), the NLRB held that an employer's response "is sufficient if the information is made available in a manner not so burdensome or time-consuming as to impede the process of bargaining."[17/] We therefore find that the Board did not violate the Act when it required the Association make its request to the Board's secretary.

Prior to the breakdown of "information" negotiations, the Board provided requested data for free. Once "formal" negotiations

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17/ The Hearing Examiner incorrectly reported Trustees of Boston University, 210 NLRB No. 48, 86 LRRM 1336 (1974). There, a refusal to provide budget information violated the LMRA.

began, it required the Association pay $1.00 per page.[18/] Because the costs involved are insubstantial, we find that the Board must bear the costs of supplying the Association with the routine information necessary for the conduct of negotiations which the Act requires. See Goodyear Atomic Corp., 266 NLRB No. 160, 113 LRRM 1057 (1983), aff'd __ F.2d __, 116 LRRM 3023 (6th Cir. 1984); General Motors Corp., 243 NLRB No. 19, 101 LRRM 1461 (1979); see also, O'Reilly, Unions' Rights to Company Information, Labor Relations and Public Policy Series No. 21 (1980). In contrast, when substantial costs are involved, the parties must negotiate in good faith as to the allocation of costs. Absent agreement, the Board must grant the Association access to the records from which this information can be derived. IAM Lodge 73 v. United Aircraft Corp., 534 F.2d 422, 90 LRRM 2272 (2d Cir. 1975), aff'g in part, rev'g in part United Aircraft Corp., 192 NLRB No. 62, 77 LRRM 1785 (1971), (insisting that union pay for preparing and reproducing company records did not violate section 8(a)(5) of the LMRA when amount requested cost well over $50,000 to prepare and reproduce.)[19/]

18/ Although the Right to Know Law is not within our jurisdiction, $1.00 per page for copies appears to exceed its mandate. N.J.S.A. 47:1A-2 provides:

First page to tenth page	$0.50 per page
Eleventh page to twentieth page	0.25 per page
All pages over 20	0.10 per page

19/ Because this is a case of first impression, we will not require the Board to post a notice of this violation.

(15) The Association alleges that McGinnis conditioned further negotiations upon receiving certain information not tied to bargaining. The Hearing Examiner found, given all the circumstances, no violation. We agree.

The Association first raised the issue of binding arbitration and cited alleged acts of intimidation, threats and loss of privileges to support this demand. The Board's request for details concerning these alleged acts was not in itself illegal; the Association could have simply said no. While a flat refusal to negotiate further might have violated the Act, the Board resumed negotiations. We thus find that the Board did not violate subsections 5.4(a)(1) or (5).

(16) The Association alleges that Webb unlawfully interrogated and reprimanded five Association members about the Giordano reception. The Hearing Examiner found insufficient supporting evidence. We agree. Although the meetings were called to police the use of school facilities for Association purposes, they were not coercive and ended with Webb assuring the teachers they would not be disciplined. Webb's questions neither discriminated against these employees nor interfered with their rights. We thus find no violation of subsections 5.4(a)(1) and (3).

The Association excepts to certain aspects of the Hearing Examiner's recommended remedies. Specifically it urges relief that goes beyond a cease and desist order and a notice. We reject these exceptions. A cease and desist order will presumably stop future

violations, and in light of the small workforce, a notice should inform all interested employees of any violations.[20/]

ORDER

The Downe Township Board of Education is ordered to:

A. Cease and desist from:

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

2. Discriminating in regard to hire or tenure or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, by reprimanding employees such as Bennett and Schreier for engaging in protected activities and by granting a non-contributory prescription plan to certain employees solely because they were not represented by the Association.

3. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by the Act by reprimanding employees such as Garrison for engaging in protected activity.

4. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms

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20/ We note that the Director of Representation blocked proceedings over a representation petition pending resolution of these unfair practice proceedings. We have now resolved all unfair practice issues and we assume the Board will post notices and otherwise comply with all remedies. In light of these developments, the Director of Representation may resume the representation proceedings.

and conditions of employment of employees in that unit, by failing to provide requested data for negotiations at no cost to the Association.

B. Take the following affirmative action:

1. Remove from Garrison's personnel file any reprimand and material related to the Powell visit.

2. Remove from Schreier's personnel file any reprimand and material related to the April 3, 1984 discussion with a parent.

3. Remove from Bennett's personnel file any reprimand and material related to her April 15, 1984 use of students.

4. Eliminate any differences between the prescription plans of the members of the collective negotiations unit and the supportive staff. Also, reimburse any employee in the Association unit for expenses incurred since September 1, 1984, which are directly attributable to any economic differences between the two plans.

5. Provide the data for negotiations at no cost to the Association upon appropriate request to the Board's secretary.

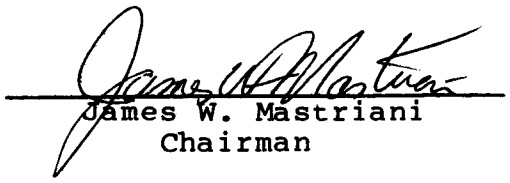
6. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall immediately be signed by the Respondent's authorized representative and posted, and shall be maintained by 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.

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

The Association's Complaint regarding the remaining allegations is dismissed.

The Board's Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Johnson, Suskin and Wenzler voted in favor of this decision. However, Commissioners Suskin and Wenzler dissented from finding the Board committed an (a)(3) violation by calling the charging party into a conference as discussed on page 25 of the decision. None opposed. Commissioner Hipp abstained.

DATED: Trenton, New Jersey
November 18, 1985
ISSUED: November 19, 1985

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.

WE WILL NOT discriminate in regard to hire or tenure or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, by reprimanding employees such as Bennett and Schreier for engaging in protected activities and by granting a non-contributory prescription plan to certain employees solely because they were not represented by the Association.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed by the Act by reprimanding employees such as Garrison for engaging in protected activities.

WE WILL remove from Garrison's personnel file any reprimand and material related to the Powell visit.

WE WILL remove from Schreier's personnel file any reprimand and material related to the April 3, 1984 discussion with a parent.

WE WILL remove from Bennett's personnel file any reprimand and material related to her April 15, 1984 use of students.

WE WILL eliminate any differences between the prescription plans of the members of the collective negotiations unit and the supportive staff. We will also reimburse any employee in the Association unit for expenses incurred since September 1, 1984, which are directly attributable to any economic differences between the two plans.

DOWNE TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

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

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

H.E. NO. 85-36

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

In the Matter of

DOWNE TOWNSHIP BOARD OF EDUCATION,

Charging Party & Respondent,

-and-

DOCKET NOS. CE-84-22-29
CE-84-24-30
CO-84-315-31

DOWNE TOWNSHIP EDUCATION ASSOCIATION,

Respondent & Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Board violated Subsections (a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act as follows: (1) when the Board in April 1984 granted a non-contributory prescription plan to its unrepresented Supportive Staff, which was superior to the partially contributory prescription plan negotiated with the teachers represented by the Association during the course of collective negotiations on a reopener; and (2) reprimanded two of its teachers, one of whom attempted to communicate directly with members of the Board and the other who had engaged in protected activities during the work day without having previously been informed that such activity was not permitted, which was deemed analagous to the violation of an illegally promulgated no-solicitation rule.

The Hearing Examiner also recommended that the Commission find that the Association violated Subsection 5.4(b)(2) of the Act when its professional negotiator attempted to influence the Board in the selection of its representative for the purposes of negotiations, in particular the negotiator objected to the participation in the negotiations of the Board Superintendent and Building Principal.

By way of remedy, as to the grant of the non-contributory prescription plan, the Hearing Examiner recommended that the Board forthwith grant to the teachers represented by the Association a non-contributory prescription plan equivalent to that granted to the Supportive Staff, retroactive to September 1, 1984, and, further, that the Board reimburse any teacher for the expenses incurred as a result of any difference between the teachers' partially contributory prescription plan and the Supportive Staff's non-contributory prescription plan.

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. 85-36

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

In the Matter of

DOWNE TOWNSHIP BOARD OF EDUCATION,

Charging Party & Respondent,

-and-

DOWNE TOWNSHIP EDUCATION ASSOCIATION,

Respondent & Charging Party.

Docket Nos. CE-84-22-29
CE-84-24-30
CO-84-315-31

Appearances:

For the Board, Ralph Henry Colflesh, Jr., Esq.

For the Association, Selikoff & Cohen, Esqs.
(Steven R. Cohen, Esq. and Carol F. Laskin, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge, Docket No. CE-84-22-29, was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 21, 1984 by the Downe Township Board of Education (hereinafter the "Board") alleging that the Downe Township Education Association (hereinafter the "Association") 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 Alan Holden, a representative of the Association, had on February 13, 1984, during negotiations on a reopener in the current agreement, communicated directly with the President of the Board, with copies to the members of the Board, wherein Holden specifically requested that the Board members join directly in the negotiations without the participation of the Superintendent; and that Holden refused to negotiate with the Superintendent despite the Board's designation of the Superintendent as its representative, Holden claiming that the Superintendent and the Building Principal could not

conduct negotiations because they were responsible for the evaluation of teachers; and on February 26, 1984 Holden reiterated his demand that the members of the Board directly negotiate with the Association, and demanded further that the Board President attend the next negotiations session; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(2) and (3) of the Act. 1/

A second Unfair Practice Charge, Docket No. CE-84-24-30, was filed with the Commission on March 21, 1984 by the Board alleging that the Association had engaged in additional unfair practices within the meaning of the Act, in that the Association, by its representative, Rose Garrison, executed a document entitled "Criteria for Informal Negotiations" on January 9, 1984, and thereafter brought Holden, an NJEA Negotiations Consultant, into negotiations whereupon Holden proceeded to object to the presence of the Superintendent as a representative of the Board in negotiations thereby restraining the Board in the selection of its negotiations representative, all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(b)(2) and (3) of the Act. 2/

A third Unfair Practice Charge, Docket No. CO-84-315-31, was filed with the Commission on May 16, 1984 by the Association, alleging that the Board had engaged in unfair practices within the meaning of the Act, in that the Board, acting through its agents, William McGinnis, Jr., the Board's professional negotiator, Superintendent Joseph Webb and Building Principal Mary Ann Eber violated the Act as follows: (1) on or about January 23, 1984 Webb and Eber threatened employees with pay cuts, a reduction in force and layoffs if they did not continue with "informal negotiations"; (2) on or about January 23, 1984 Webb and Eber

1/ These Subsections prohibit public employee representatives or their agents from:
"(2) Interfering with, restraining or coercing a public employer in the selection of his representative for the purposes of negotiations or the adjustment of grievances.
"(3) Refusing to negotiate in good faith with a public employer, if they are the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit."

2/ See footnote 1, supra.

indicated that if Association members requested "formal negotiations" they would "remove all previously agreed upon matters from the table"; (3) on or about January 23, 1984 Webb and Eber indicated that negotiating over binding arbitration would be futile; (4) on or about February 9, 1984, February 13, 1984 and March 15, 1984 the Association's representatives requested data for negotiations, which request has been refused by the Board; (5) on about March 19, 1984 Webb and Eber engaged in the surveillance of the activities of Joyce Powell, a representative of the Cumberland County Education Association; (6) on or about March 20, 1984 Webb and Eber interrogated an employee regarding that employee's alleged activities on behalf of the Association as to Powell; (7) in or about early April, 1984 Eber discriminated against Yvonne Bennett with regard to an observation in the classroom because Bennett was active on behalf of the Association; (8) on or about April 4, 1984 Eber issued a warning notice entitled "Conference Report" to Linda Schreier because Schreier was active on behalf of the Association; (9) on or about April 17, 1984 Webb and Eber issued a warning notice entitled "Conference Report" to Bennett for "inappropriate use of students" because of Bennett's activity on behalf of the Association; (10) on or about April 11, 1984 Eber granted, effective September 1, 1984, a Prescription Drug Plan to those of the Board's employees not represented by the Association; (11) on or about March 20, 1984 Webb issued a Teacher Evaluation Report to Anita Ferguson with a "needs improvement" overall rating for an observation conducted on March 15, 1984, which was due to Ferguson's activities on behalf of the Association; and (12) on or about April 2, 1984 Eber informed Ferguson that her contract would not be renewed, and thereafter the Board decided not to renew the contract of Ferguson on account of her activities on behalf of the Association. All of the foregoing is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5)

of the Act. 3/

On September 4, 1984 the Association filed with the Commission an amended Unfair Practice Charge, alleging that the Board had engaged in additional unfair practices within the meaning of the Act, in that the Respondent's agents, supra, had engaged in the following conduct in violation of the Act; (1) on or about January 9, 1984 members of the Association's Negotiations Committee were coerced by Webb and Eber into signing a document entitled "Criteria for Informal Negotiations" under threat that if they did not do so the Board would reduce its salary proposal and/or demand wage concessions and otherwise withdraw items previously offered in negotiations; (2) on or about March 15, 1984 McGinnis refused to continue negotiations with the Association and conditioned further negotiations upon the receipt of certain information set forth in a withdrawn Unfair Practice Charge filed by the Board (Docket No. CE-84-23); (3) on or about April 9, 1984 Garrison, on behalf of the Association, wrote to the Board concerning allegations made by Webb against the Association and, thereafter on April 10, 1984, Garrison was summoned into Webb's office and told that she was being given a verbal warning and would be charged with insubordination if she again communicated directly with the Board in writing; and (4) on or about April 17, 1984 Webb summoned Association members Jean Metsger, Garrison, Patsy Austin, Bennett and Belva Jane Tomlin to his office where he interrogated them and reprimanded them for assisting the Association and the Cumberland County Education Association in connection with a meeting held on the Board's premises. All of the foregoing was alleged a violation of N.J.S.A. 34:13A-5.4(a)(1), (2),

3/ 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."

(3) and (5) of the Act. 4/

It appearing that the allegations of the Unfair Practice Charges, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 23, 1984. Pursuant to the Complaint and Notice of Hearing, hearings were held on October 31, November 1, 2, 5, 7, 26 and December 17 and 20, 1984 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 March 12, 1985.

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

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

FINDINGS OF FACT

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

2. The Downe Township Education Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Rose Garrison is the Secretary of the Association and has been Chairman of the Negotiations Committee since 1982.

4. The current collective negotiations agreement is effective during the term July 1, 1982 through June 30, 1986 and contains a reopener clause in Article XXVII, commencing July 1, 1984 (J-1, p. 15). The clause provides that the

4/ See Footnote 3, supra.

parties may reopen as to the salary Article and two "language issues."

5. On October 5, 1983 Garrison wrote to Superintendent Joseph H. Webb, in which she stated the Association's intention to reopen negotiations with the Board as to the salary Article and two other language articles as provided for in Article XXVII of J-1, supra. Garrison expressed the hope that the Association would have its initial proposal prepared before the Christmas vacation and that the parties might begin negotiations after the new year.

6. On October 26, 1983, in response to Garrison's request, the New Jersey Education Association (NJEA) advised her that Alan E. Holden had been assigned to assist in negotiations (A-31).

7. Garrison wrote to Webb on November 29, 1983, in which she requested data for negotiations, namely, a list of employees covered by the agreement, their salary classification, step on the scale, etc. and the cost to the Board of the Medical Program for unit employees (A-2).

8. On December 9, 1983 Webb responded to Garrison's request for data in full and included in his cover letter the statement that he would like to discuss with Garrison "...an alternative to formal negotiations..." (J-2).

9. Webb testified that he had spoken with various members of the Association over the previous year regarding "informal negotiations," which he defined as negotiations without professional negotiators such as the Board's negotiator, William J. McGinnis, Jr., and an NJEA Negotiations Consultant for the Association. The parties have previously used professional negotiators on both sides. Webb referred to having spoken specifically with Eric H. Dichter, the Vice-President of the Association from 1982 through 1984, Belva Jane Tomlin, the President of the Association, and Phyllis M. Lake, a past President of the Association. Dichter, a witness for the Association, testified that on the last day of school in June 1983 he and a group of teachers went to a bar and res-

taurant known as the Friendly Tavern shortly after noon. At about 3:00 p.m. Webb and Mary Ann Eber, the Building Principal, joined the teachers. At that point those teachers remaining were Dichter and Tomlin. Dichter, Tomlin, Webb and Eber remained until about 8:00 p.m., during which time they were all imbibing. Dichter testified credibly that at about 7:00 p.m. he and Tomlin stated that they hoped for harmonious negotiations in the future and that, in response, Webb raised the matter of "informal negotiations." Dichter testified that he and Tomlin responded that it was a "possibility." There was no further discussion of the matter. The Hearing Examiner does not credit Webb's testimony that at this encounter Dichter and Tomlin stated to him their preference for negotiations without the use of professional negotiators and, thus, agreed to "informal negotiations." The convivial setting in which the very limited discussion of the matter of informal negotiations occurred clearly does not support the likelihood that any agreement or understanding was reached, which would be binding upon the Association.

10. Shortly before the Christmas vacation in 1983 Garrison went to Webb's office and it was agreed that the first meeting would take place on January 9, 1984, at which time, according to Garrison, Webb was to explain what he meant by "an alternative to formal negotiations" (see J-2, supra).

11. On January 9, 1984 Garrison appeared in Webb's office with her negotiating team, Yvonne Bennett and Anita Ferguson. Webb was present with Eber. Garrison did not have a proposal ready on behalf of the Association. Webb testified that the Board did not consider this a negotiating session. The meeting lasted approximately one-half hour, during which the following transpired: Garrison testified credibly that Webb explained his idea for informal negotiations, namely, that there would be four meetings within one month; that the parties would exclude professional negotiators; and that he, Webb, had spoken to Tomlin and Dichter re-

garding informal negotiations in June 1983. Webb then presented to the three Association negotiators a document entitled "Criteria for Informal Negotiations" (J-3). This document set forth what Webb had just explained to the Association's negotiators, concluding with the provision that if a settlement was not reached, all proposals would be withdrawn and formal negotiations would be scheduled. The Association negotiators then caucused, and when they returned Garrison was authorized to sign the Criteria document. According to Garrison, the Association's team felt that they were under tremendous pressure to execute J-3 because of Webb's expressed determination. Webb then said "...let's get started... I am ready to negotiate... We can do this tonight... and we will all go out to dinner" (3 Tr. 139, 140). Garrison stated that the Association was not ready and a new date was set for January 23, 1984. At some point, immediately before the conclusion of the meeting on January 9th, Bennett asked a question regarding binding arbitration, to which Webb replied that there was no need for it in the Township inasmuch as there had only been six grievances and only one was submitted to advisory arbitration. To make his point, Webb added that "Hell would freeze over" before the Association ever got a contract with binding arbitration (3 Tr. 141).

12. The parties met for their first informal negotiations session on January 23, 1984. The same individuals were present as at the January 9th meeting, supra. The Association presented its proposals to Webb, which were as follows: a grievance procedure including binding arbitration instead of advisory arbitration; compensation for evening meetings; and a salary proposal (the details of which were never placed in evidence). After Webb and Eber caucused, they returned to inform the Association negotiators that none of the Association's proposals were acceptable. Webb raised a question of the availability of funds for salary increases and then gave to the Association the Board's counterproposals, which involved an increase of two days in the teacher work year, a change of

wording in the personal days and a salary offer of six per cent: $1,000.00 for the first year and $1,050.00 for the second year. Webb proceeded to overwhelm the Association's team with certain calculations from the budget and other sources. He referred to the CAP law, different state taxes and certain reimbursement formulae. Bennett testified without contradiction that Webb also stated that Aide positions could be cut and that teachers in special programs could be back in regular classrooms. The Association caucused and then rejected the Board's proposals, but did lower its own salary demand. Bennett and Garrison testified credibly that the Association's team felt overwhelmed by the manner in which Webb used "figures" and, as a result, the Association's negotiators discussed in caucus proceeding to formal negotiations. Before the meeting ended, Webb said that if formal negotiations occurred "...the Board would withdraw its initial proposal" and "we would go back to...square one" since, if the Board went into formal negotiations "...the money (for salaries) would go to pay...(its) negotiator..." (3 Tr. 150, 151). The meeting lasted about two hours.

13. On January 25th the Association's negotiators decided to meet with Webb and tell him that they wanted formal negotiations. This occurred as a result of conversations among the Association's negotiators the evening before, at which time they concluded that they were lacking in the necessary skills or expertise for informal negotiations regarding financial matters. Webb appeared to be aggravated by the Association's request for formal negotiations. According to Garrison, whom the Hearing Examiner credits, Webb said "...you can bring in Jesus Christ if you want to. I don't care who you bring in..." (3 Tr. 156). Before the meeting ended, Bennett said to Webb that she and Ferguson were non-tenured teachers and they felt that they should have a professional negotiator. Webb agreed and said that he had never in his experience had non-tenured teachers

on the negotiating team. 5/

14. On January 26, 1984 Webb sent a memo to Garrison, confirming that the next negotiations session was scheduled for February 9, 1984, as a result of a discussion between Webb and the Association's Negotiations Consultant, Alan E. Holden (A-3). Webb then proceeded in this memo to vent his displeasure with the discontinuance of informal negotiations, expressing to Garrison that the Association should act "more responsibly" in the future and, finally, expressing regret that the negotiations session for January 26th had to be cancelled.

15. At the negotiations meeting on February 9, 1984 the Board was represented by Webb and Eber and the Association by Holden, Garrison and Lake. Webb, after gratuitously observing that he was glad to see a "new team" since the "old team" didn't know how to negotiate, began talking about the District's financial situation but that it was a good place to work. He then proceeded to supply the Association with the Board's response to their proposal (J-6). This was a document dated January 26, 1984 from Webb to the Association's negotiating committee which, however, was not delivered until this meeting. The Association team then caucused and, after returning, Holden and Webb got into a philosophical discussion over binding arbitration. Webb stated that advisory arbitration had worked very well and that if the Association thought they were going to get binding arbitration they were "spinning...wheels and...out in left field..." (3 Tr. 166). Holden remained adamant and then asked for certain data concerning the tax rate of Downe Township and the surrounding districts, in addition to the new school budget and two prior budgets. Webb stated that he should communicate with the Board's Secretary. Holden then said that the parties should proceed to formal negotiations. Webb agreed that further informal meetings would be futile and that Holden should contact the Board regarding formal negotiations.

5/ As a result of Webb's comments, and their own individual apprehensions, Bennett and Ferguson, both of whom were non-tenured at the time, left the negotiating team for several weeks, returning at a meeting on March 8, 1984 for reasons to be explained hereinafter.

Webb testified that Holden, in referring to going to formal negotiations, said that he did not wish to meet with Webb, only with Board members. Holden flatly denied that he ever, during any meeting or in any correspondence, stated that Webb or Eber should be removed as negotiators for the Board. But, however, Holden in a subsequent letter to the Board President, Jack Read, on February 13, 1984 stated "...we do not think it is in the best interest of your school district to send your Superintendent and Principal to the table with your teachers when the Superintendent and Principal are the ones who evaluate teachers..." (A-7). The Hearing Examiner finds as a fact that Holden, did, at least in the foregoing February 13th letter, make a request to Read to have Webb and Eber removed from the Board's negotiating team. The Hearing Examiner credits the testimony of Webb that Holden stated on February 9, 1984 that he did not wish to meet with Webb, only the Board members, and rejects the contrary testimony of Holden.

16. As indicated above, Holden wrote to Board President Read on February 13, 1984, in which he requested that members of the Board join in negotiations, adding that the present format could become "very counter-productive" as Superintendent Webb has claimed that certain of the Association's team do not "understand" negotiations. (A-7). Holden also requested of Read that he direct the Board Secretary to forward a copy of the last two school budgets, the proposed budget for the next year and the school tax rate for the past two years. Read responded to Holden on February 22nd, stating that he found the tone of Holden's letter to be both antagonistic and presumptuous (J-4). Read questioned the sincerity of the Association in seeking to reach an equitable agreement. Finally, Read directed Holden to forward all correspondence concerning negotiations to the Superintendent "...who will be coordinating negotiations for the Board..." Read suggested that the next meeting for negotiations take place in

Webb's office on March 8th. Holden responded to Read's letter on February 26, 1984, in which he sought to correct certain matters for the record and questioned whether or not Webb or Eber were fully conveying the facts to Read and the Board regarding negotiations up to that point (J-5).

17. The next negotiations meeting took place, as proposed, on March 8th. Present for the Association were Holden, Garrison, Bennett and Ferguson, 6/ Linda Schreier, Jean Metsger, Patsy Austin, Tomlin and Lake. Present for the Board were William J. McGinnis, Jr., Webb, Eber, Read, and two other Board members, George Ripper and Helga Ricci. This session was understood by all concerned to be the commencement of formal negotiations. The meeting started with a review of the Association's original contract proposal by McGinnis, who was attending negotiations for the first time in the reopener negotiations. He was appearing as the Board's professional negotiator, having represented the Board for 8½ years, during which he had negotiated at least three agreements. After McGinnis reviewed the Association's proposal, the Board caucused for almost an hour, at the end of which another meeting was scheduled for March 15, 1984.

18. The final negotiations meeting, before the Board filed its Unfair Practice Charges, supra, occurred on March 15, 1984. 7/ Present for the Association were the same individuals as at the March 8th session except for Garrison, who was absent. Present for the Board were the same individuals as at the March 8th session except that Board member Donald Chance was present in place of Read. At the outset, McGinnis gave Holden the written proposal of the Board, which while dated March 8, 1984 was not given to the Association until this meeting (J-7).

6/ Holden testified that he had urged Bennett and Ferguson to return to the negotiating team in order to protect themselves by taking an active part in negotiations.

7/ In making the necessary findings as to what transpired between the parties at the negotiations session on March 15th, the Hearing Examiner has relied extensively upon the negotiations notes of Holden, Bennett and Schreier for the Association (A-4, A-5 and A-6), in addition to the negotiations notes of Eber for the Board (A-30). These negotiations notes are fairly detailed and are reasonably consistent with one another. In this way the Hearing Examiner has harmonized divergence in testimony of the witnesses as against the negotiations notes.

Also, the Association was given the Board's response to the Association's original contract proposal (J-8). McGinnis opened on behalf of the Board by asking Holden why binding arbitration was necessary. Holden replied that it was to give the contract "meaning" and "full force and effect" (A-5, p. 2; A-6, p. 2; and A-30, p. 7). Holden added that it was a "must item" and that the Board should agree to it since 70% of the cases arbitrated are decided on "management's side" (A-5, p. 2 and A-30, pp. 7, 8). When McGinnis asked Holden if he was saying there was no contract without binding arbitration, Holden replied "I'm not saying that" (A-5, p. 2 and A-30, p. 8). The Board then caucused for about 15 minutes, following which the Association caucused for about 20 minutes and then the parties resumed negotiations. McGinnis next replied to Holden's reiteration of his request for documents, stating that the Board Secretary was available and that Holden would have to pay for copies. Holden then returned to his reasons for binding arbitration as follows: employees are leaving the District, not because of salary, but because of intimidation; 14 employees have made applications to other Districts as of this date; binding arbitration would eliminate disputes without fear of jobs; Downe Township is not a "nice place to work"; for the above reasons there has been a loss of privileges and rights; and employees see advisory arbitration as a "useless process" (A-4, p. 5; A-5, p. 3; A-6, p. 3; and A-30, pp. 10-12). 8/ After Holden had concluded with his remarks regarding

8/ Both McGinnis and Webb testified that Holden, in listing the above reasons for the necessity of binding arbitration in the District, was directing his comments to Webb and Eber, and that Holden used the term "mismanagement." Further, McGinnis testified that Holden addressed the Board's members directly, in asking for the removal of Webb and Eber from negotiations, and that Holden requested that the Board take "administrative action" against them. Finally, according to McGinnis, Holden said to him that nothing would happen in negotiations unless action was taken against Webb and Eber. The Association's witnesses made an effective rebuttal of these allegations. This coupled with the detailed negotiations notes of Eber, who if actually under attack would have logically made some note of the fact, compels the Hearing Examiner to find as follows: Holden did not initiate the use of the term "mismanagement," rather it was McGinnis who first used the term; and Holden did not ask the Board members present to remove Webb and Eber from negotiations nor to take "administrative action" against them.

binding arbitration, McGinnis asked him what he meant by threats, intimidation and loss of privileges. Holden responded that he didn't want to be more specific at that time. Holden continued to take this position throughout the balance of the session. The Board then caucused for 15 minutes and, after returning, McGinnis stated that the Board considered Holden's comments unfounded and asked for substantiation, which was not forthcoming. In the face of Holden's persistence in refusing to respond, McGinnis stated that the Board's response would come from PERC in the form of unfair practice charges (A-30, p. 14).

19. On March 19, 1984 Joyce Powell, a teacher employed by the Vineland Board of Education and an Executive Board member of the Cumberland County Council of Education Associations (CCCEA), arrived at the Township Elementary School with Richard D. Lindsey, the President of the CCCEA and also a teacher in Vineland. This is the building where Garrison teaches and where Webb and Eber have their offices. The time of their arrival was about 3:00 p.m. They first went to the office where they were met by Gertrude Diament, Webb's secretary. Powell and Lindsey introduced themselves and asked to speak to Garrison. Diament asked if they were with the NJEA, to which they replied "yes." Diament left and returned shortly, stating that Garrison was busy.[9/] Diament then offered chairs to Powell and Lindsey while they waited for Garrison. A few minutes thereafter, Powell asked to speak with Webb, which request was denied. Powell then saw Eber and asked if they could go to the Faculty Room. Eber stated that Webb had said that they could not.[10/] Garrison testified that at about 3:30 p.m., when she was leaving her classroom for the day,

9/ The purpose of the visit by Powell and Lindsey to Garrison was to hold a meeting in Downe Township in order to "activate" the Association.

10/ Webb testified regarding the Board's policy on visitors. Any visitor is to report to the main office, such as Powell and Lindsey did on March 19th. There was no evidence that this policy has been applied unequally as between Association and non-Association personnel. There was testimony that an insurance agent, Stanley Allen, frequently visits the school but there was no testimony indicating that he is treated any differently than were Powell and Lindsey on March 19th.

she met Powell, who said that she wanted a favor and handed Garrison a letter from Lindsey, which requested a meeting room for the CCCEA on April 4, 1984 at 4:30 p.m. (A-16). Garrison indicated that there would be no problem. Garrison and Powell proceeded to the Faculty Room where they met Bennett and Tomlin. They remained there for about 10 minutes when all four exited together to the parking lot after having signed out at the office. Garrison left the parking lot immediately at about 3:45 p.m. Powell remained, conversing with Tomlin and Bennett.

20. On March 20, 1984 Webb spoke with McGinnis regarding the visit of Powell and Lindsey to the office the day before, supra. On the same date he wrote to McGinnis, reciting in three paragraphs what he, Webb, understood to have transpired on March 19th (J-30). In the second paragraph, Webb stated that Garrison met with Powell from approximately 3:30 p.m. to 3:50 p.m. in room 114 in the Elementary School, thereby conducting Association business on school property without prior authorization in violation of the collective negotiations agreement. In the fourth paragraph of J-30 Webb said that he had requested Garrison to meet with him and Eber on March 20th and that Garrison told him of the circumstances of the Powell visit. Webb stated that he explained the possible contractual violation. Garrison's testimony essentially confirmed what Webb had said in his March 20th memo to McGinnis, supra. However, Garrison did not concur in Webb's interpretation of Article V, Section 5.3 of J-1, in that she contended that there was no use of school facilities involved in her encounter with Powell the day before. She testified without contradiction that Webb said that he was going to have to proceed with litigation against the Association and Garrison.

21. Several days prior to March 26, 1984, Powell called Read to explain what had happened on March 19th. Read allegedly said to Powell that he did not want to talk to her because she was NJEA and the NJEA "stinks." However, Read credibly denied using this term in his conversation with Powell. Read acknowledged that Powell was very agitated and was clearly upset by the events on and after March 19th.

Powell stated that Read asked for something in writing. On March 26th Powell wrote a two page-letter to Read, complaining primarily about Webb (A-12). Significantly, Powell made no reference in her letter regarding Read's having said that the NJEA "stinks."

22. On March 28, 1984 Webb wrote separate letters to Garrison, Powell and Lindsey, in each of which he made reference to Powell and Lindsey having entered the Elementary School on March 19th without a prior appointment to conduct Association business on school property during school hours (J-9, J-10 and J-13). Webb stated that this was a violation of the agreement, even as to Powell and Lindsey who are not parties to J-1. Copies of each letter were sent to Read, as Board President, the Personnel Committee, McGinnis and Eber.

23. On March 30, 1984 Powell wrote to Webb, in response to Webb's letter of March 28th (A-13B). She sent a copy to Read, and also a copy to all Board members with a separate cover letter (A-13A). Read then wrote a letter to Powell on April 10, 1984, rebutting "...the numerous inaccuracies and misstatements noted therein" (J-11). In this letter Read clearly concurred with Webb's interpretation of the collective negotiations agreement, namely, that the Powell and Lindsey visit on March 19th had been a violation of the use of school facilities provision without prior approval.

24. On April 9, 1984 Garrison wrote to all Board members, complaining about Webb's letter of March 28th, in which he had expressed concern that Garrison was violating the agreement by having allegedly met on March 19, 1984 without prior approval (A-15). She then recited for the Board the events that had occurred on March 19th, stating that she felt that she had adhered to the collective negotiations agreement. On April 10th Garrison found a pink slip in her mailbox from Webb requesting that she meet with him (A-17). Webb stated that the Board had asked him to handle the matter of her letter, adding that he was very upset with her having communicated directly with Board members. Webb said that under no circumstances should Garrison

go to the Board before seeing him, and that she would be charged with insubordination if it happened in the future. Webb stated that he was giving her only a verbal warning at this time. Webb's testimony as to this incident was substantially the same as that of Garrison.

25. On April 16, 1984 the Association hosted a reception for Dennis Giordano, an NJEA Representative, which was to begin at 1:45 p.m. in Garrison's Room 114 at the Elementary School. This was after the end of the school day for that particular day due to a parent-teacher conference that evening. On the same date April 16th, Webb sent a joint memo to Garrison, Bennett, Tomlin, Metsger and Austin, in which he requested that they meet with him at 8:30 a.m. on April 17, 1984 (J-15). The meeting took place as scheduled on April 17th with Eber present. Webb said that he had a problem with the meeting held "yesterday." He questioned each of those present as to what time they had started to prepare for the reception. Metsger said that it was about 1:35 p.m. when the students had left. Garrison agreed that all of the students had left by that time. Webb said that the students had not left until 1:40 p.m. Garrison said that she had assumed that the school day ended at 1:30 p.m. Garrison testified that Eber had given permission to use the room. Webb insisted that the agreement had been violated since the room was being prepared before the school day had ended. The meeting concluded with Webb stating that he would check, and that Eber would notify each teacher if he found any violation of the agreement. Later the same day, Webb summoned the same individuals to meet with him at 1:30 p.m. At this meeting Webb stated that he had checked the Staff Manual and that the day ended at 1:35 p.m. Thus, the contract had been violated because the room was not reserved until 1:45 p.m. and the preparation had begun before that. Garrison testified without contradiction that such a situation had never arisen before regarding the reserving of a room. That was the end of this incident.

26. On April 16th, the day of the Giordano reception, Bennett had sent several of her students to her car in the parking lot in order to bring back cakes for the

reception. Eber saw this occur, and on the same date prepared a Conference Report, the subject of which was "Inappropriate use of students" (J-19). Webb acknowledged that a Conference Report was disciplinary in nature. The Report, which was shown to Bennett on April 17th, recited that under no circumstances should students be used for the benefit of "the teacher's special interest group." Under "Recommendations," the Report stated that students were not to be used for "union activities" and that Bennett should refrain from "participating in union activities" during her regular work day. Bennett testified that in her three years in the District she had never received a Conference Report. Bennett testified without contradiction that she had sent students to her car in the parking lot on previous occasions where they were unsupervised. She testified finally that Webb had later told the faculty that it was permissible to send students to cars but not for "special interest groups," meaning the Association.

27. As previously found, Bennett served on the Association's Negotiations Committee during the first three months of 1984. The Charging Party contends that Bennett's evaluations by Webb were affected by her union activities. Various evaluations and related documents on Bennett were received in evidence, covering two of the more than three years that Bennett has been a teacher in Downe Township, specifically covering the period from May 12, 1982 through May 1984 (J-16 through J-18; and J-20 through J-28). Bennett testified without contradiction that in her more than three years of employment she has been evaluated 13 times, three of which were "commendable" and none being "unsatisfactory." On May 12, 1982 Eber indicated that Bennett's lessons were well planned, and that she showed a willingness to devote time and effort beyond what was basically required to do the job well. On the same date Eber gave Bennett an Evaluation Report, which stated that all categories of performance were "satisfactory" (J-28). Thereafter, Bennett's evaluations were done by Webb, who in June 1983 noted that Bennett provided a classroom setting that was "exceptional," that her lessons were well planned and that her organization was

"excellent" (J-23). On the same date, in June 1983, Webb in his Evaluation Report of Bennett, rated her "satisfactory" in all categories (J-25). In an Evaluation Report on October 18, 1983, Webb gave Bennett an overall rating of "commendable" (J-16). Again, on December 19, 1983, Webb in his Evaluation Report of Bennett gave her an overall rating of "commendable" (J-17). However, on April 3, 1984, Webb's Evaluation Report of Bennett, which internally appeared to indicate "commendable" performance, resulted in Webb giving her an overall rating of "satisfactory" (J-18).[11/] In May 1984 Webb prepared an Annual Performance Report on Bennett, in which he noted that she continued to provide an excellent classroom setting and devoted time beyond the regular day to planning (J-20). Also, in May 1984, Webb's Improvement Plan for Bennett contained a statement urging that she "Refrain from engaging in union activities during your regular work day" (J-21). Finally, in May 1984, Webb's Evaluation Report of Bennett gave her a "satisfactory" rating in all areas, however, making reference to the Conference Report of April 16, 1984, involving the sending of students to the parking lot (J-19, supra). At the end of the 1983-84 school year Webb recommended that Bennett be granted tenure, and she became tenured on either September 1 or October 1, 1984.

28. Schreier, who attended the negotiations sessions on March 8 and March 15, 1984, received a Conference Report on April 4, 1984 (J-14). The Conference Report was prepared by Eber, and was based on Schreier having spoken with a parent while she was on bus duty on April 3rd. Schreier admittedly spoke to the parent, regarding her child's work in class, for approximately five minutes on that date. According to Schreier, Eber made "a big thing of it." Eber testified that Schreier had also spoken with the grandparent of a student in the Fall of 1983 while she was on bus duty. Thus, the Conference Report was warranted for the incident on April 3, 1984. Schreier prepared a response to the Conference Report on that same day, April 4th, in which she contended that speaking to the parent regarding her child in no way interfered with her performance on bus duty (A-18).

11/ The Charging Party contends that this rating of "satisfactory" by Webb is causally related to Bennett's participation in union activities during the first three months of 1984.

29. Ferguson was hired in September 1981 and never gained tenure, having been terminated in June 1984. Ferguson served on the Association's Negotiations Committee for three years, having volunteered to do so. All of Ferguson's evaluations and related documents were received in evidence, covering the period of October 13, 1981 through March 15, 1984 (A-34 through A-40; and B-1 through B-7). Ferguson testified that she had had 10 evaluations in her three years and that five of these stated "Needs Improvement." Webb testified that it was unusual for a non-tenured teacher to receive five out of 10 "Needs Improvement" evaluations. When Webb recommended to the Board at its April 9, 1984 meeting that Ferguson not be renewed for the 1984-85 school year, he testified that she was the only teacher in his seven years of experience who had served three years as a teacher and was not renewed for the fourth year with tenure. Webb insisted that even though Ferguson received an overall "Satisfactory" evaluation on September 27, 1983 and January 6, 1984 (A-39 and A-40), he had grave doubts that Ferguson would be tenured, having told Ferguson that she was marginal at the end of her second year in June 1983.[12/] Webb added that the only reason that Ferguson was continued for the third year was because she was in Special Education. Webb's decision not to recommend renewal and tenure, which was also recommended by Eber, came after Ferguson's March 15, 1984 evaluation, the overall rating of which was "Needs Improvement" (B-7).[13/] When the Hearing Examiner asked Webb if he did not mislead Ferguson by giving her a "Satisfactory" rating in September 1983 and January 1984, he replied that he had not misled her, repeating his testimony that he had told Ferguson that she was marginal at the end of her second year. Ferguson pointed to a difference in Webb's demeanor which, prior to the March 15th evaluation, had always been jovial, but changed to one of coldness on and after March 15th. The Hearing Examiner attaches little weight to this testimony of Ferguson. Ferguson first learned that she would not be renewed at a meeting with Eber on April 2, 1984.

12/ Ferguson testified that she had never received any prior warning that her contract was in jeopardy and might not be renewed.

13/ Ferguson made a written response to her March 15th evaluation, which she put in Webb's mailbox on April 4, 1984 (A-22).

30. On April 3, 1984, Webb wrote to Ferguson, advising her that he was recommending to the Board that her contract not be renewed for 1984-85 (A-21). When Ferguson received Webb's April 3rd letter, she went to Morrisey, who advised her to send a mailgram to the Board members, asking for a hearing, which was done on the same day (A-25). On April 6th, Webb told Ferguson to follow the proper procedure and advised her on what to do.

31. Ferguson appeared at the Board meeting on April 9th, with her husband; Charles Peraset, an NJEA Representative; and Bennett. The Board immediately went into Executive Session and, when it returned, it voted, among other matters, not to renew Ferguson's contract. Peraset requested of Read that he be permitted to speak. Peraset was given only sixty seconds to do so, and he charged the Board with insensitivity and anti-union animus.

32. On April 12, 1984, Ferguson wrote a letter to the Board's Secretary, requesting a written statement of reasons as to why she was not being renewed (A-24). Thereafter, on April 23rd Ferguson again wrote to the Board's Secretary, this time requesting a hearing on the non-renewal of her contract (A-26). On April 26, 1984 Webb wrote to Ferguson and set forth a written statement of the reasons for non-renewal (A-41). In this statement Webb recited the fact that Ferguson had received five out of 10 evaluations, which were less than satisfactory, and essentially summarized her weaknesses as a teacher over a three-year period. On May 1, 1984 Webb again wrote to Ferguson, this time advising her that she might appear at the Board meeting on May 21, 1984, in order to present any witnesses on her behalf, and enclosing a copy of the procedure for the appearance of non-tenured teachers before a Board of Education (J-29).

33. Ferguson, her husband, Peraset and Bennett appeared before the Board as scheduled on May 21st. Peraset spoke first, at considerable length, dealing primarily with Ferguson's evaluations and the bargaining confrontation which had occurred in negotiations. Next, Peraset called Ferguson to testify and she read

a handwritten statement to the Board in support of her position that she should receive a renewal of her contract (A-32). Next, Bennett spoke on Ferguson's behalf, but was ruled out of order for having allegedly discussed the 1984 collective negotiations, which had taken place between the Board and the Association to date. Peraset claimed that Read was interfering with Ferguson's right to a hearing. After Ferguson and Bennett broke down in tears, Read relented and said that they could say anything they wanted but they declined. Peraset summed up and thereafter the Board caucused. The Hearing Examiner credits Read's testimony, in which he denied making any statement or statements indicating a bias against the NJEA or Peraset, although Read did acknowledge stating to Peraset that he felt that Peraset's "antics and carryings on" had contributed to the upset of Ferguson and Bennett. On May 22, 1984 the Board's Secretary advised Ferguson of the Board's action in reaffirming its decision of April 9, 1984 not to renew her contract for the 1984-85 school year (A-28).

34. The current collective negotiations agreement provides in Article XXIII, Section 23.5, that as of September 1, 1984 the Board will provide a Prescription Plan, the maximum contribution being $60.00 per year for each participating unit member with an increase of $15.00 effective with the 1985-86 school year (J-1, p. 14). An insurance carrier was selected in April 1984 to provide this benefit.

35. The Supportive Staff, including Teachers' Aides, have never been included in the collective negotiations unit with the teachers, nor in any other unit. However, the Supportive Staff has traditionally been provided with the fringe benefits provided for teachers, notwithstanding the lower salaries for the Supportive Staff. Webb testified without contradiction that the Board had discussed a Prescription Plan for Aides as far back as the Spring of 1982.

36. In April 1984, Webb told Eber to meet with the Supportive Staff, and a meeting was held on April 12, 1984 at 8:45 a.m. in the library of the Elementary School (A-33). All Aides, Secretaries, Cafeteria Workers and Custodians were invited to attend. Eber told the members of the Supportive Staff that they were

going to be offered the Prescription Plan, which would be non-contributory, except for the payment of $1.00 per prescription. She said that the teachers would still have to pay for their Plan, but that the Board could afford to offer the Supportive Staff a non-contributory Prescription Plan because it did not have to negotiate with the Supportive Staff. The Prescription Plan for the Supportive Staff became effective on July or September 1, 1984. One week later Webb met with the teachers and told them of the selection of an insurance carrier by the Board at its last meeting on April 9, 1984.

37. Tomlin, who had been in the District for about 10 years, had resigned in November 1983, effective December 31, 1983, for personal reasons. Subsequently, Tomlin asked the Board to rehire her and this was done in December with a break in her seniority. She started as a new employee but essentially retained her prior salary. Tomlin asked Morrisey if he could do anything regarding the reinstatement of her seniority. On February 1, 1984 Morrisey called and spoke to Eber and then to Webb. Eber indicated to Morrisey that it would not be to Tomlin's advantage to pursue the matter because the Board had done Tomlin a favor by rehiring her when they did not have to do so. When Morrisey pressed Eber on the issue, she asked him to talk to Webb. Webb reiterated essentially what Eber had said, regarding the Board doing Tomlin a favor, adding that Morrisey should not pursue the matter because he would lose. Webb at one point stated, "If you take the case, I'll stick it up your keister." (See A-19). Thereafter, Morrisey filed an appeal to the Commissioner of Education on February 23, 1984. The Commissioner of Education affirmed the Board and the matter is now on appeal to the the State Board of Education.

DISCUSSION AND ANALYSIS

The Association Violated Subsection (b)(2) Of The Act In February 1984 By The Conduct Of Its Representative Alan E. Holden But Not Subsection(b)(3)

The Commission never having decided a case involving an alleged violation of Subsection(b)(2) of the Act, the Hearing Examiner refers to the private sector and the decisions of the Federal Courts and the National Labor Relations Board since Subsection(b)(2) of our Act is patterned after Section 8(b)(1)(B) of the National Labor Relations Act.[14/] There have been numerous decisions of the Federal Courts and the NLRB involving union coercion of employers in the selection of a representative for purposes of either adjusting grievances or engaging in collective negotiations. Thus, in NLRB v. Local 964, Carpenters, 447 F. 2d 643, 78 LRRM 2167 (2nd Cir. 1971) the Court said that: "...the right of employees and the corresponding right of employers... to choose whomever they wish to represent them in formal labor negotiations is fundamental to the statutory scheme ..." See, also, General Electric Co. v. NLRB, 412 F. 2d 512, 516, 71 LRRM 2418 (2nd Cir. 1969). Representative of the decisions of the NLRB on the subject of union coercion of an employer's selection of a representative include: Union Independiente, etc., 249 NLRB No. 147, 104 LRRM 1433 (1980); ILA Local 1329, 246 NLRB No. 122, 102 LRRM 1682, 1684 (1979); Teamsters Local 610, 236 NLRB 1048, 98 LRRM 1406 (1978); and Local 259 UAW, 225 NLRB No. 55, 92 LRRM 1417, 1419 (1976).

Applying the above Federal precedent in Section 8(b)(1)(B) decisions to the instant case, the Hearing Examiner finds and concludes that the Board has proven by a preponderance of the evidence that the Association violated Subsection(b)(2)

14/ The New Jersey Supreme Court's most recent reference to the Federal model in construing our Act is found in Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235, 240, 241 (1984). Section 8(b)(1)(B) of the NLRA prohibits a labor organization from restraining or coercing "an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Compare Subsection(b)(2) in footnote 1, supra.

of the Act in February 1984 when Holden , the Association's professional negotiator, stated to Webb at a negotiations meeting on February 9, 1984 that he did not want to meet with him, but only members of the Board, and when Holden on February 13, 1984 wrote to Board President Read, stating that the Association did not think it in the best interest of the District to send its Superintendent and Principal to negotiations since they are the ones who evaluate teachers (see Finding of Fact No. 15, supra). Since Holden did not persist in this position of seeking to exclude Webb and Eber from the negotiations process after February 13th, [15/] the Hearing Examiner has concluded that there was no further violation of Subsection(b)(2) at the two negotiations sessions on March 8 and March 15, 1984. Thus, in footnote 8 of Finding of Fact No. 18, supra, the Hearing Examiner has credited the Association's witnesses and evidence as to who initiated the use of the term "mismanagement" and as to whether the term "administrative action" was used by Holden in allegedly asking Board members to remove Webb and Eber from the negotiations. In each instance the Hearing Examiner has found that the use of these terms could not be attributed to Holden .

Further, the Hearing Examiner has concluded that the Association through Holden did not violate Subsection(b)(3) of the Act at the negotiations sessions on February 9th, March 8th and March 15th inasmuch as the parties met and the sessions involved a give and take over the threshhold issue of the Association's insistent demand that binding arbitration be incorporated into the collective negotiations agreement (see Findings of Fact Nos. 17 and 18, supra). Holden was careful throughout the three negotiations sessions, supra, not to let hard bargaining over the issue of binding arbitration become surface bargaining, which would have been a violation of Subsection(b)(3) of the Act: Compare Phillipsburg Board Education, P.E.R.C. No. 83-34, 8 NJPER 569, 570 (1982) and State Locals, NJSFT-AFT, AFL-CIO, 141 N.J. Super.

15/ The Hearing Examiner does not consider Holden's February 26, 1984 letter to Read (J-5) as indicating that the Association would only meet with Board members and and that Webb and Eber must be excluded.

470 (1976). See Also, Inter-Polymer Industries, Inc., 196 NLRB No. 101, 80 LRRM 1509 (1972).

Finally, Garrison in no way caused the Association to violate Subsection(b)(3) by bringing Holden into the negotiations, notwithstanding that she executed the "Criteria for Informal Negotiations" document (J-3) on January 9, 1984. The Association officers had never agreed to informal negotiations prior to January 9th (see Finding of Fact No. 9, supra). The document itself concluded with the provision that, "If a settlement is not reached within this framework, all proposals are withdrawn and formal negotiations will be scheduled." This provision clearly gave Garrison and the Association the unqualified right to bring in a professional negotiator such as Holden.

For all of the foregoing reasons, the Hearing Examiner concludes that the Association violated Subsection(b)(2) of the Act, but did not violate Subsection(b)(3).

The Board Did Not Violate Subsection(a)(2) Of The Act By Its Conduct Herein

It is difficult to glean from the instant record, evidence which would lead to the conclusion that the Board violated Subsection(a)(2) of the Act as alleged. First, a review of the allegations in the Association's original and amended Unfair Practices Charges does not indicate to the Hearing Examiner that the Association is even alleging a violation by the Board of Subsection(a)(2), which, by its terms, requires an allegation that some employer conduct has resulted in the domination or interference with the formation, existence or administration of the Association herein.

Even assuming arguendo that the Association has adduced evidence of Board domination or interference with the Association, the Commission has laid down a clear cut rule for determining the type of activity in which a public employer must engage in order to violate Subsection(a)(2) of the Act: North Brunswick Township Board of Education, P.E.R.C. No. 80-122, 6 NJPER 193 (1980). There the Commission said:

> With regard to the Board's alleged violation of section (a)(2), the Education Association has not presented any additional facts to support this allegation, other than the Board's refusing to negotiate with its chosen representatives. While the Board's conduct does, in a sense, "interfere" with the Education Association's ability to collectively negotiate, it does not constitute pervasive employer control or manipulation of the employee organization itself, which is the type of activity prohibited by section (a)(2). Duquesne University, 198 NLRB No. 117, 81 LRRM 1091 (1972)...Kurz-Kasch, Inc., 239 NLRB No. 107, 100 LRRM 1118 (1978)...

See, also several more recent decisions of the NLRB to the same effect, namely, that it is pervasive employer control or manipulation that is proscribed by Section 8(a)(2) of the NLRA, after which Subsection (a)(2) of our Act is patterned: Deepdale General Hospital, 253 NLRB No. 92, 106 LRRM 1039 (1980); Homemaker Shops, Inc., 261 NLRB No. 50, 110 LRRM 1082 (1982); and Farmers Energy Corp., 266 NLRB No. 127, 113 LRRM 1037 (1983). Plainly, there is no evidence whatever of pervasive control or manipulation of the Association by the Board.

Thus, based both on the dearth of evidence in the record, and the foregoing precedent of the Commission and the NLRB, the Hearing Examiner concludes that the Board did not violate Subsection (a)(2) of the Act by its conduct herein.

The Board Violated Subsection (a)(5) Of The Act By Granting The Supportive Staff A Prescription Plan Superior To That Of The Teachers During The Reopener Negotiations With the Association

The Association alleged a series of violations of Subsection (a)(5) by the Board (C-1, C-4; Para's 5 [a] through 5 [f]). The Association also alleged as a violation of Subsection (a)(3) of the Act the granting by the Board to the Supportive Staff of a non-contributory prescription plan superior to that granted to the teachers whose plan is partially contributory (C-1, Para 5[o]).[16/] The

16/ The Hearing Examiner, however, treats the allegation regarding the non-contributory prescription plan as an alleged violation of Subsection (a)(5) of the Act in accordance with NLRB precedent: American Lubricants Co., 136 NLRB 946, 49 LRRM 1888 (1962).

Hearing Examiner first summarizes the relevant evidence pertaining to the Subsection (a)(5) allegations.

The relevant evidence discloses that: (1) notwithstanding that the Association's Negotiations Committee may have felt under tremendous pressure to execute the "Criteria for Informal Negotiations" document, they elected not to leave the meeting on January 9, 1984 and Garrison executed the document for the Association (Finding of Fact No. 11, supra); (2) also, on January 9th, Webb, in response to a question from Bennett regarding binding arbitration, stated that "Hell would freeze over" before the Association ever got a contract containing binding arbitration (Finding of Fact No. 11, supra); (3) at the negotiations session on January 23, 1984, Webb stated that if formal negotiations occurred "...The Board would withdraw its initial proposal" and "we would go back to ... square one" since, if the Board went into formal negotiations "...the money (for salaries) would go to pay ...(its) negotiator..." (Finding of Fact No. 12, supra);[17/] (4) on January 26, Webb sent a memo to Garrison, in which, inter alia, he vented his displeasure with the discontinuance of informal negotiations, stating that the Association should act "more responsibly" in the future (Finding of Fact No. 14, supra); (5) at a negotiations session on February 9, 1984, Webb gratuitously observed that he was glad to see a "new team" (referring to the

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17/ The Association contends that Webb's threat to withdraw the Board's initial proposal, submitted to the Association on February 9, 1984 (J-6), was carried out on March 15th when McGinnis submitted a revised proposal to Holden (J-7). However, a comparsion of these proposals shows clearly that the Board did not withdraw its proposal, but merely modified it in a manner which the Hearing Examiner finds consistent with the parameters of give-and-take negotiations.

presence of Holden) since the "old team" did not know how to negotiate, and when the subject of binding arbitration was raised, he stated that if the Association thought they were going to get binding arbitration they were "spinning wheels and ... out in left field..." (Finding of Fact No. 15, supra); (6) on three occasions, February 9th, February 22nd and March 15th, the Board through Webb, Read and McGinnis, respectively, responded to Holden's request for data concerning the tax rate for Downe Township and surrounding districts, in addition to the new school budget and two prior budgets, by advising Holden to communicate with the Board's Secretary, which, apparently, Holden failed to do (Findings of Fact Nos. 15, 16 & 18, supra, and J-4); (7) the agreement (J-1), covering the teachers, provides for a partially contributory prescription plan as of September 1, 1984 (Finding of Fact No. 34, supra); (8) the Supportive Staff, who are unrepresented, have traditionally been provided with the same fringe benefits provided to the teachers, and the Board discussed a prescription plan for aides as far back as the Spring of 1982 (Finding of Fact No. 35, supra); and (9) on April 12, 1984, Eber, at the direction of Webb, advised the Supportive Staff that they were being offered a prescription plan, which would be non-contributory, and that this could be done because the Board does not have to negotiate with the Supportive Staff (Finding of Fact No. 36, supra).

The test for determining whether an employer has engaged in bad faith or surface bargaining is determined under Commission precedent and the decisions of the Federal Courts and the NLRB by the "totality" of the employer's conduct in negotiations: State College Locals, NJSFT-AFT, AFL-CIO, E.D. No. 79, 1 NJPER 39, 40 (1975), aff'd 141 N.J. Super. 470 (1976); Southwestern Pipe, Inc. v. NLRB, 444 F.2d 340, 77 LRRM 2317, 2325 (5th Cir. 1971); and Typoservice Corp., 203 NLRB No. 183, 83 LRRM 1595, 1596 (1973).

In State College Locals, supra, the Executive Director stated that a determination that a party has refused to negotiate in good faith "... will depend upon an analysis of the overall conduct and/or attitude of the party charged. The object of this analysis is to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement as opposed to a pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement ..." (1 NJPER at 40).

The first item for consideration in the conduct of the Board herein are the several statements of Webb on behalf of the Board, which indicate an adamant refusal to agree to the inclusion of binding arbitration in the grievance procedure of the collective negotiations agreement. Thus, Webb stated that "hell would freeze over" before the Association would ever obtain binding arbitration, and that if the Association thought that they were going to obtain binding arbitration, they were "spinning wheels" and "out in left field." However, note that while Webb made the latter statement on February 9, 1984, McGinnis, in the two subsequent negotiations sessions on March 8th and March 15th, did not take an adamant position against including binding arbitration in the agreement. At the March 15th session, McGinnis inquired of Holden why binding arbitation was necessary, and thereafter Holden was the one who took up the cudgels, explaining why binding arbitration, was a "must item," to which the Board should agree. Thus, viewed in its "totality," the Board, although strenuously opposed to binding arbitration, was engaging in hard bargaining rather than illegal surface bargaining: Chevron Oil Co. v. NLRB, 442 F.2d 1067, 77 LRRM 2129, 2133 (5th Cir. 1971).

Next for consideration is Webb's statement of January 26th to Garrison that the Association should act "more responsibly" in the future, and his

statement at the negotiations session on February 9, 1984 that the "old team" did not know how to negotiate, referring to Garrision, Bennett and Ferguson. Again, these statements by Webb hardly appear to arise to evidence of a violation of Subsection (a)(5). Clearly, in negotiations, statements are made by one side to the other, as to which the receiving side must manifest an "thick skin." Of course, if derogatory remarks and comments are continuously made by one side to the other, in such a manner as to indicate a disdain for or rejection of the negotiations process, then such conduct could constitute evidence of bad faith.

The next item to be examined involves Holden's several requests for data concerning the tax rate for Downe Township and the surrounding districts, in addition to the new school budget and the two prior budgets. In each of three instances, Holden was referred to the Board's Secretary, but elected not to avail himself of that alternative. When Read wrote to Holden on February 22, 1984, he enclosed a copy of the Board's procedures for examining public records and obtaining copies at $1.00 per page (J-4). McGinnis reiterated the procedure to Holden at the March 15th negotiations session. However, Holden remained content throughout to renew his request for the above date several times without ever communicating with the Board's Secretary.

The Hearing Examiner notes that Garrison had no difficulty in obtaining information from Webb, pertaining to the reopener negotiations (A-2 and J-2). Thus,Webb and the Board acted, consistent with Article 5.1 of the agreement (J-1), which provides that the Board agrees to make available upon request all information regarding the school district that is available to the public. The mere fact that Holden was directed to communicate with the Board's Secretary pursuant to Board policy does not indicate to the Hearing Examiner that the Board has acted in

derogation of its contractual obligation under Article 5.1 or under applicable Commission or private sector precedent.

In Shrewsbury Board of Education, P.E.R.C. No. 81-119, 7 NJPER 235 (1981), a case involving the flat refusal of the Board to provide the Association with correspondence and Board minutes relating to a grievance, the Commission followed the precedent of the United States Supreme Court in NLRB v. Truitt Mfg. Co., 351 U.S. 149, 38 LRRM 2042 (1956) and NLRB v. Acme Industrial Co., 385 U.S. 432, 64 LRRM 2069 (1967). On the facts in Shrewsbury, which are vastly different from the instant case, the Commission found a violation of Subsection (a)(5) and ordered the Board to comply with the Association's request, supra.

In a subsequent Commission decision, City of Union City, P.E.R.C No. 83-162, 9 NJPER 394 (1983), affm'g. H.E. 83-34, 9 NJPER 251 (1983), a union request for "worksheets," which were prepared as part of the employer's budget process, was refused by the employer and a resulting complaint was dismissed by the Commission. The Hearing Examiner had cited Cincinnati Steel Castings Co., 86 NLRB No. 83, 24 LRRM 1657 (1949) where the union requested a written list of names of employees and the employer's response was to offer to furnish them orally. The NLRB held that an employer's obligation to furnish data need not be in the exact form requested by the union. It appears the Cincinnati case lends support to the response of the Board herein, in that the Board responded differently to Holden than he requested but did not refuse to provide him with the information.

Also, pertinent to the instant case are two decisions of the NLRB. In Trustees of Boston University, 210 NLRB No. 48, 86 LRRM 1336 (1974) no violation was found by the employer's refusal to provide its physical plant budget for the current year and two prior years. Additionally, the NLRB exonerated an employer

who refused to provide data because the union refused to pay the cost involved: United Aircraft Corp., 192 NLRB 382, 77 LRRM 1785, 1795 (1971) and IAM Lodge 73 v. United Aircraft Corp., et al , ___ F.2d ___, 90 LRRM 2272, 2303 (2nd Cir. 1975).

Based upon Commission and federal precedent, the Hearing Examiner concludes that the Board's request that Holden contact the Board's Secretary for the requested data and pay the related expense was reasonable and, coupled with Webb's complete response to Garrison's request for data in December 1983, did not constitute a refusal to negotiate in good faith in violation of Subsection (a)(5) of the Act.

Further, the Hearing Examiner cannot concur with the contention of the Association that the conduct of McGinnis at the negotiations session on March 15, 1984 constituted a violation of Subsection (a)(5). In making Finding of Fact No. 18, supra, the Hearing Examiner relied heavily on the negotiations notes submitted in evidence (see footnote 7, supra). He deemed these notes made at the time of the event, as having greater probative value when considered together than the divergent testimony of the witnesses. The Hearing Examiner credited the Association witnesses in concluding that Holden did not initiate the use of the term "mismanagement" nor did he ask the members of the Board at that meeting to remove Webb and Eber from negotiations or to take "administrative action" against them (see footnote 8, supra). Thus considered, the only conduct McGinnis engaged in, according to the Association, was the alleged conditioning of the continuation of negotiations upon receipt of information not tied to bargaining (see Association's brief, pp. 61-64). The Hearing Examiner does not agree that McGinnis did any such thing, but only engaged in conduct which he had deemed approriate to

his position as the professional negotiator for the Board. The Hearing Examiner is of the view that McGinnis' statement to Holden at the conclusion of the meeting that the Board's response would come from PERC in the form of Unfair Practice Charges is closer to a violation of the Act than anything that occurred previously at the negotiations session on March 15th. However, given the totality of the Board's conduct in the reopener negotiations, no violation of the Act is found by the actions of the Board's negotiators during the months of January, February and March 1984.

Finally, there is the question as to whether or not the Board negotiated with the Association in bad faith when, on April 12, 1984 Eber, at a direction of Webb, advised the Supportive Staff that they were being offered a non-contributory prescription plan, and that this could be done because the Board did not have to negotiate with the Supportive Staff. The background to this event is important, namely, that the Board had discussed a prescription plan for the aides as far back as the Spring of 1982, and that the Supportive Staff, who are unrepresented, have traditionally been provided with the same fringe benefits provided to the teachers, who are represented by the Association. Also, note that the teachers were granted a partially contributory prescription plan as of September 1, 1984, the same date that the non-contributory plan was to take effect for the Supportive Staff.

While there is no pertinent Commission precedent apposite to the instant situation, 18/ there is one relevant decision of the NLRB dealing with the

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18/ The Board cites Borough of Avalon, P.E.R.C. No. 84-105, 10 NJPER 180 (1984) in support of its position that it did not violate the Act. The facts in that case are so different from

(Footnote continued on next page)

comparative treatment of represented and unrepresented employees: American Lubricants Co., supra. In American Lubricants the employer had paid a Christmas bonus to all of its employees since 1948. A union was certified for certain group of the employer's employees in 1959 and, after a contract was executed in 1960, the employer discontinued the bonus for the represented employees only and continued to make payment of the bonus to the non-represented employees. The Board found this disparate treatment to be a violation of Section 8(a)(5) of the NLRA. No violation of Section 8(a)(3) was found. The Board ordered a monetary make whole remedy for the represented unit employees whose bonus had been discontinued. Cf., Hemet Casting Co., 260 NLRB No. 60, 109 LRRM 1272 (1982) and McCulloch Corp., 132 NLRB 201, 48 LRRM 1344 (1961).

The Hearing Examiner notes that the Association has cited NLRB v. Exchange Parts Co., 375 U.S. 405, 55 LRRM 2098 (1964). By way of arguing the suspect timing of the Board herein in granting the non-contributory prescription plan to the unrepresented Supportive Staff. The factual situation in Exchange Parts is quite different from that of the instant case in that there an employer conferred benefits to its unorganized employees in the context of an organizing campaign and the filing of a representation petition. The case does not really deal with disparate treatment between represented and unrepresented employees and, thus, it is of little value in persuading the Hearing Examiner that a violation occurred in the instant case. However, American Lubricants, supra, is clearly sufficient to support a finding of a violation of Subsection (a)(5) of the Act in view of the

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(Footnote continued from previous page)
those herein that the Hearing Examiner deems the case inapposite.

substantial superiority of the Supportive Staff's non-contributory prescription plan as opposed to the partially contributory plan negotiated by the Board with the Association for its teachers. Thus, the Hearing Examiner finds and concludes that the Board violated the Act and an appropriate remedy will be recommended.

The Board Violated Subsections (a)(1) and (3) Of The Act With Respect To The Allegations In Paragraphs 5(i), 5(j), And 5(m) Of Its Unfair Practice Charges

The Hearing Examiner intends to treat seriatim the allegations in the Association's Unfair Practice Charges, beginning with paragraph 5(h) and continuing through paragraph 5(q). As indicated, the Hearing Examiner has concluded that the Board violated Subsection (a)(1) and (3) of the Act, by the conduct alleged in paragraphs 5(i), 5(j), and 5(m) of the Unfair Practice Charges filed by the Association but that the Board did not violate the Act with respect to the remaining paragraphs of the Charge referred to previously.

In determining whether violations of Subsections (a)(1) and (3) of the Act have occurred, the Association must satisfy the test as set forth in Bridgewater Tp. v. Bridgewater Public Works Assoc., 95 N.J. 235 (1984) in which it adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980), which had been approved by the United States Supreme Court in NLRB v. Transportation Mgt., Corp., ____ U.S. ___, 113 LRRM 2857 (1983). Since the Hearing Examiner has determined that the instant Unfair Practice Charges regarding Subsections (a)(1) and (3) involve an alleged "dual motive" in the actions of the Board, the following requisites must be utilized in assessing employer motivation: (1) the Association must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in

the Board's decision to discipline or threaten discipline; and (2) once this is established, the Board has the burden of demonstrating that the same action or actions would have taken place even in the absence of protected activity (95 N.J. at 242).

The New Jersey Supreme Court in Bridgewater further refined the test in dual motive cases 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 protected activity (95 N.J. at 46). Finally, the Association must establish a nexus between the exercise of protected activity and the Board's conduct in response thereto: North Brunswick Tp., P.E.R.C. No. 80-69, 5 NJPER 544 (1979).

Allegations As To Which A Violation Is Found

The allegations and proofs with respect to paragraph 5(i) establish that Webb and Eber summoned Garrison to a meeting on March 20, 1984 where Garrison was questioned regarding the circumstances of a visit by Powell and Lindsey to the office on March 19th, infra. Garrison acknowledged that she had met with Powell in or around 3:30 p.m. on March 19th on the school premises. Webb accused Garrison of conducting Association business on school property without prior authorization in violation of the agreement (Article V Section 5.3 of J-1). Garrison disputed Webb's interpretation of the agreement, contending, that there was no use of school facilities involved. Webb stated that he was going to have to proceed with litigation against the Association and Garrison. (The foregoing recital of events is found in Finding of Fact No. 20, supra, and J-30). On March 28, 1984, Webb sent a letter to Garrison reprimanding her for the events of March 19th and reiterating that there had been a violation of the agreement. Copies of this letter were sent

to Board President Read, the Personnel Committee, McGinnis and Eber. (See Finding of Fact No. 22, supra).

Further, as to paragraph 5(j), the allegations and proofs establish that on April 9, 1984, Garrison wrote to all members of the Board complaining about Webb's letter of March 28th, i.e., the lack of prior approval for use of school facilities (A-15). Garrison recited in the same letter the events that occurred on March 19th and defended her position under the agreement. On April 10th, Webb summoned Garrison to a meeting in his office where he stated that the Board had asked him to handle her letter, adding that he was very upset with her having communicated directly with Board members. Webb stated that under no circumstances was Garrison to go to the Board before seeing him, adding that if she did so in the future she would be charged with insubordination. Webb concluded by stating that he was only giving her a verbal warning at this time. (See Finding of Fact No. 24, supra).

* * * *

Although the Hearing Examiner will find, infra, that the Board did not violate the Act by the conduct of Webb and Eber on March 19, 1984, in connection with Powell and Lindsey, the entire episode as to Garrison between March 20th and April 10, 1984, smacks clearly of a violation of the Act. At the meeting with Webb and Eber on March 20th, Garrison was questioned regarding her activities after the end of the school day on March 19, 1984, and was accused of violating the agreement, as to which Webb stated that he was going to have to proceed with litigation against the Association and Garrison. This meeting was followed by a confirming letter of March 28th with copies to the Board President and the Personnel Committee thereby constituting a clear written reprimand. When Garrison

sought to bring the matter to the attention of the Board directly in writing, she was threatened with insubordination if she did it again and given a verbal warning. Such conduct on the part of Webb was plainly unrelated to Garrison's job performance but instead was due to her defense of her interpretation of the agreement with respect to the use of school facilities and departing from the "chain of command" in having written directly to Board members. Webb's verbal and written reprimands and the threat of future discipline, supra, constitute a violation of Subsection (a)(1) and (3) of the Act.

In Black Horse Pike Reg. B/E, P.E.R.C. No. 82-19, 7 NJPER 502 (1981), a case having to do with the placing of letters pertaining to protected activity in personnel files, the Commission aptly stated:

> ...The Board may critize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity... (7 NJPER at 504).

In City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190, 191 (1978), aff'd. App. Div. Docket No. A-3562-77 (1979), the Commission stated that the presentation of a position to an elected official regarding a term and condition of employment (here the interpretation of J-1) is a protected activity. See, also, Commercial Tp. B/E, P.E.R.C. No. 83-25, 8 NJPER 550 (1982), aff'd. App. Div. Docket No. A-1642-82T2 (1983) and Salem City B/E, P.E.R.C. No. 84-153, 10 NJPER 439 (1984).

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The allegations and proofs with respect to paragraph 5(m) disclose the following: On April 16, 1984, Bennett sent several students to her car in the parking lot in order to bring back cakes for a reception for Dennis Giordano, an

NJEA representative, which was to commence at 1:45 p.m. in Garrison's Room 114 at the Elementary School (see Findings of Fact Nos. 25 and 26, supra). Eber saw this occur and, on the same day, prepared a Conference Report, the subject of which was "inappropriate use of students" (J-19). Webb acknowledged that a Conference Report was disciplinary in nature (7 Tr 140). Bennett had never received a Conference Report in her three years of employment and on several previous occasions had sent students to the parking lot without incident (4 Tr 162, 163). The Conference Report was shown to Bennett on April 17 and recited that under no circumstances should students be used for the benefit of "the teacher's special interest group." Under "Recommendations" the Conference Report stated that students were not to be used for "union activities" and that Bennett should refrain from "participating in union activities" during her regular workday. Bennett also testified that Webb had later told the faculty that it was permissible to send students to cars but not for "special interest groups," clearly meaning the Association. Finally, Webb made reference to the necessity of Bennett refraining from "participating in union activities" during her regular workday in Bennett's Performance Improvement Plan (J-21) and her Job Description Evaluation Report (J-22), which were dated May 1984 and executed on June 6, 1984.

Considered in the light of Bennett's overall "commendable" and "satisfactory" performance in the course of 13 evaluations over a three-year period, which resulted in her being granted tenure for the 1984-85 school year, the April 16 Conference Report, supra, can only be viewed as discipline imposed by Eber for Bennett's having participated in union activities, i.e., the Giordano reception. Plainly, a prima facie case has been established that Bennett's exercise of protected activity was a "substantial" or "motivating" factor in the

decision of Eber, supported by Webb, to issue the Conference Report (J-19). Note that Bennett had not been the object of discipline for having engaged in like activity on earlier occasions, which reinforces the conclusion that it was her activities on behalf of the Association on April 16 that brought about Eber's Conference Report. Webb and Eber did not establish a legitimate business justification for issuing the Conference Report on April 16, it being noted that Eber did not even testify as to the incident. There was no proof by the Board of a previously enunciated rule against sending students to the parking lot and, thus, Bennett did not have notice of any rule prohibiting her engaging in activities on behalf of the Giordano reception during the regular workday. Thus, Subsection (a)(1) of the Act was independently violated: See T.R.W., Inc., 257 NLRB No. 47, 107 LRRM 1481, 1482 (1981). Accordingly, the Hearing Examiner finds and concludes that the Board violated Subsections (a)(1) and (3) of the Act by the issuance to Bennett of the Conference Report on April 16, 1984.

* * * *

Allegations As To Which No Violation Is Found

The allegations and proofs as to paragraph 5(n) indicate that, as previously noted, the Association on April 16, 1984, hosted a reception for Giordano, which was to commence at 1:45 p.m. on that date. This was after the end of the school day for that particular day due to a parent-teacher conference that evening. On the same date, April 16, Webb sent a joint memo to Garrison, Bennett, Tomlin, Metsger and Austin, all of whom had participated in arranging for and attending the reception (J-15). Webb requested that the five individuals meet with him at 8:30 a.m. on April 17, 1984. The meeting took place as scheduled with Eber also present. Webb said that he had a problem with the meeting held "yesterday,"

questioning each of them as to what time they had started to prepare for the reception. There was a conflict among those present as to what time the school day had ended. Metsger said that it was about 1:35 p.m. when the students had left and Garrison agreed. Webb, however, said that the students had not left until 1:40 p.m. Garrison said she had assumed the school day ended at 1:30 p.m. and that Eber had given permission to use the room. Webb insisted the agreement had been violated since the room was being prepared before the school day had ended and that he would check the Staff Manual. Webb concluded by stating that if there were any individual contract violations that Eber would contact those persons, and that if there was a violation of the contract by the Association then he would contact Garrison (4 Tr 11, 172). Later the same day, Webb summoned the same individuals to meet with him, stating that he had checked the Staff Manual and that the day ended at 1:35 p.m. thus, the contract had been violated because the room had not been reserved until 1:45 p.m. (4 Tr 14). Webb concluded with a warning "not to do this again" (4 Tr 173).

Unlike the verbal and written reprimands to Garrison in connection with her activities on March 19, 1984 and communicating directly with the Board thereafter, supra, and the Conference Report issued to Bennett on April 16, 1984, supra, the conduct of Webb vis-a-vis Garrison et al. fails to persuade the Hearing Examiner that a violation of the Act occurred. Admittedly, the five individuals were twice summoned to a meeting with Webb on that date and they were questioned regarding the time that they utilized the reserved room for preparation for the reception for Giordano. However, the tenor of Webb's questioning hardly appears to have been coercive and might more properly be characterized as pursuit of a legitimate business justification, that of monitoring or policing the use by the

Association of school facilities for union purposes. This would clearly fall under the second part of the Bridgewater test and, thus, not controlled by the cited case of Salem Cty. Bd. for Vocational Education, P.E.R.C. No. 79-99, 5 NJPER 239 (1979), aff'd. App. Div. Docket No. A-3417-78 (1980). Thus, considered, the Hearing Examiner will recommend dismissal of the allegation in paragraph 5(n).

* * * *

Paragraph 5(h) alleges that on March 19, 1984, Webb and Eber engaged in the surveillance of the activities of Joyce Powell, an official of the Cumberland County Council of Education Associations because Webb and Eber perceived that Powell supported the Association. The Association claims that the alleged surveillance is a violation of Subsection (a)(1) of the Act. The Hearing Examiner refers to Findings of Fact Nos. 19-23, supra, for a recital of facts pertinent to the surveillance allegation. Briefly, on March 19, 1984, Powell and Lindsey, teachers employed in Vineland, and officials of the CCCEA, arrived at the Board offices in the Elementary School at about 3 p.m. for the purpose of speaking to Garrison. Webb's secretary asked if they were with the NJEA, to which they replied "yes" and the secretary left and returned shortly stating that Garrison was busy. The purpose of the Powell and Lindsey visit was to arrange to hold a meeting of the CCCEA in Downe Township. A few minutes after arriving, Powell asked to speak with Webb and, when that request was denied, Powell asked Eber if they could go to the Faculty Room. Eber said that Webb had said they could not. At about 3:30 p.m. Garrision met Powell as she was leaving her classroom and they then proceeded to the Faculty Room where they met Bennett and Tomlin. After remaining there about ten minutes, all four left and went to the parking lot after signing out at the office. The next day, March 20th, Webb reported on the events of Powell's visit to

McGinnis and followed up the conversation with a three page memo (J-30). Webb's meeting with Garrison on that date has already been covered supra, but Webb did communicate with Board President Read regarding Powell's visit and thereafter there were telephone conversations exchanged between Powell and Read together with a letter from Webb to Powell and Lindsey on March 28, 1984, which alleged that their visit was a violation of the agreement with the Association (J-9 & J-10).

In finding no violation of the Act by the conduct of Webb and Eber on March 19, 1984, the Hearing Examiner is persuaded that the Association failed to prove that Webb and Eber engaged in surveillance of Powell, Lindsey, Garrison or anyone else on that date. As set forth in footnote 10, supra, Webb testified credibly on the Board's policy on visitors. Any visitors report to the main office such as Powell and Lindsey did on March 19th. There was testimony that an insurance agent frequently visits the school but there was no testimony that he was treated any differently than Powell and Lindsey were when they were required to report to the main office. The mere fact that Webb's secretary may have been directed to record the times of their arrival and departure does not, in the opinion of the Hearing Examiner, arise to the level of illegal surveillance. Compare: NLRB v. Historic Smithville Inn, 414 F.2d 1358, 71 LRRM 2972 (3rd Cir. 1969). In concluding that the Board did not violate the Act herein, the Hearing Examiner has in no way been influenced by the fact that Powell and Lindsey were not employees of the Board.[19/] Accordingly, it is recommended that the allegations in paragraph 5(h) be dismissed.

* * * *

19/ See footnote 27 of the Association's Brief (p.71).

The Association alleges in paragraph 5(k) that in early April 1984, Eber discriminated against Bennett by the timing of a classroom observation and the overall rating given to Bennett because she was active on behalf of the Association. As Finding of Fact No. 27, supra, discloses, Bennett had served on the Association's Negotiations Committee during the first three months of 1984. Various evaluations were received in evidence covering two of the more than three years that Bennett has been a teacher in the district. She had been evaluated thirteen times, three of which were "commendable" and the rest being satisfactory (See J-16 through J-18 & J-20 through J-28). Bennett last received a "commendable" evaluation by Webb on December 19, 1983 (J-17) and this immediately preceded the commencement of negotiations. A classroom observation of Bennett on April 2, 1984, resulted in an overall rating of "satisfactory" (J-18). There were several "satisfactory" ratings thereafter in May 1984 (J-20 & J-21), following which Webb recommended that Bennett be granted tenure and she became tenured in September or October 1984.

The Association contends that by Webb having given Bennett "satisfactory" overall ratings after December 19, 1983 when he last gave her a "commendable" rating, the Board has retaliated against Bennett for having participated in negotiations on behalf of the Association during the first three months of 1984. This is a difficult proposition to accept when one considers that out of thirteen evaluations in three years, only three of the evaluations were "commendable." In May 1984, following the alleged objectionable evaluation of April 3rd, Webb stated that Bennett continued to provide an excellent classroom setting and devoted time beyond the regular workday to planning (J-20). Admittedly, in May 1984, Webb made reference to the necessity of Bennett refraining from engaging in union activities

during her workday and referred to the Conference Report of April 16, 1984 (J-19, supra), involving the use of students and the parking lot which the Hearing Examiner has previously found to be a violation of the Act. The final reason for not accepting the Association's contention that the Act was violated with respect to Bennett's April 1984 evaluation derives from the fact that she was recommended for tenure by Webb at the end of the 1983-84 school year and became tenured in either September or October 1984. Bennett's participation in negotiations was not significantly different from that of Ferguson, whose contract was not renewed for the 1984-85 school year. Thus, the Hearing Examiner rejects the Association's argument that Bennett's "satisfactory" evaluation in 1984 was in retaliation for the exercise by her of protected activities.

* * * *

The Association alleges in paragraph 5(1) that on April 4, 1984 Eber issued a Conference Report to Schreier for having permitted a parent to speak to her without an appointment, which action by Eber was because Schreier was active on behalf of the Association being an officer and also having attended two negotiations sessions in March 1984. As reference to Finding of Fact No. 28, supra, indicates, Schreier was on bus duty on April 3, 1984 and spoke with a parent in the area of the office regarding the classwork of a student for approximately five minutes. Eber overheard the conversation and on that day admonished Schreier and the next day issued a Conference Report (J-14), which was placed in Schreier's file (8 Tr 33). Schreier prepared a reponse on the same day, April 4th, in which she contended that speaking to the parent regarding her child no way interfered with the performance of her bus duty (A-18). The Hearing Examiner disregards Eber's testimony about a prior incident in the Fall of 1983 inasmuch as it was

first raised at the hearing and was not referred to in J-14. The Conference Report (J-14) was the first one received by Schreier in approximately four years (5 Tr 191).

In recommending dismissal of the allegations regarding Schreier's Conference Report of April 4, 1984, the Hearing Examiner turns again to Bridgewater, supra. His concern is with the first requisite in assessing employer motivation, namely, that the Association must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline. Admittedly, the imposition of discipline is a managerial prerogative and immune from attack unless protected activity is implicated. The Hearing Examiner is convinced that a prima facie showing has not been made, sufficient to support an inference that any protected activity of Schreier was a substantial or a motivating factor in Eber's decision to issue the Conference Report. The protected activity of Schreier, being an officer of the Association, and attending two negotiations meetings, is of a lesser quantum than the protected activity of the alleged discriminatee in Mt. Holly Tp. Bd. of Ed., P.E.R.C. No. 85-81, 11 NJPER ____ (1985), affm'g H.E. No. 85-23, 11 NJPER 13 (1984). In Mt. Holly, the discipline was an alleged discriminatory transfer and the discriminatee was an active association representative, who had vigorously challenged her evaluation several weeks before the transfer. This Hearing Examiner concluded that the Association had failed to make a prima facie showing sufficient to support an inference that protected activity was a substantial or motivating factor in the Board's decision to transfer, which was affirmed by the Commission. Having here found that the first requisite of Bridgewater had not been met, the Hearing Examiner need not reach the second requisite of legitimate business justification.

* * * *

Finally, in paragraphs 5(p) & 5(q) the Association complains that Webb gave Ferguson a "needs improvement" overall rating on March 20, 1984, notwithstanding that Ferguson's previous ratings during the 1983-84 school year were "satisfactory," which is alleged to have occurred because of Ferguson's activities on behalf of the Association; and on April 2, 1984, Eber informed Ferguson that her contract would not be renewed, which is also alleged to have been because of Ferguson's protected activities. First, Ferguson's activities on behalf of the Association were limited to having attended negotiations, both informal and formal, in January and March 1984. There was no evidence that Ferguson did any more than attend the negotiations sessions. Thus, on the facts, Ferguson's engaging in protected activity was minimal in 1984, notwithstanding that she had been on the Negotiations Committee for three years. All of her evaluations were received in evidence and covered the period October 13, 1981 through March 15, 1984 (A-34 through A-40 & B-1 through B-7). Ferguson testified that she had ten evaluations during this time and that five of them stated "needs improvement." Webb testified that it was unusual for a non-tenured teacher to receive this many "needs improvement" evaluations. It is true that Ferguson received two "satisfactory" evaluations in September 1983 and on January 6, 1984, but Webb had grave doubts that she would become tenured, having told her that she was marginal in June 1983. Webb added that the only reason that Ferguson was continued for the third year was because she was in Special Education. His decision not to recommend renewal and tenure, concurred in by Eber, came after Ferguson's March 15, 1984 evaluation where the overall rating was "needs improvement" (B-7). The Hearing Examiner has attached little weight to the testimony of Ferguson that Webb's

demeanor at the time of the March 15 evaluation had changed from jovial to one of coldness. Ferguson learned from Eber on April 2, 1984, that she would not be renewed and this was confirmed in writing by Webb the next day (A-21). Thereafter, there were a series of communications between Ferguson and Webb and the Board Secretary regarding the recommended nonrenewal. The subject of Ferguson's nonrenewal was raised at a Board meeting on April 9, 1984 and at a hearing before the Board on May 21st. (See Findings of Fact Nos. 29-33, supra).

The Hearing Examiner, in recommending dismissal of the allegations of a violation of the Act in the nonrenewal of Ferguson for the 1984-85 school year, attaches no weight to the fact that Ferguson was the first teacher not granted tenure in the memory of Webb. In the opinion of the Hearing Examiner there was an adequate basis in Ferguson's performance, i.e., her five out of ten "needs improvement" evaluations since October 13, 1981. Webb's testimony that she was considered marginal and was retained for the 1983-84 school year because she taught in Special Education is credited. Thus, the Board had a legitimate business justification in adopting Webb's recommendation that Ferguson not be renewed thereby satisfying the second requisite of Bridgewater that the decision to nonrenew Ferguson would have taken place even in the absence of protected activity. Also, as in the case of Schreier, supra, the Association failed to make a prima facie showing sufficient to support an inference that Ferguson's minimal protected activity was a "substantial" or a "motivating" factor in the Board's decision not to renew her contract for the 1984-85 school year: Mt. Holly Tp. Bd. of Ed., supra. It plainly strains credulity to accept the Association's argument that anti-union animus or hostility toward Ferguson was the basis of Webb's and the Board's actions (See the Association's Brief, pp.91-97). Specifically, the Hearing

Examiner has credited the testimony of the Board's President Read, in which he denied making any statement or statements indicating bias against the NJEA or Peraset, the NJEA Representative who appeared for Ferguson at the two Board meetings on April 9 and May 21, 1984. Further, the Hearing Examiner does not accept the contention of the Association that Webb reprimanded Ferguson for going outside the chain of command in communicating directly with the Board (A-25). On the facts, any "reprimand" of Ferguson by Webb in this regard was substantially different from Webb's conduct toward Garrison after the March 19, 1984 incident with Powell and Lindsey. In conclusion, the Hearing Examiner must recommend dismissal of the allegations with respect to the nonrenewal of Ferguson's contract for 1984-85.

* * * *

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

CONCLUSIONS OF LAW

1. The Association violated N.J.S.A. 34:13A-5.4(b)(2) by the conduct of Alan E. Holden in February 1984.

2. The Association did not violate N.J.S.A. 34:13A-5.4(b)(3) by the conduct of Alan E. Holden and Rose Garrison in January, February and March 1984.

3. The Board did not violate N.J.S.A. 34:13A-5.4(a)(2) by the conduct of its representatives and agents.

4. The Board violated N.J.S.A. 34:13A-5.4(a)(5) in April 1984 when it granted to its Supportive Staff a non-contributory prescription plan superior to that granted to its teachers represented by the Association during negotiations on a reopener in the collective negotiations agreement.

5. The Board did not violate N.J.S.A. 34:13A-5.4(a)(5) by the conduct of its representatives and agents as alleged in Paragraphs 5(a) through 5(f) of the Complaint.

6. The Board violated N.J.S.A. 34:13A-5.4(a)(1) and (3) by the conduct of its representatives and agents as alleged in Paragraphs 5(i), 5(j) and 5(m) of the Complaint.

7. The Board did not violate N.J.S.A 34:13A-5.4(a)(1) and (3) by the conduct of its representatives and agents as alleged in Paragraphs 5(h), 5(k), 5(l), 5(n), 5(p) and 5(q) of the complaint.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Association cease and desist from:

1. Interfering with, restraining or coercing the Downe Township Board of Education in the selection of its representative for the purposes of negotiations or the adjustment of grievances, particularly, by seeking to preclude the Superintendent and the Building Principal from participating in collective negotiations.

B. That the 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.

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 refraining from reprimanding employees such as Rose Garrison and Yvonne Bennett for engaging in protected activities.

3. Refusing to negotiate in good faith with the Downe Township Education Association regarding the unilateral establishment of a non-contributory prescription plan for the Supportive Staff superior in its terms to that negotiated with the Association for its teachers.

C. That the Association take the following affirmative action:

1. 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 Association's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Association to see that such notices are not altered, defaced, or covered by other materials.

D. That the Board take the following affirmative action:

1. Forthwith provide to members of the collective negotiations unit represented by the Association a non-contributory prescription plan equivalent in all respects to the non-contributory prescription plan granted to the Supportive Staff as of September 1, 1984. And, additionally, forthwith reimburse any employee in the collective negotiations unit represented by the Association for expenses incurred since September 1, 1984, which are directly attributable to any economic differences between the benefits provided by the Association's partially contributory prescription plan and the Supportive Staff's non-contributory prescription plan.

2. Remove from the personnel files of Rose Garrison and Yvonne Bennett any documents referring to reprimands as follows: in the case of Garrison (J-13 and anything related thereto) and in the case of Bennett, the April 16, 1984 Conference Report (J-19 and anything related thereto).

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked Appendix "B". 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 Board's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Board to insure that such notices are not altered, defaced or covered by other materials.

E. Both the Association and the Board shall notify the Chairman of the Commission within twenty (20) days of receipt what steps they have taken to comply herewith.

F. That the allegations that the Association violated N.J.S.A. 34:13A-5.4(b)(3) and the allegation that the Board violated N.J.S.A. 34:13A-5.4(a)(2) be dismissed in their entirety.

G. That the Association's request that additional remedies be granted, as set forth at pages 98-105 of its Brief, be denied.

Alan R. Howe
Hearing Examiner

DATED: April 15, 1985
Trenton, New Jersey

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 members that:

WE WILL NOT interfere with, restrain or coerce the Downe Township Board of Education in the selection of its representative for the purposes of negotiations or the adjustment of grievances, particularly, by seeking to preclude the Superintendent and the Building Principal from participating in collective negotiations.

Downe Township Education Association
(Employee Representative)

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, NJ 08618 (609) 292-9830

Appendix "B"

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.

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 refraining from reprimanding employees such as Rose Garrison and Yvonne Bennett for engaging in protected activities.

WE WILL NOT refuse to negotiate in good faith with the Downe Township Education Association regarding the unilateral establishment of a non-contributory prescription plan for the Supportive Staff superior in its terms to that negotiated with the Association for its teachers.

WE WILL forthwith provide to members of the collective negotiations unit represented by the Association a non-contributory prescription plan equivalent in all respects to the non-contributory prescription plan granted to the Supportive Staff as of September 1, 1984. Additionally, WE WILL forthwith reimburse any employee in the collective negotiations unit represented by the Association for expenses incurred since September 1, 1984, which are directly attributable to any economic differences between the benefits provided by the Association's partially contributory prescription plan and the Supportive Staff's non-contributory prescription plan.

WE WILL remove from the personnel files of Rose Garrison and Yvonne Bennett any documents refering to reprimands as follows: in the case of Garrison (J-13 and anything related thereto) and, in the case of Bennett, the April 16, 1984 Conference Report (J-19 and anything related thereto).

Downe Township 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, NJ 08618 (609) 292-9830