

P.E.R.C. NO. 87-154

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

DOWNE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-86-173-101

DOWNE TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Downe Township Education Association against the Downe Township Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when it gave Rose Garrison, the Association's secretary and negotiations chairperson, an unfavorable evaluation in retaliation for her Association activity and her participation in an earlier unfair practice proceeding. The Commission finds, however, that the evaluation was motivated by the supervisor's accurate belief that Garrison was improperly instructing a student.

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DOWNE TOWNSHIP EDUCATION
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Colflesh & Burris, Esqs.
(Ralph H. Colflesh, Jr., of counsel)

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

DECISION AND ORDER

On January 6, 1986, the Downe Township Education Association ("Association") filed an unfair practice charge against the Downe Township Board of Education ("Board"). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (4),^{1/} when it gave Rose Garrison, the Association's

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees

secretary and negotiations chairperson, an unfavorable evaluation. The charge alleges that this evaluation was in retaliation for her role as negotiations chairperson and her participation in an earlier unfair practice proceeding before the Commission.

On January 24, 1986, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On February 4, 1986, the Board filed an Answer. It admits that Garrison received a "needs improvement" evaluation, but denies the criticism was because of her protected activities. Rather, the Board contends that the evaluation was based on a supervisor's observation of Garrison's performance and the supervisor's good faith belief Garrison needed improvement.

On March 4, 1986, the Association filed a motion to deem as true certain allegations in its unfair practice charge. On March 20, 1986, Richard C. Gwin, the Hearing Examiner, granted the motion. Downe Tp. Bd. of Ed., H.E. No. 86-44, 12 NJPER 252 (¶17106 1986).

On May 8, 1986, the Hearing Examiner conducted a hearing. The parties examined witnesses and introduced exhibits. At the conclusion of the Association's case, the Board moved to dismiss the Complaint. The Hearing Examiner denied the motion.

1/ Footnote Continued From Previous Page

in the exercise of the rights guaranteed to them by this act and (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

On July 29, 1986, the Association moved to supplement the record with three additional exhibits. On August 19, 1986, the Hearing Examiner granted the motion. The parties also filed post-hearing briefs.

On March 5, 1987, the Hearing Examiner issued his report recommending the Complaint be dismissed. H.E. No. 87-53, 13 NJPER ____ (¶ ____ 1987). He found the Board did not violate subsections 5.4(a)(1), (3) and (4) when it gave Garrison a "needs improvement" evaluation. Applying In re Bridgewater Tp., 95 N.J. 235 (1984), he found that the Association established a prima facie case that Garrison's protected activity was a motivating factor in her evaluation, but that the Board demonstrated it would have so evaluated her even absent her protected activity.

On March 19, 1987, the Association filed exceptions. It contends the Hearing Examiner erred in finding that the Board proved that it would have taken the same action even absent Garrison's protected activity. It contends that the Hearing Examiner should not have found Eber to be credible because she previously had committed unfair practices on the Board's behalf. Finally, the Association contends that Eber's departure from her prior practice of giving Garrison a "satisfactory" rating precludes a finding that Eber would have given her a "needs improvement" rating absent Garrison's protected activity.^{2/}

^{2/} The Association also requested oral argument. We deny that request.

On March 26, 1987, the Board filed exceptions and replied to the Association's. It excepts to the Hearing Examiner's taking administrative notice of Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1986) ("Downe Tp. I") and finding that the Association established a prima facie case under Bridgewater, contending that the only evidence of animus was the prior unfair practice.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-12) are accurate. We adopt and incorporate them here.

We reject the parties' exceptions to the Hearing Examiner's treatment of Downe Tp. I. He properly took administrative notice of those factual findings. N.J.A.C. 19:14-6.6 provides that Hearing Examiners may take notice of "judicially noticeable facts." Our determinations are noticeable under New Jersey Rule of Evidence 9, which provides:

Judicial notice may be taken, without request by a party, of (a) the decisional, constitutional, and public statutory law and rules of court of every other state, territory and jurisdiction of the United States, private acts and resolutions of the Congress of the United States and of the legislature of this State, and of every other state, territory and jurisdiction of the United States, and duly enacted ordinances and duly published regulations and determinations of governmental subdivisions or agencies of the United States, of this State, and of every other state, territory and jurisdiction of the United States [Emphasis added].

Therefore, we hold the facts found in Downe I were properly noticed by the Hearing Examiner. We also believe that the prior unfair

practice may be used as one factor to establish Eber's anti-union animus towards Garrison. This is especially true here since we have already found in Downe I that Eber violated the Act when she questioned, accused, reprimanded and threatened Garrison. Tama Meat Packing Corp. v. NLRB, 575 F.2d 661 (8th Cir. 1978). See generally, Morris, The Developing Labor Law, at 194 (2d ed. 1983).

The Association urges us to go one step further and consider Eber's prior unfair practices in assessing her credibility. Absent compelling evidence, we will not substitute our review of the transcript for a Hearing Examiner's credibility judgment based on his observation of the demeanor of each witness. State of New Jersey, P.E.R.C. No. 85-98, 11 NJPER 229 (¶16088 1985); Tp. of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980); City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980); Long Branch Bd. of Ed., P.E.R.C. No. 77-70, 3 NJPER 300 (1977). The Hearing Examiner did not find Eber not credible and we will not do so solely because she has earlier committed an unfair practice. See, Evid. R. 22, Comment 4 (Anno. 1986) cited in Newark Redevelopment and Housing Auth., P.E.R.C. No. 87-34, 12 NJPER 766 (¶17292 1986).

We now apply the Bridgewater^{3/} standard to the facts. We

^{3/} We also apply the Bridgewater analysis to allegations of violations of subsection 5.4(a)(4). Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 87-1, 12 NJPER 574 (¶17216 1986). See Airborne Freight Corp. v. NLRB, 728 F.2d 357, 115 LRRM 3214 (6th Cir. 1984); Montag Oil, Inc., 271 N.L.R.B. 195, 116 LRRM 1452 (1984).

agree with the Hearing Examiner that the Complaint should be dismissed. We do not, however, believe that the Association established that Garrison's protected activity was a substantial or motivating factor in Eber's decision to give Garrison a "needs improvement" evaluation. We reach this conclusion because Eber was not motivated by anti-union animus; she was motivated, in her supervisory position, to evaluate accurately a teacher she observed.^{4/} There is one fact which is at the heart of that evaluation: Garrison erroneously taught a student with visual problems a lesson designed for students with auditory problems. This evaluation was made right after the observation. In fact, the Hearing Examiner recognized that "Eber genuinely believed that Garrison was using improper instruction materials in her class and was not teaching her student consistent with the student's IEP. She

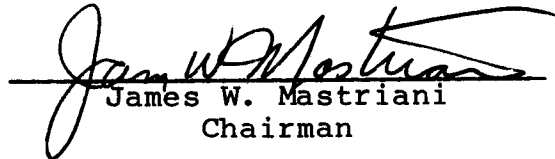
^{4/} However, the Hearing Examiner properly denied the Board's motion to dismiss at the conclusion of the charging party's case. When a respondent moves for dismissal at the end of the charging party's case, the Hearing Examiner must accept as true all the evidence supporting the charging party's position and must give the charging party the benefit of all reasonable inferences. UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER (¶ _____ 1987); New Jersey Turnpike Auth., P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1978). The Hearing Examiner must deny the motion if there is a scintilla of evidence to prove a violation. Here, giving the Association the benefit of all reasonable inferences, the Hearing Examiner properly found a scintilla of evidence to establish a violation. The Association's case included evidence of Garrison's protected activity, Eber's knowledge of that activity and the hostility of the Board and Eber to protected activity in the past. The timing of the evaluation so close to the Commission's decision also suggested that there may have been hostility towards her protected activity.

reached this conclusion before the Commission issued P.E.R.C. No. 86-66." Nor do we believe it determinative that Garrison had not previously received such an evaluation since there is no evidence that her previous observations had revealed a similar degree of teaching deficiency. See generally Ridgefield Park Bd. of Ed., P.E.R.C. No. 84-152, 10 NJPER 437 (115195 1984), aff'd App. Div. Dkt. No. A-5536-83T7 (6/6/85).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson and Wenzler voted in favor of this decision. Commissioner Smith was opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
June 17, 1987
ISSUED: June 18, 1987

H.E. NO. 87-53

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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-and-

Docket No. CO-86-173-101

DOWNE TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The hearing examiner recommends dismissal of a complaint, in which the Downe Township Education Association, alleges that the Downe Township Board of Education violated sections 5.4(a)(4), (3) and, derivatively, (1) by downgrading the evaluation of Rose Garrison in response to her Association activities and her testimony in an earlier Commission unfair practice hearing.

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Appearances:

For the Respondent
Colflesh & Burris, Esqs.
(Ralph H. Colflesh, Jr., Esq.)

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

HEARING EXAMINER'S
REPORT AND RECOMMENDED DECISION

On January 6, 1986, the Downe Township Education Association ("Association") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Downe Township Board of Education ("Board") violated sections 5.4(a)(1), (3) and (4)^{1/} of the New Jersey Employer-Employee

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or

Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") by giving an unfavorable evaluation to Rose Garrison, the Association's secretary and negotiations chairperson, in retaliation for her exercise of protected activity and her participation in a Commission unfair practice hearing.

On January 24, 1986 the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On February 4, 1986 the Board filed an answer denying any violation of the Act.

On March 4, 1986, the Association filed a motion to deem as true certain allegations in its unfair practice charge. On March 20, 1986 I granted the Association's motion. Downe Township Board of Education, H.E. No. 86-44, 12 NJPER 252 (¶17106 1986).

After granting several requests for postponements, I conducted a hearing on May 8, 1986. The parties examined witnesses and introduced documents. When the Association concluded its case, the Board moved to dismiss the charge. I denied the motion and the Board presented its defense. The parties waived oral argument and I advised the parties that briefs would be due thirty days after the

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condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

receipt of transcripts. Transcripts were late and briefs were scheduled to be due by August 4, 1986.

On July 29, 1986 the Association moved to supplement the record with three additional exhibits. On August 4, 1986 the Board filed its brief and a letter opposing the Association's motion.

On August 19, 1986 I granted the Association's motion, advised the Association that its brief was due by September 5, 1986, and provided the Board an opportunity to file a reply brief by September 22, 1986.

The Association subsequently requested and demonstrated good cause for an extension of time to file its brief. It filed a brief on October 31, 1986. Shortly thereafter I granted the Board's request for an extension of time in which to file its reply. On February 5, 1987, the Board advised me that it did not intend to file a reply brief and the record was closed.

Based on the entire record I make the following:

FINDINGS OF FACT

1. The Downe Township Board of Education is a public employer within the meaning of the Act and subject to its provisions.
2. The Downe Township Education Association is a public employee representative within the meaning of the Act and is subject to its provisions.
3. In response to an Association motion, I deemed the following allegations in its unfair practice charge as true: (a) Rose Garrison has been employed by the Board as a teacher since

1972; (b) she was the Association's secretary and negotiations chairperson; and (c) in her fourteen years as a teacher, she has never received an overall performance evaluation rating of less than "satisfactory".

4. Garrison was a witness in an unfair practice hearing between these parties held on October 31, November 1, 2, 5, 7, 26, and December 17 and 20, 1984. The hearing examiner issued his decision on April 15, 1984. H.E. No. 85-36, 11 NJPER 245 (¶16094 1985). The Commission issued its decision on November 19, 1985. P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985) ("P.E.R.C. No. 86-66"). Garrison also testified at an arbitration hearing in June 1985 that resulted in an award favoring the Association.

5. Over the Board's objection, I took administrative notice of the Commission's findings of fact in P.E.R.C. No. 86-66. In that decision the Commission ruled on unfair practice charges filed both by the Board and the Association concerning events during and after their reopener negotiations in early 1984. The Commission concluded that Board Superintendent Ronald Webb unlawfully reprimanded and threatened Garrison. It concluded also that Webb unlawfully downgraded the evaluation of Anita Ferguson to "needs improvement" due to Ferguson's activities on behalf of the Association.

6. The Commission decision was dated November 18, 1985. On that date, Frank Morrissey, an N.J.E.A. UniServ Representative, telephoned Linda Schreier, the Association's President, and outlined

the results of the decision. That night Schreier attended a Board meeting, informed the Board that the Commission had ruled in the Association's favor, and invited the Board to work with the Association to improve education in Downe Township. The Board made no response other than to thank Schreier. Superintendent Webb and Principal Mary Ann Eber attended the meeting. Webb confirmed Schreier's remarks about the Commission's decision by calling the Board's attorney on November 20, 1985.

7. Principal Eber was a member of the Board's negotiations team during the 1984 negotiations. She attended the 1984 hearing and the June 1985 arbitration at which Garrison testified. Eber conducted a performance evaluation of Garrison in November 1985. On November 13 she observed Garrison teaching a student who had been classified as having "significant deficits in visual perception." (R-2, p. 5). During the 43-minute class, Garrison spent approximately 30 minutes instructing the child with a Semel Auditory Processing kit. The kit contains materials for instructing students with hearing related learning problems. After the class Eber obtained the lesson manual accompanying the Semel kit (R-1) and the student's individualized education program ("IEP"). The IEP describes the student's learning problems, outlines the teacher's objectives and advises the teacher about how to instruct the student. After reviewing the IEP, Eber was concerned because the student was not diagnosed as having an auditory but a visual problem. Eber wondered if Garrison was instructing the child properly. Excerpts from the IEP follow:

Learning Consultant's Summary

Test results indicate no auditory perceptual deficits. There are, however, significant deficits in visual perception--specifically, visual memory and visual-motor integration. Perceptual training should be instituted to remediate deficits noted. For the time being, regular instruction should emphasize the auditory channel. Also, modifications can be made to regular instruction, such as reducing the amount of writing required, highlighting written material, and instructions given with the tape recorder.

Instructional Area

Visual Perception

Annual Goal

To improve visual perception to a normal developmental level.

Objectives

1. Demonstrate a normal developmental level in the area of visual perception.
2. Demonstrate a normal developmental level in the area of visual-motor integration.
3. Handwriting on daily basis will attain a level of neatness that is satisfactory to the teacher.

INSTRUCTION GUIDE (PART II)

Instructional Area

Visual Perception

Annual Goal

To improve visual perception to a normal developmental level.

Instructional Strategies

1. To develop visual memory, arrange instructional materials in such a way as to emphasize attention to details by underlining certain words or numbers, or use color coding to call attention to parts often ignored.
2. Develop the ability to note details by showing objects or pictures, then removing one or two to see if [the student] can remember which one is missing; or, when the piece is removed, have her select it from a group of items, the rest of which are not used.
3. Help [the student] to recognize the sequential nature of patterns. Show her a sequence in an order that she knows, such as small, medium, and large blocks, or dominoes with one, two, and three spots. Remove it from view and ask her to repeat it.
[R-2].

Eber met with Garrison the next day (November 14) and told her that she was concerned because the IEP neither indicated that the student had an auditory learning problem nor recommended using auditory instruction materials such as the Semel kit. Eber asked Garrison why she was teaching this lesson. Garrison replied that she did not have adequate materials and that she had talked to other teachers who had advised her that what she was doing was appropriate. Eber told Garrison that the IEP was not being followed.

The next morning Eber asked Garrison to come to her office. Eber had reviewed Garrison's lesson plans for the following week and for the previous several weeks. Garrison's plans reflected that she had used extensively instruction materials designed to improve hearing learning problems. Eber

told Garrison that the student needed instruction to improve a visual not an auditory problem and advised her to follow the IEP and to be sure that her lesson plans reflected this. Garrison said that she would comply.

8. Garrison and Eber had a post-observation conference on November 22, 1985, two days after the Board had been informed of the Commission's decision in P.E.R.C. No. 86-66. The written evaluation that Eber prepared follows:

I. INSTRUCTION:

A. Structure of lesson: (Objectives, Assignment, Use of Materials)

The teacher was observed working with one classified perceptually impaired student who is in need of visual perception instruction. Units 5 and 6 of the Semel Auditory Process Program were used to give the student practice in distinguishing the f and v initial consonant sounds. The student first listened for same/different sounds in work pairs pronounced by the teacher. Next, the student had to indicate the location of the sound and indicate/different sounds by marking in the student response book. Other activities included circling words beginning with the target sound, saying a tongue twister using the target sound verbally completing sentences said by the teacher with words beginning with the target sound and writing ten sentences using the target sound. Thirty minutes of the 43 minute class.

B. Execution (Preparation, Classroom Management, Teaching Methods, Evidence of learning process, Attainment of Lesson Objectives, Adjustment to needs of students, Motivation.)

A review of the teacher's manual for the Semel program indicates that the teacher followed

recommended procedures for using the program. The teacher worked directly with the student encouraging correct responses and using praise when appropriate.

A major concern is that this child's IEP very specifically states that test results indicate no auditory perceptual deficits. However, there are significant deficits in visual perception. Therefore instruction and materials used (whether commercial or teacher made) should be to remediate deficits noted in the IEP.

.... For the last 10 minutes of period Visual Thinking Cards, Dale Seymour Publications, were utilized. The cards presented a series of visual puzzles to be solved by the student.

II. STUDENT PARTICIPATION: (Classroom Atmosphere, Student Involvement, Interaction, Responsibility, Understanding, Awareness of Teacher, Student-teacher respect.)

The classroom atmosphere was appropriate. The student was cooperative and willingly carried out teacher instructions.

III. PHYSICAL SETTING: The classroom, which is shared with another teacher, is neat and attractive in appearance. Bulletin boards are colorful and interesting and display seasonal themes.

IV. OTHER: Lesson plans for the week following the observation indicated the teacher's intention to use APII another auditory perception training program with this student. Lesson plans for previous weeks (beginning with Oct. 16) indicate that auditory processing was the predominant objective. The materials utilized were the Semel Auditory Processing Program and APT II, Auditory Processing Training (see attached plans).

V. COMMENDATIONS: Information presented in Mrs. Garrison's lesson plan book is neat and well organized.

VI. RECOMMENDATIONS:

1. Select materials appropriate to deficits and needs indicated in the IEP of your students.

2. Review information provided by commercial materials to determine the purpose of materials.

3. Fulfill your responsibility of providing instruction based on the needs of your students as indicated in the IEP's.

4. Implement areas of required growth as indicated in your IPIP. Please note section II, A.

Garrison read the observation and Eber asked her if she had any questions. Eber then checked the space on the evaluation form designating a "needs improvement" rating. Garrison was upset. When she questioned Eber about the rating, Eber replied that her concerns were serious, that Garrison must follow the IEP, that there was no excuse for what had happened, and that Garrison was responsible for using appropriate teaching materials.

9. Eber had written the evaluation report over the weekend of November 16 and 17, 1985. She had spoken to William Gauntt, author of the IEP and learning disability teacher consultant ("LDTC") in the school district, about the contents of the student's IEP and Garrison's teaching techniques. Gauntt advised Eber that Garrison should not be using the "auditory processing" equipment for this student.

10. Garrison wrote a rebuttal to the evaluation defending her teaching strategy by reference to a book written by Janet W. Lerner, Learning Disabilities--Theories, Diagnosis, and Teaching Strategies, Houghton Mifflin Co. 1981. Garrison explained that she was attempting to cure the student's weakness by emphasizing her strength. I have no doubt that Garrison believed that she was

properly instructing the child and that Eber believed that she was not.

11. On September 14, 1984, an employee organization calling itself the C.A.R.E. (concerned about real education) Group filed a petition to decertify the Association. Garrison was an active campaigner on behalf of the Association prior to the election (conducted April 2, 1986) that ultimately resulted in the decertification of the Association. Of the approximately 16 members of the C.A.R.E. Group, 14 received commendable evaluations from Webb and Eber for the 1984-85 school year.^{2/} No Association member who testified in the unfair practice proceeding resulting in Commission decision P.E.R.C. No. 86-66, received a commendable evaluation rating. Approximately one-half of all other Association members, however, received commendable ratings from Webb and Eber during the time between the previous unfair practice hearing and the end of the 1984-85 school year. Eber testified that, typically, about three-fourths of the teaching staff receive commendable evaluation ratings. Garrison was the only teacher in the district to receive a "needs improvement" evaluation for the 1984-85 school year.

12. The Association introduced copies of other teachers' evaluation reports completed by Webb and Eber in an attempt to show

^{2/} During the 1983-84 school year a member of the C.A.R.E. Group did receive two unsatisfactory evaluations and his contract was not renewed for the 1984-85 school year.

a disparate treatment of Garrison. CP-3 is an evaluation of a vocational education teacher (the name is deleted from the document) written by Eber on October 22, 1985 and signed on October 25, 1985. Eber compliments the teacher's classroom environment, her alertness to student safety, and her devotion to organizing her classroom. Eber recommended that the teacher set clear objectives at the beginning of her lessons, attempt to organize "hands-on" class-time and to discourage activities such as pencil sharpening while she is lecturing. This teacher received a satisfactory rating from Eber.

ANALYSIS

The Association alleges that Eber retaliated against Garrison, in violation of sections 5.4(a)(4), (3) and, derivatively, (1) of the Act because Garrison engaged in Association activities and testified at an unfair practice hearing.

Analysis of the 5.4(a)(3) issue requires an application of the standards set forth in In re Township of Bridgewater, 95 N.J. 235 (1984) ("Bridgewater"). I also apply the Bridgewater test to the 5.4 (a)(4) elements of the complaint and discuss that issue contemporaneously with the 5.4(a)(3) issue, due to the similarity of the facts underlying the claims.^{3/}

^{3/} The Commission has not yet specifically adopted the Bridgewater test in analyzing section 5.4(a)(4) violations. In Matawan-Aberdeen Reg. Bd. of Ed., H.E. No. 86-61, 12 NJPER

Under Bridgewater, no violation will be found unless the Charging Party proves, by a preponderance of the evidence on the

3/ Footnote Continued From Previous Page

458 (¶17174 1986), a hearing examiner applied the test in finding that a Board's good faith misinterpretation of a contract provision constituted a legitimate business justification for withholding the wages of Association witnesses on leave to testify at an unfair practice hearing. This conclusion was the basis of the hearing examiner's recommendation to dismiss both 5.4(a)(3) and (4) charges. The hearing examiner, relying on Galloway Tp. Bd. of Ed. v. Galloway Tp. Assn of Ed. Secy's., 78 NJ 1 (1978), referred to cases decided under the National Labor Relations Act in which the Board (and federal courts) applied the Wright-Line test to section 8 (a) (4) cases. The Commission affirmed the hearing examiner's decision without addressing the appropriateness of using the Bridgewater test in 5.4(a)(4) cases. P.E.R.C. No. 87-1, 12 NJPER 574 (¶17216 1986).

In a case currently before the Commission for review, a hearing examiner has applied the Bridgewater test in recommending a county be found in violation of section 5.4(a)(4), based on the hearing examiner's finding that the county's decision to discontinue a safety incentive program was motivated by certain statements made by a union representative at an exploratory conference. Hunterdon County Bd. of Ch. Freeholders, H.E. No. 87-47 13 NJPER _____ (¶_____ 1987).

I am using (and recommending the adoption of) the Bridgewater test here for two reasons. First, there is the private-sector policy of applying the Wright-Line test in 8(a)(4) cases. See Airborne Freight Corp. v. NLRB, 115 LRRM 3214 (6th Cir. 1984); In re Montag Oil Inc., 271 NLRB 185, 116 LRRM 1452 (1984). Second, there is the compatibility of the underlying disputes in 5.4(a)(3) and (4) cases. This case is a good example. Section 5.4(a)(3) protects public employees from retaliation by their employers for exercising protected rights; giving testimony at an unfair practice hearing is among those rights. Fundamental to both 5.4(a)(3) and (4) is the concept of discrimination responsive to the exercise of protected rights. Section 5.4(a)(4) could be characterized as a specifically defined 5.4(a)(3) issue. Therefore, it seems reasonable to apply the same standard of proof to both violations. See Hunterdon Cty. Bd. Ch. Freeholders, P.E.R.C. No. 87-35, 12 NJPER 768, 771 (¶17293 1986).

entire record, that protected conduct was a substantial or motivating factor in an action adverse to an employee's terms and conditions of employment. 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. Such a showing constitutes proof of a prima facie violation. Id. at 246.

If the employer did not present evidence to rebut, or if the reasons an employer proffered to explain an adverse action are rejected as pretextual, the prima facie case is a sufficient basis for finding a violation without further analysis. Where the record demonstrates that both unlawful motives and other motives contributed to a personnel action, the employer will not have violated the Act if it can prove, as an affirmative defense, that the adverse action would have taken place even absent the protected conduct. Id. at 242.

The employer need only present this affirmative defense if the Charging Party has demonstrated a prima facie violation.^{4/}

^{4/} See Bridgewater; NLRB v. Transportation Management Corp., U.S. ___, 103 S.Ct. 2469, 76 L.Ed. 2d 667 (1983); In re Right Line, 251 NLRB No. 150, 105 LRRM 1169 (1980); In re Ocean County College, 204 N.J. Super. 24 (App.Div. 1985); East Orange Public Library v. Taliaferro, 180 N.J. Super 155 (1981); Bergen Community College, P.E.R.C. No. 87-99, 12 NJPER ___ (¶ ___ 1987); UMDNJ-Rutgers Medical School, P.E.R.C. No. 87, 12 NJPER ___ (¶ ___ 1987); Morris, The Developing Labor Law, (2d ed. 1983) at 191-92; Bartosic and Hartley, Labor Relations Law in the Private Sector, (2d ed. 1986) at 115-16.

The Association's evidence is circumstantial. At no time during the evaluation process did Eber make a direct reference to Garrison's Association activities, to her testimony in the 1984 unfair practice hearing or to the Commission's decision. Thus, in determining whether the Association has demonstrated a prima facie violation, my attention is directed to the proofs concerning Garrison's exercise of protected activity, the Board's knowledge of the activity, and the Board's responsive conduct.

The Association has proved that Garrison was involved in protected activity. She was a member of the negotiations team in 1984, she participated in an arbitration hearing as an Association witness in June 1985, and she was an active campaigner on behalf of the Association prior to the decertification election. There is no dispute that Garrison testified in the earlier unfair practice hearing. There is also no dispute that Eber was aware of Garrison's involvement in protected activity and her testimony. Eber was a member of the Board's negotiations committee in 1984, and attended both the Commission hearing in 1984 and the arbitration hearing in June 1985. The remaining question is whether Garrison's evaluation can reasonably be characterized as a hostile response to her protected conduct.

The Commission has recognized that a change in evaluation ratings closely following an employee's participation in protected activity may be evidence of employer hostility. Downe Township Board of Education, P.E.R.C. No. 86-66, Slip Op. at 27. Here the

evaluation followed the issuance of a Commission decision by three days. The Board argued that this does not adequately raise a 5.4(a)(4) [or (a)(3)] issue; that the the Act refers not to the issuance of decisions but specifically to "testimony," which in this case was given in late 1984, and that the Association has failed to establish a connection between Garrison's evaluation and her testimony.

I disagree. It is not inconceivable that an employer would take no action against an employee shortly after she testified in an unfair practice hearing but would have a change of heart after discovering that her testimony formed the basis for the finding of an unfair practice. Certainly the timing of the alleged reprisal is relevant in weighing the evidence--all of the facts must be closely examined in a case like this.

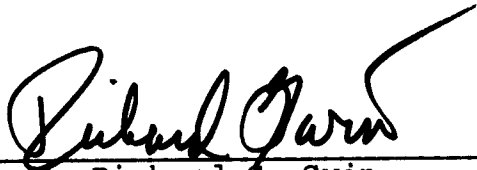
I hold here that Garrison's involvement in the heated 1984 negotiations, her participation in the previous unfair practice hearing, her involvement in Association activities after that hearing, Eber's knowledge of Garrison's conduct, the timing of the Commission's decision and Garrison's first "needs improvement" rating in 14 years, and the fact that the Board has previously downgraded performance ratings in response to employees' exercise of protected activity, constitutes a prima facie showing sufficient to support an inference that Garrison's protected conduct was a motivating factor in Eber's evaluation of her.

I turn now to the question of whether the Board has demonstrated, as an affirmative defense, that it would have taken the same action if Garrison had not engaged in protected conduct. I conclude that it has.

The preponderance of the evidence on the entire record demonstrates that Eber would have given Garrison the same evaluation rating even if Garrison had not engaged in protected activity or the Commission had not recently issued its decision. In mixed motive cases, the fundamental question is the employer's motivation at the time of the alleged adverse action. See NLRB v. A & T Mfg. Co., 738 F. 2d 148, 151 (6th Cir. 1984). I have found that Eber genuinely believed that Garrison was using improper instruction materials in her class and was not teaching her student consistent with the student's IEP. She reached this conclusion before the Commission issued P.E.R.C. No. 86-66. The record reveals that Eber's conclusion was reasonable. Her review of the student's IEP and the manual accompanying the Semel kit raised a question in her mind that she sought to resolve by seeking the advice of the school district's LDTC. The LDTC confirmed her suspicion that Garrison was not properly instructing the child. Eber raised her concern with Garrison in discussions on November 14 and 15, 1985-- prior to the issuance of the Commission's decision. Eber also reviewed Garrison's lesson plans for the following week and for the preceding month and discovered that Garrison was using a great deal of her class time with the student using materials designed to remedy hearing rather than visual learning problems.

Further, a comparison of Garrison's evaluation with the other evaluations admitted into evidence does not warrant a finding of disparate treatment. While the other evaluations do contain recommendations for improvement, there is no indication on the record to suggest that, in the evaluator's opinion, the other teachers had spent large amounts of their class time using inappropriate instruction materials.

Based on the above, I recommend that the Commission dismiss the complaint.


Richard C. Gwin
Hearing Examiner

Dated: March 5, 1987
Trenton, New Jersey