

H.E. NO. 98-5

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

In the Matter of

ATLANTIC CITY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-95-122

ATLANTIC CITY EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, George G. Frino, attorney

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak,  
attorneys  
(Richard A. Friedman, of counsel)  
(Edward H. O'Hare, on the brief)

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On October 20, 1994, the Atlantic City Education Association ("Association" or "Charging Party") filed an unfair practice charge (Cm-1) alleging that the Atlantic City Board of Education ("Board" or "Respondent") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) and (3).<sup>1/</sup>

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<sup>1/</sup> These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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."

The Association alleges that the Board transferred three Association officers, Bryan Feinberg, Paul Spinelli and Doris Banilower, in retaliation for the exercise of their protected activities. It is alleged that these protected activities included grievance activity in the 1993-94 school year and public opposition to the superintendent's selection procedure for assignment of the district's teachers to the new Atlantic City High School for the 1994-1995 school year. On May 5, 1994, the Board transferred these Association officers from their high school positions to other schools in the district effective for the 1994-1995 school year.

A Complaint and Notice of Hearing was issued on January 19, 1995 (Cm-1).<sup>2/</sup> On February 8, 1995, the Board filed an Answer (Cm-2) generally denying the allegations contained in the complaint and asserting affirmative defenses. Hearings were conducted by Hearing Examiner Illse E. Goldfarb on April 10 and 13, May 3 and 17, July 21, and November 20, 1995.<sup>3/</sup>

On March 13 and 16, 1995, the Board filed a motion to dismiss, and, alternatively, a motion for summary judgment with the Hearing Examiner. The Board reiterated its affirmative

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2/ Exhibits received into evidence were marked by the Hearing Examiner, Illse E. Goldfarb, as "Cm" for Commission exhibits, "J" for joint exhibits, "CP" for Charging Party's exhibits, and "R" for Respondent's exhibits.

3/ Transcript citations "1T, 2T, 3T, 4T, 5T and 6T" refer to transcripts of hearings on April 10, April 13, May 3, May 17, July 21 and November 20, 1995, respectively.

defenses and requested that the complaint be dismissed. On April 10, 1995, Hearing Examiner Goldfarb denied the Board's motions on the record (1T13).

On April 13 and on May 3, 1995, the Association sought to amend the complaint with two additional allegations. First, the Association alleges that the Board sent a retaliatory notice to teaching staff in March 1995, disclaiming liability for personal information released to the Association in connection with this charge in violation of subsection 5.4(a)(1) and (3) of the Act (CP-3; 2T135). The Hearing Examiner granted the motion to amend with regard to this allegation.<sup>4/</sup>

The Association also sought to amend the complaint to allege that the superintendent retaliated against substitute art teacher Barbara Lapin for filing a grievance (3T26). This issue was fully and fairly litigated by the parties, and I therefore consider the record developed about Barbara Lapin (3T3-3T16; 3T20-3T31; 3T51-3T52; 3T107; 6T31-6T32; 6T34).<sup>5/</sup>

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<sup>4/</sup> On April 13, 1995, the Hearing Examiner also granted the Association's motion to amend the complaint to correct a date on page 3, paragraph 1 to read April 19 and to correct the date in paragraph 3 to May 17 and May 18. The Board raised no objection to this amendment (2T136-2T138).

<sup>5/</sup> What appears to have occurred in the record is that the Association's motion with regard to a second proposed amendment was never granted by the Hearing Examiner, but the issue was fully and fairly litigated (3T26). See Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-B2T2.

At the conclusion of the hearing, the parties waived oral argument. After extensions of time, the parties filed post-hearing briefs and responses, the last of which was received on April 23, 1996. In May 1997, the case was reassigned to me after Ms. Goldfarb left the employment of the Commission.

Based upon the record, I make the following:

**FINDINGS OF FACT**

1. The Atlantic City Board of Education is a public employer within the meaning of the Act. The Atlantic City Education Association is the majority representative for certified teaching staff and non-certified support staff employed by the Board.

2. The Board and the Association are parties to a collective negotiations agreement effective from July 1, 1994 through June 30, 1997 (J-1). The parties' 1994-1997 negotiated agreement provides for a three step grievance procedure ending in binding arbitration at the fourth step. For teachers, the first step of the grievance process begins with the building principal, the second step is an appeal to the superintendent and the third step is an appeal to the Board. The Board shall hold a hearing if the grievance reaches the fourth step.<sup>6/</sup>

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<sup>6/</sup> The parties' prior agreement was effective from July 1, 1991 through June 30, 1994 (CP-1; 1T100-1T101) The expired agreement differed from the current contract in that it provided for an optional hearing at the Board's discretion in step four of the grievance procedure. (J-1; CP-1)

Association Organization

3. The Association draws its membership from certified and non-certified staff in the District (1T30). For the school year 1993-1994, Association officers included: President Ilena Pitts; Vice-President for certified members Bryan Feinberg; Vice-President for non-certified members James Turberville; Sr. Vice-President Clementine Brown; Corresponding Secretary Mary Ross; Treasurer John Mazzocca; and district-wide Grievance Chairpersons Lourdes Falcon and Marcia Genova (1T29-1T30; 1T42; 1T60; 2T35; 3T68; 3T73-3T74).

The Association also had grievance and building representatives appointed in each of the 12 school buildings who worked closely with the grievance chairpersons (1T61, 1T79-1T82). Senior building representatives and building representatives were responsible for distributing Association materials to the building membership (1T31-1T32). Building grievance representatives primarily tried to settle concerns or issues raised by employees in their individual buildings (1T33).

4. During the 1993-1994 school year, the Association maintained an office in the basement of Atlantic City High School (1T28). In September 1994, the Association office as well as Ms. Pitts who was then a full-time release-time officer were relocated to the uptown complex "[A]s far from the high school as possible" (1T26-1T28; 1T126 2T28).

5. Besides Pitts, several of the Association officers, including Spinelli, Feinberg and Banilower, worked at the high school during the 1993-94 school year. Paul Spinelli, a social studies/history teacher, was one of the two grievance chairs at the high school (1T32-1T33; 1T79; 1T164; 2T34; 2T83; 2T160; 3T57; 3T68). There were approximately 14 Association building representatives at the high school including two senior building representatives (1T31). Doris Banilower, a math teacher, was one of the two senior building representatives (1T32).

6. During the 1993/94 school year, High School Principal Ernest Harper knew that Spinelli, Feinberg, Banilower and Pitts were Association activists (3T57).

#### Individual Work History and Association Responsibilities

7. **Paul Spinelli**, the high school grievance chair, has been employed by the Board since 1980 (1T161). He has a bachelor's degree in social studies and has a certification to teach secondary education social studies (1T161). When he was first hired, he taught in the high school for two years; then he was laid-off (1T162). Upon recall, he was assigned to teach in a junior high school and continued to do so until 1990, when again, he was transferred to the high school (1T162). During his four years teaching in high school, he taught advanced placement courses in U.S. government and world history (1T163). Throughout his employment, he has been an Association member and has held various offices including building representative and senior building representative (1T164).

As grievance chairperson for the Atlantic City High School for the 1993/1994 school year, he handled grievances and concerns only for certified staff. He shared the grievance chairperson duties with Anthony Rice, who handled grievances for non-certified, support staff (1T32; 1T79; 1T164-1T165; 2T35-2T36). Their duties were to work primarily to settle the concerns or issues pertaining to Association unit members in the high school (1T33).

Association members with a complaint about working conditions in the high school would see Spinelli first (1T178-1T179). He would investigate the employee's complaint, review the contract to see if there was a violation, and bring it to the building principal to see if it could be resolved informally; if not, he would submit a formal grievance. If no response was received, then the grievance would be brought to the Association district grievance chair who would act on it (1T164-1T165). As building grievance chair, Spinelli signed all high school grievances filed by the Association (1T187). Spinelli, also, would not have any direct interaction with the administration relative to the grievance process beyond the high school principal (2T40).

8. **Bryan Feinberg**, the Association vice president for certified staff, was assigned to the high school library/media center (3T65). He taught television production and photography(3T63).

Feinberg has been employed by the Board for 18 years. For 17 of those years, he was assigned to the high school as a media specialist. Feinberg was never assigned to an elementary school or middle school prior to the 1994/1995 school year. He holds certifications as a teacher of the handicapped and a media specialist. Additionally, he has a master's degree as a media specialist (3T62-3T64).

The media specialist certification allows him to function as a librarian, a high school librarian, run an audio-visual department, teach television production and photography, although it is not the same degree that a librarian would obtain. He is also qualified and certified to teach special education (3T64).

In 1993/1994, he held the position of vice-president for certified members and was on the Association's negotiations team<sup>7/</sup> (1T166; 3T67). Since he was a high level Association official and employed at the high school, he and Spinelli discussed all grievances at the high school (3T71-3T72). Feinberg was involved in some grievances as an Association representative and also in some as a grievant himself during the 1993/1994 school year, including a grievance contesting restrictions placed on his access to the audio visual room (1T197; 3T71-3T72). Some of the grievance meetings which he attended may have involved grievances which were ultimately resolved (3T72).

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<sup>7/</sup> Feinberg held other executive level positions in the Association during the 1992/1993 school year including Superintendent's liaison, negotiating team member and vice-president (3T67-3T68).



9. **Doris Banilower**, one of two senior building representatives in the high school, has been employed by the Board since 1980 (2T85; 5T73). Banilower had been a substitute teacher for three years prior to her appointment in 1980 as a regular teacher (2T85). Prior to teaching at Atlantic City High School, Banilower taught at Atlantic County Community College and at several schools in New York (2T89; 5T75).

Banilower is certified to teach math and has done so at the high school for 14 years (2T86). From 1980-1986, Banilower taught basic skills math and remedial math (5T75). From 1986-1994, she taught College preparatory courses in calculus, advanced math, algebra and trigonometry (2T87). Prior to 1994, she had never taught below the ninth grade level (2T89; 5T76).

Banilower was one of two senior building representatives at the high school (1T168; 2T141-2T142). Banilower had been a building representative for several years (2T90). As senior building representative, Banilower's duties were to receive and post Association materials throughout the building (2T91). She often spoke to different faculty members about things the Association hoped to accomplish and asked for their participation. She took notes at representative council meetings and distributed them to the members.

Banilower attended meetings representing faculty to discuss the goals of the Association (2T91). She did not handle grievances (2T91-2T92). However, in the 1993-94 school year, she

was involved in two grievances personally -- one involved the changing of a student's grade on a permanent record without informing her and the other involved discipline as a result of her leaving a May faculty meeting early (2T93). Further, one of her activities during this school year was to circulate a petition in the building concerning opposition to changes in health benefits. She spoke to 75% of the faculty asking them to sign the petition which was presented to the Board and to Superintendent Harris (2T91-2T95).

Banilower also participated on a liaison committee which met once a month after school with the principal to work issues out before filing a grievance (2T93). The superintendent did not attend the liaison committee meetings (2T114).

10. **President Ilena Pitts**, the association president, has been employed by the Board for over twenty years (1T26). During the 1993/1994 school year, she held the position of security guard in the Atlantic City High School (1T26-1T27). She described her primary duties as making sure that the contract is enforced and advising the membership what occurs throughout the State in the NJEA, NEA and in the local (1T28).

11. **Lourdes Falcon**, the district-wide grievance chairperson, has been employed by the Board for six years (1T59-1T60). During the 1993/1994 and 1994/1995 school year, she served as a guidance counselor at Brighton Avenue School (1T59; 1T78). Falcon served as the district-wide chief grievance

chairperson and held this position for three years (1T61; 1T78; 2T35). Her duties included making sure that there were grievance representatives in each school (1T61).

Falcon assigned the representatives for each building and they all comprised a grievance committee which she chaired (1T79-1T82). Another duty included making sure that grievance procedures are handled in a timely basis (1T61).

Association Activities: 1993-94 School Year

12. Staff morale at the high school was low during the 1993-94 school (1T33; 1T170-1T171). Grievance filings had increased (3T59). Spinelli had filed approximately sixteen (16) grievances before February 1994 (1T179; 3T33). Some grievances, such as a grievance filed by Banilower contesting a unilateral grade change, were resolved informally at the first step with High School Principal Ernest Harper (1T201; 2T92). Harper recalled discussing "at least one or two" grievances with Superintendent R. Mark Harris, although he had no specific recollection which grievances were discussed (3T37).

Other grievances were appealed to Harris' level, the second step in the grievance process. These included grievances contesting the extension of the work day at the high school, the institution of sign-in procedures applicable to certain staff members and the improper posting and filling of job openings (1T201-1T204). Second and third step grievances were not being answered (1T63; 1T71; 1T172).

13. Falcon attended the Board's September 28, 1993 meeting and inquired about a grievance appealed by the Association to the Board level (1T63; 1T86). The Board did not remember the matter and denied receiving the grievance. She promised to come back for the following Board meeting with certified receipts (1T65-1T66).

14. Falcon together with Pitts, Genova and Ross, attended the next Board meeting on October 26, 1993. Falcon gave Board members copies of the grievance in question with certified mail receipts indicating that the document had been delivered to them and to Harris (1T66-1T67). The receipt jogged the Board's memory. In the spirit of improving communications with the Association, the Board directed Harris to "sit down" and communicate with the Association (1T45; 1T67). Harris assured the Board that he would (1T68).

15. When the Board meeting ended, Harris told Pitts that he wanted to talk to her immediately. Pitts followed Harris to his office accompanied by Falcon, Genova and Ross (1T43-1T44; 1T68). Harris began the meeting by stating that "I would prefer to whip you people in private rather than in public" (1T46) and that Falcon's direct appeal to the Board circumvented the grievance procedure (1T70). Falcon responded that she brought the matter to the Board in order to find out if the Board had even received the grievances and to find out why she was being ignored (1T70; 1T85; 1T88-1T89). Harris stated that he preferred that

Falcon speak directly with him as opposed to her "filing things and putting things on paper" (1T45) and that, in the future, he would reprimand her if she did not follow the grievance procedure (1T70-1T71).<sup>8/</sup>

Specific grievances were then discussed, one of which concerned a termination (1T56-1T57). Harris advised them that they should pick and chose their grievances and stop defending certain people (1T47; 1T71; 1T73). Pitts responded that it was the obligation of the Association to defend its members (1T48; 1T71).

Harris told Pitts that it was important to screen grievances, particularly since the parties were in negotiations for a successor agreement (1T47; 1T48; 1T75). He referred to a recent grievance concerning compensation for parent-teacher conferences as a case in point (1T49).<sup>9/</sup> He stated that the grievance put the Association in a bad light because the public would perceive the Association as being more interested in money than attending parent-teacher conferences (1T48-1T49; 1T58; 1T74). Harris continued that Pitts could not understand this because she was not a teacher (1T50; 1T74; 1T95) and had a "union

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<sup>8/</sup> I credit the testimony of Pitts, Falcon and Genova as to the October 26 meeting in Harris' office. Harris did not rebut their testimony.

<sup>9/</sup> Genova described it as having been won by the Association (1T48), whereas Falcon noted that it was still pending at the time of the meeting (1T74).

mentality" (1T71). Harris thought that Gene Sharp, the NJEA representative, was running the Association. Harris stated, "...you just keep listening to Sharp" (1T47; 1T53; 1T72). Harris ended the meeting by stating to Falcon that he has an "open door policy and (she) should use the door". He did not discuss settlement of any specific grievances (1T100).

Genova described Harris' tone as hostile and sarcastic particularly to Pitts, during this October 26 meeting (1T53). Falcon felt that Harris was reprimanding her (1T70-1T71; 1T95). Their testimony was unrebutted.

16. Barbara Lapin was assigned to the high school during the 1993-94 school year as a full-time substitute art teacher, a position she had held for ten years (3T4). On November 26, 1993 Lapin filed a complaint with the State Department of Education objecting to the Board's failure to offer her a permanent position at the high school (CP-4A; 3T6; 3T9).<sup>10/</sup> Subsequently, on November 30, 1993, Lapin wrote to Harris formally applying for the permanent position (R-15).

Early in December, 1993, Harris visited Lapin's classroom to observe her teaching and to talk with her students (3T14-3T15). Shortly thereafter, Lapin asked Harris to visit her classroom again to view her classroom bulletin board (3T150).

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<sup>10/</sup> Lapin continually referred to the filing as a "grievance" and testified that Harris referred to the filing as a "grievance" filing (3T3-3T6; 3T15; 3T20-3T22).

Harris did return on December 10, 1993 and asked to talk with Lapin in the hallway. Lapin testified that Harris asked her why she had filed the "grievance", that she had no right to do so and that she would have to withdraw the "grievance" if she wanted a job.

(3T15-3T16; 3T20-3T21; 3T23). Lapin told Harris that she filed because she wanted a job. Lapin felt that Harris spoke to her in a hostile manner. (3T20).<sup>11/</sup>

On December 14, 1993, Lapin wrote to Harris stating that she "was withdrawing her grievance and all related actions" concerning the high school art teacher position (CP-5; 3T21-3T22). She was appointed to a regular (non-substitute) position as an art teacher at the high school in 1994 (3T4).<sup>12/</sup>

#### Harris Appointment and Background

17. In July 1992, the Board appointed Dr. R. Mark Harris as superintendent (4T2). Prior to this appointment, Harris has been the assistant superintendent for curriculum and instruction from 1987 through 1992 (4T2-4T3).

18. While Harris was an assistant superintendent, a determination was made by then Superintendent Lasardi to restructure education generally in the school district and to

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<sup>11/</sup> Lapin's testimony is un rebutted.

<sup>12/</sup> In school year 1994-95, Ms. Lapin was assigned to an elementary school complex in Atlantic City as a regular art teacher. Her contract was not renewed for the 1995-96 school year (3T3-3T5). For purposes of this decision, these subsequent employment actions are not relevant and offered solely for the purpose of background information.

examine/redesign the program in the high school in particular (4T4). Harris was assigned to review education specifications for a new high school to be opened in September 1994, because the administrative team had determined that the comprehensive traditional plan of education in place from years ago did not meet the needs of the high school for the 21st century. Therefore, the plan was to reorganize the high school (4T4).

#### Restructuring the High School: The Plan

19. Restructuring the high school was phase 1 in a district-wide initiative called "New Generation Learning Community Project", but the Board intended to restructure all of the district schools eventually (4T42). Harris' charge when he became superintendent in July of 1992 was to begin the implementation of the new educational program and complete it for a new high school (4T2-4T3).

20. Several steps were involved in the reorganization plan for the high school (4T4). First, department heads and supervisors at the high school were removed from the high school and they were elevated to district level supervisors responsible for curriculum areas (4T4-4T5). Secondly, in an attempt to give students more opportunity to connect what they learned from each discipline, a model suggesting a "house plan" was adopted (4T5). The suggestion underlying this plan was that smaller and more personal interaction with teachers was better for students in their interaction with teachers (4T5).



21. Central to the plan was adopting a theory of teaching suggesting that the "constructivist" way of delivering education is best (4T5). This method suggests that a cooperative, active learning strategy is best for students. A learning by doing strategy rather than a passive process of learning was the design adopted for the high school (4T5-4T6).

22. In the beginning of the 1993-1994 school year, Harris was creating the high school component of the plan (4T7). A significant piece needed to carry out a successful constructivist program at the new high school involved staff selection (4T6-4T7; 4T42). Harris wanted staff assigned to a new high school whose teaching style was constructivist and matched the new paradigm adopted for teaching at the high school (4T7-4T8). The four basic components for the paradigm included:

- a.) school membership -- how did the teacher construct an environment so the students could connect with a significant adult or group of adults available to nurture them;
- b.) academic success and achievement;
- c.) self esteem;
- d.) vision -- giving students an opportunity to give them a purpose behind what they learn, and visualize where they will be in the future (4T8-4T9).

Harris knew when staffing the high school he had to accommodate staffing for all needs and programs in the district (4T39-4T42).

23. During the 1993-1994 school year, Ernest Harper was the Atlantic City High School principal. He had been the principal for six years. He continued his assignment as high school principal until October 11, 1994 just prior the opening of the new high school (3T31-3T32; 6T5).<sup>13/</sup>

Harris asked the principals of the various schools to give him feedback on teacher applicants for the new high school in terms of discipline records, lesson plans, colloquial relationships within the building's activities and other pertinent data for purposes of Harris' personal administrative review of the individual applicants for positions in the new high school (4T44; 4T52). Harper as high school principal was part of this process (5T13-5T16; 6T6-6T7).

The "Road Show" and Application Process

24. In February 1994, Harris and members of his administrative staff held a series of staff meetings known as the "Road Show" for the purpose of introducing the new paradigm for secondary education in the district and distributing applications for teaching positions in the new high school (4T12; 4T15). These meetings were conducted primarily at the high school with one general presentation for all other interested staff at the elementary level (4T12).

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<sup>13/</sup> In October 1994, Harper was transferred out of the high school and became the Operations Executive. His duties included working on personnel development and staff recruitment. Harper filed a grievance as a result of his own transfer (3T32).

25. At these meetings, Harris explained that the key to the success of the new high school was selecting and developing teachers from within the district whose teaching style was compatible with the proposed instructional system (4T6-4T8). Harris wanted teachers who were "constructivists" or had the desire to change or make the transition from a traditional style (4T9-4T10). Harris defined a constructivist as a teacher who believes that students have a stake in the outcome of their education and, therefore, develops a teaching style that actively engages the students in the learning process (4T9-4T10).

26. Any teacher with a secondary certification interested in teaching at the new high school was invited to apply (1T129; 4T12). Because Harris was looking for teachers who had or could be developed to have a constructivist teaching style, Harris knew that some teachers who were currently teaching at the high school would not be reassigned to the new high school (4T11).

27. The selection process was two-fold and was designed to funnel as much information from as many sources as possible to Harris in order for him to make his decisions (4T39).<sup>14/</sup> The

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<sup>14/</sup> An Unfair Practice Charge was filed by the Association on May 2, 1994 alleging that the unilateral imposition of these selection procedures violated the Act. In Atlantic City Board of Education, P.E.R.C. 95-98, 21 NJPER 265 (¶26168 1995), the Commission determined that the application requirements for teachers seeking a position in the new high school were substantive, not procedural, and that any restriction on the Board's ability to assess teacher qualifications for a transfer would significantly interfere with the Board's educational policy determinations. Therefore, the Commission found no violation of the Act.

first component was the public part and involved interviews by a Staff Discovery Committee, while the second component was the administrative part conducted by the superintendent and dealt with evaluation of information from various sources including a review of confidential personnel information (4T19).

The thrust of the Staff Discovery Committee was to identify instructional styles after reviewing applications and interviewing applicants (4T36-4T37). Harris considered all of the teachers currently at the high school to be "good" teachers. He communicated this repeatedly to the committee (4T8; 4T36). The committee's role was only to "discover" those talents that would demonstrate that the teachers would be well suited for the new high school by identifying where on the teaching style continuum the applicants placed, ranging from traditionalist to constructivist (4T10; 4T26; 4T36).

This public piece accounted for a very low percentage of the decisional process (5T9). Harris viewed the Staff Discovery Committee interviews as a means to counteract some negative media publicity which suggested that the teaching staff was less than capable. He regarded this procedure as a way to introduce the community to his "very capable instructional staff" (4T27; 5T10-5T11). However, the administrative piece of the selection process was by far the most important component, and, ultimately, the final decision as to who would be assigned to the new high school rested with Harris (3T129; 5T9; 6T21).

28. Applicants were to submit an "Application for Reassignment" by March 11, 1994 (CP-2). The Application for reassignment requested certain personal information: home phone number, social security number, teaching certifications and experience in the area of certification as well as three references.

An applicant ranked seven institutes or curriculum areas in order of interest.<sup>15/</sup> and submit an essay addressing his or her unique qualification to teach in a school where the students would be "treated as clients" and "learning will be the most important product" (R-1; 4T17). All names were removed from the application so that they would be given a "blind reading" (4T28). Spinelli, Feinberg and Banilower applied for reassignment to the high school as did other high school Association officers (2T31; 2T124; 2T144; 3T112).

29. Applicants were then interviewed by a Staff Discovery Committee made up of Board members, administrators, teachers, parents, students and representatives from the Atlantic City business community (R-1; R-2; 4T19-4T20; 4T29; 4T33). Committee members were instructed on how to conduct an interview so as to determine an applicant's instructional style (R5-R9; 4T26-4T27).

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<sup>15/</sup> An applicant could also suggest additional institute themes.

30. Interviews were conducted by the three Staff Discovery Committees on April 25, 27, 28 and May 2, 1994 (R-10). Harris did not take part in the interviews although he was physically present on most occasions to act as a "facilitator" (5T9; 5T48-5T49). All applicants were rated on their teaching style on a scale that ranged from 1 through 3, 3 equals "highly recommended," 2 equals "recommended" and 1 equals "conditionally recommended" (R-11a, b, c). One-hundred sixty-eight (168) applicants were interviewed (R-12).

31. At the same time that the Staff Discovery Committees were conducting their interviews, Harris was analyzing confidential personnel information on each applicant (4T43). Harris considered this analysis, his "administrative" review, to be the most important component of the application process (4T55).

32. Harris rated the applicants' essays, using the Staff Discovery Committee rating scale of "1" through "3" (5T8). The interview ratings (R-11a, b, c) and Harris' essay evaluations were summarized on the "Tally Sheet" (R-12; 4T58; 5T7).

Spinelli's interview rating was 1.4 (R-11c) and his essay rating was 1.9 (R-12); Feinberg's interview rating was 2.9 (R-11a) and his essay rating was 1.5 (R-12); and Banilower's interview rating was 1.8 (R-11c) and her essay rating was 2.7 (R-12). The Tally Sheet listed other factors considered by Harris, such as teaching load, extra curricular activities, attendance of the applicants and their students, lesson plans, annual written

performance reports and student grade distribution and disciplinary records (3T126-3T127; 4T53-4T54). No information or rating was included for these items. Harris, as "committee of one," merely used the Tally Sheet to "focus" his review of each applicant (4T58-4T59).

33. On a separate form, Harris himself gave each applicant a "socio" grade for cooperation with colleagues and participation in school governance committees or departmental committees (4T61-4T62; R-13).<sup>16/</sup> The socio grade for Banilower and Feinberg was a "D," and a "C+" for Spinelli (R-13).

34. The last step in Harris' "administrative" review was to interview an applicant's principal (4T44; 4T52; 5T13; 6T6-6T7). Harris interviewed Harper about each of the approximately 100 high school applicants, including Spinelli, Feinberg and Banilower (6T7-6T8). They discussed each applicant "very cursorily" (5T15).

Harris asked Harper to state how an applicant would "fit with the [new] high school" (6T10). Harper's responses varied from brief to more extensive (6T19-6T20). Harris made it clear that Harper's recommendations were not binding on him as he would be making the final recommendation to the Board (4T51-4T52; 5T9; 6T17; 6T21).

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<sup>16/</sup> Harris noted extra-curricular activities of only four applicants on this form and approximately thirty applicants received no grade. There was no explanation in the record for the lack of grades for these individuals (R-13).

35. Five or six of the applicants that Harper discussed with Harris were identified as "not fitting the mold" for purposes of being placed in the new high school (6T15). Neither Spinelli nor Feinberg were identified by Harper as being part of this group (6T15-6T16).

Harper had engaged in many conversations with Feinberg and knew about his interest in the new high school (6T16), so Harper recommended him as "fitting the mold" (6T10). Harris indicated to Harper that the issue of Feinberg going to the new high school was "non-negotiable" (6T11). Further, Harris did not indicate to Harper that Feinberg was being transferred to fill a need in any other facility (6T11).

Harris also indicated to Harper that Banilower would not be assigned to the new high school (6T20). Harris did not indicate to Harper that Banilower was being transferred to fill a need at any other school (6T18). Finally, the discussion as to Spinelli was brief and Harris indicated to Harper that the subject of Spinelli's assignment to the new high school was "non-negotiable" (6T13; 6T21-6T22). Just as with Feinberg and Banilower, Harris did not indicate to Harper that Spinelli was being transferred to fill any special needs at another school (6T13-6T14; 6T18). There were no discussions at this meeting about the union activities of Banilower, Feinberg or Spinelli (4T72; 6T20).



Association Opposition to Selection Procedure

36. Harris was aware in April 1994, that the Association was opposed to the reassignment procedure created by him for staffing the new high school. (Stipulation 5T90). It aroused significant controversy and was discussed and argued at board meetings (Stipulation 5T91). In the spring of 1994, Feinberg spoke at board meetings in opposition to the proposed transfer procedures (Stipulation 5T92). Banilower also addressed the Board at various meetings in opposition to the procedures (2T107-2T108; 3T89-3T90). After one Board meeting in April, Banilower, Pitts and Genova together with other Association representatives met privately with Harris to express their disapproval of the selection procedure (2T108-2T110).

37. The retention and transfer procedures were also discussed and debated in the local media -- newspapers, radio and television (Stipulation 5T91). During that time, Harris spoke numerous times in favor of the procedure, while the Association spoke against it (Stipulation 5T91). Spinelli was one of the Association's speakers in opposition to the selection process (1T216; 3T85).

38. Harper knew that the reassignment procedure was vigorously disputed at the high school (3T81-3T84). At an Association meeting on April 13, 1994, attended by approximately ninety (90) teachers, Pitts, NJEA representative Sharp, Spinelli, Feinberg and Banilower explained their reasons for opposing the reassignment procedure. Harper was seen by Banilower to be present during this Association meeting (1T214-1T215; 2T100).

Spinelli felt that the reassignment process was coercive and divisive in that it was involuntary and forced teachers to compete with each other in order to keep their jobs (1T128; 1T130; 1T209). Banilower was opposed to the public disclosure of personal and confidential information (2T97-2T98). Feinberg spoke out at the high school meetings in opposition to the interview process and was against having teachers from other buildings applying for his job (3T92). John Kenny, a high school math teacher, objected to being evaluated by non-teachers (1T128). It was decided that the Association would urge other teachers not to participate in the application process (2T5-2T6).

39. The next day, April 14, 1994, Harris stood outside Spinelli's classroom looking into the classroom for about 15 to 20 minutes (1T117; 2T29-2T30). This incident represented the first time that Harris had visited Spinelli's classroom, although Harris never entered Spinelli's classroom on that day (2T31).<sup>17/</sup>

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17/ Harris testified that he often visited classrooms at random, but he denied that he "hovered" outside Spinelli's classroom (4T73). Spinelli's testimony was corroborated by Edie Southard, a teacher whose classroom is next to Spinelli's. She testified that she could see Harris "peering" into Spinelli's classroom for 15 or 20 minutes (1T117-1T118). She had never seen him do that to anybody, although she did recall seeing Harris enter Spinelli's class one time in the past to observe a speaker Spinelli had in his classroom (1T119). Harris' only testimony in regard to the April 14 incident was that he did not recall the incident (4T73). I credit the testimony of Spinelli and Southard as to this incident.

40. Shortly after the April 13 Association meeting, Spinelli notified Harper that he, Feinberg and John Kenny, a high school math teacher, would visit other schools during their prep periods on April 15. Harper gave his permission (1T175-1T176). In the past, prep time had been considered unscheduled time, and Spinelli had visited other schools for union business during his prep or planning period (1T175-1T176).<sup>18/</sup>

On April 15, 1994, Spinelli visited other school buildings during his prep period to speak to other teachers (Stipulation 5T92). Spinelli was going to discuss his opposition to the transfer process (3T94-3T95).<sup>19/</sup>

41. When Spinelli returned to the high school, he was met by Harper and told that he was not permitted to go to other schools (1T177). When Spinelli informed him that he had already gone, Harper said: "Okay, well then don't worry about it." (3T177-3T178).

Kenny, on his return, was greeted by Harris and Harper and told essentially the same thing (1T131-1T132). Kenny felt that this was a change in the prior practice that had been

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<sup>18/</sup> Spinelli relied on Article 6 of the parties negotiated agreement which provides that Association representatives may meet with teachers for Association business during the preparation period provided that the principal of the school is notified prior to the meeting (CP-1; J-1).

<sup>19/</sup> Testimony supports a finding that this event occurred on April 15, 1994, not on the stipulated date of April 10, 1994 (1T176).

recognized for the twenty-three years that he had been in the school district when it was common practice to visit other school on union business during free time (1T130-1T132).

Finally, Harper visited Feinberg before Feinberg left the high school. Feinberg decided not to leave the high school after Harper told him he was denied permission (3T93-3T94).

42. On April 19, 1994, at Harris' request, Harper sent a memo to Spinelli stating:

In follow-up clarification on the requests to leave the building, permission can be granted only outside of school hours (before 7:50 AM or after 3:00 PM). Therefore, I must rescind any prior granting of said permission by the administration (CP-2; 3T38; 3T40-3T41).

Spinelli filed a grievance regarding Harper's memo (1T196).

43. On May 2, 1994, the Association filed an Unfair Practice Charge alleging that the unilateral imposition of the selection procedures violated the Act.

#### The Transfer Decision

44. Harris made his recommendations to the Board at its May 5, 1994 meeting (R-14; 4T62). Kenny was reassigned to the new high school, but Spinelli, Feinberg and Banilower were among fourteen applicants who were not.

Banilower was transferred to the Indiana Avenue School which is a K-6 elementary school (2T87) as a basic skills math teacher. Subsequently, she was reassigned to another elementary school, the New Jersey Avenue School, prior to the start of the 1994-95 school year to teach basic skills math (4T71). In

1994-95, Banilower was transferred back to the new high school (6T34). Feinberg was transferred to Central Junior High School, media center. Spinelli was transferred to Chelsea Junior High School, grades 7 and 8 (R-14).<sup>20/</sup>

45. At the May 5, 1994 meeting, the Board passed a resolution adopting Harris' reassignment and transfer recommendations (R-14; 5T60-5T61).

Rationales for the transfers were only given to the Board if the Board asked for reasons. Harris did not recall the Board asking why Spinelli, Feinberg or Banilower were reassigned (5T60-5T62).

The day after the Board meeting, Feinberg and Spinelli went to Harper's office to discuss their transfers from the high school (2T33). Spinelli asked Harper if all things were equal, why he and Feinberg were transferred. Harper replied that he thought they were being transferred because of their "union activity" ((2T32). Harper and Feinberg corroborated Spinelli's testimony (3T133-3T135; 6T26).

46. Harris stated publicly that the reason for the transfers was as follows:

We were looking for the ability for teachers to -- one, to be constructivists or their ability to move towards being a constructivist. That's what we were looking for. So that if you were not a constructivist at the time the selection was made, at least through training and other

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<sup>20/</sup> Lapin was reassigned to the Uptown School Complex to teach art.

opportunities that we could help you to become a constructivist (5T63).

Despite this public declaration, the transfer of Spinelli, Banilower and Feinberg had nothing to do with whether they were constructivist or traditionalist.

Q. All right. Did you ever indicate, when any of these three people here were transferred, publicly that the reason they were transferred was -- had nothing to do with whether they could or couldn't be constructivists, but because they were needed for whatever talents they had at other schools?

A. That's correct

Q. You said that?

A. No. I said that would have been my reply, had I been asked for a rationale.

Q. Well -- did you ever offer that rationale whether you were asked for it or not?

A. No. (5T64)

This private rationale, the positive reasons to transfer due to "needs" at other schools, was not communicated to the public, to the individuals, to Harper, nor to the principals of the schools to which they were being transferred (5T57-5T59; 5T60-5T64; 5T68).

Once Feinberg, Spinelli and Banilower were transferred, Harris did not know if their assignments reflected the use of their skills or the needs which he had identified at each school. His explanation for this lack of knowledge was that he did not "micro manage the schools" (5T48-5T49).

47. According to Harris, Feinberg was transferred to a school where he would be helping to plan new media centers as part of Phase 2 of the district-wide "New Generation Learning Community" (4T65-4T66). Feinberg is certified as a media specialist, ran the high school media center (television and

photography) for 17 years and helped design the media space in the new high school (3T63-3T64; 4T65). Harris stated that Feinberg would have a "key role" in planning other centers in the district (5T42-5T43).

Nevertheless, prior to the transfer/reassignment, Harris did not discuss the transfer with the principal at Central Junior High School nor did the principal request that Feinberg be sent there (5T40-5T41). In fact, Central has no media center, and Feinberg runs the library media center which consists of a few pieces of equipment (3T65).

Feinberg's role in establishing a media center at Central was minimal at the time of his transfer because the Board had not yet dealt with sites nor had it hired architects or construction management (5T42-5T43). At the time that Harris made his decision relative to Feinberg, the Board was still dealing with master plan development (5T42). The rationale expressed by Harris for transferring Feinberg for the 94-95 school year, when the need for his media specialist skills was premature, was "to allow [Feinberg] to settle in...before he gets his feet wet dealing with the kinds of things that we wanted him to deal with" (5T43).

Subsequently, a committee was formed to help facilitate the construction of new buildings and coordinate the construction so that it would meet the needs of the restructuring program. Feinberg was not assigned to the committee nor was he asked to play a planning role at his school (5T86-5T87; 6T31).

On October 6, 1994, Feinberg attended a district workshop for media specialists where he learned from an attendee that she was assisting the principal at the Chelsea Heights School where she was assigned to plan a new library/media center. This teacher, Melba Conrad, only had a teaching certificate and was working toward her media certification (3T30-3T31).

48. According to Harris, Spinelli was "a very fine teacher" with "an excellent track record in terms of being able to manage students" (4T67; 5T45-5T46). Harris concluded this because of the few discipline referrals reflected in Spinelli's record (4T67). Spinelli was transferred to Chelsea Junior High School for this reason. Harris considered Spinelli to be "a very fine teacher, a very strong teacher, someone that kids look up to and admire" (4T67).

As with Feinberg, Harris did not speak to the principal at Chelsea regarding the reasons for the transfer nor was there a request made by the Chelsea principal to have Spinelli transferred to his school (5T47). Harris thought that Spinelli would be a stabilizing influence at Chelsea since the principal was retiring and the staff was being shifted around. Spinelli had taught at Chelsea years before (4T67).

Harris did nothing to facilitate the usage of Spinelli's "special skills" in regard to management of disciplinary problems (5T49). There was a change in principals at Chelsea as of August



30, 1994. Harris never discussed the role he envisioned for Spinelli with the new principal, Rios (5T50).<sup>21/</sup>

In August 1994, the building's vice-principal, Rios, replaced Milan. Spinelli spoke to Rios in August. Rios said that he had heard rumors that Spinelli was coming but had not been formally notified (5T70). Rios never assigned Spinelli any special duties in regard to discipline at the school other than his general teaching and classroom duties (5T71-5T72).

49. According to Harris, Banilower was transferred to the Indiana Avenue Elementary School to teach basic skills math and to act as a resource person, because math scores there were "dismal" (4T71). He felt that she had a strong knowledge base in mathematics, while most elementary teachers were generalists. This knowledge base was important to dispel the math phobia of other elementary teachers (4T69-4T71). During the summer of 1994 when the Board received the District's standardized test scores, it was determined to reassign Banilower to the New Jersey Avenue School to teach basic skills mathematics in order to improve math scores there (4T71-4T72).

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<sup>21/</sup> Harris testified that he spoke to Principal Milan about Spinelli's role at the school in June 1994 (5T50). However, when Spinelli spoke to Milan in June, Milan did not even know if Spinelli was the person coming to his building. During a subsequent conversation with Milan in August, Milan still did not know that Spinelli was going to be assigned to his building (5T67-5T69). I credit Spinelli whose testimony has been credible throughout.

When Banilower reported to the New Jersey Avenue School prior to the beginning of the 1994-95 school year, she met with the principal, Dorothy Bullock who informed Banilower that she would be teaching basic skills generally, including math, language and reading (5T77-5T78). Banilower explained that she could only teach math, since her certification was in math (2T88; 5T78).

Bullock never requested Banilower to take on any extra duties besides teaching math, such as math curriculum development (5T78). At the time of Banilower's reassignment to the New Jersey Avenue School, there were six other teachers who taught basic skills generally including math and all had elementary school endorsements (5T79). Banilower taught only basic skills math and was the only teacher in the district assigned to teach only basic skills math (5T80). She was given no duties as a resource person for the other basic skills teachers (5T80-5T81).

#### The May 17 Staff Meeting

50. On May 17, 1994, Harper held a regular general staff meeting in the high school at the end of the school day (2T12; 2T18; 2T114; 3T53; 3T96). Present at the meeting were faculty and various administration officials (3T54). As usual, some teachers left the meeting before it was over (2T118; 3T99-3T100). Among the approximately 10 to 25 teachers who left the meeting early were Spinelli, Feinberg and Banilower (2T18; 2T26; 2T115; 3T96).

51. Shortly after the May 17 staff meeting, Harris told Harper that he wanted to reprimand five teachers who left the

meeting early: Spinelli, Feinberg, Banilower, Ms. Weaver and Mr. Greenberg (2T22-2T24; 3T45-3T48; 3T55-3T56). Harris explained to Harper that he wanted a reprimand procedure initiated and that Harper was to prepare letters of reprimand for the teachers (3T46-3T47).

On May 18, 1994, Spinelli, Feinberg, Banilower and Greenberg were called in one at a time to Harper's office to meet with Harper, Harris and four vice-principals from the high school (2T19-2T20; 2T119; 3T54; 3T101). Prior to the May 18 meeting, Spinelli testified that Harper told him it was about the faculty meeting the day before and suggested that he might want a union representative (2T74). Similarly, Banilower sought union representation prior to the meeting with Harris because she felt intimidated by Harper's summons (2T120).

52. When Spinelli arrived at Harper's office, he asked that the union representative waiting outside the room remain with him during the meeting (2T76). Harris told him, "read your contract, you are not entitled to one" (2T20). Then one of the vice-principals stated that it appeared that the teachers had left the staff meeting in protest. Spinelli denied that there was a protest. He explained that he left the meeting because minor surgery made it necessary for him to use the bathroom. Harris dismissed this explanation and responded that Spinelli was an adult and should be able to control himself (2T77-2T78).

53. Before Banilower reported to Harper's office, she asked another building representative to accompany her. Harris "shooed" the representative away, telling him he could not come in (2T121). Harris asked Banilower for an explanation as to why she had left the meeting, and she explained that she left the meeting early to go back to her classroom and get her keys before the janitor locked the door for the evening (2T116; 2T121-2T123). Harris then told her that a disciplinary letter would be put in her file, and if it ever happened again, "[she] would be considered insubordinate" (2T122).

54. Feinberg arrived unaccompanied to Harper's office. When Harris told him that he was called in because he left the staff meeting early -- something he was not allowed to do -- Feinberg requested union representation (3T101-3T102). Harris refused his request (3T102). Feinberg was asked to explain his early departure from the faculty meeting, and he explained that he left the meeting early because he had to deliver a video tape of the last Board meeting to the local cable company's office ten miles away (3T121-3T122).

55. At the end of each of the meetings with the individuals, Harris gave the same warning; they would receive "a letter in the file" to which they could respond, and, if it happened again, they would be disciplined for insubordination (2T21; 2T122; 3T51; 3T103). Harper wrote the disciplinary

letters, but Harris never reviewed them, and Harper let the matter drop (3T51).<sup>22/</sup>

#### The Association Election

56. The Association held an election for officers in mid-May 1994 after the transfer decisions were announced (2T28). Pitts was reelected president and Spinelli was elected vice-president. At around this time, Spinelli had a meeting with Harris to discuss "possibly reconsidering the transfers" (2T27-2T28). When Harris congratulated Spinelli on his new elected Association office, Spinelli told him that Pitts was reelected because she could get the votes out. Harris responded that "I can control the Association any time I want...I can get 383 votes" (2T28).

#### Notice to Teaching Staff Who Applied for Reassignment

57. Banilower and Feinberg attended a workshop at the high school on March 31, 1995 where other teachers told them about a notice that the Board had recently distributed to teachers who had applied for reassignment to the new high school (2T129; 3T104-3T105). The notice stated that the Board was responding to the Association's demand for "personal confidential records" used

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<sup>22/</sup> There was testimony that Greenberg spoke out at the April 13 staff meeting about the interview process (3T98) and had sent a letter registered mail to Harris in opposition to the transfer process (2T24). There was also testimony that Weaver was vocal at the April 13 meeting (2T25). However, the record is not clear as to whether Weaver was disciplined.

by the Board when the reassignment and transfers were made in May of 1994. The notice indicated as follows that the demand was being made in the context of "a pending unfair labor practice charge":

That case was brought by the Association on behalf of Paul Spinelli, Bryan Feinberg and Doris Banilower. It seeks to compel their transfer to the new Atlantic City High School.

This notice is given to you because you may have certain rights that can be asserted with respect to the furnishing of personal information in response to the demand of the Association. In absence of any written objection received by the Board before Friday, March 31, 1995, the material will be turned over to the attorneys for the Association. The Board shall not be liable for any damages caused by complying with the Association's demand.

Any further question should be directed to the Association. (CP-3)<sup>23/</sup>

58. As a result of this notice, Feinberg and Banilower felt singled out again by the Board as being troublemakers (2T130; 3T105).

#### ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates subsection 5.4(a)(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, by a

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23/ Hearing Examiner Goldfarb admitted CP-3 into evidence after Charging Party amended the complaint to add this incident as a alleged violation of Section 5.4(a)(1) and (a)(3).

preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis.

Timing is an important factor in assessing motivation and may give rise to an inference that a personnel action was taken in retaliation for protected activity. City of Margate, P.E.R.C. No. 87-45, 13 NJPER 498 (¶18183 1987); Bor. of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985).

The Association argues that the Board's decision to reassign teachers Banilower, Feinberg and Spinelli was in retaliation for their activities in representing the Association. More specifically, it contends that during the 1993-94 school year, each of these teachers as union officials and representatives was involved in filing numerous grievances on behalf of union members as well as on their own behalf and were

actively involved in opposing the Board's unilateral implementation of a selection procedure to determine teacher assignment to the new Atlantic City High School.

The Board counters that it was not motivated by animus toward anyone's protected activity, that it had substantial business justification for making the decisions to transfer, that its transfer decisions were the appropriate exercise of a managerial prerogative, that, in any event, the statements of its superintendent were only "generalized, free-floating anti-union animus" or "non-coercive expressions of views, argument or opinion" with no causal link as a motivating factor in the decision to transfer, and, finally, that the ultimate statutory authority to transfer/reassign rests with the Board not the superintendent.

The parties stipulated to the first two Bridgewater elements as to Spinelli and Feinberg -- that Spinelli and Feinberg engaged in protected activity and that the Board knew of it. Further, the Charging party has established through direct evidence that Banilower engaged in protected activity and that the Board knew of it. As senior building representative at the high school, she was active in union representation matters such as circulating a petition among staff challenging the Board's new health benefit plan and delivering the petition to the Board, filing grievances on her own behalf in 1993-94 and was vocally opposing the Superintendent's selection procedure on behalf of the



association, including speaking out at the April Association meeting to encourage other teachers to voice their opposition to Harris' plan and, subsequently, at the April Board meeting and after the Board meeting at a private meeting in Harris room .

#### Hostility Toward Protected Activities

The next component of Bridgewater is whether the Board exhibited animus toward protected activities. I find that Harris was hostile toward the protected activities of the Association and toward Spinelli, Feinberg and Banilower as Association officers and representatives. The Board argues that because the superintendent's office is a statutory office and because the statute does not confer the final authority on the superintendent as Chief School Administrator to authorize the personnel action complained of (i.e., the transfer), the motivation or animus cannot be attributed to the Board. However, the superintendent is the agent of the Board for purposes of enforcing terms and conditions of employment. There was ample evidence that after all the input from outside sources, the transfer decision was ultimately made by the superintendent. Although the Board was required to and did approve the transfer decision by resolution, there was no evidence that the Board initiated its own independent inquiry into the transfers being recommended to it prior to approval. Rather the evidence supports my conclusion that the Board accepted the recommendations of Harris as its agent and is accountable for the results of that decision. See Chatham's School District, P.E.R.C. No. 91-122, 17 NJPER 334 (¶22147 1991).

Starting in the fall of the 1993-94 school year, the Association had appeared at Board meetings in an attempt to determine why various grievances were not being responded to and to find out if the Board was even receiving the grievances (1T84). After the October 26 Board meeting, Harris, having been instructed by the Board to sit down and communicate with the Association, instructed the Association President, Pitts, to come immediately to his office. Accompanied by Falcon, Genova and another Association representative, Harris proceeded to criticize Falcon for going to the Board and to remonstrate Pitts for not picking and choosing which grievances to file. In particular, Harris' threat to reprimand Falcon if she did not follow the grievance procedure is direct evidence of hostility.

Another example of Harris' hostility toward the grievance activity of the Association was illustrated by the testimony of Barbara Lapin. In November 1993, Lapin had filed a complaint with the Commissioner of Education regarding the Board's failure to appoint her to a regular as opposed to a substitute position at the high school. Although the filing itself may not a protected activity (i.e., not a contractual grievance), the fact that both Lapin and Harris referred to the filing as a "grievance" in conjunction with Lapin's unrebutted testimony that approximately two weeks after the filing, Harris visited Lapin's classroom, questioned her filing of the grievance, told her she had no right to do so and advised her that she would have to withdraw the

"grievance" if she wanted a job is evidence of hostility. Harper verified that Lapin discussed Harris' statements with him and expressed her concern that her job was at risk.<sup>24/</sup>

The focus of Board and Association activity during the 1993-94 school year was the implementation of the selection process for teacher assignment to the new high school and the decision by the Board, on recommendation from Harris, as to which teachers would be assigned to the new high school. Announcement of the process was made in February at staff meetings. On April 13, 1994 at an Association meeting, Feinberg, Spinelli and Banilower together with Association President Pitts and NJEA representative Sharp spoke out strongly against the selection process. Principal Harper was seen to be in the room during the meeting. The next day, April 14, 1994, Harris stood outside Spinelli's classroom for 15 or 20 minutes peering inside. Harris never entered Spinelli's classroom nor had he ever done this before. I view this unannounced and gratuitous visit by Harris as evidence of hostility for Spinelli's openly expressed opposition to Harris' selection procedure at the April 13 Association meeting.

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<sup>24/</sup> For purposes of supporting an independent (a)(1) violation of the Act, this testimony is time barred under the six-month rule in Section 5(c) of the Act. Therefore, although I can consider it as evidence of hostility in support of an (a)(3) violation and a derivative (a)(1), I do not find an independent (a)(1) violation. State of New Jersey, P.E.R.C. No. 93-116, 19 NJPER 347 (¶24157 1993).

As a result of the April 13 Association meeting, Spinelli, Feinberg and John Kenny, a high school math teacher, determined to visit other schools during their prep time to encourage opposition to the interview and selection process. In the past, union representatives were permitted to leave the building during their free or prep time to visit other buildings on Association business. However, on this occasion, after having notified Harper of their intentions, when Spinelli and Kenny returned they met by Harper and/or Harris and told that they would not be permitted to go to other schools in the future and that they were not permitted to go that day. Feinberg never went to the other school because Harper reached him before he had left.

I attribute this retraction of permission to visit other schools to Harris' hostility toward the Association following the April 13 meeting -- Harper had previously given permission for the visit. The refusal to permit visits to other schools to conduct union business during unscheduled time was a change in long standing policy. This abrupt change in policy in combination with the purposes for the visit to other schools (i.e., to garner teacher opposition to Harris' selection process) adds up to

further evidence of hostility as the motivating factor for the personnel action.<sup>25/</sup>

Another example of hostility is the meeting between Harris and Harper in order for Harris to listen to Harper's feed back on the applicants as to who would go and who would stay (2T7-2T8). In reference to the decision to transfer Feinberg and Spinelli, Harris indicated to Harper without further explanation that Feinberg and Spinelli's transfers were "non-negotiable". This statement indicates that the decision as to Spinelli and Feinberg was final and was arrived at by Harris without the benefit of Harper's knowledge as to their teaching styles or abilities or the administrative needs of the high school.

In support of the conclusion that union animus was the motivating factor in Harris' decision regarding the Association and the three individuals, the Association presented evidence of two other incidents contemporaneous with the announcement of the transfer decisions. These incidents occurred within days of the transfer decision by the Board and are so contemporaneous with the personnel action that they serve to illustrate the frame of mind of Harris and provide evidence of hostility and motivation. I

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<sup>25/</sup> I reject the Board's argument that the actions taken by Harris in restricting visitation to other schools was supported by the collective bargaining agreement and was a legitimate exercise of the Board's right to prevent misuse of "prep time." The testimony of Spinelli and Kenny concerning the past practice of visiting other schools during freetime to conduct union business was unchallenged.

reject the Board's argument that these events were not evidential because they occurred after the transfer decision.

In the first instance, shortly after the Association elections in May and after the transfer decisions had been approved by the Board on May 5, Spinelli attended a meeting with Harris to discuss the possibility of Harris' reconsidering the transfers. Harris congratulated Spinelli on being elected as Vice President. On hearing from Spinelli that Pitts had been reelected as President because she could get the vote out, Harris responded that he "could control the Association any time I want" (Fact 61).

The second incident took place on May 17, 1994, twelve days after the Board meeting approving Harris' recommendations of transfer and two weeks after the filing by the Association of the unfair practice charge relative to the unilateral implementation of the selection procedures. Harper conducted a regular faculty meeting at the high school. During that staff meeting anywhere from ten to twenty-five teachers left the meeting, but shortly after the meeting, Harris informed Harper that he wanted to reprimand five teachers who left the meeting early, including Feinberg, Banilower, Spinelli, Ms. Weaver and Mr. Greenberg. He also instructed Harper to prepare letters of reprimand for the teachers. Harris viewed the leaving of the meeting early as a union protest.<sup>26/</sup>

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<sup>26/</sup> Greenberg and Weaver were also vocal opponents of the selection process.

On May 18, 1994, the five individuals were called in one at a time to Harper's office where Harris and some vice-principals were also present. Banilower and Spinelli were accompanied by union representatives, but Harris told the representatives to leave. Feinberg arrived unaccompanied to the meeting, but was denied his request for union representation after the meeting started.

I also find that the denial of union representation under these circumstances supports the claims of the Charging Party that Spinelli, Feinberg and Banilower's Weingarten rights were disregarded and that an independent Section 5.4(a)(1) violation occurred. In East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, App. Div. Dkt. No. A-280-79 (6/18/80), the Commission adopted the holding in NLRB v. Weingarten Inc., 88 LRRM 2689, 420 U.S. 251 (1975). Under Weingarten, an employee is entitled to have a union representative present at an investigatory interview which the employee reasonably believes might result in discipline.

In this context, the purpose of the May 18 meeting was clearly an investigatory interview -- i.e., each was asked for an explanation for their leaving the faculty meeting -- which might result in discipline. Spinelli was told by Harper before the interview that he could bring a union representative since the meeting with Harris would be about the faculty meeting the day before, while Banilower felt she needed a representative because

she was intimidated by the summons to the meeting. Feinberg initially went unaccompanied to the meeting. However, Harris informed him as soon as he entered the meeting that he was summoned to the meeting because "you walked out of a meeting and...you weren't supposed to...." Feinberg then requested representation and was denied (3T101).

I find that there is ample direct evidence that the decision to transfer Feinberg, Spinelli and Banilower was motivated by union animus. Because I infer that the Board and, its agent, Superintendent Harris were motivated by animus toward the protected activities, I must now examine the asserted business justifications offered by the Board for the transfer decisions.

#### Asserted Business Justification

The Board argues that regardless of any asserted animus, Harris articulated legitimate reasons for the transfer of Spinelli, Feinberg and Banilower, namely that their special skills and talents were needed in other schools. I have examined the rationale offered by Harris as the basis for his decision in each instance and have concluded that the asserted business justification is pretext. The basis for my conclusion is as follows.

Harris testified at length regarding the new paradigm he envisioned for the delivery of educational services to the students of his district. There is no doubt that the basis for implementation of the program was the selection of teachers who



were "constructivist" in their teaching styles or who were open to becoming "constructivists". The only publicly articulated reason for assignment to the new high school was the ability to either be a constructivist or to become a constructivist. However, in the case of Spinelli, Feinberg and Banilower, Harris admitted that the reason they were transferred had nothing to do with whether they were constructivists, but was because they were "needed" at other schools. It appears to me that the first time Harris articulated the specific reasons for his decision to transfer Spinelli, Feinberg and Banilower was at the hearing of this matter. Harris confirmed that he did not communicate his rationale to the public, to the three individuals, to Harper nor to the principals of the schools to which they were being transferred. I find this lack of communication evidence of the artifice employed in justifying the personnel action.

Further evidence of pretext is illustrated by Harris' failure to consider the input of Harper in the decision to transfer Feinberg and Spinelli. In order to identify who would be assigned to the new high school and who would be transferred, Harris developed a selection process for application to the new high school which would allow him to identify teachers with the abilities or the potential to achieve the abilities which he sought. This process included interviews with the Staff Discovery Committee, written essays and in-put from principals.

Despite this elaborate system designed to funnel as much information as possible to Harris to assist him in making his decision, when he met with Harper, Harris clearly indicated that he had already made up his mind as to Spinelli and Feinberg. Their transfers were "non-negotiable". Harris did not even consider the opinion of a principal who had been at the high school for six years and whose job entailed the administration of the building and the supervision of teachers being considered for the new high school.

Not only did Harris disregard Harper's opinion in regard to the transfer decision as to Spinelli and Feinberg, but he did not consult with the principals at the schools where Harris ostensibly had determined the skills and talents of Spinelli, Feinberg and Banilower were needed. None of the principals requested that these teachers be transferred to their schools nor did Harris determine that the special skills and talents of Spinelli, Feinberg and Banilower would be utilized by the principals to fill the needs identified by Harris as the reasons for the transfers.

In examining the specific reasons for the transfer of Spinelli, Feinberg and Banilower, I find support for my conclusion that the business justification for the personnel action taken was pretextual.

As to Feinberg, despite Harper's recommendation that Feinberg fit the mold and should be assigned to the new high

school, Harris transferred him and provided the explanation that Feinberg was transferred to a school where he would be helping to plan a new media center as part of phase two of the district wide reorganization and that Feinberg was to have a "key" role in planning other centers in the district. It is interesting to consider that although Feinberg was to have a "key" planning role, Harris never informed him of the role Feinberg was to play. This failure to discuss or inform Feinberg of what Harris had in mind for him is evidence of pretext.

Further, prior to the transfer, Feinberg had run the high school media center for 17 years and taught television and photography. He was transferred to Central Junior High School which had no media center and where he was assigned the job of running the library and handing out a few pieces of audio-visual equipment.

At the time of Feinberg's transfer, Harris confirmed that there were no plans underway to develop the media center at Central since the Board was still studying site plans for new construction. The rationale offered by Harris for moving Feinberg to Central before any "need" for his special talents was to allow him to settle in. Nevertheless, when a committee was formed to help facilitate the construction of new buildings during 1994-95, Feinberg was not appointed to that committee despite the allegedly "key" role he was to play in planning other centers in the district.

Furthermore, in another school in the district, the Chelsea Heights School, there was active planning in the 1994-95 school year for a new library media center to be located at the school. The media specialist assigned to that school who was assisting the principal in the planning process only held a teaching certificate and was working towards her certificate as a media specialist. It would have been logical to utilize Feinberg's special skills at Chelsea where an immediate need was identified than at Central where planning had not yet been initiated. For these reasons, I conclude that the business justification offered as the reason for Feinberg's transfer was pretextual.

As to Spinelli, Harris purportedly transferred him to Chelsea Junior High School for two reasons. Firstly, Spinelli demonstrated an ability to manage discipline problems. Harris concluded that this ability was a strength of Spinelli's because of the few disciplinary referrals reflected in Spinelli's record at the high school. However, the principal at Chelsea did not request Spinelli's transfer, and Harris never spoke to him about why Spinelli was being transferred to the school. Once at Chelsea, Spinelli was assigned no special duties in regard to discipline at the school other than his general teaching and classroom duties.

Secondly, Harris asserts that he transferred Spinelli to Chelsea because the principal was retiring, and there was a shift in teaching staff. He thought that with Spinelli's strong

teaching skills and the fact that he had taught at Chelsea years before, he would be a stabilizing influence. I reject this reasoning as pretextual. The strong teaching skills attributed to Spinelli, his ability to handle discipline problems, his good organizational skills, his ability to keep students focused and to garner the respect of his students would be equally valuable assets in the new high school. Further, the "stabilizing" influence of a strong teacher was needed as much in the transitional phase of the new high school where there was a shift in teaching staff as it was at Chelsea. For these reasons, I reject this justification for Spinelli's transfer as being pretextual.

As to Banilower, Harris transferred her to an elementary school<sup>27/</sup> to teach basic skills math because the math scores were dismal. Harris felt that because she had a strong knowledge base in mathematics, she could be a resource person for the other teachers who were viewed as generalists with "math phobias". Banilower had only taught high school mathematics although she did hold a certification for grades K-12.

When Banilower arrived at her new assignment, she was informed by the principal that she was expected to teach basic skills math, language and reading. Banilower could only teach

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<sup>27/</sup> Banilower never reported to the first school she was transferred to because during the summer of 1994 the standardized scores were released, and it was determined to send her to the New Jersey Avenue School.

math and informed the principal of this situation. If Banilower was transferred by Harris to the elementary school because she was to act as a resource person for generalists with math phobias, it is illogical that the principal would have expected her to act as a generalist (i.e., teaching all subject areas). At no time after her transfer was Banilower given any special duties as a resource person for the other basic skills teachers. For these reasons, I find that the justification for Banilower's transfer was pretextual.

I find that the Association has met its burden under Bridgewater. I conclude that the charging party has proven, by a preponderance of evidence on the record as a whole, that the protected activity of Spinelli, Banilower and Feinberg in filing grievances on their own behalf or on behalf of the Association and their opposition on behalf of the Association to the superintendent's selection process was a substantial and motivating factor in Harris' decision to transfer them out of the high school. I reject the Board's explanation for the transfer decisions as pretextual. I therefore conclude that the Board violated section 5.4(a)(1) and (3) of the Act.

#### The March 31, 1995 Notice

Finally, in regard to the amendment to the complaint involving the March 31, 1995 distribution of a notice to employees advising them that Spinelli, Feinberg and Banilower filed a charge seeking "to compel their transfer to the new Atlantic City High

School", the Association argues that this notice independently violates section 5.4(a)(1) and (3) of the Act. Since the standards of Bridgewater require an adverse personnel action, I find that the charging party has not shown that the Board took a personnel action as a result of this notice. The transfer occurred effective for the 1994-95 school year. It was too remote in time to support a Bridgewater violation and a derivative section 5.4(a)(1) violation..

The charging party asserts an "independent" violation of subsection 5.4(a)(1). Cf. UMDNJ, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987)(violation of section 5.4(a)(3) is a derivative violation of subsection 5.4(a)(1)). An employer independently violates subsection 5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports & Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The charging party need not demonstrate an illegal motive. New Jersey Sports & Exposition Auth.; Orange Bd. of Ed., citing Hardin, The Developing Labor Law, at 75-78 (3d ed. 1992).

The charging party asserts that the notice was hostile and belittling to Banilower, Spinelli and Feinberg and that by singling them out interfered with their rights to file the unfair practice charge. The Board argues that in issuing this notice, it

was only complying with the method agreed to by the parties to notice all affected employees whose personnel records were being disclosed by the Board to the Association's attorney.

However, if the object of the notice to affected employees was to alert them of rights which they might assert relative to the release of personal information, the paragraph which names Spinelli, Feinberg and Banilower personally and characterizes the pending unfair practice charge as seeking to "compel their transfer" to the new high school is superfluous. Further, I find no proof in the record that this notice was sanctioned or approved by the Hearing Examiner or by the Association. The notice is unsigned and on the stationary of the Atlantic City Board of Education.

For these reasons, I conclude that the justification for the issuance of this notice is pretextual and the wording of the notice had a tendency to interfere with the Association's statutory rights in violation of section 5.4(a)(1).

#### **CONCLUSION OF LAW**

The Board violated section 5.4(a)(1) and (3) of the Act when it transferred Bryan Feinberg, Doris Banilower and Paul Spinelli from the high school in retaliation for the exercise of their protected activities under the Act. The Board also independently violated Section 5.4(a)(1) when it denied Feinberg, Banilower and Spinelli union representation at the investigatory interview on May 18, 1994. Finally, the Board independently



violated section 5.4(a)(1) of the Act when it issued the March 31, 1995 notice to employees.

**RECOMMENDED ORDER**

I recommend the Commission ORDER:

A. That the Atlantic City Board of Education cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by transferring Bryan Feinberg, Paul Spinelli and Doris Banilower out of the Atlantic City High School, by denying them union representation at an investigatory interview and by issuing notices to employees like that issued on March 31, 1995.

2. Discriminating in regard to hire or the tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by transferring Bryan Feinberg, Doris Banilower and Paul Spinelli out of the Atlantic City High School.

B. That the Board take the following action:

1. Offer Bryan Feinberg, Paul Spinelli and Doris Banilower the option to transfer immediately to the Atlantic City High School with substantially the same hours of work and employment responsibilities as they had immediately prior to the transfer or to remain at their current assignments.

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

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

Dated: August 13, 1997  
Trenton, New Jersey

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Wendy L. Young  
Hearing Examiner

**WE WILL NOT** interfere with, restrain or coerce our employees in the exercise of their rights under the Act, particularly by transferring Bryan Feinberg, Paul Spinelli and Doris Banilower out of the Atlantic City High School, by denying them union representation at an investigatory interview and by issuing notices to employees like those issued on March 31, 1995.

**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 transferring Bryan Feinberg, Doris Banilower and Paul Spinelli out of the Atlantic City High School.

**WE WILL** offer Bryan Feinberg, Doris Banilower and Paul Spinelli the option to immediately transfer to the Atlantic City High School with substantially the same hours of work and employment responsibilities as they had immediately prior to the transfers or to remain in their current assignments.