

H.E. NO. 2005-1

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

In the Matter of

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,

RESPONDENT,

-and-

Docket No. CI-H-2001-23

GARY LaBETTE,

CHARGING PARTY.

**SYNOPSIS**

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that the Middletown Township Board of Education terminated unit employee and shop steward Gary LaBette for engaging in protected activities, particularly the filing of grievances and an unfair practice charge. The Hearing Examiner found that some evidence but not a preponderance of the evidence showed that protected activities figured in the Board's decision to terminate LaBette, whose discharge had been upheld by a grievance arbitrator.

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.

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GARY LaBETTE,

CHARGING PARTY.

Appearances:

For the Respondent,  
Kenney, Gross, Kovats & Campbell, attorneys  
(Malachi J. Kenney, of counsel; Christopher B. Parton,  
on the brief)

For the Charging Party,  
Lomurro, Davison, Eastman & Munoz, attorneys  
(Thomas M. Comer, of counsel)

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On October 19 and November 3, 2000, Gary R. LaBette filed an unfair practice charge and amended charge against the Middletown Township Board of Education. The charge as amended alleges that on July 28, 2000, Board Director of Buildings and Grounds/Facilities Joe Grabowski terminated LaBette's employment "in response to a prior PERC matter . . . and contrary to an agreement [of the parties reached] on April 6, 2000. . ." The

Board's action allegedly violates Section 5.4a(1) and (3)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On September 17, 2001, a Complaint and Notice of Hearing issued. On September 25, the Board filed an Answer acknowledging the termination and denying any violation of the Act. The Board admits that LaBette was one of three employees terminated on July 31, 2000. It asserts that LaBette and two accomplices were terminated for unauthorized use of Board vehicles during work hours; specifically, driving the vehicles to Eatontown, a nearby municipality, where they disconnected and removed a hot tub from a residence and transported it to LaBette's home. The Board also asserts the LaBette's termination was sustained in a grievance arbitration award dated December 1, 2000, Docket No. AR-01-091. A copy of the award was attached.

The Board contends that LaBette was terminated for just cause, pursuant to the collective agreement between it and

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<sup>1/</sup> 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."

Teamsters Local 11, LaBette's majority representative. It urged the Commission to defer to the award and dismiss the Complaint.

On April 12, 2002, the Board filed a Motion for Summary Judgment seeking dismissal of the Complaint. On April 15, the Motion was referred to me for a decision, pursuant to N.J.A.C. 19:14-4.8. On May 1, 2002, counsel for LaBette filed a letter, entering his appearance. On June 21, 2002, counsel for LaBette filed a response to the Motion.

On August 13, 2002, I issued a decision denying the Board's Motion for Summary Judgment (H.E. No. 2003-4). Relying upon City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375 (¶13172 1982), I found that deferral was inappropriate because the Complaint set forth allegations of anti-union motivation and discrimination which were not presented or considered in arbitration.

On January 28 and December 8, 2003,<sup>2/</sup> I conducted a hearing at which the parties examined witnesses and presented exhibits. Briefs and replies were filed by March 22, 2004.

Based upon the record, I make the following:

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<sup>2/</sup> The second day of hearing was scheduled for March 13, 2003. On March 10, the hearing was postponed, pursuant to the request of Charging Party, with consent of the Board. I proposed new dates to which the parties were not amenable. On July 28, August 14 and September 8, 2003, I requested a status report from the Charging Party. On September 10, I received a letter from Charging Party advising that the matter had not been resolved informally and requesting a new hearing date.

**FINDINGS OF FACT**

1. Gary LaBette was hired as a substitute custodian by the Board in October, 1994 and appointed as a "permanent" employee the following August. He possessed a "black seal" license and had been a "union plumber" engaged by locals in New York City and Fort Lauderdale, Florida (1T76).<sup>3/</sup> LaBette was promoted to mechanic helper and then to plumber mechanic in March, 1997, the latter post elevating him over more senior unit employees. Each change in title brought a wage increase to LaBette (1T74; 1T76; 1T77; 1T194; 1T195).

Sometime between March, 1997 and March, 1999, Board Supervisor of Plant Operations (and LaBette's immediate supervisor) Theodore Clark verbally chastised LaBette for either arriving later to work than the 7 a.m. start time or failing to phone the Board before 7 a.m. to advise of his late arrival or partial day's absence (2T70; 2T112; 2T113). Clark testified that he knew he had admonished Labette before March, 1999 "because . . . it [hadn't] come to a head . . . I basically told him that . . . 'You've got to knock it off; you've got to stop this.' And I told him I wouldn't write it up" (2T113).

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<sup>3/</sup> "C" represents Commission exhibits; "CP" represents Charging Party exhibits; and "R" represents Respondent exhibits. "T" represents the transcript, preceded by a "1" or "2" representing the first or second day of the hearing, respectively, and followed by the page number(s).

LaBette testified that he received no written reprimands from and had no "run-ins" with any Board supervisor, including Clark, before March, 1999 (1T78). "Run-in" was not defined or illustrated. I credit both Clark's testimony that he warned LaBette about his attendance before March, 1999 and LaBette's testimony that he received no written reprimand before March, 1999.

2. In or around August, 1998, LaBette became another of several shop stewards for Teamsters Local Union No. 11, IBT, the majority representative of certain Board employees (1T79; 1T199). LaBette acknowledged that before March, 1999, his status as shop steward had no "impact" on his "relationship with management" (1T80).

3. On or shortly before March 16, 1999, a snowfall in Middletown prompted Board activation of a "snow chain list," essentially a process by which a designated or approximated number of listed unit employees were phoned in a particular sequence, largely by fellow unit members, to advise them of the opportunity for overtime employment consisting of plowing or shoveling snow on Board premises. LaBette and several other unit employees living outside an immediate geographic area purportedly were not called and did not perform snow removal (1T84-1T85). Similar omissions had occurred in response to previous snowfalls (1T81-1T82).

Soon after learning that he and other unit employees had been bypassed, LaBette and chief shop steward and unit employee Arthur Scott requested a meeting on the subject with Board representatives (1T82). On or around March 16, 1999, the two stewards met with Board Administrative Supervisor John Parcels (1T198). The union representatives proposed that management (rather than unit members) telephone the unit employees needed for snow removal. Parcels declined the proposal (1T83; 1T84). LaBette also requested and was denied payment for the "missed" work.

LaBette testified specifically that Parcels proposed to post a copy of the "call list" near the employee "sign-in" desk so that employees reporting for snow removal duties could check-off their names upon arrival. He also testified that Parcels agreed on behalf of the Board to "take responsibility if someone wasn't called in; that [the Board] would pay them . . . however many hours that people missed" (1T83; 2T44). Board Supervisor of Plant Operations Theodore Clark denied in his testimony that any term and condition of employment regarding procedures for or payment pursuant to activating the "snow chain" list changed as a consequence of LaBette's protest or grievance (2T119). LaBette also testified that he was told that he would not be paid because he had been telephoned for snow removal duty by unit employee Brian Grushard (1T86). The record is not clear about when

LaBette was informed about the reason his request for overtime payment was denied. Parcels did not testify in the hearing; I otherwise credit LaBette's testimony. By crediting LaBette, I do not find that the Board had necessarily agreed to compensate those employees (for overtime snow removal) who should have been called but were not. I find that Parcels represented that position, in the absence of specifically conflicting evidence.

On March 16, "union steward" Scott and "employee" LaBette signed and filed a grievance regarding "[being] overlooked on the snow chain list" and seeking payment for "five hours [of] overtime" compensation (CP-1; 1T86; 1T90). Chief shop steward Scott signed every grievance on behalf of Teamsters Local Union No. 11 (1T196). Supervisor Clark did not speak with LaBette about having been bypassed on the list or about the related grievance on or before March 16 (2T77).

4. LaBette testified that the next day, March 17, Board Supervisor of Safety and Health Kenneth Walls called him into his administrative office located in the basement of High School North (1T91). LaBette happened to be "in the office" and "ran into [Walls] in the main office" (2T30). I infer that the "main office" refers to the principal office of the Board's physical plant at High School North.

LaBette testified that Walls said: "Don't file the grievance. You don't need the extra trouble that it's going to



bring you. And/or Barbara doesn't need the extra trouble, either" (1T92). "Barbara" refers to Barbara Carpenter, a Board employee and secretary to Director of (Plant) Facilities, Joseph Grabowski (2T104). She was LaBette's "girl friend" (1T92). On cross-examination, LaBette testified that Walls said: "You nor Barbara need the extra grief that you are going to get if you file this grievance" (1T207). He was asked if Walls said anything else, to which LaBette answered: "Yeah; he said to withdraw it" (1T207). LaBette believed that Walls meant that "the other managers [i.e., supervisors] would come down on [him] for putting in the grievance" (1T92). LaBette characterized Walls' warning as friendly advice (1T228). On cross-examination, LaBette testified that Walls did not specify which supervisor(s) would give him a "hard time" (2T31; 2T32). No other witnesses were present besides Walls, according to LaBette (2T30). No evidence indicates how Walls may have learned of the grievance. LaBette testified that he replied to Walls: "I will do what I [think] is right and I had to put in a grievance" (1T93).

Kenneth Walls testified that he was not LaBette's immediate supervisor and that three other supervisors (of Maintenance, Custodial Service and Administration) "preceded" him in "dealing with maintenance and custodial crews" (2T142). He was primarily responsible for "safety needs", such as asbestos removal from school facilities (1T227; 2T142). LaBette conceded on the record

that the "snow chain" grievance would not affect Walls' responsibilities (1T228). I infer that testimony to mean that any outcome of the grievance would not change Walls' job duties. Walls denied having any conversation with LaBette in or around March 1999 concerning any subject related to a grievance he filed against the Board. He specifically denied telling LaBette not to pursue a grievance against the Board at the risk of "things happening to him if he did" (2T142). Walls also testified that he knew Barbara Carpenter when she was employed by the Board and denied speaking with her about LaBette's grievance (2T141; 2T144).<sup>4/</sup> Sometime in 1998, Walls spoke with LaBette about his marital problems, particularly his efforts to obtain custody of his daughters. LaBette asked Walls to "computerize" a log book which was to be submitted during discovery in his custody case (2T143). On cross-examination, Walls testified that he was

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<sup>4/</sup> Supervisor Clark testified that sometime before March 16, 1999, he spoke with Carpenter after he was informed by a relative of hers that she was "dating" LaBette. He testified that he spoke with her shortly after her unspecified hiring date because of a potential "conflict" regarding her employment duties for Director Grabowski; specifically, he was concerned about divided loyalties in light of her access to "confidential" information regarding maintenance employees (2T105; 2T106; 2T127; 2T128; 2T130). Clark testified that Carpenter informed him that she was no longer dating LaBette (2T105-2T106). Clark did not participate in the decision to hire Carpenter (2T105). I credit Clark's testimony but make no finding on the status of Carpenter's relationship with LaBette at time of Clark's inquiry of her.

". . . friendly with [LaBette] as [he] was with any maintenance or custodial [employee] at that time" (2T145).

I credit LaBette's testimony that supervisor Walls advised him to withdraw the "snow chain" grievance or risk that continued processing would generate "extra trouble" or "grief" for him or Carpenter. LaBette's testimony was resilient under aggressive cross-examination. Given Walls' previous and uncontested assistance to LaBette in his custody case, I believe that Walls would have imparted the purported statement as friendly advice or a "heads-up." Accordingly, I do not quite believe the implied meaning of Walls' testimony; specifically, that he was no more friendly with LaBette than he was with any other unit employee. I also find that Walls had no immediate or secondary supervisory authority over secretary Carpenter and over maintenance and custodial unit employees, including LaBette.

5. LaBette testified that on March 17 or 18, 1999, he was "switched from [doing] plumbing to electrical work" (1T93). LaBette had performed plumbing duties exclusively for about two years before the switch. LaBette testified that the switch was done to "bust [his] chops" (1T194). I infer that LaBette believed that the "switch" was a retaliation for his March 16 grievance filing. LaBette did not testify about the length of the period of time he was ordered to perform electrical work. I

find that LaBette was assigned to perform electrical work for an unspecified and finite period beginning March 17 or 18, 1999.

6. Sometime during the work day on Friday, March 19 or 26, 1999, Supervisor Clark told LaBette to install a snow plow on his assigned Board truck. Clark had observed the truck without an attached plow on Board premises. LaBette replied that he would install the apparatus the next day (2T72). The following Monday, between 7:15 and 7:30 a.m., Clark observed LaBette installing the plow on his truck on the Board lot. He asked LaBette why he had not installed it beforehand. LaBette answered that he had forgotten (2T72). LaBette elaborated on the record:

It had snowed and I was about 10 or 15 minutes late to work. And they asked me why. I said I had to clean off my truck and everything. And then when we got down to the yard, I didn't have my plow hooked up. I was supposed to do it that Saturday but I had forgotten because we worked late. [1T95]

Clark informed LaBette that he was "going to write him up" for being tardy (2T9; 2T82). LaBette testified that he "believed" that three other unit employees had not installed plows on their assigned vehicles and that Clark said to him that "[supervisors] didn't want to write up these certain individuals so they couldn't write up me without writing them up" (1T97). I credit LaBette's testimony.

LaBette read the reprimand for tardiness a couple of days later (1T97). Sometime during a work day in early April 1999,

Clark destroyed and discarded the reprimand in the presence of Scott and LaBette, pursuant to Teamster Local 11's request to give LaBette "a break" (2T83). LaBette's memory about the withdrawal of this reprimand is vague; "I looked in my personnel file at some point and it wasn't there" (1T98). On cross-examination, LaBette testified that Clark "told me that he threw [the reprimand] out" (2T10). I credit Clark's testimony.

7. The March 16 grievance was not processed in accordance with the contractual grievance procedure and was apparently denied (1T99). On April 28, 1999, Supervisor Walter Cahill issued a memorandum to LaBette, admonishing him for "phoning in a family sick day" at 7:35 a.m. Cahill wrote: "This is not acceptable procedure. In the future, you must telephone one of the maintenance supervisors before 7 a.m." (CP-3). LaBette admitted the late phone call in his testimony (1T109; 1T110; 2T12).

8. On May 25, 1999, Teamsters Local #11, IBT filed an unfair practice charge (dkt. no. CO-99-373) against the Middletown Board. The charge alleged:

On or about April 19, 1999, and continuing by its officers, agents or representatives, [the Board has] discriminated and harassed Gary LaBette because of his membership and activities on behalf of Local 11, IBT, as shop steward. [CP-2]

On cross-examination, LaBette acknowledged that the charge referred only to his conduct and not to any other shop steward's

conduct on behalf of Teamsters Local #11 (1T202). LaBette was also unaware of any evidence indicating that the Board had harassed or retaliated against any other shop steward for engaging in protected conduct (1T202-1T203).

9. On June 2, 1999, Supervisor Walter Cahill issued a memorandum to LaBette concerning "2nd letter-phoning in late." Cahill wrote:

On Tuesday, June 2, 1999, at 7:27 a.m. you phoned in a personal day. Your work day starts at 7 a.m. As you were told before, this is not acceptable procedure. In the future, you must telephone one of the maintenance supervisors before 7 a.m. when you are going to be absent. [CP-3]

LaBette admitted telephoning the Board from his home after 7 a.m. on June 2, owing to his caring for an ill child (1T110; 2T12).

10. On June 25, 1999, Supervisor Clark issued a memorandum to Board Administrator of the Office of Human Services William Hybbereth, Jr. Clark wrote that at 12:15 p.m. that day, LaBette "phoned in" a "family sick day", noting that his work day begins at 7 a.m. Clark wrote that LaBette offered the excuse that he was "in the process of moving into a new house and did not have a telephone." He wrote:

This is the third time this has happened. The first time was April 28th and the second time was June 2nd. He has received letters to the effect that this is not acceptable procedure and this conduct will not be tolerated.

The proper procedure is to complete a 'Request to be Absent' form and request either a personal or vacation day or to call before 7 a.m. on the day you will not be coming to work. A family sick day should not be used for moving into a new home.

Please contact me at your earliest convenience so that we can discuss disciplinary action. [CP-3]

Copies of the memorandum were issued to LaBette, Supervisor Cahill and Director Grabowski (CP-3). LaBette did not contest the circumstances described in Clark's memorandum (1T110; 1T111; 2T13). On July 1, 1999, LaBette was issued a summary "warning notice", advising that another infraction will result in "disciplinary action" (CP-3; 1T118). On cross-examination, LaBette admitted that all three (April and June, 1999) "criticisms" were "true"; that he had not phoned the Board by 7 a.m. (2T14). LaBette testified that the criticisms were a harassment anyway, because "it was very lax where we work. As a plumber, [I] work through [my] breaks or lunch or end of the [shift] . . . and the supervisors knew it. So, if we came in [or called in] a couple of minutes late, it really didn't matter" (2T15).

Clark admitted on cross-examination that before April 1999, "when [a unit employee] signed in and signed out was not strictly enforced" (2T107). He also testified:

If you were in the middle of a job, let's say in the middle of a hallway--school is going on--you cannot just leave the job, so you

work through your breaks or your lunch and either a) take overtime for it at the end of the day; or b) you left early. [2T108]

Clark denied that the Board had an understanding that employees working through breaks or working late were permitted to arrive a few minutes late in the morning (2T108). He testified: "No, anybody that was late, you know, if they were caught. I'd always speak to anybody that I caught" (2T108). Sometime in or after August, 2000, a time clock was installed in the office at High School North to accurately record employee arrival and quit times (2T103-2T104).

LaBette's and Clark's testimonies are reconcilable in a hypothetically narrow factual scenario. If an employee was "a few minutes late" and not observed arriving late by a supervisor, he or she could simply write the exact start time of his or her shift on the sign-in sheet and proceed unfettered (see finding no. 12). The employee might then believe that arriving slightly late "really didn't matter", as LaBette testified. LaBette's July 14, 1999 late phone call and arrival arguably exemplifies this scenario (had he not been disciplined) (see finding no. 11). In other instances of his having been reprimanded before July 14, LaBette had phoned the Board or arrived about 30 minutes late or later. I credit Clark's testimony.

11. On July 14, 1999, Supervisor Cahill issued a memorandum to LaBette regarding "telephoning in late." Cahill wrote that



LaBette had phoned at 7:05 a.m. that morning to advise that he will be reporting late for work and that he came to work at 7:18 a.m. Cahill wrote that "due to your recent warning notice by Ted Clark, a copy of this memo is being forwarded to the personnel office for possible disciplinary action." Copies were issued to Administrator Hybenneth and Director Grabowski (CP-5).

LaBette testified that he phoned at 7:02 a.m. and that the clock near the Board "sign-in" desk is "[fast] by three minutes" (1T123). He also testified that he signed "in" at 7:15 a.m. in Cahill's presence. Assuming that LaBette is correct, I consider his testimony an admission that he phoned and reported to work late.

12. Unit employees typically wrote their start and quit times on printed sign-in sheets kept in the physical plant office at High School North. Employees invariably wrote the starting and quitting minutes of their respective shifts. For example, if employee Hellwege's shift began at 7 a.m. and ended at 3:30 p.m., he wrote his start time as "7:00" and his quit time as "3:30", regardless of the actual time of his arrival or departure measured by the clock near the sign-in sheets (1T125; 1T126; 2T102-103; CP-5). LaBette testified that in June or July 1999, he began writing his actual reporting and leaving times to demonstrate that on occasion, employees work late and do not seek

overtime compensation (1T126-1T127). I credit LaBette's testimony.

13. On July 19, 1999, LaBette sent a letter to Administrator Hybenneth, disputing the existence of a requirement that (before April 28) unit employees must "call in at a certain time when calling in sick." He wrote of his children's illnesses on April 28, June 2 and June 25, 1999. He also wrote that he was a single parent and circumstances sometimes ". . . make it difficult to call at exactly 7 a.m." (CP-4). LaBette also contested the fairness of the reprimands. He wrote:

After five years of employment at Middletown [Board] with numerous advancements and a clean record it seems a bit odd that I now have three warning notices all within one month after filing charges against management with the State. I am in no way the biggest offender of this and since they do not discipline all employees equally, I feel that this is discrimination and harassment. [CP-4]

LaBette conceded the facts set forth in all three reprimands, one of which was issued before the original charge was filed with the Commission. Nor did LaBette proffer evidence showing that other unit employees, presumably not active in the IBT, nor grievance filers, were greater "offenders" than he of the Board "call-in" work rule.

Supervisor Clark conceded that before April 1999 he had not "written up" any unit employees for arriving late or calling-in late (2T111). Clark testified: "I believe most of the people

that I had a problem with, I spoke to verbally and the problem was rectified" (2T75). He more directly testified: "LaBette was written up for [failing to timely call] mainly because he just kept on doing it with total disregard [for] what he was told to do" (2T101). Clark's testimony is corroborated by finding nos. 1, 6, 7, 9 and 10. Clark named two other unit employees, including LaBette's brother, he had reprimanded in writing for lateness after April 1999 (2T111). Sometime in the summer of 1999, after LaBette had been reprimanded, Clark "found him sleeping" in the morning of a work day on the roof of the New Monmouth School. Clark did not issue a reprimand to LaBette for the infraction (2T113; 2T114).

14. On July 20, 1999, Hybbeneth issued a memorandum to "all Teamsters" regarding a "procedure on reporting absences." Hybbeneth wrote that if an "a.m. shift" employee needs to be absent and did not previously complete a "Request to be Absent" form, he or she must "call [the] assigned school and the Building and Grounds Department" at a given telephone number "no later than 7 a.m." (CP-6).

15. On Monday, August 16, 1999, LaBette did not report to work. LaBette testified that he phoned the appropriate Board office late on the previous (Sunday) night and left a voice message on the answering machine to the effect that he will be absent from work on Monday and that his absence should be

considered a "family sick day" (1T131). When LaBette arrived at work on August 17, he was informed that "there was no record of [his] having called" (1T132). Clark testified:

The day in question, I know for a fact that he did not call in or there were no messages left on the machines, due to the fact that I was the only supervisor in that day with the secretary from the entire department. I checked everyone's machine. [2T85]

LaBette was debited a sick day and his salary for August 16 was withheld (1T133).

On August 20, Clark issued a memorandum to LaBette regarding the "failure to phone-in absence." Clark wrote that LaBette did not notify the maintenance department of his August 16 absence, noting that "all of the answering machines were checked" to no avail. Clark wrote that he was recommending that LaBette "be docked a day's pay" for the infraction, pursuant to the July 14 written warning (CP-7). Copies were sent to Hybbeneth and Grabowski.

16. On August 18, 1999, Teamsters Local Union No. 11, IBT filed an amended charge alleging that since March 16, the Board engaged in "discriminatory conduct because of LaBette's membership and activities" on behalf of the majority representative (CO-99-373). The Teamsters specifically alleged that the March 16 "warning"; the March 22 transfer of LaBette to the electrical crew; the April 28, June 2, June 25 and July 14, 1999 reprimands; and a May 7 assignment to work "general

maintenance" all violated 5.4a(1), (3) and (4) of the Act. Nothing in the record refers to the alleged May 7 assignment.

17. On September 2, 1999, Teamsters Local Union No. 11 filed a grievance against the Board contesting LaBette's "unjust suspension for one day." Scott and LaBette signed the grievance (CP-7).

18. On September 10, 1999, LaBette wrote a letter memorializing his immediate resignation as "shop steward from Teamsters Local 11" because of "preconceived, continued harassment by management and due to my efforts to affect the integrity and rights under the contract of Teamsters Local 11 members" (CP-8). LaBette gave the letter to Supervisor Cahill and a copy to the Union (1T139).

19. On October 13, 1999, Board Administrator Hybbeneth issued a letter to Teamsters Union Local No. 11 President Peter McGourty regarding the grievance contesting LaBette's "unjust suspension for one day." Hybbeneth wrote that he was denying the grievance, following the September 22 "Board level hearing." Copies were sent to Chief shop steward Scott and LaBette (CP-7).

On October 15, McGourty sent a letter to Hybbeneth, expressing his "disappointment" with the denial and reiterating that LaBette had called the Board and requested a family illness day and that "by some error, either mechanical or by transfer of documents . . . there was a mistake made by some personnel who

are responsible for . . . logging and paying of days absent." Finally, McGourty wrote that the Union will proceed to arbitration on the grievance (CP-7).

LaBette also believed at that time that the Board had made a "clerical mistake" by not logging his phone call requesting the family sick day (1T137).

20. On March 22, 2000, Supervisor Walter Cahill issued a memorandum to LaBette regarding "tardiness." He wrote that that morning LaBette arrived at work at 7:25 a.m. and that he had been advised more than once to phone a maintenance supervisor before 7 a.m. on any day he expected to be late or absent. Cahill wrote that he "will be forwarding a copy of this letter to the personnel department" (CP-9).

LaBette did not dispute his late arrival on March 22. In December 1999, LaBette sustained injuries in an automobile accident, including recurring migraine headaches, the facts of which he had reported to the Board (1T142; 1T143; 1T188). LaBette provided a doctor's note excusing his lateness but unspecified Board representative(s) refused to remove Cahill's March 22 memorandum from LaBette's personnel file (1T143; 1T144).

21. On March 31, 2000, Teamsters Local Union No. 11 filed a grievance against the Board, contesting the "write-up slip on tardiness" issued nine days earlier to LaBette. The "adjustment

desired" was that "the slip [be] removed from [LaBette's personnel] file" (CP-10).

22. On May 9, 2000, Board Superintendent Jack DeTalvo sent a letter to LaBette memorializing a settlement of certain litigation. DeTalvo wrote:

In accordance with the resolution of Docket No. AR-99-722, AR-00-238 and CO-99-373, the Board has agreed to the removal of Monday, August 16, 1999 from your permanent attendance record.

The Board has also agreed to reimburse you for the docking of August 16, 1999 (\$129.25) and for five hours of overtime on March 16, 1999 (\$111.85) for a total of \$241.11. The Board will also expunge from its records all reprimands and disciplinary letters relating to such currently in your personnel file within nine months after issuance and shall not use such records for any purpose. [CP-11]

Supervisor Ted Clark did not participate in any discussions leading to the settlement memorialized in the DeTalvo's May 9 letter (2T122).<sup>5/</sup> On cross-examination, Clark acknowledged that he cared "a little" about the settlement because he disagreed that LaBette was owed compensation for work he had not done (2T124-2T125). Clark also acknowledged his (hypothetical) opposition to a resolution of the "snow chain" grievance which would require the Board to place all of the phone calls to

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<sup>5/</sup> On March 10, 2000, a Complaint and Notice of Hearing issued on CO-99-373, as amended. On April 26, 2000, Teamsters Local 11, IBT filed a letter advising of an "amicable resolution" and a request to withdraw the charge, which was promptly granted.

employees in a snow emergency. Clark estimated that he currently was responsible to call about 20 employees in such instances; he would have to phone more than 100 employees if the Board was required to make all the calls (2T118; 2T121). No evidence suggests that Board Administrator Hybbeneth considered, discussed or approved such a resolution of the "snow chain" grievance.

23. On December 14, 1999, LaBette was injured in a vehicle accident while on duty and hospitalized briefly. He sustained an unspecified back injury in addition to recurring migraine headaches (1T142; 1T187; 1T188; see finding no. 20). Beginning in January, 2000, and continuing for eight weeks or more, LaBette received physical therapy for the back injury (1T189). During that period, LaBette reported to work and was assigned "light duty" (1T188). A physician recommended that he acquire a hot tub or "jacuzzi" for home use to aid recuperation (1T148; 1T187).

24. On July 27, 2000, near the end of the work day when unit employees had gathered in the physical plant office at High School North to "sign out," LaBette approached chief shop steward Art Scott, whose negotiations unit position as head or chief stock clerk provided him "control over the 'rack' truck, a vehicle used for moving bulk items" (1T26-1T27; 1T64; 1T65-1T67; 1T154). Scott was not a supervisor of unit employees (1T54). Nor does the record suggest that he was a foreman. LaBette asked Scott for permission to use the truck the next day during "lunch



time" to transport a hot tub from a residence in Eatontown to his own home in Middletown (1T40; 1T148; 1T154). Scott was unperturbed by the reason and immediately assented, saying, "It's your time." (1T154). Unit employee Mark Hellwege was present and heard their exchange, which he largely corroborated on the record (1T26-1T28; 1T65-1T68). Hellwege was not a shop steward and no evidence suggests that he filed a grievance before July 28, 2000 (2T27). In 1998 or 1999, he was issued a "verbal written warning" for arriving several minutes late to work (1T27). LaBette asked unit employee Wally Hartsgrove for his assistance the next day but he declined (1T158).

25. LaBette testified that unit employees were permitted to use Board vehicles on weekends and during the work week if the vehicles were not being used [for Board purposes]. He testified that he was unaware of any policy requiring management approval of Board vehicle use for personal reasons. He testified that he was required to "ask [for and receive permission from] the person who's in charge of the truck" (1T153).

LaBette testified that before July 2000, "several workers used Board vehicles for personal business and nothing was ever said" (1T149). I infer that LaBette meant that Board supervisors or representatives did not criticize those "workers" or instances. LaBette testified that on an unspecified date, "his friend" and fellow employee Danny Goodbody used the Board rack

truck (with Scott's permission) to transport construction debris from his home to a dumpster on Board premises (1T150). He also testified that supervisors Kenneth Walls, John Paris, Walter Cahill and Director Joseph Grabowski separately used Board vehicles for "personal use". Grabowski assertedly borrowed a Board van to transport items during his relocation from Cherry Hill to Middletown (1T150). LaBette testified that he accompanied Walls in a Board vehicle to pick up a home water heater at a supply company, transport it to Walls' home and install it after work hours (1T150-1T151). LaBette testified that John Paris used a Board vehicle to carry two Board employees to his home for the purpose of inspecting his yard for the best location "to run [water] lines for his [swimming] pool" (1T151). He testified that supervisor Cahill "had a diesel boat motor delivered to High School North, [which] was unloaded by Art Scott [using] the Board forklift truck . . . and [later] loaded back onto a truck with the forklift and delivered to his house" (1T152). Finally, he testified that supervisor Clark "had a load of dirt dumped at his house in the [Atlantic] Highlands" (1T151).

Clark testified that supervisors are permitted to use Board vehicles for personal errands. Supervisors Parcels, Walls, Cahill, Clark and Director Grabowski each drive an assigned Board vehicle to and from their homes each work day and use them throughout the work week to perform Board business (2T93; 2T94).

Clark also testified that non-supervisory employees must receive "permission" to use Board vehicles "after [work] hours" (2T94). I infer that unit employees do not have permission to use Board vehicles for personal errands during regular work hours. I also infer that it is unlikely that unit employees receive appropriate (i.e., Board-authorized) "permission" to use Board vehicles for personal errands from non-supervisory employees. Clark also contradicted LaBette's testimony that he accompanied Walls in a Board vehicle; Clark testified that he and not LaBette accompanied Walls in a privately-owned Ford pick-up truck during non-work hours to pick up and deliver a water heater (2T95-2T96). He admitted that "long ago" he once drove a Board truck with surplus topsoil in tow to his home after work hours (2T137). In his position as Supervisor of Plant Operations for the past nine years, Clark never authorized a unit member to use a Board vehicle for a personal errand during work hours (2T93).

LaBette's hearsay anecdotes of supervisors using Board vehicles for personal errands are consistent with Clark's testimony that supervisors are permitted to use them for personal errands during non-working hours. LaBette did not identify a Board representative or document as the source of his understanding that unit employees were permitted to use Board vehicles for personal errands during work day hours, with permission of "the person in charge of the [vehicle]." I infer

that one "in charge of a vehicle" is not necessarily a supervisor. Nor did LaBette rebut Clark's testimony that unit employees could use Board vehicles for personal errands with "permission" only after work hours. I credit Clark's testimony.

26. On the morning of July 28, 2000, LaBette and unit employee Hellwege approached Scott at High School South. LaBette asked Scott to confirm that the "rack" truck would be available for his use at "lunch time" that day. (Unit employee lunch periods were 30 minutes and began on the hour or half-hour between 11:30 a.m. and 1 p.m. (1T33)). Scott confirmed its availability, saying that he will leave the truck unlocked in the parking lot at High School North with the key in the ignition (1T28-1T29; 1T155). LaBette solicited the assistance of unit employee Jerry King that morning for the hot tub pick-up and transport (1T36-1T37; 1T158). No evidence suggests that King was a shop steward or that he had filed any grievance(s).

At or around 11:30 a.m., LaBette and Hellwege drove to the High School North lot in a Board "step" van and found the key in the ignition switch of the unlocked "rack" truck (1T33; 1T156; 1T159; 2T86). Earlier in the day, Clark was informed by a unit employee that LaBette was "up to something"; others told him that LaBette had asked them "to give him a hand" (2T133; 2T134). Clark observed LaBette "take the rack truck from work at approximately 11:30 [a.m.]" (2T86). Hellwege followed in the

"step" van and picked up King at a nearby Board building (1T35). In the presence of unit employee Roddy Schoelner, Clark said: "I wonder where [LaBette] is going", to which Schoelner replied that LaBette was picking up and transporting a hot tub to his home (2T135). Clark made no effort to stop LaBette (2T135).

Clark immediately informed Director Grabowski of LaBette's departure and plan (2T89). Grabowski promptly informed the Superintendent about LaBette's actions. Clark was instructed to drive his Board vehicle to LaBette's home, await his arrival and photograph it (2T89; 2T90). Grabowski instructed Cahill to go to New Monmouth School, LaBette's assigned workplace that day, and verify that he was not there (2T90). Parcels was instructed to drive to a highway location and to phone and inform the Director if LaBette's borrowed vehicle "came back that way" (2T91).

27. At or around 2 p.m., LaBette drove the Board "rack" truck conveying a disassembled hot tub into the driveway or immediate proximity of his home. Hellwege and King followed in tandem in the "step" van (2T91). They were met by Director Grabowski, supervisors Clark, Parcels and Cahill, and Middletown police detectives (1T40; 1T43; 1T160). Clark took pictures with a camera (2T91). LaBette testified that Grabowski said to him: "Smile for the camera" and "I got you this time" (1T161). Hellwege testified that Grabowski said to both King and he: "I hope your friendship with [LaBette] is worth your jobs" (1T41;

1T161). He testified that Grabowski's demeanor was "joyful and overzealous" (1T42). Clark testified that he did not hear Grabowski comment to LaBette (2T131). I credit LaBette's and Hellwege's testimonies.

LaBette unloaded the hot tub. He, Hellwege and King were divested of Board keys, beepers and other items and then transported to the physical plant administrative office at High School North by the police detectives (1T44; 1T161-1T162). (They were not criminally charged). Upon arrival, they were met by Scott. Scott asked LaBette: "What did you tell them?" LaBette replied: "I told them you said I could borrow the truck." Scott said: "I'm not jeopardizing my 25 years [of Board employment] for you." Scott also said he would not admit giving LaBette permission to use the "rack" truck (1T46; 1T69; 1T164).

LaBette, Hellwege and King were directed to Grabowski's office or a conference room at High School North (1T43; 1T72). LaBette testified that Grabowski told them that they were "all fired," after which he asked: "Do you guys have any remarks or statements you want to say?" (1T62). Hellwege testified that they were told "[they] were being terminated" (1T43). Clark testified that LaBette acknowledged his responsibility for using the Board "rack" truck and Grabowski said they all were suspended pending his conferral with the Superintendent. Clark testified: ". . . I had got a phone call from the Superintendent and that

was that" (2T92). I find that the Board effectively terminated all three employees on July 28, notwithstanding the slightly-varying testimonies.

28. On August 3, 2000, Superintendent DeTalvo issued a memorandum to "all custodial/maintenance staff." It provides:

I want to remind all staff that district property, including vehicles, machinery, tools, etc., is not to be used for personal purposes. In the event of exceptional circumstances, staff may borrow district property only with written administrative approval.

Any employee found utilizing district property for non-Board of Education purposes will face the most severe disciplinary action available. [CP-12 (emphasis supplied)]

29. On December 1, 2000, Arbitrator Michael S. Murray issued an "Opinion and Award" (AR-01-091) denying a grievance filed by "IBT, Local 11" contesting LaBette's termination for just cause. The Arbitrator "upheld" the Board's decision arising from the circumstances of LaBette's use of the "rack" truck in July, 2000 (R-3).

Employee Hellwege's termination was upheld by an arbitrator, pursuant to a separate arbitration hearing. Employee King's termination was not upheld by an arbitrator, pursuant to another arbitration hearing (1T93). The arbitrator reinstated King because the facts showed that he believed he was ". . . going to pick up a compressor or motor for a rooftop air-conditioning unit for a Board building" (2T99-2T100).

**ANALYSIS**

Public employees and their organizations have a statutory right to avail themselves of negotiated grievance procedures. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.4a(1) and (3). The standards for establishing whether an employer has violated those subsections are set out in In re Bridgewater Tp., 95 N.J. 235 (1984). 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 unlawful motives 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.

LaBette contends that "his termination was in retaliation for several grievances that he filed on behalf of himself and union members" (brief at p.2). The Board's brief is directly responsive to that contention. I will analyze the facts in light of LaBette's contention, despite the specific allegation in the Complaint that LaBette was fired "in response to a prior PERC matter", etc., ostensibly violating 5.4a(4) of the Act. LaBette must prove that his protected conduct--filing grievances--was a substantial or motivating factor in the Board's decision to terminate his employment. If LaBette proves that case by a preponderance of evidence, the Board must prove that it would have terminated LaBette's employment regardless of his protected conduct.

The first two parts of the three-part test have been met. Teamsters Local Union No. 11 filed several grievances (and an unfair practice charge) on LaBette's behalf, which is protected activity under the Act. The Board knew of the grievances and the charge and signed an agreement with the union disposing of grievances and the amended charge. The remaining question is

whether the Board was hostile to LaBette and discharged him for pursuing or filing the grievances.

On March 17, 1999, the day after shop steward LaBette filed his "snow chain" grievance, supervisor Kenneth Walls advised LaBette to withdraw the grievance or risk "extra trouble" or "extra grief" which would follow its processing. Soon afterwards, LaBette--trained and licensed as a plumber--was assigned to perform electrical work for an indeterminate period for the first time in two years or more. Certain inferences would have to be drawn to infer hostility from these facts. I assume that the March 17, 1999 threat is direct evidence of hostility to the grievance filing and that the timing of the assignment is circumstantial evidence of an enactment of the "trouble" or "grief" threatened.

I find that LaBette has not proved by a preponderance of evidence that the assumed hostility continued through other filings (grievances, charge, letter) over the next fifteen months, culminating in his July, 2000 termination, the employment action contested in the Complaint.

LaBette did not deny that he reported late to work in March, 1999 and that supervisor Clark two weeks later discarded the reprimand he authored memorializing the incident. Nor did LaBette deny phoning the Board after 7:30 a.m. on April 28, for which he was reprimanded by supervisor Cahill. The May 25 unfair

practice charge does not identify any specific Board conduct illustrating "discrimination" or "harassment"; nor does the record indicate that anything occurred on April 19, as was alleged in the charge. LaBette admitted the underlying facts in the reprimands issued to him on June 2 and 25, 1999. On July 14, LaBette was admittedly late again, albeit by only a few minutes.

None of the reprimands suggest continuing Board animus for LaBette's March 16 grievance. The absence of a written rule mandating timely employee notice to the Board for an anticipated lateness or absence could be evidence that no rule existed. I do not draw such an inference; employee shifts typically extended from 7 a.m. to 3:30 p.m. An employer's legitimate interest in or concern about an employee phoning or arriving thirty minutes late (or later), as documented (and uncontested) in the reprimands, compared to one phoning or arriving "a couple of minutes late", as LaBette characterized those same lapses, is self-evident. Supervisor Clark also placed LaBette on effective notice of the "timely arrival" rule when he issued and rescinded the March 1999 reprimand.

LaBette violated the work rule three times in less than two months, prompting Clark's June 25, 1999 memorandum to Administrator Hybbeneth and the July 1 summary "warning notice" advising that another infraction will result in "disciplinary action." In the absence of evidence of disparate treatment of

unit employees for the same or similar repeated infractions and in the absence of sustained or renewed animus for the March 1999 grievance, I do not believe that the Board's measured responses connote hostility.

The July 14 reprimand warrants particular scrutiny because LaBette phoned the Board that morning only a few minutes after 7 a.m. to advise that he will be arriving late to work. If LaBette had not been reprimanded for the same or similar infraction on four previous occasions, one could glean persisting animus for the March 1999 grievance in this reprimand. I do not find or infer animus because the Board would likely be vigilant toward a repeat offender of the rule and it took no action against LaBette, despite the ultimatum in the July 1 summary warning notice. Nor did the Board act against LaBette when supervisor Clark found him asleep during his shift in the summer of 1999.

The record reveals nothing more suspicious than a good faith dispute over the circumstances of LaBette's August 16, 1999 absence from work. Labette testified credibly that he phoned the Board on Sunday night and recorded a message reporting his intended absence on the next day, Monday. Clark credibly testified that he personally checked all possible Board recording devices on Monday and heard no message from LaBette. On August 17, LaBette was informed that no message had been received. I infer that he was also informed of a likely punishment for the

omission. On August 18 and September 2, 1999, the Teamsters filed an amended charge and a grievance contesting the one-day "unjust suspension." On September 10, LaBette wrote a letter to the Board advising of his immediate resignation as a shop steward. The grievance was duly processed during the fall of 1999. I find that no Board conduct in this period suggests animus, notwithstanding allegations set forth in the Teamsters' filings and in LaBette's correspondence.

LaBette did not engage in protected conduct and the Board did not discipline him between August 1999 and March 22, 2000. On the latter date, LaBette failed to timely advise the Board of his (belated) 7:25 a.m. arrival at work, for which he was reprimanded. Nine days later, Teamsters Local Union No. 11 filed a grievance protesting the reprimand. In early May, 2000, the Board and the Teamsters informally resolved two pending grievances and the amended charge (CO-99-373, upon which a Complaint had issued). All reprimands and disciplinary letters were by agreement expunged from LaBette's personnel file. No animus may be inferred from any of these events.

On July 28, 2000, supervisor Clark did not prevent or stop LaBette from driving to Eatontown in the Board "rack" truck. However Clark's omission might be characterized, it cannot be considered an entrapment which mitigates LaBette's intent to use the "rack" truck for his personal errand. Later that day,

Director Grabowski gloated upon observing LaBette deliver the hot tub, saying: "I got you this time." One could infer that Grabowski openly relished witnessing (and photographing) LaBette driving a Board vehicle on a personal errand during work hours, particularly if he disapproved of the Board's May 2000 voluntary disposition of the several pending matters concerning the former shop steward. One might consistently infer that Grabowski was pleased to have apprehended a recidivist workplace-rule-violator. Considering the absence of anti-union animus in Board actions between March 1999 and July 2000, I do not find that Clark's omission and Grabowski's remark on July 28 reveal animus.

Assuming that LaBette met his burden under Bridgewater, I must now consider whether the Board proved by a preponderance of evidence that it would have terminated LaBette's employment even in the absence of protected activity. Bridgewater at 95 N.J. 244. I find that the Board has met this burden.

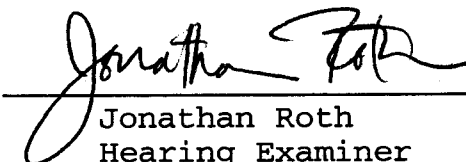
No evidence suggests that supervisors authorized unit employees to use Board vehicles for personal errands during their shifts. LaBette provided corroborating anecdotes to Clark's testimony that supervisors were permitted to use Board vehicles for personal errands after work hours. LaBette's other anecdote about unit employee Goodbody, identical to his own experience of receiving "permission" to use the Board "rack" truck from unit employee and chief shop steward Scott, does not prove that the

permission was authorized or condoned, generally. In sum, no specific evidence implicates the veracity of Supervisor Clark's testimony that unit employees were not permitted to use Board vehicles for personal errands during their shifts, notwithstanding the absence of a written directive before August 3, 2000.

LaBette enlisted unit employees Hellwege and King to assist him on July 28 and the personal errand to collect and deliver the hot tub exceeded by two hours the period allocated for a lunch break. The Board simultaneously terminated all three employees for using Board vehicles in their endeavor. Hellwege and King had previously engaged in little or no protected activity. I find that the Board terminated LaBette for his conduct on July 28 and would have terminated him for it in the absence of any protected activity.

**RECOMMENDATION**

I recommend that the Commission dismiss the Complaint.

  
Jonathan Roth  
Hearing Examiner

Dated: July 7, 2004  
Trenton, New Jersey