

P.E.R.C. NO. 2003-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SOMERSET HILLS REGIONAL
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-2001-215

SOMERSET HILLS EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Somerset Hills Regional Board of Education. The Complaint was based on an unfair practice charge filed by the Somerset Hills Education Association alleging that the Board violated the New Jersey Employer-Employee Relations Act by changing a custodian's shift from morning/day hours to afternoon/evening hours to keep him from serving as an Association grievance representative. The Commission concludes that the Association did not meet its burden of proving, by a preponderance of the evidence, that anti-union animus motivated the decision to transfer the custodian to the evening shift.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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SOMERSET HILLS EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Sills Cummis Radin Tischman Epstein
& Gross, attorneys (Philip E. Stern, of counsel)

For the Charging Party, Klausner & Hunter, attorneys
(Stephen B. Hunter, of counsel)

DECISION

On February 5, 2001, the Somerset Hills Education Association filed an unfair practice charge against the Somerset Hills Regional Board of Education. The charge alleged that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5),^{1/}

^{1/} These provisions 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. (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

(continued...)

by changing custodian Glenn Deter's shift from morning/day hours to afternoon/evening hours to keep him from serving as an Association grievance representative. The charge further alleged that the change tended to interfere with employee rights under the Act. On June 26, the Association filed an amended charge alleging that the work schedule change led to Deter's constructive discharge. The amendment also withdrew the 5.4a(5) allegation.

The charge was accompanied by applications for interim relief and temporary restraints. The applications were denied. I.R. No. 2001-9, 27 NJPER 208 (¶32071 2001).

On August 6, 2001, a Complaint and Notice of Hearing issued. On January 24 and 30, 2002, Hearing Examiner Kevin M. St. Onge conducted a hearing. The parties examined witnesses, stipulated facts, introduced exhibits, and filed post-hearing briefs.

On December 3, 2002, the Hearing Examiner recommended that the Complaint be dismissed. H.E. No. 2003-10, 29 NJPER 3 (¶2 2002). He found that Deter was the Association's high school grievance representative and a member of the negotiating committee. He was one of two custodians who worked a morning/day shift. Five other custodians and the head custodian worked later afternoon/evening shifts. The Board decided to transfer the head

1/ (...continued)
in that unit, or refusing to process grievances presented by the majority representative."

custodian to the morning shift and to move Deter to afternoon/evenings. The Hearing Examiner concluded that the Association failed to prove hostility or interference with the exercise of rights protected by the Act. He also concluded that the Association, having failed to establish discrimination, did not meet the threshold requirement to establish its constructive discharge claim nor did it demonstrate that Deter's resignation was involuntary.

On January 24, 2003, after an extension of time, the Association filed exceptions. It asserts that the Hearing Examiner erred when he failed to conclude that the Board was hostile toward Deter's protected activity. In particular, it contends that there were shifting and pretextual reasons for Deter's transfer; the mid-year transfer was timed to constructively discharge Deter; supervisors and administrators exhibited anti-union animus; there was increased grievance activity prior to the change; the change violated a contractual seniority provision and practice of seniority-based assignments; and administrators and supervisors knew the mid-year schedule change would cause Deter to quit. The Association also asserts that the Hearing Examiner erred by failing to conclude that the Board violated 5.4a(3) when it involuntarily transferred Deter and erred by failing to respond to the Association's argument that the Board's actions violated 5.4a(1) because they were

"inherently destructive of employee rights." Finally, the Association asserts that the Hearing Examiner erred in failing to appropriately apply the standards for analyzing constructive discharge cases to the uncontroverted facts. The Association relies on its post-hearing brief.

On February 4, 2003, the Board filed an answering brief urging adoption of the Hearing Examiner's recommendations. It asserts that we should defer to the Hearing Examiner's credibility determinations. It contends that the Hearing Examiner properly concluded that the Board did not violate 5.4a(3). It further contends that the Hearing Examiner addressed the 5.4a(1) allegation and concluded that Deter was not prevented from performing his responsibilities as grievance representative during his shift, or from going to school before his shift to meet with Association members. The Board argues that the Hearing Examiner recognized that the Board's reasons for transferring Deter were legitimate and neither shifting nor pretextual; the transfer did not violate any contract seniority language or past practice; and the timing of the transfer does not indicate animus. Finally, the Board asserts that the Hearing Examiner was not required to discuss the constructive discharge standard because he properly concluded that there was no unfair practice.

On March 12, 2003, the Association requested leave to reply to the Board's answering brief. Absent objection, we grant that

request. The Association asserts that: the Hearing Examiner found all witnesses to be credible; the Hearing Examiner failed to properly analyze the shifting reasons for the mid-year schedule change and the testimony of three witnesses that all previous transfers had been consistent with seniority; and any operational justification for the transfer was outweighed by the interference with the right of employees to assist the Association.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 4-26) with this modification.

We modify the last sentence of the first paragraph of finding 7 to delete the phrase, "[d]espite Deter's position as custodian." That phrase does not reflect the testimony of Association Vice-President and General Grievance Chairperson Joseph Foglia.

The standards for assessing discrimination claims are set forth in In re Bridgewater Tp., 95 N.J. 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proved, by a 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 the employer did not present 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. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

We adopt the Hearing Examiner's conclusion, based in large part on his credibility determinations, that the Association did not meet its burden of proving, by a preponderance of the evidence, that anti-union animus motivated the decision to transfer Deter to the evening shift.

We reject the Association's contention that there were shifting and pretextual reasons for Deter's transfer. The Board

wanted to place its head custodian on the day shift. Its operational reasons for doing so remained essentially unchanged and were credited by the Hearing Examiner. That the Association may not agree with the rationale does not make the motivation anti-union or illegal.

We also reject the contention that the mid-year transfer was timed to induce Deter to resign. Deter had made it clear at hiring and when he sought promotion to head custodian that he needed to be home to attend to his family around dinner time. That fact does not, however, prove anti-union animus. The Board's unwillingness to consider reassigning another employee besides Deter so as to enable it to bring the head custodian to the day shift more likely reflected its belief that it did not have to abide by seniority, that a 3-way switch was more disruptive, and that it did not have to go out of its way to accommodate Deter's personal or union needs. We do not infer that the Board's unwillingness to have asked the other day shift custodian if he would have been willing to change shifts means that the Board acted for an illegal reason.

We agree with the Association that there was some evidence of disdain for having a custodian as a union representative for teachers. There is, however, no nexus between those who expressed that sentiment and the decision to change Deter's shift.

We reject the Association's contention that there was increased grievance activity prior to the change. The Hearing Examiner found that the record evidence did not warrant such a finding. We agree.

We reject the Association's contention that we should find that the change violated a contractual provision allegedly requiring seniority to be used in shift selection. The Hearing Examiner found that there are two "plausible" interpretations of the contract. That seniority may have been used in the past, as Deter and Foglia testified, does not resolve the differing contractual interpretations. We also reject the Association's contention that Deter and Foglia's testimony about the past use of seniority proves hostility in this case. Foglia testified that he was not aware of any other situations comparable to Deter's where custodians were moved mid-year. Accordingly, even if we were to credit their testimony, we would not infer that the failure to use seniority in this situation evidences anti-union animus. The Hearing Examiner credited Soriano's testimony that he did not abide by seniority because he did not believe that the contract required him to do so.

Given the Hearing Examiner's findings and our consideration of the Association's exceptions to those findings, we dismiss the allegation that the transfer was in retaliation for Deter's protected activity.

We next address the alleged violation of N.J.S.A. 34:13A-5.4a(1). An employer independently violates subsection 5.4a(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 and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Proof of actual interference, intimidation, restraint or coercion is unnecessary. The tendency to interfere is sufficient to prove a violation. Mine Hill Tp. Thus, a party asserting an independent violation of 5.4a(1) must establish that the employer engaged in some action which would tend to interfere with, intimidate, coerce or restrain an employee in the exercise of statutory rights.

Unions can negotiate restrictions on an employer's right to transfer union representatives, subject to an employer's right to meet operational requirements. Local 195, IFPTE v. State, 88 N.J. 393, 418-419 (1982). No such provision was negotiated in this case and it would be inappropriate for us to read that protection into the Act. Cf. State of New Jersey, D.U.P. No. 84-25, 10 NJPER 212 (¶15107 1984) (transfer of shop steward where other employees available to be transferred did not implicate right under the Act). To do so would obviate the need for unions to negotiate such protection. Deter had a statutory right to be

a grievance representative. But his statutory right did not include a right to stay on a day shift. Under these circumstances, we dismiss the independent 5.4a(1) allegation.

We need not further consider the constructive discharge allegation because we have found that Deter's separation was not motivated by anti-union animus or that it otherwise tended to interfere with protected rights.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. Commissioner Katz was not present.

DATED: May 29, 2003
Trenton, New Jersey
ISSUED: May 30, 2003

H.E. NO. 2003-10

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

In the Matter of

SOMERSET HILLS REGIONAL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-2001-215

SOMERSET HILLS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Somerset Hills Regional Board of Education did not violate the New Jersey Employer-Employee Relations Act by changing a custodian's work shift. The Hearing Examiner found that the Somerset Hills Education Association did not prove that the Board's selection of a custodian, who served as building grievance representative and member of the Association's negotiating committee, for shift change was done in retaliation for his exercise of protected conduct.

Relying on In re Bridgewater Tp., 95 N.J. 235 (1984), the Hearing Examiner found the Association failed to meet its burden of proving hostility or interference with the exercise of rights protected by the Act. The Hearing Examiner also found that the Association, having failed to establish discrimination, did not meet the threshold requirement to establish its constructive discharge claim nor did it demonstrate that the custodian's resignation was other than voluntary.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E. NO. 2003-10

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Appearances:

For the Respondent, Sills Cummis Radin Tischman Epstein &
Gross, attorneys
(Philip E. Stern, of counsel)

For the Charging Party, Klausner, Hunter & Rosenberg,
attorneys
(Stephen B. Hunter, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 5 and June 26, 2001, the Somerset Hills Education Association (Association) filed an unfair practice charge and amended charge with the Public Employment Relations Commission (Commission) alleging that the Somerset Hills Regional Board of Education (Board or District) committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act) by violating N.J.S.A. 34:13A-5.4a(1), (3) and

(5).^{1/} The Association alleges the following: (1) the Board changed custodian Glenn Deter's daily starting and ending times in violation of the parties' collective negotiations agreement (CNA); (2) the change was made in retaliation for Deter's active participation in Association activity; and (3) the schedule change resulted in Deter's constructive discharge.

The unfair practice charge was accompanied by an application for interim relief and sought temporary restraints. The Board opposed the applications and both were denied. See I.R. No. 2001-9, 27 NJPER 208 (¶32071 2001).

A Complaint and Notice of Hearing issued August 6, 2001. A prehearing conference and hearing were scheduled for August 21 and 28, 2001, respectively. Following several adjournment requests by the parties, the prehearing conference was conducted November 14, 2001 and the hearing was conducted January 24 and 30, 2002.^{2/} During the prehearing conference Charging Party clarified its filing, noting that the amended charge withdrew the 5.4a(5) claim.

^{1/} These provisions 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. (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."

^{2/} Transcript references are 1T and 2T respectively.

Charging Party confirmed this again on the record during the hearing (1T7).

On January 23, 2002 at 8:59 p.m., the Board faxed Charging Party and the Commission a statement contending the charge, as amended, should be dismissed as moot because Deter resigned his position and was no longer employed by the Board. It contended the 5.4a(5) claim was merely a dispute over the interpretation of a seniority provision in the collective agreement therefore beyond the Commission's jurisdiction. The Board also contended the 5.4a(1) and (3) claims should be dismissed because they were insufficiently plead and the Board had legitimate operational justifications for the personnel action independent of Deter's Association activity. The statement was construed as a motion and was denied (1T13).^{3/}

During the hearing the parties presented witnesses, submitted exhibits^{4/} and entered stipulations. The Board's motion to dismiss at the close of Charging Party's case-in-chief was denied (2T2-2T8). The parties waived oral argument and, following several extensions of time, submitted briefs by September 13, 2002. Based on the entire record I make the following findings of fact and recommendation.

^{3/} The Board did not file an Answer as required by N.J.A.C. 19:14-3.1. It did, however, oppose interim relief and temporary restraints. Charging Party was, therefore, on notice of the Board's positions and/or defenses in this matter and I find it was not prejudiced by being required to present its case.

^{4/} Exhibit designations are as follows: C - Commission; J - Joint; CP - Charging Party; R - Respondent; and A - Administrative Notice.

FINDINGS OF FACT

1. The Board is a public employer, the Association an employee organization, and Glenn Deter was, at all relevant times, a public employee within the meaning of the Act (1T8, 1T9, 1T27).

2. The Association is the recognized majority representative of a unit consisting of certificated employees, office staff, cafeteria personnel, aides and custodial and maintenance personnel. The Board and the Association are parties to a CNA covering the period July 1, 1999 through June 30, 2002 (J-1).

The CNA includes a 5-step grievance procedure to resolve disputes regarding the interpretation of provisions in the CNA. The five steps include discussion with the employee's immediate supervisor, appeal to the school principal, appeal to the superintendent, appeal to the Board and, with Association consent, final and binding arbitration pursuant to Commission rules and procedures governing grievance arbitration (J-1, pp. 5-6). Article IV B states that part of the purpose of the grievance procedure is to keep proceedings under it informal (J-1, p. 4). Article IV C 1 describes the grievance procedure as self-executing; "Failure at any step to communicate the decision on a grievance within the specified time limits shall permit the employee(s) to proceed to the next step." (J-1, p. 4). The CNA does not require either party to grievance proceedings to sign documents verifying receipt of grievances or decisions.

Deter's Work History

3. Deter was employed by the Board for approximately six years (1T27). He was hired in January 1996 as a kitchen custodian at Bernards High School. His work hours were 10:00 a.m. to 6:00 p.m. daily and his duties were to clean the kitchen and cafeteria (1T27). Deter discussed, during initial interviews for the position, that family issues prevented him from working evenings. He held the kitchen custodian position for three years (1T26-1T28, 1T80).

4. In July 1999, he applied for and received the day custodian position. He sought the position, in part because it afforded better hours (1T29). A self-described "Mr. Fix It", Deter was responsible for opening the building, maintaining certain inventory, cleaning certain rooms, offices and hallways, supplementing the maintenance staff by fixing equipment if possible and responding to emergencies as needed (1T29-1T30, 1T137).

Deter's work schedule as day custodian was Monday, Tuesday, Thursday, Friday - 6:00 a.m. to 2:00 p.m. and Saturday - 7:30 a.m. to 3:30 p.m. Deter reported to Head Custodian John Groff; when Groff retired Deter reported to Khone Xumphonphakdy. The head custodians worked a daily 1:00 p.m. - 9:00 p.m. schedule and Deter usually received specific assignments, if any, from the head custodian during their one-hour overlap (1T31, 1T35-1T37, 1T94; R-1). Deter also received assignments from Assistant Principal Richard Palazzi who was the administrative supervisor for custodial staff until fall 2000 (1T29-1T31, 2T53).

5. When Groff retired Deter unsuccessfully sought, in June 2000, the head custodian position. As a pre-condition, however, he also sought to have the head custodian's work schedule changed to a split schedule; part days, part nights. Xumphonphakdy got the job over Deter and continued the 1-9 p.m. shift except that on Wednesdays he worked 6:00 a.m. to 2:00 p.m. (1T31-1T32, 1T37, 1T36, 1T94-1T95, 1T98-1T100; R-1). Deter was upset he did not get the position but recognized the Board got a good candidate. Deter continued as the only day custodian at the high school (1T95).

After Deter left the kitchen custodian position in 1999, it was staffed by new employees as needed (1T38). As of September, 2000, the kitchen custodian was Gorge Amerman. He worked the same 10:00 a.m. to 6:00 p.m. daily schedule Deter had worked as kitchen custodian (1T38). Deter had more seniority than Amerman (1T72, 1T81, 2T79-2T81, 2T85). Amerman was an Association member but was not actively involved in grievance or negotiations activity (2T85).

6. As of October 2000, 5 custodians were assigned to primarily night schedules (3 worked 3:00 p.m. to 11:00 p.m., 2 worked 5:00 p.m. to 1:00 a.m.) at the high school. Their work schedules overlapped with the head custodian's schedule either 4 or 6 hours except Wednesdays when the head custodian worked a 6:00 a.m. to 2:00 p.m. day shift (R-1).

Deter's Association Activity

7. Deter was an active member of the Association and beginning in July 2000 he was appointed to the Association's

negotiating committee and was assigned to be the Association's building grievance representative at the high school (2T118). Twenty-plus year veteran science teacher, Association Vice President and General Grievance Chairperson Joseph Foglia was responsible for Deter's appointments (1T42, 1T50, 1T104, 1T116). Foglia supervised all Association building grievance representatives (1T103-1T104). Despite Deter's position as custodian, Foglia and Association President James McCarron found him to be intelligent and interested, he had ". . . smarts and a willingness to work to be on our team." (1T105).

As grievance representative Deter was responsible for handling Association grievances at the high school for all professional and non-professional personnel (1T40). He was not, however, entitled to release time from work to perform Association business. He handled his grievance representative duties while on breaks and after his shift (1T91, 2T47; J-1).

8. During the fall of 2000, Deter filed or otherwise participated in five grievances on behalf of Association members with high school supervisory and administrative personnel (1T53-1T60; CP17, CP18, CP19). The first grievance Deter initiated was a September 29, 2000 matter involving overtime compensation. Deter processed it jointly with Foglia to a hearing before the superintendent where it was sustained (1T53-1T54, 1T132; CP-17) (Saez grievance). Deter's second grievance was initiated October 6, 2000 and was also processed jointly with Foglia. It involved the

teaching staffs' work day and was resolved with High School Principal Lynn Caravello (1T54, 1T55, 1T133; CP-18) (teacher work day grievance).

During the processing of the teacher work day grievance, Deter was still training as a grievance representative. He attended a meeting with Foglia and Principal Caravello. At the meeting, Caravello asked Foglia whether the Association really wanted Deter as grievance representative (1T41, 1T43; CP18).

9. Some time during the fall of 2000, Department Supervisor for Design, Technology and Physical Education James Hoppe told Deter, with respect to his becoming building grievance representative, that he [Deter] should be "sure that I knew what I was doing because I was only a custodian, I was not tenured and they could change my hours, they could -- things could be done to me to make my life not happy at the school." (1T68, 1T92). Hoppe also told Foglia that he thought it was inappropriate for Deter, as a custodian, to represent teachers (1T157-1T158). Hoppe thought it was ironic a custodian was grievance representative for a unit of teachers but he was not aware of any circumstances in which Deter's position as building grievance representative would give rise to retaliation due to union animus (2T30-2T31). After making the comments to Deter, Hoppe realized they were inappropriate (2T29-2T30). Assistant Principal and Dean of Studies Charles Soriano did not share Hoppe's view and according to reports he heard, he believed Deter "did a decent job as a grievance chair" (2T97).

10. Deter's third grievance involvement was a matter initiated October 26, 2000 by Foglia and processed to the assistant superintendent's level. The dispute centered on graduate credits and salary guide placement; the parties agreed to resolve the issue during successor collective negotiations (1T55-1T56, 1T134; CP-19) (graduate credit grievance).

The fourth grievance Deter assisted in processing was a matter predating his role as building representative. It involved teacher Judy Martin's classroom assignment (1T58-1T60). The fifth grievance was an informal matter involving a kitchen custodian work issue; Deter helped Amerman resolve the issue some time in October 2000 (1T57) (Amerman issue).

While processing the foregoing matters through mid-December, 2000, Deter met with various administrators approximately 12 to 18 times including Principal Caravello, Assistant Principal Palazzi, a technology supervisor, Assistant Superintendent Pete Miller and Superintendent Ray Gaultieri. Deter never had occasion to deal with Assistant Principal and Dean of Studies Soriano until he filed his own grievance about his schedule change in December 2000 (1T40-1T52, 1T65-1T66, 2T34). Most of the grievances referred to above were still pending around the time Deter filed his grievance (1T148-1T149).

The Schedule Change

11. In August 2000, the Board hired Dr. Raymond Gualtieri as superintendent (1T82, 1T108-1T109, 1T150, 2T106). When hired he:

was directed by the Board of Education to evaluate practices within the school district. The Board of Education felt that we were pretty much a mom-and-pop organization. One of the reasons that they brought me in was to bring the school district into the millennium, as we were scheduled to grow and indeed we are growing, and so I challenged the administrative team at one of our first meetings in the fall to look at all the practices that we had in place in the district and to bring ideas back to the administrative council table as to ways to improve and to enhance and to run the district in a more efficient and cost effective manner (2T107).

Soriano was appointed high school assistant principal and dean of studies in July 1999. In October 2000, consistent with Superintendent Gualtieri's directive, Principal Caravello restructured administrative duties. Among other reassignments, Palazzi's responsibility to supervise custodial staff at the high school was reassigned to Soriano (2T54). The new duty assignments were announced during a faculty meeting some time during the fall of 2000 and Soriano met with custodial personnel individually during that period (2T55-2T56).

Following the change in his duties, Soriano considered changing the custodial staff schedule because "there was discussion at that time in the district about restructuring in terms of the administrative team, and we were asked to think about efficiency of practice throughout our own various responsibilities" (T35). His goal was to bring the head custodian at the high school onto a day schedule to align the high school with the practice in other District buildings. Doing so would give the head custodian better access to students and staff and would allow him to better evaluate

the quality of the night shift's work (2T37-2T38). Doing so would also allow the head custodian to act as a liaison between administrators and maintenance during the day (2T38).

Soriano decided to reschedule Deter, not Amerman, because Deter's more generalized day custodial schedule and duties were better suited to be filled by the head custodian than Amerman's particularized kitchen custodial duties and schedule (6:00 a.m. - 2:00 p.m. versus 10:00 a.m. - 6:00 p.m.) (2T40-2T41). I credit both Soriano's and Gualtieri's explanations for reassigning the head custodian to the day shift. Specifically, Soriano thought:

. . . that it made most sense to have the head custodian take the 6 to 2 p.m. starting and ending times because that gave him the direct liaison to the maintenance staff. That aligned the custodial structure with the custodial structure in place at the Bedwell Elementary School in our district, with the Middle School in our district, with districts that I have been familiar with in terms of their arrangement of custodians. It gave him time to walk the building in the morning, to determine the quality of the work that took place over the course of the evening. It gave him the chance to brief me on anything that happened; for instance, vandalism that may have occurred at night. He would be able to witness that in the morning. That's the kind of structure I think that works best (2T83).

Dr. Gualtieri agreed with Soriano,

. . . he evaluated the situation at the high school, saw that the way the head custodian was handled at the high school was completely different from the way it was handled in our other two schools in the district, the Bedwell Elementary School and the Bernards Middle School. In both of those places, the head custodian worked the day shift. Mr. Soriano explained that he had also had input from the

maintenance team. We have a district-wide maintenance team at that point of three people, we've since grown to four people, who all worked the day shift, and it was their input also that it was important to have a head custodian at the high school, which was our largest physical plant in the district, on the day shift. He also related that it would facilitate the cleaning. The way it was now, that the current head custodian left before the cleaning of the high school was done. I think the cleaning shift didn't actually leave the building until about 1:00 a.m., and when the head custodian came in in the afternoon, he was not able to evaluate the quality of the cleaning work because the students, 600 students and 200 staff members had been in the building and messed it up. So it was his recommendation that the head custodian in the high school should come in before everyone else, as we did in the Middle School and the elementary school and evaluate the quality of the cleaning at the high school (2T108-2T109).

Moreover, in Gualtieri's past experience, head custodians typically worked day shifts (2T109). Gualtieri and Soriano denied that the schedule change or any Association considerations motivated the decision to reassign Deter (2T42, 2T109, 2T111). Additionally, both noted that since the schedule change the head custodian arrangement on day shift has worked well (2T43-2T44, 2T110). While Soriano was aware Deter was the building grievance representative, he was not aware Deter had been involved with five specific grievances during the fall of 2000 (2T42).

12. I also credit Soriano's reasons for the schedule change as set forth in the December 12, 2000 memorandum notifying Deter and Xumphonphakdy of the change:

Effective 1 January 2001 I am making a change to the custodial schedule at the high school, which will affect starting and ending times for

employees. This memorandum, provides for a 20-day notice period.

The purpose of the schedule change is to have the head custodian on site during the school day; this adjustment aligns the high school with the custodial staffing in place at Bedwell Elementary and the Middle School. Consequently, Mr. Xumphonphakdy will be more accessible to the high school administration during the school day; in addition, his new starting and ending times will facilitate a direct liaison to the district's maintenance staff.

Mr. Xumphonphakdy will assume the starting and ending times of 6:00 a.m. to 2:00 p.m. on Tuesday, Wednesday, Thursday and Friday, and on Saturday from 7:30 a.m. to 3:30 p.m. Monday will be Mr. Xumphonphakdy's day off. Mr. Xumphonphakdy and I have decided that Mr. Vongvilay will open the building at 6:00 a.m. and work until 2:00 p.m. on Monday.

Mr. Deter will assume the daily starting time of 3:00 p.m. and ending time of 11:00 p.m. on Monday, Tuesday, Wednesday, Thursday and Friday.

Thank you, in advance, for your cooperation.
(CP-1).

The head custodian's duties include quality control and appropriate input with the administration regarding scheduling, budgeting and ordering supplies (2T66). Moving the head custodian to the day shift eliminated the direct line of supervision for the night staff (2T66-2T73). According to Soriano, there were no problems with evening shift custodians having a lack of supervision after the head custodian was moved to a day shift schedule (2T103). Before Deter's schedule change, 7 of the building's 8 custodians worked after 3:00 p.m. cleaning a mostly vacant building (1T75-1T78, 2T62). The head custodian was there to supervise most days until 9:00 p.m. (2T62-2T63, 2T67).

Soriano and other administrators typically work until 5:30 p.m. Before the schedule change he and the head custodian worked 4 1/2 to 5 hour overlapping schedules. The net effect after the change was a 1 to 1 1/2 hour increase in their potential contact time during the day (2T70, 2T77, 2T79).

13. Deter was not in work December 12th or 13th but on the 14th was called into Soriano's office and given the memo (1T66-67; CP-1). Prior to the meeting, Deter had not heard of or been involved in any discussions about changing his work schedule or duty assignments (1T67-1T68).

On December 15, 2000, Deter sent Soriano an e-mail requesting, based on seniority and job familiarity, that he be reassigned to the 10:00 a.m. - 6:00 p.m. kitchen custodian position instead of being reassigned to work evenings (1T71, 1T72; CP-2). Soriano did not respond immediately because he wanted to check to see if Deter was contractually entitled to the kitchen custodian position (2T81-2T82). Deter repeated his e-mail request on December 21, 2000. Soriano did not reply to the e-mail but spoke to Deter in person and the next day denied the request in writing (1T72, 2T82; CP-3, CP-5).

Soriano's reason for not moving Deter into the kitchen custodian position and putting Amerman on nights when he brought the head custodian on days is because that would have necessitated a 3-way switch (2T86-2T88). The Deter/head custodian switch was a 1-for-1 staff exchange and least disruptive to the overall staff

schedule. Soriano never sought Deter or Amerman's input on the change. He did acknowledge, however, that the 3-way switch would have accomplished the same goals as the 1-for-1 switch (2T86-2T93).

Deter's Seniority Grievance

14. Article XII C 1 of the CNA provides the following:

Daily starting and ending time shall be determined by the employee's supervisor. Employees will be notified of any change in starting and ending times at least one week in advance. A fixed five day work week shall be annually assigned on a basis of seniority. Overtime assignments will be made on an equitable basis by the Head Custodian as needed. (J-1, p. 27).

There is no dispute Deter was notified at least one week in advance of the change of his start and end time; he was provided approximately 20-days notice (1T89, 2T48). On December 22, 2000, however, Deter filed a grievance based on the seniority provision of Article XII C 1 (1T73; 2T50, 2T81; CP-4, J-1). The statement of the grievance was "Mr. Glenn Deter has his shift assignment changed from day to night. Mr. Glenn Deter has not been given the choice of work shifts as dictated by the agreement of the SHEA/BOE, page 27." The relief sought was "Mr. Deter receives a choice of shift assignment according to seniority. Mr. Deter be made whole for all financial losses and any other losses suffered as a result of the this action by the administration." The grievance was signed by Foglia (CP-4).

15. Deter contends Soriano would not acknowledge receipt of the grievance because he thought Deter, as a custodian, "was beneath him" (1T62). When asked whether Board administrators would

sign to acknowledge receipt of grievances, Foglia responded that the signing practice was a new phenomena but began before the Gaultieri administration. According to Foglia, ". . . no one ever denied signing, that was kind of a first to have Mr. Soriano say no, I won't accept this." (1T135). Before Gaultieri became superintendent the parties never disputed the timeliness of filing grievances (1T136). Foglia contends that under Gaultieri the Association had to "document every move we made for fear of not having documentation, in other words, the signing, the dating, time lines should be adhered to." (1T136). But, beginning with Deter's grievance, according to Foglia, administrators, particularly Soriano, refused (1T61-1T62, 1T35).

Soriano explained he did not want to sign the grievance because

It has not been practice in the past for me to sign grievances. I was handed a grievance. I would talk through it with the association representative, do any fact-finding if necessary, and then provide a response, and at that time I would sign it. But I don't sign them prior to a disposition. I've never done that before (2T52, 2T95).

Deter and Foglia were apparently requesting Soriano to sign the grievance report form at the top of the document as a record of its receipt by the Board. Soriano explained why he initially refused.

Following that discussion with, first it was with Mr. Deter, he initially asked me to sign it and then I wouldn't. And I think he thought it was because it was his grievance. That wasn't why, I just don't sign grievances.

Mr. Foglia came in to me and said, "Here's the grievance, we need you to sign it." I have processed grievances before, we can look back in the record, I don't sign the top and I didn't do that ever. It was not procedure.

But following the discussion with Joe, I said something to both Dr. Caravello and I brought it up in an administrative council about this. At some point following the discussion with Mr. Foglia about signing it, I think I may have even signed it that day because he was so upset about this has to be signed, so I may have scrolled at the top my name and the date because it just, it seemed to me ludicrous, that I brought it up with the administrators. And Dr. Gualtieri told us then from that point on we need to have a stamp in the office where we stamped the grievance to show that it was received, but he said nothing about signing it. In fact, he advised us not to sign the grievance in the space because that would be agreeing to whatever it was that was stated in the grievance (2T95-2T96).

The Saez, teacher work day and graduate credit grievances were the only grievances predating Deter's schedule change grievance for which the Association submitted, as evidence, copies of its initial grievance reports (CP-17, CP-18 and CP-19). There is no indication on the Saez grievance that any Board representative acknowledged receipt--either by signature or date stamp. The teacher work day grievance was date stamped received by the Board but not signed. The graduate credit grievance was also date stamped received and signed but only signed to indicate disposition. Deter's grievance was not date stamped received but did include, consistent with Soriano's testimony, on the upper right hand corner a handwritten note "rec'd 12-22-2000 C. Soriano." (CP-4).

Based on the foregoing I do not credit Deter's assertion that Soriano refused to sign because as a custodian he was "beneath him." Moreover, contrary to Foglia's assertion that the signing requirement predated the Gualtieri administration, the Association's own evidence reflected it did not always request administrators to sign grievance reports to acknowledge receipt (CP-17, CP-18 and CP-19).

While the Association complains that Soriano refused to sign to acknowledge receipt of Deter's grievance none of the other grievances filed in fall 2000 were so signed and Soriano did sign the Deter grievance. Based on these facts, I find the parties did not have a practice requiring administrators to sign grievance reports for receipt purposes. Soriano clarified the Board's policy now is to date stamp the grievance report but not sign it.

16. On December 22, 2000, Soriano denied Deter's grievance, citing the CNA as support for the schedule change and justification for not moving him to the kitchen custodian position. He stated:

The Administration conscientiously reviews building practices and procedures to ensure that they are consistent with the "Agreement Between the Somerset Hills Regional Board of Education and The Somerset Hills Education Association 1999-2002."

The contractual provision governing this issue is found in Article XII, C., 1., "Custodial Maintenance Personnel Rights," "Starting and Ending Times," which states in full as follows:

1. Daily starting and ending times shall be determined by the employee's supervisor.

Employees will be notified of any change in starting and ending times at least one week in advance. A fixed five-day workweek shall be annually assigned on a basis of seniority. Overtime assignments will be made on an equitable basis by the Head Custodian as needed.

Effective 2 January 2001, and pursuant to the aforementioned contract provision, I am making a further modification to Mr. Deter's schedule. Given that Mr. Deter is currently working Monday, Tuesday, Thursday, Friday and Saturday, his workweek will remain the same; his starting and ending times will be changed to reflect the attached schedule (CS-2000/2001 #074).

Mr. Deter's request for the position of kitchen custodian (10:00 a.m. - 6:00 p.m.) because, as Mr. Deter suggests, "I have seniority over Mr. Amerman," is denied. Similarly, the relief sought by the Association is not supported by the aforementioned contract provision (CP-5).

The December 12 memo (CP-1) changed Deter's work schedule (6:00 a.m. to 2:00 p.m., Monday, Tuesday, Thursday, Friday and 7:30 a.m. to 3:30 p.m. Saturday) to 3:00 p.m. - 11:00 pm., Monday to Friday. The December 22 memo conformed Deter's night schedule to the particular days of the week he worked previously, Monday, Tuesday, Thursday, Friday and Saturday (1T73, 1T89; 2T50; CP-5). The second memo confirmed Deter's hours would be 3:00 p.m. to 11:00 p.m. week nights, off Wednesday, and 7:30 a.m. to 3:30 p.m. on Saturday (1T89; CP-6).

17. Soriano acknowledged Deter had more seniority than Amerman (2T79-2T81, 2T85). Foglia and Deter generally contended that during the course of their employment the CNA was construed to provide that custodial scheduling decisions were based on seniority

regardless of day or night shift schedules (1T71-1T73, 1T115-1T116). According to Foglia, within his approximately 20-year tenure in the District, no other custodial transfer occurred that was not based on seniority (1T115). Foglia's recollection was that the only mid-year, mid-contract transfers resulted from vacancies (1T117). Foglia stated anecdotally that custodial transfers or assignments were:

. . . always consistent with seniority, and the custodians themselves always talked about it as if it was a matter of fact. We had senior custodians who had other jobs that depended upon their assignments being at a certain time slot . . . and they always referred to this contract clause, and it was in my mind when this whole issue first came about . . . (1T115).

The Association, however, did not present any direct evidence of specific custodial schedule changes, particularly changes to starting and ending times, that were based on seniority considerations, therefore, I do not credit Deter and Foglia's testimony on this point.

Foglia's interpretation of Article XII C is that Deter is entitled, by seniority, to his fixed 5-day work week and to particular start and end times (1T155). Soriano interprets the same provision as granting the superintendent discretion to set start and end times which may be changed on one week's notice (2T51). Moreover, the provision, according to Soriano, sets a fixed 5-day work week but guarantees only days of work, not hours or start or end times (2T49-2T51, 2T99).

Soriano's interpretation is that if the Board changes individual work days, not hours, it must do so based on seniority (2T99). He acknowledged, therefore, that the first memorandum (CP-1) was a technical violation of the contract because it changed the actual days Deter was scheduled to work. This was cured by the companion December 22 memos (CP-5 and CP-6) restoring Deter to his daily schedule but changing his hours of work (2T49-2T51, 2T100). Soriano, consistently, through varying hypothetical scenarios posed by Charging Party, contended the contract provision does not require start and stop time schedule changes be based on seniority (2T51, 2T99, 2T102).

Given the terminology, grammar and sentence structure of Article XII C, both Foglia's and Soriano's differing interpretations are plausible.

18. At some time following submitting the Deter grievance, Foglia and Soriano met in Soriano's office. Foglia asked him to explain why he transferred Deter in light of the seniority provision in the contract. According to Foglia he had "never lost [his] temper with any administrator but in this situation [] came very close." (1T113). Foglia described the meeting:

I came in with the contract, I believe it's page 27, and showed Mr. Soriano about the seniority clause and asked for an explanation of how they could transfer Glenn and not observe what we perceive to be a valid contract item. And I wasn't given a straight answer, I wasn't given an explanation, I was told that they were going to do it, period. I was used to having administrators explain their position, and we would try to kind of put ourselves in their

shoes, because if you're dealing in an issue, it is important to try to take the other side's position, and I was not able to do that because I had no clue why this change was being made and how our contract could be violated. So obviously, at least to me, because it was in words, to the point that during our discussion--let's put it this way, I don't know how to say this with--we could have had a real WWF show in Mr. Soriano's office, that's how angry I became. I wasn't given explanation over this change in his schedule, which to me was clear cut black and white, it's violating our agreement.

Q. What happened in terms of resolving this meeting? Did you--

A. I wanted to leave the office and Mr. Soriano didn't want the meeting to end, so he got kind of in my way to leave the office.

Q. Please be specific.

A. He got up and stood in front of the door. And that's when the WWF feeling came across me. But I sat back down and we talked for some more. And then the meeting ended and I left, but I was very upset.

Q. During the course of your involvement in the Deter grievance, were you ever given an explanation by Mr. Soriano or any other board supervisor or administrator as to why Glenn Deter was selected for the involuntary transfer and not the less senior day custodian?

A. No, no, I never got an answer, which is what, I think, if I had been given that, it probably would have lowered the stress of the whole issue. (1T113-1T115).

While I credit Foglia's description of the meeting, particularly his state of mind, I do not credit his assertion that he "never got an answer" regarding the seniority issue. Foglia is a 20-year veteran teacher, Association president, vice president and general grievance

chair. He has first-hand personal knowledge of the grievance procedure. Deter's seniority-based grievance had been filed before the meeting, therefore the Association and Foglia knew that the Board disputed the interpretation of the seniority provision of Article XII C. 1. It is not credible to contend Foglia never got an answer. He knew the answer - the parties disputed the interpretation of the CNA. The frustration Foglia felt during the meeting seems to be the logical extension of not being able to convince Soriano of his (Foglia's) position. Foglia's level of frustration, however, is not evidence of Board or Soriano hostility.

Deter's grievance was processed to the Board-level of the grievance procedure and was denied (1T80). No evidence was presented regarding whether the Association sought to arbitrate the matter pursuant to Article IV of the CNA. I take administrative notice of the Commission's records that no arbitration requests were filed regarding this matter.

After the Schedule Change

19. Deter and Foglia contend that after the schedule change Deter was no longer able to function as the Association's grievance representative because he was no longer at work during the day, therefore members could not talk to him about grievances (1T74, 1T81, 1T139, 1T156). Deter was not, however, prevented by the Board from performing his responsibilities as grievance representative during his shift, or from going to school before his shift to meet

with Association members (1T92). Regardless, Deter stepped-down as grievance representative and Foglia took over the duties because he could not find a replacement for the remainder of the 2001 school year (1T81, 1T139).

After the schedule change Deter told Soriano, Palazzi and Caravello that he would be forced to seek another position. By April 7, 2001, finding his new work schedule untenable and adversely affecting his family life, Deter resigned and found a new job as head custodian working days at a school in Chatham, New Jersey (1T75, 1T84-1T85).

Labor Relations Before/After July 2000

20. According to the Association, and not rebutted by the Board, immediately prior to July 1, 2000, the Board and Association's relationship ranged from "pretty good" to "the best it ever was" (1T82, 1T106). Seven-year Superintendent Richard Noonan retired in 1999 and was succeeded by Interim Superintendent Tom Butler. During the Noonan/Butler administrations, according to Foglia, few grievances were filed and those were usually resolved; only one or two went to arbitration (1T106-1T108).

Association President McCarron and Vice President and General Grievance Chairperson Foglia met with Gaultieri in September 2000 to address approximately eight (8) grievances left over from the previous administration (1T110, 2T106, 2T107). According to Foglia, Gaultieri told him that at his previous position at the Wissahickon School District in Pennsylvania he fielded three to five

grievances per week (1T110; 2T106). Foglia thought, at the time, that Gaultieri would be ". . . in heaven, we don't field three to five grievances per week, more or less three to five grievance per month in this district." (1T110). According to Gaultieri, however, in his four years at Wissahickon he had about 30 grievances (2T106). I need not resolve this discrepancy; both may be true but neither support or negate any evidence of hostility directed toward Deter's Association activity.

According to Foglia and Deter, Gaultieri's hiring and what they characterize as Soriano's title change and shifting job responsibilities and their respective resulting involvement in grievance processing changed the parties' spirit of problem solving and the administration began neglecting contractual matters. Foglia contends this gave rise to more grievance filings during Fall 2000 (1T82-1T83). Foglia described the difference in the way grievances were handled under the new administration as having an aggressive tone (1T111). Deter described the difference as a drop in morale. "It wasn't as pleasant a place to work. A lot of issues were arising. A lot more grievances were being filed (1T83).

Despite Foglia's and Deter's generalized assertions about an increase in grievance filings, the Association did not present any evidence of the actual number of grievances filed during either the Noonan or Butler administrations. Their general contentions there were few and that they were usually resolved is insufficient to compare or contrast against the actual evidence of grievance

activity during the fall of 2000 (1T148). Moreover, within the first year of Gaultieri's administration, the Association initiated approximately a dozen grievances. According to Foglia, however, it was not the number of grievances but the way in which they were handled which concerned the Association (1T148).

Based on the foregoing, I draw no inferences from the nature or number of grievances filed and/or processed during the fall of 2000.

ANALYSIS

The issues in this matter are whether Deter was selected for a schedule change due to his processing grievances as building grievance representative and being a member of the Association's negotiations committee. If so, the Board violated 5.4a(1) and (3) of the Act by discriminating against him due to the exercise of protected activity and interfering, restraining or coercing him in the exercise of rights protected by the Act. An interrelated issue is whether Deter was constructively discharged.

5.4a(3) Standard Review

The standard for deciding a(3) allegations was established by the New Jersey Supreme Court in In re Bridgewater Tp., 95 N.J. 235 (1984). There the Court held:

no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing 1) that the employee engaged in activity protected by the Act, 2) that the employer knew

of this activity, and 3) that the employer was hostile toward the exercise of the protected activity. Id. at 246.

If the employer did not present evidence of a motive not illegal under the Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the Charging Party has proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner, and then the Commission to resolve.

The decision on whether a Charging Party has proven hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Med. School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18060 1987).

5.4a(1) Standard of Review

An employer independently violates subsection 5.4a(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 and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient to prove a violation. Mine Hill Tp. Thus, a party asserting an independent a(1) must establish that the employer engaged in some action which would tend to interfere with, intimidate, coerce or restrain an employee in the exercise of statutory rights.

Constructive Discharge Standard of Review

In constructive discharge cases the Bridgewater standard must be applied in conjunction with the constructive discharge standard established by the Commission in Morris Cty., P.E.R.C. No. 82-28, 7 NJPER 578 (¶12259 1981). In Morris Cty., the Commission observed that a constructive discharge occurs:

where the facts reveal that an employee resigned due to an employer's unfair practice or following an employer's imposition of 'onerous working conditions' after the employee's exercise of a protected activity. For an employer to be held legally responsible, it must be alleged and shown that the termination involved was the culmination of a plan on the employer's part to force such action, or the foreseeable consequence of earlier harassment. Id. at 580.

See also, Essex Cty. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 524 (¶17196 1986).

To establish a constructive discharge claim, a charging party must first establish that the employer discriminated against the affected employee in retaliation for engaging in protected activity, and then establish that the employee's resignation was a planned or a reasonably foreseeable consequence of the employer's action. Essex Cty. Sheriff Dept., 14 NJPER at 191. Bridgewater set the standard for determining whether an employer engaged in such discrimination.

The Merits of this Case

There is no dispute Deter engaged in protected activity, processing grievances, and the Board, through its agents--including Soriano--knew of this activity. Two of the three parts of the Bridgewater test are therefore satisfied. There is no direct evidence, however, that the Board was hostile toward Deter's exercise of protected activity.

The Association relies upon a combination of factors, including the timing of the schedule change and inferences which it contends may be drawn from Soriano's conduct, comments made by Caravello and Hoppe, and the alleged overall deterioration of the parties' labor relationship, to support its contention the Board was hostile to Deter's grievance processing activity. None of this evidence, taken separately or collectively, establish that Deter's schedule change was motivated by union animus. Additionally, the Association's assertion that Deter's schedule change prevented him from continuing to operate as grievance representative and was

calculated to induce him to quit his job is not supported by the record.

I have not drawn several inferences the Association contends supports its position the Board was hostile to Deter's grievance processing activity. While I found all the witnesses in this proceeding were credible, I found the Board's witnesses, particularly Gualtieri and Soriano, to be more reliable. Their testimony, particularly Soriano's, was supported by independent or corroborative evidence. Deter's and Foglia's testimony, although consistent with each others, for the most part consisted of generalized, conclusory allegations or anecdotal statements that were not supported by corroborative facts and, in the specific case of whether Soriano signed Deter's grievance, were rebutted by the Association's own exhibits. While I have no doubt Deter and Foglia believed they were truthful in their statements, I find the Board's witnesses, particularly Soriano, inherently more reliable.

Fall 2000 Labor Relationship and Grievance Activity

I do not accept the Association's conclusory contention that Gualtieri's hiring in August 2000, Soriano's assumption of administrative responsibility for custodians in fall 2000 and Deter's service as grievance representative in fall 2000, all contributed to a deterioration in the parties' labor relationship. New grievances were filed during the Gualtieri administration. With a new superintendent and efforts to restructure administrative responsibilities, new administrators were involved in grievance

processing, particularly Soriano in his capacity as administrative supervisor for custodians. To the extent things were different between the Association and the Board this can best be attributed to the fact the parties' representatives were different-new superintendent (Gualtieri), new custodial administrator (Soriano) and new building grievance representative (Deter).

The Association has not proven, by a preponderance of the evidence, that there is any linkage between the changes in the parties' representatives during fall 2000 and Deter's subsequent schedule change. The Association's characterization that Soriano's involvement in contract administration was aggressive, negative or outwardly hostile is not supported by the record. The only evidence of aggression or outward hostility was Foglia's depiction of the meeting he had with Soriano about Deter's grievance. Foglia was the one who had the "WWF feeling" come over him, not Soriano-Foglia even acknowledged that Soriano wanted to continue the meeting so they could try to resolve the seniority issue. That is not evidence of Soriano or Board hostility.

Deter and Foglia contended Soriano never explained his reasons for the schedule change or departure from seniority-based assignments. Soriano did, however, explain the basis for the schedule change in his December 22, 2000 memorandum (CP-5). He specifically denied the Association's seniority-based relief stating it was not supported by the contract. Therefore, I find Deter and Foglia's frustration was not due to the lack of an explanation but

that they disagreed with it. This is not evidence of Board hostility.

Additionally, there is insufficient evidence on this record for me to conclude there was a proliferation of grievance activity during the fall of 2000. While Deter and Foglia made generalized assertions about an increase in grievance filings, their conclusory statements are undermined by the absence of evidence of the actual number of grievances filed during the prior two administrations. The Association simply did not provide enough evidence for me to conclude that eight grievances left over from the prior administration (which may incidentally have been District-wide and not necessarily limited to the high school) and the initiation and/or processing of five grievances in a five month period at the high school, constitutes a proliferation of grievance filing.^{5/}

Moreover, Foglia acknowledged the Association's concern was not the number of grievances but the way in which the Board handled them. The Association's evidence regarding the Board's handling of grievances, however, was also anecdotal. Deter and Foglia testified that the Board was holding the Association to the time lines outlined in the CNA and that Soriano allegedly refused to sign Deter's grievance. Even if I credited the Association's assertions

^{5/} The Association's evidence of grievance activity that occurred after Deter's schedule was changed or in which he was not involved, CP-13 through CP-16, is not evidence of hostility related to Soriano's determination to bring the head custodian onto the day shift.

regarding the Board's new "sharp" grievance practice, I draw no adverse inference from the Board holding the Association to the negotiated time lines to initiate and process grievances as set-forth in the CNA. The Association never contended or presented any evidence that the Board held it to any higher standards than those set-forth in the contractual grievance procedure. The Association cannot complain that they were being held to the standard of conduct they agreed to in negotiating the grievance procedure.

Additionally, Soriano did not refuse to sign Deter's grievance and even if he did, that conduct occurred after he made the schedule change decision; it is not evidence of hostility which motivated the schedule change.

The Timing of the Schedule Change

The Association places substantial emphasis on the timing of the schedule change. Timing of events is an important, but not controlling, factor in analyzing employer motivation and hostility. UMDNJ, P.E.R.C. No. 86-5, 11 NJPER 447, 448, 449 (¶16156 1985); Dennis Tp. Bd of Ed., P.E.R.C. No. 86- 69, 12 NJPER 16, 18 (¶17005 1985); Essex Cty. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988); Rutgers, The State University, P.E.R.C. No. 2001-38, 27 NJPER 91 (¶32034 2001). In this case, the timing of Deter's schedule change occurred approximately five months after he began serving as grievance representative, a period which coincided with Gualtieri's first five months as superintendent in the District.

Deter participated in approximately five grievances and 12-18 meetings with various administrators in those five months. Although Soriano became Deter's administrative supervisor during that period, he did not have any contacts with him as the Association's grievance representative.

Based on the record, it does not appear Soriano had any dealings with Deter until Deter filed his own grievance contesting the change in his start and end times and sought the kitchen custodian position. There is no apparent independent significance to the timing of this mid-year schedule change except that it was consistent with Gualtieri's directive to his administrators.

Caravello's Question and Hoppe's Comments to/about Deter

I do not find Principal Caravello's question or Supervisor Hoppe's comments are evidence of hostility nor is there record evidence Soriano knew about the comments, shared the sentiments and/or was influenced by them. Caravello's question to Foglia regarding whether the Association really wanted Deter as grievance representative and Hoppe's comments to Deter and Foglia do not run afoul of Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981) (distinguishing employer speech critical of employee organizations/representatives from employer conduct taken against employees for matters unrelated to employment performance) and are not evidence of hostility.

Caravello was not critical of Deter or his status as an employee. Rather, her question was directed to Foglia and was

addressed to the Association's selection of a non-tenured, non-professional employee to represent professional employees and the corresponding impact that may have on labor relations. Although no evidence was presented regarding the history of custodians representing teachers in labor relations, I infer from the overall presentation of this case that it is a rather unique, although not inappropriate, circumstance. Caravello's question seems to be in response to the uniqueness of Deter's status which, by his very involvement in processing grievances, impacts the labor relationship. If the administrators have traditionally dealt with teachers representing teachers, then Deter's involvement is unique.

As a practical matter, Caravello's question had no effect on Deter's involvement in the grievance process. The question was asked early in his tenure as representative and he had numerous subsequent dealings with Caravello and other administrators, and was even recognized by Soriano as having done a decent job as grievance representative. Moreover, since Caravello was not the one who decided to change Deter's schedule I find her question too remote and insignificant to draw any adverse inference.

Department Supervisor Hoppe's comments were advisory not threatening. The comments were factually based--Deter was a custodian, not tenured and the Board can argue it has rights in the contract to change his hours. Whether the change was subsequently done appropriately is irrelevant to the fact that Hoppe was expressing his personal opinion that he thought it ironic a

custodian represented teachers. I do not construe the comments as having the tendency to interfere with Deter's protected rights.

Caravello's question and Hoppe's comments do not reflect ill will or malice and are not attributable to Soriano who made the decision to change Deter's work hours.

Signing Grievances, Responding to
Emails and Not Consulting with
Custodians Before Changing Schedules

The Association's contention that Soriano had a superiority complex regarding Deter which was manifested by his refusal to sign Deter's grievance, respond to two emails regarding his request to be reassigned to the kitchen custodian position and failure to consult him or Amerman before making the change is not supported by the record.

Deter and the Association put substantial stock in Soriano's alleged refusal to sign Deter's grievance as evidence of hostility. The fact is the grievance report form had no specific location for administrators to sign to acknowledge receipt. Although Foglia contended the Association began soliciting such acknowledgments before the Gaultieri administration, none of the grievance reports filed during the fall of 2000, before Deter's was filed, were signed by administrators. Deter's grievance was subsequently acknowledged by Soriano.

Deter's contention that Soriano treated him with disdain is based upon his mistaken belief Soriano refused to acknowledge receipt of the grievance. His belief was not supported by the

record and therefore his testimony about Soriano's treatment of him is not reliable.

Additionally, Foglia and Deter's apparent belief that they needed to "document every move we made" is not supported by the record. The Association presented no evidence that any grievance before Deter's was rejected or not processed due to procedural deficiencies like "dates and time lines [that] should be adhered to." In other words, to the extent Soriano and the Board may have been holding the Association to procedural requirements (i.e., time lines) as set forth in the parties' CNA, the Association did not present any evidence that the Board added procedural requirements not set-forth in the CNA.

The Association's effort to paint Soriano as having a superiority complex is also undermined by Foglia's depiction of his meeting with Soriano. It was Foglia who seemingly overreacted, not Soriano. They disagreed over the interpretation of Article XII C, and although Deter and Foglia repeatedly contend they never received an explanation for why Deter was reassigned, the reality was they were given several explanations in writing; CP-1, CP-5 and CP-6 set-forth Soriano's rationale for the change. Deter and Foglia do not agree with his explanations.

Although Soriano did not immediately reply to Deter's two e-mail requests to take Amerman's kitchen custodian position instead of working nights, I credited Soriano's explanation. He wanted to check on Deter's seniority claim. Seven days after Deter sent his

first e-mail, he had Soriano's answer. Just because Soriano did not more quickly respond to Deter's demand is not, by itself, evidence of animus.

As a practical matter, it would have been a good idea for Soriano to discuss the impending schedule change with Amerman and Deter. Article XII C 1 may give the Board the right to make the change but it does not preclude discussion with the employees who will be impacted by it. The fact that Deter and Amerman were not consulted regarding the schedule change, however, is not evidence of hostility but evidence that Soriano thought he acted consistent with the contract.

Seniority Provision and the Parties' Disputed Interpretations

There was insufficient evidence in the record to conclude that changes to start and end times are based on seniority or that Soriano's failure to follow Article XII C 1 according to the Association's interpretation in Deter's case, is evidence of hostility.

Article XII C 1 contains the word "seniority" once, in the third sentence. "A fixed five-day workweek shall be annually assigned on a basis of seniority." The subject of the sentence is "a fixed five day workweek," the verb is "assigned" and the object is "seniority." It is not clear to me, however, whether the term "seniority" as used in that sentence is limited to a "a fixed five day workweek" or applies more generally to the subject of sentence one, "[d]aily starting and ending times..." or other portions of Article XII C 1.

Importantly, however, whether the Association is correct that Deter had a seniority-based right to the kitchen custodian position is a matter for the parties' grievance procedure, not this hearing. No adverse inference of hostility can be drawn from the fact that the Board disputes the Association's interpretation of the CNA.

Even more compelling is the Association's failure to establish that the parties ever applied the provision in the manner it suggests. Deter and Foglia's generalized assertions that the provision was an all inclusive seniority provision is not persuasive. The Association cited no specific examples of any custodians, identified by names, years or circumstances, whose start and end times were changed based on the seniority provision or the Association's interpretation of it.

The parties' dispute over the interpretation and application of Article XII of the CNA is the heart of this case. The parties' respective interpretations are plausible and therefore that dispute should properly be resolved through the contractual grievance procedure. State of New Jersey (Dept. Of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

Deter's Voluntarily Resignation

The record does not support that the schedule change was calculated to prevent Deter from operating as grievance representative or that it was intended to induce him to quit his job.

Deter's status as grievance representative does not cloak him with any greater claim to any particular work schedule. Since he was not entitled to release time from work to attend to Association business, that activity was relegated to break periods and before and after work. He conceded that was still the case after the schedule change; he could still conduct Association business before his shift while teachers and other unit members were still in the building, and he could still perform his Association activities on his break periods (i.e., meet with other custodians/unit members, make telephone calls, etc.).

The Association seems to contend that Deter's night schedule inherently precluded him from serving as grievance representative but offered no concrete examples of how he was actually prevented from carrying out his duties. He worked a 3:00 p.m. to 11:00 p.m. schedule. No evidence was presented explaining why he could not tend to his grievance duties at any time before his shift or while on breaks during his shift. Accordingly, there is insufficient evidence from which to conclude the schedule change interfered with Deter's statutory right to serve as the Association's grievance representative.

While Deter may have been hired with the understanding he had personal reasons to work a primarily day schedule, those personal reasons do not supercede the Board's right to establish start and end times provided it is not done in violation of the Act. Moreover, Deter's reasons for not being able to work nights

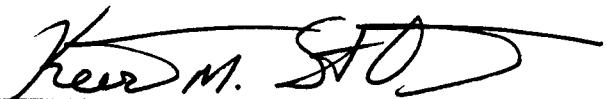
are somewhat suspect in that when the previous head custodian, Groff, retired, Deter sought the position and proposed a modified schedule that included his working some nights. There is simply insufficient evidence on this record to conclude that Deter's voluntary resignation was a planned or reasonably foreseeable consequence of the schedule change.

The Association did not present any evidence regarding Deter's role as member of the negotiating committee or that the Board was hostile toward his participation on that committee.

Based on the above findings and analysis, I conclude that the Board did not violate the New Jersey Employer-Employee Relations Act by changing Deter's starting and ending times. Additionally, the Association has not proven by a preponderance of the evidence that Deter's resignation was other than voluntary or that it was a planned or a reasonably foreseeable consequence of the schedule change. Therefore, I make the following recommendation.

RECOMMENDATION

I recommend the complaint and amended complaint be dismissed.



Kevin M. St. Onge, Esq.
Hearing Examiner

Dated: December 3, 2002
Trenton, New Jersey