H.E. NO. 2007-005

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

In the Matter of

SHORE REGIONAL BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2005-098

SHORE REGIONAL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that the Shore Regional Board of Education failed to assign Linda Conway to its newly renovated library in retaliation for her protected activities as Shore Education Association president, in violation of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-5.4a(1) and (3). The Hearing Examiner found that while the Association proved that the Board was hostile to Conway's protected activity pursuant to the standards set forth in In re Bridgewater Tp., 95 N.J. 235 (1984), the Board proved, by a preponderance of the evidence, that it would have reassigned Conway even in the absence of that activity. Moreover, although the Superintendent's remark to Conway, standing alone, supported the finding of an independent a(1) violation, the remark was not specifically pled in the charge. Therefore, the independent a(1) allegation was dismissed.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Report and Recommended 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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Appearances:

For the Respondent,
Alexis Tucci, attorney

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

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 15, 2004, the Shore Regional Education Association and Linda Conway ("Association") filed an unfair practice charge against the Shore Regional Board of Education ("Board"). The charge alleges that the Board failed to assign Linda Conway to its newly renovated library in retaliation for her protected activities as Association president, in violation of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-5.4a(1) and (3).[1/]

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)

On March 3, 2005, a Complaint and Notice of Hearing issued. On March 22, the Board filed an Answer generally denying the allegations and asserting separate defenses. Hearings were held on July 7 and 14, August 18, September 14, October 19, November 2, and December 14, 2005.[2/] At the close of Charging Party's case-in-chief, Respondent made a motion to dismiss, which I denied (2T1-2T19). Post-hearing briefs and reply briefs were filed by May 30, 2006.[3/] The record closed on May 31, 2006.

Based upon the entire record, I make the following:

1/ (...continued)
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."

2/ The transcripts will be referred to as 1T (July 7), 2T (July 14), 3T (August 17), 4T (August 18), 5T (September 14); 6T (October 19), 7T (November 2), and 8T (December 14). The Commission's exhibits shall be referred to as "C-". The parties' joint exhibits will be referred to as "J-", Charging Party's exhibits as "CP-" and Respondent's exhibits as "R-". At the July 7 hearing, at Charging Party's request, I amended the caption to correctly reflect Linda Conway as a charging party along with the Association (1T7).

3/ The briefing schedule was extended due to the hearing examiner's anticipated personal leave of absence from February 1 through June 1, 2006. The hearing examiner's leave was subsequently extended to July 10, 2006.

Findings of Fact

A. Shore Regional generally

1. The Shore Regional Board of Education is a regional high school district in Monmouth County consisting of about 700 students, 170 teachers and 30 other staff (6T47, 6T129). Leonard Schnappauf has been the superintendent/principal at Shore Regional High School since 1992 (6T6, 6T8, 6T10, 6T12; 7T8, 7T9).

As principal, Schnappauf is the instructional leader of the building in charge of athletics, instruction, and support staff (6T13). As superintendent/principal, he is two steps in the grievance procedure (7T38).

Prior to being appointed superintendent/principal, Schnappauf was Association Vice-President and became acting/interim President when Bill Lewis, the President, was injured in an automobile accident (6T7; 7T7-7T8). Schnappauf has been on both sides of negotiations - he "sat through" three negotiations sessions as superintendent, and when in the Association, one or two (6T4).

Prior to joining the Board, Schnappauf was the teacher's association head and negotiations chair at LaSalle Military Academy in Oakdale from 1970 to 1974 (6T5-6T6; 7T7).

B. Linda Conway

3. Linda Conway has been employed by the Board since November 1976 (C-1). Conway is a tenured librarian media specialist (C-1; 6T88).

4. The Shore Regional Education Association ("Association") is the exclusive representative of a negotiations unit including all part-time and full-time classroom teachers, guidance counselors, nurses, librarians, social workers, coaches, the coordinator of computer education, activity advisers and clerical and secretarial employees of the Board (C-1; J-1). Conway has been President of the SREA since 1988 (C-1, C-2).

Schnappauf has known Conway professionally since 1976 (6T3). He was aware that she engaged in protected activity as SREA President (6T48).

C. The Labor Relations Climate

5. Marc Abramson has been employed by the New Jersey Education Association (NJEA) as a UniServ representative since 1986 (8T9). A UniServ representative is a professional employee of the NJEA who deals with all aspects of labor relations, including advanced grievance processing, labor arbitrations, and contract negotiations (1T73, 1T87). Formerly, as an NJEA negotiations consultant from 1978 to 1986, Abramson was regularly assigned to handle issues involving the Board (8T7). Abramson was assigned elsewhere from 1986 to 1989, and then resumed

working with the Board until approximately 2002 or 2003 (8T10-8T11). When Abramson returned, Linda Conway was Association President, Alfred Campanella was superintendent, and Schnappauf was the principal (8T12).

Abramson recalled that the parties "got along rather well" while Campanella was superintendent, and were able to work out any issues that arose (8T9). However, Abramson believed that after Schnappauf became superintendent, there was a change in the labor relations atmosphere (8T13). Compared to other locals, according to Abramson, Schnappauf seemed unwilling to settle issues unless the NJEA had "his back up against a wall" (8T14).

Abramson's relationship with Schnappauf was usually cordial, but Schnappauf's relationship with Conway was not (8T13). Abramson believed that the relationship between Conway and Schnappauf was "quite contentious" compared to other locals with which Abramson was familiar. In his opinion, Schnappauf "had great difficulty dealing with Linda in a civil manner" (8T13). According to Abramson, Conway was an active and assertive president:

> (S)he would not take no for an answer. She would question Lenny, in my presence; she would not sit back and allow Lenny to try to muscle her. She stood up for the Association and did, as I see it, an admirable thing. She was always there for Association members. (8T15-8T16).

During one grievance meeting, Abramson noticed that Schnappauf was very agitated before the meeting began (8T15). As Abramson was entering the conference room, he observed that Schnappauf's face was "very red", and he was yelling at Conway (8T20).

Schnappauf described his relationship with Abramson and Conway differently. He explained that although he and Abramson had their "moments," they developed a working relationship and were able to resolve grievances (6T30). He doesn't recall "getting huffy" with Conway in a grievance meeting as Abramson described (6T30).

I credit Abramson's testimony generally, particularly his description of the change in the labor relations climate after Schnappauf became superintendent/principal. Abramson's testimony was forthright and based on a number of years' experience with the Board under separate Association and Board leadership. Schnappauf did not specifically deny Abramson's factual assertions.

6. Robert Fisher was a teacher at Shore Regional from 1970 until his retirement in 2003; he now resides in Florida (1T30). Fisher variously served as the Association's grievance chairperson, its Vice-President and on the negotiating team (1T30).

In 1996, Fisher and Conway met with Schnappauf on behalf of a teacher who had been suspended for coming to school intoxicated. Tenure charges were previously sustained against the teacher, but he was returned to work by the Commissioner of Education after his suspension (6T21). The new incident involved the teacher having been under the influence of alcohol in the presence of students, the teacher's denial, and a bottle of liquor being found in his classroom (7T42). Fisher described Schnappauf's reaction:

> [Schnappauf] was extremely angry, extremely agitated with [the teacher] and he seemed very angry at us as Union representatives of taking the position to defend [the teacher] . . . . And he did some yelling and screaming, he used some inappropriate language and basically gave Conway and me hell for having the audacity to defend this man (1T45).

Schnappauf then punched a door or a wall during the discussion (1T46).

Schnappauf doesn't deny Fisher's account of events, but doesn't recall using any foul language during the discussion, yelling or punching the wall (6T18-6T19, 6T20; 7T44). Schnappauf explained that he tends to be "very passionate and emotional when it comes to certain things;" and that he was angry with the teacher because this was the second incident since the teacher had returned to the building (the other incident did not involve alcohol use) (6T19, 6T22). Schnappauf stated, however, that he

was not angry with Fisher and Conway for representing the teacher (6T22; 7T43). From his prior Association membership, he said he recognized the Association's representative obligation and respects the role of a union person in the performance of their duties (6T49).

I credit Fisher's factual testimony.

7. According to Fisher, around 2000, the relationship between the Association and Schnappauf became at times "very hostile . . . there were times when the Union had a very, very difficult time getting along and working things out with Mr. Schnappauf" (1T31, 1T32). Teachers had expressed concerns to the Association's executive committee about Schnappauf's temper, lack of patience, or inappropriate language or conduct when dealing with problems in the building (1T32-1T33). As a result, in 2001, the Association contemplated taking a vote of "no-confidence" against Schnappauf, but the motion was discussed and tabled (1T32-1T34). Some executive committee members volunteered to meet with Schnappauf privately to discuss his behavior and temper (1T34).

8. In early 2002, the Association became concerned about the passage of the proposed school budget (1T35). The Association leadership solicited the membership to make telephone calls and speak positively about the school in the community to encourage passage of the budget to avoid budget cuts which would

result in staff reductions (1T36). The budget passed, but at the next Board meeting, Schnappauf recommended the elimination of certain positions and programs (1T37). Certain teachers were scheduled to be RIFfed for the 2002-2003 school year at the April 2002 Board meeting (6T24, 6T26)[4/]. Association members were angry because they felt there had been a good faith assumption that such budget cuts would not happen (1T37). In April 2002, the Association met and took a vote of no-confidence against Schnappauf for recommending the cuts (1T37-1T38).

9. Conway and another teacher, Cindy DuToit, approached Schnappauf with the letter communicating the no-confidence vote before the April 2002 Board meeting. They delivered it to him and got a receipt (1T39). Conway was scheduled to address the Board to make the no-confidence vote public, but after Fisher shuttled between Schnappauf and Association representatives, the Association decided to hold off on making the vote public until the May Board meeting to give Schnappauf and the Board time to discuss Association proposals for avoiding some of the cuts (1T41).

By the May meeting, the Association learned that all but two of the positions the Association hoped to have restored would

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4/ A "RIF," commonly known as Reduction in Force, is governed by N.J.S.A. 18A:28-9, which provides that school districts may "abolish . . . positions for reasons of economy" within the requirements of the statute.

still be cut (1T43). Fisher spoke to Schnappauf but there was no more room for movement (1T43). When Fisher informed the Association of this, they determined to "go public" with the vote of no-confidence (1T43). Conway and Fisher decided to go see Schnappauf to inform him of the "go public" decision as a courtesy (1T43).

10. Schnappauf was in his office preparing for the meeting; in view of the budget issues to be discussed, Schnappauf anticipated a tense meeting and for the audience to be upset (6T26). Board meetings are usually held in the library, but the meeting was scheduled in the auditorium because a large turnout of up to four hundred people was expected (6T26, 6T27). As Schnappauf walked from his office toward the auditorium, Conway and Fisher approached him and asked to speak to him (6T26). Schnappauf agreed and the three went into an attendance office located between Schnappauf's office and the auditorium (6T27). Conway and Fisher gave Schnappauf the letter expressing the vote of no-confidence (6T27; 1T44). Schnappauf became very angry with Conway and Fisher and said to them, in a loud, agitated voice, "Well, if this is what you are going to do then wait and see what I am going to do" (1T44). Schnappauf repeated the statement at least twice (1T44).

11. Ronald Valentine is a retired Board teacher who attended the May 2002 Board meeting. While speaking with a

colleague near the attendance office, he overheard Schnappauf angrily "screaming at the top of his lungs", saying words to the effect of "what I can do or what I will do"; Conway and Fisher then exited the attendance room (1T64-1T65). Valentine asked Conway if she was all right because she appeared upset (1T66).

Schnappauf's reaction to what Fisher said follows:

> I am not going to question those words at all because I would say that I don't believe that Mr. Fisher would lie, so I would say that in my emotion and frustration [sic] any other emotion you want when you are walking into a big meeting, facing your own Board, that I said this, but in no way would it be meant to be anti-Union animus. It would just be a remark made in the heat of discussion or in upsetment [sic] (6T27).

This was the first time Schnappauf had received a letter of no-confidence, although Schnappauf's predecessor, Dr. Alfred Campanella, had received two (6T28, 6T29; 7T40). He was embarrassed, but he says he recognized the Union's right to do it and "move(d) on" (6T28).

12. Regina Tierney is a Board math teacher and the Association's current First Vice-President (1T68). Conway typically attends Board meetings, but if she is unavailable, another SREA officer will attend in her place (1T69). Tierney attended the August 2002 Board meeting in Conway's absence at her request (1T68).

During the public comment portion of the meeting, two members of the public questioned the Board about the reasons for

the SREA's no-confidence vote (1T69). Board member Paul Rolleri stated that Schnappauf had called the SREA's points "untrue"; according to Tierney, Rolleri then "referred to Mrs. Conway as coming up with the vote of no-confidence, they were essentially her ideas or her reasons" (1T70). Tierney interpreted Rolleri's statement to mean that he thought that Conway had "formulated" the no-confidence vote (1T72). I credit Tierney's testimony.

D. The Library

13. Conway was assigned full-time to the Board's library from November 1976 until July, 2003 (C-1, para 5). Conway and Sandra Lerner were co-full-time librarians beginning in 1986, until Lerner retired in 1994 (7T100).

After Lerner's retirement, William Valenti began working as a part-time librarian with Conway (7T51). Valenti has been employed by the Board since 1974 or 1975 (7T50). Valenti is a tenured librarian-media specialist and taught English exclusively until 1994 (6T90; 7T51).

Valenti was a "swing person" who could be reassigned from the library to teach classes as needed. One year when there was adequate staffing Valenti worked a full year in the library; every other year he worked three-fifths (7T52). Typically, of the eight class periods in the school day, Conway would cover five periods in the library and Valenti covered three (7T102).

14. The collective agreement between the Board and the SREA specifies that the Association President is to work only five of ten daily periods, and that a fully-certified librarian must be present whenever the library is open (6T95-6T96; J-1). Collective agreements in neighboring districts do not have such a provision; the librarian works a normal workday similar to the nurse or guidance counselor (7T113). The Board has unsuccessfully attempted to change this provision through negotiations, to permit a teacher to be present when the library was open, in order to have additional flexibility in assigning staff to the library (6T97, 6T100, 6T102; 7T69-7T70).

15. At the beginning of the 2002-2003 school year, due to budget constraints, Schnappauf determined that the best way to accommodate the collective agreement was to implement an alternate period schedule, whereby the library would be open on even numbered periods on even numbered days, and odd numbered periods on odd numbered days (5T95-5T96; CP-39). Schnappauf removed Valenti from the library and reassigned him to teach English for four periods and to staff the E-1 center ("E-1"), a computer lab supplementing the library, four periods a day as needed (5T95; CP-39).

16. In October 2002, the Association filed a grievance alleging that on "even" days, Conway was required to work the tenth period, which she was otherwise accustomed to taking as a

duty free period for union leave time (7T71-7T72; C-1, para. 7C). There was no guaranteed duty free tenth period in the parties' contract (7T72). The parties resolved the grievance by agreeing that Conway would be permitted to leave during tenth period for union business whenever she asked (7T111).

Some students and parents in the community were upset about the change in the library schedule; an article about the change was published in a local newspaper, the Atlanticville (CP-40). The article quoted Schnappauf as saying that the library could not be open all day even though a full time librarian was available "because under the district's contract with the teachers, the librarian is only allowed to work five periods out of ten" (CP-40). The article indicated that Conway was the librarian still working in the library and was Association President. The article also quoted Schnappauf as stating that he would love to "open the library with an English teacher who would know how to use it" (CP-40).

17. The library had not been renovated since the high school was built in 1962 (3T40). The Board attempted to budget for library improvements on several occasions, including a planned $300,000 improvement in 1987; some minor changes such as rugs and cabinetry were made, but a full renovation was not fiscally possible (6T53-6T55, 6T65). Then-Superintendent Campanella wanted to increase utilization of the library. At

Campanella's direction, Dr. Daniel Sorkowitz, Conway's former supervisor, prepared reports on the utilization of the library (6T113). Class utilization of the library peaked in 1991 at about fifty percent, and then declined to about forty percent by 1995 (6T113). In 1999 the Board developed a strategic plan to renovate the library, but was again unable to fund the plan (6T54). The Middle States school accreditation team, which meets with administration, faculty and students to evaluate schools using certain indicators, issued a report on Shore Regional in December 1999 recommending that the school "undertake a serious curriculum review to increase rigor and make a concerted effort to raise expectations in each and every class" (6T56; R-2).

18. As Superintendent, Schnappauf would walk by the library several times daily and noticed that the usage was not what it should have been in his opinion (6T110). Since he became Superintendent, Schnappauf has conducted monthly student advisory committee meetings where students make suggestions and offer opinions regarding how the school can be improved (6T108). Students have raised concerns over the utilization of the library regularly for the last five to ten years (6T109). Schnappauf testified that "no one was really satisfied" with the library usage (6T113). The students explained to Schnappauf that they chose not to go to the library because of the "atmosphere" there

(7T109). Students, parents and supervisors felt that the library "wasn't a friendly place to be" (7T108).

19. As part of a continuing effort to improve the curriculum in the District, in August 2002 Schnappauf hired Tracy Handerhan as Director of Curriculum and Instruction (6T131). Handerhan is responsible for the academic achievement of the students in the district - through implementing curriculum, designating materials, and improving test scores (4T64-4T65).

From 1997 to 2002, Handerhan was supervisor of instruction, mathematics and technology in Manchester Township (4T57-4T58, 4T64). While in Manchester she had an office in the high school library (4T59). The Manchester library was a dated facility and was open every period from 7 a.m. to 3:30 p.m. with at least two classes scheduled each period (4T61). Handerhan felt the library was "pretty much over booked" every period because the librarian was "the most proactive, warmest, student encouraging type of person" and an integral component of the school building (4T62-4T63).

Handerhan believes that reading is the number one factor in student performance (4T66). She was aware that the Middle States accreditation organization had advised the Board that its scores were not on par with other communities (4T66). To increase the students' pleasure reading and improve test scores as the Board and Superintendent had directed, Handerhan undertook a number of

curricular and non-curricular changes. Among the programs Handerhan reviewed was the library (4T80). She first visited the library on September 14, 2002, for a Saturday meeting with the English teachers to assess the status of the program (4T66). She noticed that the library was dated and severely underutilized compared to her experience in Manchester and thought that a more attractive facility was necessary to draw students in (4T118, 4T70). After meeting with the English teachers, Conway and Valenti and many students, she learned that reading for pleasure was at a minimum and that became her priority (4T67). Handerhan, Conway and Valenti felt that the school needed to provide the students with exposure to different literature and focus on reading for pleasure (4T67).

After several months, Handerhan reported her observations regarding the library to Schnappauf and suggested that he consider renovating the space (4T68, 4T70; 6T132).

Handerhan and Schnappauf had a number of friendly "arguments" about the ideal financial investment to best improve the library's research capabilities -- whether paper reference materials, digital data and/or online data bases; Handerhan wanted to invest in both, but Schnappauf wanted only to update the library's technology for the coming digital age (4T69, 4T72, 4T123; 5T9; 6T42, 6T132). Schnappauf and Conway bantered about the subject as well; Conway wanted to purchase additional books,

telling Schnappauf, "You can't take a computer to read at night" (6T43).

20. In November 2002, Handerhan sent a broadcast e-mail to the Rutgers University School of Communication requesting assistance with a vision of a library (4T72, 4T122). She quickly received a response from Dr. Ross Todd, the Director of the School of Information Library Services at Rutgers, indicating he would be pleased to meet and discuss the future of the library for the 21st century (4T73). Handerhan invited Schnappauf because she wanted him to hear first-hand from Todd, whom she described as the "guru" (4T74). In view of Schnappauf's bias toward data bases and technology, Schnappauf invited Melissa Drexler, the Board's Information Network Administrator, to accompany them (4T74). Neither Conway nor Valenti were invited to attend the meeting. Handerhan believed this was a Board level matter concerning financial investment and she would not have included librarians or other personnel on a matter like this until the administration had "their ducks in order" (4T9).

On December 11, 2002, Handerhan, Schnappauf and Drexler met with Todd in his office at Rutgers (4T75). Handerhan termed Todd "a visionary that words cannot describe". He is so incredibly inspiring . . . you want a library on every corner after meeting with Dr. Todd" (4T75).

21. Todd was a school librarian in his native Australia from 1980 to 1990 prior to joining Rutgers in 2001 (5T69, 5T80). His philosophy on school libraries is based upon the established professional standards set forth in a book published by the American Association of School Librarians called Information Power: Building Partnerships for Learning (1988, second edition 1989) (5T74, 5T101).

Handerhan asked Todd how she could get students to come to the library (4T76). Dr. Todd said the library of today is evolving, and that once you get students into the library, they will read (4T77). Dr. Todd said that today's librarian should be a person who works collegially with teachers designing lessons, works independently with students, and is a staff developer; a personality who could reach faculty and students in all different areas (4T78; 5T12-5T13). He said the librarian is not "the keeper of the books", and must "get over" book fines and the notion of a security system for books which, in Todd's opinion, created a negative environment (4T78, 4T81). Todd felt that "the healthiest sign of a library is a coffee ring on every page"; when Todd was a librarian, he installed a coffee pot in the library to attract students, as an opportunity to facilitate scholarly discussion (4T77-4T78).

Dr. Todd advised Schnappauf, Handerhan and Drexler that the Board should develop a collaborative mission statement concerning

the library, formulated at "the grass roots level" by representatives of the entire Shore Regional community, so that everyone would feel a sense of pride and involvement in its development (4T79-4T80). Todd gave them several examples of learning centered mission statements (focused on student learning and student learning outcomes) which had been drafted by his students (5T11, 5T89). He also referred them to a consultant, Dr. Caroline Markuson, "a renowned library designer and author" whom Todd felt could assist the Board staff with "translating" a learning centered philosophy (4T83; 5T91; 7T103).

22. Handerhan's philosophy of the library changed after meeting with Todd (4T76). She was so impressed with this vision that her goal became to develop the library as "a highly functioning information center that truly met (that) vision" (5T12).

Schnappauf was also excited by Todd's ideas, which he interpreted to mean that for the library to change, the people running it had to change (6T134-6T135). After the meeting, Schnappauf directed Handerhan to make a presentation to the Board if she wanted to continue pursuing Todd's philosophy (6T134). Handerhan used minutes of the meeting to prepare a December 19 presentation to the full Board of Education (4T81). The Board approved the physical renovation of the library and the hiring of

Caroline Markuson as a paid consultant at Todd's suggestion (4T83; 5T9; 6T134; 7T103).

23. Thereafter, upon Todd's recommendation and with Schnappauf's approval, Handerhan formed a committee to undertake the "renaissance" of the library - the Renaissance Committee (4T80). The committee was charged with developing a philosophy, vision, and physical layout for a library "of the 21st century" (2T66-2T67, 2T77, 2T115). The committee was composed of volunteer administrators, faculty and students including Conway, Valenti, Drexler, Assistant Principal Luise Ann Peters; history teacher Andrew Ker; English teachers Kevin Houtz and Linda Ensor; and representatives from various school departments (2T21-2T22, 2T48, 2T53, 2T76; 3T4, 3T15; 4T82). Schnappauf attended the committee's opening meeting, to let the committee know, in the face of failed past efforts to update the library, that the Board supported their efforts (6T135).

The Renaissance Committee met several times between January and late spring 2003 (4T82-4T83, 4T146). The committee's first meeting was an exchange of ideas concerning what the participants would like the library to become, including the "mission", or philosophy of the library, the design of the physical space, the book collection and the types of activities in which classes would participate (3T18, 4T83). Peters explained that the committee determined that they wanted a place that was an

"excellent research facility as well as a haven, as you say, a hub for students to come and feel comfortable, whether they were doing personal reading all the way through research papers" (2T78). Kevin Houtz, an English teacher and a member of the Renaissance Committee, testified that the team agreed that the library should be a research facility with a relaxed, "coffee-house" atmosphere (2T53, 2T60-2T61). Handerhan shared Todd's philosophy of the role of a teacher librarian with the committee and that the library should be a warm and welcoming environment for students (2T115; 4T83-84). The committee agreed with Todd's view.

Markuson met with the Renaissance Committee on April 3, 2003 (4T28). She recommended that as an "ideal scenario", two librarians and a clerk be placed in the library, and that a technology person be hired to staff E-1 (4T144; 5T29; 6T147). The Committee discussed library staffing ideas in theory, but did not assess who should be assigned to the new library (2T64, 2T66; 3T34).

The Renaissance Committee developed a mission statement which was adopted by the Board at its May 22, 2003 Board meeting (C-2, Exh. C). The statement provides:

> The Shore Regional High School Library Media Center will continue to grow and develop to serve our educational community as both a hub and a haven where learning can be enhanced, the universe explored, and information

integrated and synthesized in a supportive atmosphere (C-2).

Houtz and Ensor explained that the words of the mission statement were carefully chosen; "especially the verbs" (2T67; 3T22). Schnappauf had no input into the mission statement (6T138).

E. The Administrative Management Team

24. Schnappauf conducts meetings of his school administrative management team every Monday at 9:00 a.m. (2T85; 4T17; 6T137). Members of the administrative management team included Handerhan, Peters, Director of Pupil Personnel Services Rosemary McNamara, Assistant Principal Steve Nicol, Business Administrator Nick Camarano, Athletic Director Mr. Levy, and Schnappauf (2T85-2T86, 2T123; 4T17, 4T47). Drexler typically attends part of the meeting, as does the Buildings and Grounds Supervisor; both are usually dismissed from the meeting after their reports, and the meeting may continue for several additional hours (4T47-4T48, 4T51). The team reviews the calendar for the week, hears departmental updates, and discusses other issues related to the school (4T17). Schnappauf trusts the management team and unless they make a recommendation that is "completely obtuse", he follows their recommendations (6T148).

Handerhan made a presentation of the "vision" for the new library and Dr. Todd's concept of a teacher-librarian at a management team meeting (2T78, 2T80). The team discussed how

best to physically renovate the library to meet the mission statement over several weeks' meetings, and, after Schnappauf raised the issue, who had the best qualifications as a librarian to meet that statement (2T82, 2T124; 4T29; 4T87, 6T138). Schnappauf did not indicate a choice during those meetings (4T29).

25. Around May or June 2003, Schnappauf asked the administrative management team members for recommended candidates (2T89; 4T29).

The team discussed Valenti and Conway as candidates (2T90; 4T29). Most members of the administrative team had interacted formally or informally with each (6T126-6T127). Peters felt the candidate should be someone who could assist a child in using technology to do research, who could hold a child's hand and get things moving, and who would encourage students to read for the pleasure of reading (2T85, 2T91). Peters had evaluated Valenti one year as an English teacher and found him to be "exceptional" (2T82, 2T95, 2T129). Peters had interacted with Valenti and seen his work with students and felt that Valenti had the qualities that were necessary to sustain the mission statement (2T92). Peters felt that Valenti was "a better fit for that particular center. . . . That's not to negate the skills that Mrs. Conway possesses" (2T92).

After Drexler began employment in January 2002, she was in the library on a near daily basis because her own computer had been damaged by a virus and she could not access the network from it; she chose to use a computer in the library because it was near the server (4T14). Drexler said that Conway has referred to students as "g-damn hemorrhoids" or "little hemorrhoids" to Drexler directly and with teachers present (3T22). From her observations of Conway and Valenti in the library, Drexler felt that Valenti was the better candidate because he displayed the greater ability to work with students (4T18-4T21, 4T31-4T32). I credit Peters' and Drexler's unrefuted testimony.

26. The team was aware that Markuson had recommended that two librarians and a clerk be placed in the library, and that a technology person be hired to staff E-1 (4T144; 5T29; 6T147). According to Handerhan, Markuson's recommendation would have cost over $250,000 annually for salary and benefits alone, an expense taxpayers were unlikely to approve in a budget for a school serving fewer than 750 students (5T29). After Schnappauf explained to the administrative management team that fiscal constraints required one librarian to be assigned to the renovated library, and one in E-1, the team recommended unanimously, without debate, that if one person was to be appointed, that person should be Valenti (2T90, 2T92; 4T30, 4T33, 4T88; 6T126, 6T147).

The committee felt that Valenti was an affable person who could "market" the library to the students, and thus had the best qualifications to meet the mission statement (4T88; 6T139). The team felt that Valenti's skills would be most effective in the new library, and Conway in E-1 (6T147-6T148). However, the team expected Schnappauf to make the ultimate decision (2T90, 2T124, 2T140). Schnappauf, based upon the team members' long-term knowledge of both candidates, agreed with their assessment (6T148). No members of the management team or Renaissance Committee conducted any formal interviews of Conway or Valenti (7T95). I credit Schnappauf's testimony.

F. Library Renovations Begin

27. The library was emptied just before the close of school in June 2003 and was closed for the 2003-2004 school year (4T152; 6T140).

Because the library was closed and would not reopen until at least late winter, Conway and Valenti could not be assigned there (5T62). Handerhan and Schnappauf discussed how Conway and Valenti should be assigned (5T64). Schnappauf felt that he had three options with respect to assigning Conway; (1) to assign her to an English class; (2) to assign her to E-1; or (3) to close both the library and E-1 and assign Valenti to an English class (6T140). The E-1 assignment required an educational media specialist certificate, which both Conway and Valenti had (7T83).

Schnappauf explained that he felt that if he assigned Valenti to an English class he would have had to RIF Conway for the year because the library was closed (6T140; 7T84). The Board discussed that option but Schnappauf disagreed and felt he could not make that decision; he felt it was only fair to find a position for a senior staff member (6T140-6T141). Schnappauf asserted that he believed that Conway would immediately attain tenure as an English teacher and "never lose her job" (6T141).

I credit Schnappauf's testimony as to his belief that Conway would be statutorily protected if assigned to teach English. I do not, however, credit his unsubstantiated assertion that he would have had to RIF Conway had he assigned Valenti to teach English. I note that Schnappauf became noticeably testy while being cross examined about his reasoning.

28. On July 29, 2003, Schnappauf wrote to Conway informing her that she was assigned to teach English/basic skills for the 2003-2004 school year (4T148; 5T18, 5T62; 6T75; CP-10).

Schnappauf also wrote to Valenti to advise of his assignment:

> Dear Mr. Valenti,
>
> I am writing to notify you of your assignment for the 2003-2004 school year.
>
> The renovation of the library will not be completed by the opening of the school year in September. Therefore, you are being assigned to room E1 (computer lab) until the renovation is completed. Upon its

> completion, you will be assigned full time in the library.
> (6T76; CP-9)

Schnappauf explained that the letters were intended to convey to Conway and Valenti their respective assignments only for the 2003-2004 school year (6T77). Teachers typically stay in an assignment for a full year because it is disruptive to students to move a teacher in the middle of the year (7T79). By "upon its completion" in Valenti's letter, Schnappauf explained, he meant Valenti would be assigned to the library if it were completed during the 2003-2004 school year (6T76). Schnappauf's rationale was to avoid disrupting the students by not removing Conway from the English class before the conclusion of the semester (7T79). Valenti's assignment to E-1 meant that he would not have classes of children for the whole year (5T18; CP-9). Valenti had done much of the work of packing of the library and Schnappauf reasoned that when the library was finished, Valenti could "go in there and put everything back" (6T76).

Schnappauf denied that he assigned Conway to an English class rather than E-1 because it would be more difficult to move her if the library was completed mid-year. He explained, "(B)ased on the seniority and the rules we have to work by, Ms. Conway was assigned by her certificate. Yes, I decided it" (7T81). Schnappauf continued:

> (W)hen I made that decision, that Ms. Conway's certificate allows her to teach

> English, and I had felt it would be better that the English teachers stay in all year, and that being that of the two, being that Mr. Valenti was going to be in this room which he had to develop, if it were ready, he would move out and the kids would have continuity.
> (7T82)

Schnappauf testified that at that point, he had not made his final decision concerning whether Conway or Valenti would be assigned to the renovated library (7T115).

I credit Schnappauf's factual testimony generally, but not his reasoning. I find his asserted reasons for assigning Conway to English/basic skills and Valenti to E-1 to be partially pretextual. Upon the record as a whole, I infer and find that after the administrative management committee's recommendation, Schnappauf made a final decision to assign Valenti to the renovated library; that the letters to Valenti and Conway were meant to convey their respective permanent assignments; that Schnappauf assigned Valenti to E-1 for 2003-2004 to make it easier to move him back into the library if it were finished before the conclusion of that school year; and that he assigned Conway to teach English/basic skills because it would be more difficult to move her and because he expected her teaching performance to justify his decision to appoint Valenti.

G. Tracy Handerhan's opinion

29. Handerhan was to make the final recommendation to Schnappauf concerning who should be assigned to the renovated

library (4T147-4T148). Handerhan agreed with Schnappauf's decision to put Conway in the English department because she wanted to observe Conway working with students in order to better assess her final recommendation (6T143; 7T90).

As a former math teacher, Handerhan does not make rash decisions, but seeks to justify her decisions with reasons (4T90). Having been employed for less than a year, and being aware that Conway was Association President, Handerhan felt uncertain concerning whether Conway could bond with students and felt she needed to further observe Conway's abilities before making a recommendation on who should staff the library (4T90, 4T91).

30. 2003-2004 was Conway's first year in the classroom; Handerhan observed her as she would any other new teacher over an eight month period (4T91; 7T80). Robert Fisher was retiring and needed to work for two additional months to qualify for his pension. Out of respect for Fisher's long career and expertise, Schnappauf wanted to find something productive for Fisher to do, rather than place him on hall duty (6T144; 7T85-7T86). Therefore, Fisher served as Conway's teaching mentor and worked with her for the month of September 2003; Schnappauf and Handerhan believed this would give Conway the best possible start (4T92; 6T144). Another teacher, Mrs. Delapesta, also informally assisted Conway (4T92-4T93).

Handerhan usually gives a teacher in a new assignment the benefit of the doubt at the beginning of the semester; by semester break or shortly thereafter Handerhan ultimately became concerned regarding Conway's ability to relate to students (6T146). Handerhan had noticed that Conway used "a lot of sarcasm" with students in the library; Handerhan noticed this again in Conway's class, as well as some undesirable banter between Conway and the students (4T71, 4T93). The administration received several parental complaint phone calls regarding Conway (4T92). Both Handerhan and the school disciplinarian reported problems with Conway's classroom management (6T145). Handerhan gave classroom management suggestions and the administration removed two students from Conway's classroom to give Conway "the best opportunity to be successful" (4T92). Overall, Handerhan believed Conway did "the best job that she could", but felt that Conway's classroom was not a warm and friendly environment (4T93). Handerhan did not conduct any formal, written observations of Conway (4T130).

31. From fall 2002 through spring 2004, Handerhan saw Valenti almost daily in the library, or in the hallway or on the way to the cafeteria where they both ate lunch the same period (4T84).[5/] She observed students seeking Valenti out to discuss

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5/ Although Handerhan testified that she saw Valenti assigned in the library during at least one period per day from (continued...)

things with him or just to give him a high five in the hallway (4T85). By contrast, Handerhan had seen very little interaction by Conway with students outside the library and within the library, Handerhan observed that Conway spent a lot of time in her office, or performing routine tasks such as adding paper to the copier or the printer (4T86).

32. Handerhan wanted still more "hard data" on which to base her recommendation to Schnappauf, so she reviewed the evaluations of Conway and Valenti from 1986 forward (4T94). Utilizing a formula, Handerhan calculated the usage of the library to be from twenty to forty-eight percent of classes over several years during the periods Conway was assigned in the library (4T97). She also examined Conway's written evaluations (5T46-5T59; CP-11; CP-17). The analyses described Conway as skillful in the library science area; efficient, effective, extremely knowledgeable about resources, and good at trouble shooting (4T98; 5T20). Handerhan found the analyses in the evaluations to be almost identically worded (4T98). She

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5/ (...continued)
September 2002 through June 2003 (4T84-4T85, 4T140), the record is clear that the library was open only on alternate periods in 2002-2003, and Valenti was assigned to E-1 and to teach English that year (6T95; CP-39). Since Handerhan's testimony on this point is unclear, but her testimony was otherwise credible and forthright, I infer that she was mistaken and that she saw Valenti in E-1, rather than the library, during 2002-2003.

concluded that Conway's evaluations were based upon skill and technical knowledge, "in a positive sense" (5T20, 5T24).

Handerhan concluded that Valenti's evaluations indicated he had excellent rapport with students, was "incredibly motivational" and made students realize their maximum potential; his file also contained letters from parents thanking him for the care and concern he gave their children (4T99). Valenti's evaluations evidenced the ability to reach children of all levels and to motivate students (5T21, 5T24). None of Valenti's evaluations related to his service as a librarian (7T101). Comparing the same evaluators' words as "apples to apples", Handerhan concluded that Mr. Valenti's skills best reflected Dr. Todd's description of the role of today's librarian and best supported the new mission of the library (4T99).

33. Handerhan felt she had enough information to make a recommendation to Schnappauf by spring 2004 (4T101). This was a difficult decision, one she "grappled with for a long time" (4T100; 5T20). Just before Memorial Day 2004, she scheduled an appointment with Schnappauf, explained her reasoning process to him, and recommended that Valenti be assigned to the renovated library (4T105). Schnappauf asked her, "Tracy, are you sure, do you realize what you are asking me to do?" She responded, "I realize what I am asking you to do" (4T105; 5T20). She felt her recommendation was in the best interest of the student body

(4T106). She was aware that Conway was Association President and "knew" recommending Valenti would "come to this" (the unfair practice charge) (4T100, 4T144; 5T20). I credit Handerhan's testimony.

H. Marguerite Schroeder

34. Marguerite Schroeder has been an NJEA UniServ representative since April 2003, succeeding Marc Abramson as the representative assigned to the Board (1T74). In August 2003, Schroeder had not yet met Schnappauf personally and telephoned him to discuss outstanding matters, including the issue of Conway's work assignment for the following school year. When Schroeder raised the issue, Schnappauf became very agitated, and told Schroeder that Conway had always been "a pain in the ass" as a union officer, and very difficult to deal with in the many meetings they had had (1T75-1T76, 1T104).

Schnappauf doesn't feel that very many grievances are filed at Shore Regional (6T44). He explained that all of the grievances listed in the Rider to the Complaint were settled or resolved in favor of the Association, except for one which proceeded to arbitration (6T43-6T47, 6T71-6T75, 6T113). In his first grievance meeting with Schroeder, Schnappauf believed they established a good working relationship (6T30; CP-1). He didn't recall calling Conway "a pain in the ass"; but said that if he did it was to express "informally" that Conway was a difficult

person as Association President, and Schroeder "did not disagree" (6T31). Since Schnappauf seemed unsure whether he made the remark, I find he did and that he considered Conway difficult to work with in her role as Association President.

35. Schroeder spoke to Schnappauf about Conway at the conclusion of an arbitration on January 21, 2004. Schroeder approached Schnappauf and the Board's counsel, Greg Vella, to attempt to discuss whether Conway would be reassigned to the library upon the completion of renovations (1T77). Schroeder knew that correspondence on the subject had been exchanged between Vella and the Association's counsel and said to Vella, "Well, we are here, tell Lennie what must be done." Schroeder was referring to Schnappauf assigning Conway back to the renovated library upon its completion (1T78). Vella replied, "Lennie, you know what has to be done" (1T78). Schroeder believed this statement, in conjunction with the correspondence, meant that Conway would be placed in the renovated library (1T78).

On January 30, 2004, Vella directed the following letter to Steven R. Cohen, Association counsel:

> Re: Shore Regional Board of Education ads.
> Linda Conway
>
> Dear Mr. Cohen,
>
> Please be advised, that the Superintendent expects the library to open sometime during the fourth marking period of the 2003-2004

> school year. However, construction is never certain and there is no guarantee that the library will be open before the end of the year.
>
> I can advise that the Superintendent intends to recommend that Linda Conway be reappointed to the position of Educational Media Specialist per job title, and certification. She will not be teaching during the 2004-2005 school year. It is also my understanding that Shore Regional has budgeted to hired [sic] a new English teacher for the 2004-2005 school year.
>
> If you have any questions regarding the above, please feel free to contact me. I will keep you advised when the library is near its completion.
> (C-2)

The letter was copied to Schnappauf. Schroeder felt that the letter meant that Conway would be reassigned to the renovated library as soon as it was opened (1T101). Schnappauf testified that he never agreed to reassign Conway to the library, only that she would be reassigned as a library media specialist (6T48). I credit Schnappauf's testimony that he intended only to reassign Conway as a library media specialist, although I find that he was deliberately vague about where Conway's physical assignment in his verbal communications with Schroeder and his written communications with the SREA though then-Board counsel. I specifically find that Schnappauf never agreed to reassign Conway to the renovated library.

36. In spring 2004, Schroeder understood that the library was near completion and requested to meet with Schnappauf to seek

assurance that Conway would be placed in the renovated library. During the meeting, when Schroeder raised the subject, Schnappauf became "extraordinarily agitated" and said in a "heated tone" that Conway had been in his office several times and he found her very difficult to deal with, and that Conway "is not representing her people and she is not respected by her membership" (1T79). Schroeder told Schnappauf that she found that statement hard to believe, because Conway called Schroeder often to ask questions related to her role as Association President (1T80). In Schroeder's experience, if a representative is not respected, it is the members who call Schroeder to say they are not being represented (1T93, 1T103).

I credit Schroeder's testimony of her conversations with Schnappauf concerning Conway generally. Unrefuted testimony in the record has shown Schnappauf's tendency to react strongly in situations involving Conway. Schnappauf essentially acknowledged having called Conway "a pain in the ass" while speaking with Schroeder, by indicating that Schroeder "did not disagree" with his assessment.

By letter dated April 30, 2004, Schnappauf advised Conway she would be appointed to the position of Media Specialist for 2004-2005 school year (C-2, Exh. E).

I. Schnappauf's Decision

37. In determining who to appoint to the renovated library, Schnappauf felt he had to make a "judgment call" (6T126). He had worked with both Conway and Valenti for a number of years (6T126). Schnappauf relied upon his administrative team which found that, in accordance with the mission statement, the renovated library should be the "hub" of the school, "so (Valenti) was placed in what would be the hub because of his personality and all of the traits that he has. Because in that hub would be many, many different things to do(.)" (7T96). Schnappauf concluded that Valenti had a much greater opportunity to be successful in the renovated library and Conway had a much greater opportunity to be successful in E-1 (6T149-150). Schnappauf determined that Conway was better suited to E-1 because it was a quieter setting not requiring multitasking, more like a traditional research library (6T150).

Schnappauf expressed why he felt Valenti was the perfect match for the renovated library:

> The man is so affable, he is so friendly, he has the kind of personality . . . where you feel open with him, people just go to him. Teachers, here is the best example, when I put in a program of change in my computer, if I need experienced teachers who are reluctant, we set it up so they go to Bill because they feel completely comfortable, they are not afraid to make mistakes, his personality doesn't let him be mean to people.
> (6T151)

38. The newly renovated Shore Regional High School library was scheduled to reopen in September 2004 and be renamed the Russell T. Olivadotti Learning Center (C-1, Exh. A).

39. On June 18, 2004, Schnappauf issued a joint memorandum to Conway and Valenti, as follows:

> TO: Mrs. Conway
> Mr. Valenti
>
> Re: Assignments for the 2004-2005 school year
>
> The completion of the Olivadotti Information Center affords the district the opportunity to increase services to students and faculty effective September 2004. In order to implement a plan for increased services both the Olivadotti information Center and the E1 information center will be utilized. Therefore, a meeting will be scheduled with you, Mrs. Peters and Mrs. Handerhan to develop procedures appropriate for these centers.
>
> The following are your assignments for the 2004-2005 school year:
>
> E1 Information Center - Mrs. Conway
> Olivadotti Information Center - Mr. Valenti

ANALYSIS

This is a dual motive case, turning almost completely upon the credibility of the parties' respective witnesses. For the following reasons, I find that Conway and the Association proved that animus was a substantial or motivating factor in the decision to reassign Conway from the library; however, I further find that the Board proved, by a preponderance of the evidence,

that it would have reassigned Conway even in the absence of her protected activity. Despite Schnappauf's hostility to Conway, the preponderance of evidence in the record establishes that the Board legitimately wanted a different type of librarian than it perceived Conway to be, one whom interacted better with students and whom it felt could better meet its mission for the renovated library, leading to Schnappauf's decision to reassign Conway.

In re Bridgewater Tp., 95 N.J. 235 (1984), articulates the standards for assessing allegations of retaliation for engaging in protected activity. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can

prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner, and then the Commission, to resolve.

The decision on whether a charging party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

The Association easily proved the first two parts of the Bridgewater test - it is undisputed that Conway has engaged in protected activity through her position as Association President since 1988, and that the Board knew of this activity. Schnappauf acknowledged having interacted with her in her role as Association President through his role as Superintendent/Principal for several years. Handerhan was also specifically aware that Conway was Association President.

The inquiry turned to the last component of the Bridgewater test - whether the Board was hostile to Conway's protected activity.

I find that Schnappauf expressed longstanding animus against both Conway and the Association on several occasions, and that most of that animus seemed directed against Conway as Association President. The record reflects several examples of the contentious relationship which developed between Schnappauf and Conway.

Circumstantial evidence of hostility is shown by the testimony of Marc Abramson and Robert Fisher that the labor relations climate at Shore Regional became tense after Schnappauf became superintendent. Direct evidence of hostility is shown by Fisher's unrefuted factual account of Schnappauf's reactions when Conway and Fisher met with him in their roles as Association representatives on behalf of a certain teacher. Although Schnappauf said that he did not specifically recall the incident, he did not deny Fisher's factual account. I found that Schnappauf was upset by the nature of the incident involving the teacher Conway and Fisher represented, but I could not determine at that point whether Schnappauf was also angry with Fisher and Conway due to their protected activity. After consideration of all the evidence in the record, I conclude that Schnappauf was

also angry with Fisher and Conway that day due to their roles as Association representatives.

Further direct evidence of Schnappauf's hostility to Conway and the Association was shown by Fisher's direct testimony concerning Schnappauf's reaction to the service of the May 2002 no-confidence vote, which was partially corroborated by Valentine and unrefuted by Schnappauf. The nature of Schnappauf's comment supports an inference that Schnappauf's decision whether to assign Conway to the renovated library was affected by that hostility.

The Board argues that "the facts show that any emotion or hostility that Mr. Schnappauf allegedly exhibited in front of Ms. Conway and Mr. Fisher could have resulted from" factors other than union animus, including the fact that "(Fisher and Conway) contributed to the potential volatility of the situation by their lack of consideration" in serving Schnappauf with the no-confidence vote at the time and place they did (Respondent's Brief at 32, Respondent's Reply Brief at 14).

I disagree. I find that the testimony established that a tense relationship had developed between Schnappauf and the Association by at least 2000, well in advance of the no-confidence vote in 2002, and supports an inference that Schnappauf reacted as he did because of hostility toward the Association.

Moreover, once the administrative management team recommended that Valenti be assigned to the renovated library, the way in which Schnappauf proceeded to implement that recommendation was troubling. Schnappauf's explanations for his decisions were incomplete and/or implausible. I found Schnappauf's testimony that Conway would have been RIFfed had he not assigned her to teach English to be unsubstantiated. Schnappauf did not explain why, if Valenti were assigned to teach English, Conway could not have been assigned to E-1, rather than RIFfed. I also found his reasoning for giving Conway a classroom assignment, from which Schnappauf admitted it would be undesirable to move her before the end of the school year, to be partially pretextual. From the totality of his testimony, as well as the language of his assignment letters to Conway and Valenti, I infer that Schnappauf did not want to remove Valenti mid-year, because he had already decided to place Valenti in the renovated library permanently upon its completion, and he wanted Valenti to be available to go back into the library, set it up after the renovation and begin his permanent assignment there. Conversely, by giving Conway a classroom assignment, Schnappauf assured that she would be unavailable for reassignment to the library if it were complete before the end of the school year.

I further infer that Schnappauf assigned Conway to teach English and basic skills (although she had never taught before)

as a calculated move; Schnappauf wanted Handerhan to be able to observe Conway and, I infer, he anticipated that Handerhan's observations would support and justify his decision to place Valenti in the renovated library.

Finally, I did not credit Schnappauf's explanation that the memoranda sent to Conway and Valenti were intended only to convey their respective assignments for the 2003-2004 school year. In view of the extensive record establishing that the Board sought a long term change in the philosophy of the library, it does not fit that Schnappauf would assign a librarian for merely the balance of a school year.

Therefore, I conclude that Schnappauf's decision to assign Conway to teach English/basic skills in 2003-2004 was also tainted by Schnappauf's established animus toward Conway.

Perhaps the strongest evidence of animus is provided by the testimony of NJEA UniServ representative Marguerite Schroeder. Schroeder asked Schnappauf for information about Conway's reassignment in August 2003 and in spring 2004. To Schroeder's first inquiry, in August 2003, Schnappauf remarked that Conway was "a pain in the ass" and "difficult" to deal with; to Schroeder's second inquiry, in spring 2004, Schnappauf remarked negatively about Conway's performance as Association President. Both comments were out of context and non-responsive to Schroeder's inquiries. Schnappauf did not deny making these

remarks to Schroeder, although he denied that he intended to express animus. I find that the negative quality of the responses suggests animus, and I find that they are direct evidence of hostility toward Conway's exercise of protected rights.

The Board argues that all of the witnesses called on behalf of Conway and the Association are biased in favor of the union as either members or employees of the union, therefore their testimony is not worthy of belief (Respondent's brief at 36).

> Bias is a term used in the "common law of evidence" to describe the relationship between a party and a witness which might lead the witness to slant, unconsciously or otherwise, his testimony in favor of or against a party. Bias may be induced by a witness' like, dislike, or fear of a party, or by the witness' self-interest.

State v. Holmes, 290 N.J. Super. 302, 313 (App. Div. 1996). Citing United States v. Abel, 469 U.S. 45, 52, 105 S.Ct. 465, 469, 83 L.Ed.2d 450 (1984).

I reject the Board's argument. Andrea Kane, Ronald Fisher, Robert Valentine, Regina Tierney, Marguerite Schroeder and Marc Abramson testified on behalf of the Association. Fisher, Valentine and Tierney are all current or former Association members or officers. Only Tierney is currently employed at Shore Regional; both Fisher and Valentine are retired. Schroeder and Abramson are employed by the New Jersey Education Association. The Board claims that none of these witnesses' testimony is

worthy of belief because each witness is connected to the Association.

At hearing, the Board cross-examined each witness. However, none of the testimony revealed any of the impeachable factors set forth in Holmes. None of the witnesses appeared to harbor any dislike of Schnappauf personally or as Association members. Further, no potential personal gain to any witness for offering testimony on behalf of the Association was shown. In particular, since both Fisher and Valentine are now retired, it is difficult to imagine what personal gain either could obtain by providing testimony on behalf of the Association. Fisher, in particular, now resides in Florida and likely incurred travel time and personal expense in order to provide his testimony. Finally, the testimony of Kane, a professional photographer, was limited to the authentication of photographs she took at the Association's request which were received in evidence without the Board's objection.

Thus, I find that Conway and the Association have proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

Thus, the burden now shifts to the Board to prove, by a preponderance of the evidence, that it would not have assigned Conway to the renovated library absent her protected conduct.

There is no dispute that the library was in need of renovation. It was dated and had not been renovated since it was built in 1962. The library was underutilized for any number of reasons; however, several witnesses testified that students reported that they did not feel "comfortable" or "welcome" there and that the library wasn't "a friendly place to be."

Schnappauf wanted to improve the rigor of Shore Regional's curriculum after the Middle States report in 1999. After Handerhan joined Shore Regional in August 2002, she spearheaded the effort to revitalize the library by contacting Dr. Ross Todd. The record shows that Schnappauf, Handerhan, and Drexler were highly inspired by their meeting with Todd, speaking almost reverently of him and his "vision" for school libraries and of their desire to recreate that vision at the Shore Regional library.

The Board presented testimony from various members of Renaissance Committee about how they developed the mission statement, which was intended to encapsulate the notion of a "teacher-librarian" Todd espoused. Schnappauf did not participate in the formulation of the mission statement, thus it was formulated independent of any animus Schnappauf may have felt toward Conway. This mission statement provided the framework for the Board's legitimate, nondiscriminatory motive for reassigning Conway - its desire for a certain type of teacher personality to

accomplish a renewed mission, vision and philosophy for the newly renovated library.

Thereafter, with that framework in mind, Schnappauf asked members of his administrative management committee to consider candidates for assignment to the renovated library.

All of the team members were at least informally familiar with both Conway and Valenti, but two, Peters and Drexler, had been on the Renaissance Committee and were specifically familiar with the mission statement. Peters had previously formally evaluated Valenti and found him to be "exceptional". Drexler, having observed both Conway and Valenti from a layperson's point of view, felt that Valenti displayed the greater ability to work with students. Drexler specifically expressed negative opinions about her observation of Conway's interaction with students as a librarian, saying that Conway had called students "hemorrhoids" publicly in her presence on at least one occasion. Drexler's testimony was unrefuted.

In May or June 2003, the administrative management team specifically recommended Valenti. Schnappauf was the ultimate decision maker concerning all faculty assignments including who would be assigned to the renovated library. The Association presented no testimony to refute the Board's articulated legitimate nondiscriminatory motive; specifically, Conway did not

testify to rebut the Board's evidence concerning her ability to relate to students.

The Board argues that Conway's failure to testify on her own behalf "serves to cast a doubt over the sincerity of her claims of discrimination and anti-union animus" (Respondent's Brief at 31).

When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. McCormick, Evidence §272 (3rd ed. 1984); International Automated Machines, Inc., 285 NLRB 1122, 129 LRRM 1265 (1987).

> Generally, failure of a party to produce before a trial tribunal proof which, it appears, would serve to elucidate the facts in issue, raises a natural inference that the party so failing fears exposure of those facts would be unfavorable to him. State v. Clawans, 38 N.J. 162, 170 (1962). For an inference to be drawn from the non-production of a witness, the witness must be "within the power of the party to produce" and the proffered testimony must be "superior to that already utilized in respect to the fact to be proved." Id. at 171. See also Witter by Witter v. Leo, 269 N.J. Super. 380, 391-92 (App. Div. 1994), certif. denied, 135 N.J. 469 (1994).

Cohen v. Community Medical Center, et. al., App. Div. Dkt. No. A-4499-02T5499-02T5 (June 30, 2006).

Since the Association did not provide testimony to rebut the Board's witnesses, I credit their testimony. A trier of fact can

credit a witness' testimony, particularly when it is unrefuted. Compare, City of New Brunswick, P.E.R.C. No. 83-26, 8 NJPER 555 (¶13254 1982); Clark Tp. and Xifo, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980), aff'd NJPER Supp. 2d 91 (75 App. Div. 1981). Moreover, as Conway attended each hearing date, she was apparently available to testify. Therefore, I infer that the lack of Association testimony concerning Conway's ability to relate to students, suggests that such testimony, if presented, may not have favored Conway. Cohen, supra.

Although Conway and the Association further theorize that Conway had statutory tenure and seniority rights which would have entitled her to the E-1 position to which Valenti was assigned in 2003-2004, it is not within this agency's jurisdiction or expertise to determine which candidate had superior statutory tenure and seniority rights (Charging Party's Brief at 39). See, e.g., Pascack Valley Regional High School District Board of Education, P.E.R.C. No. 92-126, 18 NJPER 361 (¶23157 1992) (teacher claiming entitlement to position by virtue of tenure and seniority rights must petition Commissioner of Education for redress).

The preponderance of the evidence establishes that the Board would have taken the same actions in the absence of Conway's protected activity. The record, as adduced through several witnesses, was clear and unrefuted that Conway did not relate to

students as well as did Valenti. Although I found the Board's reasoning for Conway and Valenti's respective 2003-2004 assignments to be partially pretextual, the assignments were based on the administrative management committees recommendation. Ultimately, Handerhan's observation bore out her pre-existing concerns about Conway's ability to relate to students. No evidence suggests Handerhan bore any animus against Conway; thus, her observation and assessment of Conway were uncompromised. In view of its mission and vision for the renovated library, and unrefuted testimony that Valenti was a better choice to fulfill that vision, no evidence suggests any circumstances under which the Board would not have chosen to appoint Valenti over Conway.

Therefore, I find that the preponderance of the evidence in the record establishes that the Board would have reassigned Conway from the renovated library absent her protected activity, because it legitimately determined that Conway was not the best fit for its vision of the renovated library, satisfying the Board's burden under Bridgewater. See Wood-Ridge Board of Education, P.E.R.C. No. 2004-12, 29 NJPER 400 (¶129 2003) (no violation found where, despite Board's dual motives, record showed that it would not have renewed custodian's contract even without his protected conduct); State of New Jersey (Judiciary), P.E.R.C. No. 2003-41, 28 NJPER 588, (¶33183 2002) (mere fact that union representative is transferred is not automatic evidence of

hostility); Newark Housing Authority, H.E. No. 96-24 22 NJPER 289 (¶27157 1996), adopted by silence, 2003 (Board had a managerial prerogative to transfer union president for legitimate business reasons); West Paterson Board of Education, P.E.R.C. No. 83-22, 8 NJPER 545 (¶13250 1982) (board demonstrated that transfer of outspoken union president was motivated by educational policy rather than animus).

Conway and the Association argue that the Board presented shifting or inconsistent reasons for its decision, warranting a conclusion that hostility was the motive for the challenged personnel decision; however, I find that the Board asserted a consistent theme: the desire to "renovate" both the physical space and the philosophy of the library, which extended to consideration of a change in library personnel.

Finally, I do not find that Schnappauf promised to reassign Conway to the library through his interaction with Schroeder and correspondence with Association counsel. To the contrary, Schnappauf was vague and noncommittal in his communications on this point, perhaps deliberately so, because Schnappauf knew at that time that the administrative management team had recommended Valenti and that Handerhan would be observing Conway over the course of the year, which confirmed that recommendation.

Conway and the Association further argue that Schnappauf "intentionally avoided" assuring Conway that she would retain her

assignment to the library, while giving Valenti such assurances (Charging Party's Brief at 40). In view of Schnappauf's opinion regarding Conway's "difficulty" as Association President, and Schroeder's repeated inquiries on Conway's behalf, I infer that Schnappauf was intentionally vague because he did not want to advise Conway that she would not be appointed. However, other than Schroeder's testimony, the Association did not present any competent evidence showing that Schnappauf or the Board ever promised Conway that she would be reassigned to the renovated library.

I next consider whether the Board independently violated 5.4a(1). A public employer independently violates section 5.4a(1) of the Act if its actions tend to interfere with an employee's exercise of protected activity. N.J. Dept. Of Human Services, P.E.R.C. No. 2001-52, 27 NJPER 177 (¶32057 2001); Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey College of Medicine and Dentistry, P.E.R.C No. 79-11, 4 NJPER 421, 422 (¶4189 1978); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 (n. 1) (¶10285 1979). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. Mine Hill Tp.

Generally, however, an independent a(1) violation will not be found unless it has been specifically pled in the charge.

Township of West Orange (Bamdas); H.E. No. 98-25, 24 NJPER 188 (¶29091 1998), remanded on other grounds, P.E.R.C. No. 99-13, 24 NJPER 429 (¶29197 1998); Ocean County College, P.E.R.C. No. 82-122, 8 NJPER 372 (¶13170 1982).

I have found Schnappauf's statement to Conway and Fisher upon being served with the Association's no-confidence vote in May 2002 to be direct evidence of hostility. Such conduct and statements by the employer "inevitably (have) the tendency to intimidate any employee from engaging in such activity." See Willingboro Tp. Bd. of Ed. and Employees Ass'n of the Willingboro Schools and Joann Phelps, P.E.R.C. No. 98-113, 24 NJPER 171, 173 (¶29085 1998); aff'd and rem'd on remedy, 25 NJPER 322 (¶ 30138 App. Div. 1999).

Standing alone, the remark would be an independent violation of 5.4a(1) of the Act. However, while the charge alleged violations of a(1) and (3) independent and derivatively, Schnappauf's remark was not specifically pled in the charge as an independent a(1) violation. In view of the lack of a specific pleading that Schnappauf's remark constituted an independent a(1) violation, I must dismiss the a(1) allegation.

CONCLUSIONS OF LAW

The Shore Regional Board of Education did not violate 5.4a(1) and (3) of the Act.

RECOMMENDATION

I recommend the Commission ORDER that the Complaint be dismissed.

Patricia Taylor Todd
Hearing Examiner

DATED: March 15, 2005
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman 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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by March 26, 2007.