

H.E. No. 2008-5

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

In the Matter of

LEAP ACADEMY UNIVERSITY CHARTER SCHOOL,

Respondent,

-and-

Docket No. CO-2005-060

LEAP ACADEMY TEACHERS ASSOCIATION/NJEA,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the LEAP Academy University Charter School violated the New Jersey Employer-Employee Relations Act by refusing to renew Tammy McGinley as an art teacher for 2004-2005 and non-renewing her for 2005-2006 because of her conduct in organizing the LEAP teachers. The Hearing Examiner also found that the Academy violated the Act by placing warnings/reprimands in her personnel file to harass and intimidate her for the exercise of protected conduct. The Hearing Examiner recommended that McGinley be offered reinstatement to an art position with all back-pay rights and benefits retroactive to the time of termination and that all inappropriate documents in her personnel file be removed.

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 that 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,
Genova, Burns & Vernoia, attorneys
(James J. McGovern and Andrew P. Oddo, of counsel)

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

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 8, 2004, and amended on October 26 and November 16, 2004, August 11, 2005 and May 1, 2006, the LEAP Academy Teachers Association and Tammy McGinley (LATA or Charging Party), filed an unfair practice charge with the New Jersey Public Employment Relations Commission (Commission) against the LEAP Academy University Charter School (LEAP or Academy) alleging that LEAP violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), particularly 5.4a(1), (2), (3),

(4) and (5).^{1/} The charge and amended charge included seven counts, among them the allegations that McGinley was discriminated against in several ways and eventually non-renewed by the Academy for engaging in conduct protected by the Act.

A Complaint and Notice of Hearing was issued on April 7, 2006, by the Acting Director of Unfair Practices. The Hearing Examiner amended the Complaint on May 2, 2006 to include the May 1, 2006 fourth amendment to the charge. On May 1 and June 1, 2006, respectively, the Academy filed an answer and amended answer to the charge essentially denying having taken any action against McGinley for the exercise of protected conduct.

Hearings were conducted on July 17, 21, 24 and 26, October 24, November 15 and December 13, 2006, and February 20, 2007 in Trenton, New Jersey.^{2/} Based upon prior discussions with the

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ The transcripts from those hearings will be referred to as 1T through 8T respectively. Commission exhibits will be referred to as "C". LATA exhibits will be referred to as

(continued...)

parties it was announced at the first day of hearing that the Charging Party would only prosecute and the Respondent would only defend against Counts One, Two, Four and Six of the charge and amended charge at this hearing (1T10). For a variety of reasons including that the parties were proceeding through other Commission processes, the Charging Party deferred prosecution on Counts Three, Five and Seven of the charge/amended charge which included the 5.4a(5) allegation. Count Seven was withdrawn (3T21).

Count One of the charge alleged that McGinley's right to engage in protected election conduct was violated when on April 28, 2004, she was issued a written reprimand (CP-22) for violating a directive (CP-9) not to speak to the media. The Charging Party seeks an order directing the Academy to refrain from imposing that directive with respect to the exercise of protected conduct, and directing it to rescind the reprimand.

Count Two alleges that McGinley was discriminated against for engaging in protected conduct when the Academy failed to follow up on a grant proposal submitted by McGinley, and when on May 14, 2004 it offered McGinley a basic skills/math position for the 2004-05 school year rather than renew her in the elementary art position she held during the 2003-04 school year. The Charging Party seeks an order directing the Academy to refrain

2/ (...continued)
"CP", and Academy exhibits will be referred to as "R".

from such discrimination and to reassign McGinley to the elementary art position.

Count Four of the charge alleged that McGinley was discriminated against for engaging in protected conduct when on October 7, 2004 she was issued a written reprimand (CP-34) for allegedly harassing faculty and staff regarding union issues during instructional time. The Charging Party seeks an order directing the Academy to refrain from engaging in such discrimination and to rescind that reprimand.

Count Six of the charge alleged that McGinley was discriminated against for engaging in protected conduct when by letter of May 11, 2005 (CP-42) she was notified she would not be renewed to a teaching contract for 2005-2006. The Charging Party seeks an order directing that McGinley be reinstated to an art teacher position or a substantially equivalent teaching position retroactive to the commencement of the 2005-2006 school year, with back pay, benefits and interest.

On July 13, 2006, the Respondent filed a motion to strike the Charging Party's requested relief sought for Count Six of the charge (C-3A). It argued that only the Commissioner of Education and not the Commission had the authority to return a tenure eligible former teacher to their prior position when such a remedy would result in obtaining tenure. The Charging Party opposed the motion by letter of July 14, 2006 (C-3B). I denied the motion as premature at that stage of the proceedings and

noted my willingness to reconsider the motion with respect to remedy as part of the parties post-hearing briefs (1T9-1T10).

The parties argued orally, examined and cross-examined witnesses and filed post-hearing and reply briefs, the last of which was received on July 26, 2007.

FINDINGS OF FACT

1. Tammy McGinley was employed by the Academy as a substitute teacher from March through November 2002 with a break in the summer (2T57; 4T63). As a substitute teacher she taught in both the elementary and high school and learned she could work in any K-12 position up to twenty-one days before being rotated (4T63; 5T32). She taught math, social studies and presumably other subjects (2T62; 4T63; 5T30). While a substitute teacher, McGinley also did home bound instruction for the Academy which included math instruction (2T63; 5T32).

In May 2002, McGinley learned that a full time art position was opening for the fall of 2002. She applied for but did not receive that position (2T58, 2T66; 5T34). In late November 2002, however, McGinley was offered a new full time basic skills position at the high school. That position began in December 2002 (4T57; CP-4). The basic skills position involved prepping students for standardized testing and included math and language arts instruction (2T67; 4T57-4T61). McGinley remained in that position through the end of the 2002-2003 academic year ending in August 2003 (2T69; 4T59).

In addition to her full time basic skills assignment, McGinley also ran the after school art program (2T69-2T70).

From September 2003 through August 2004, McGinley was the full time elementary art teacher and once again assumed some additional before and after school responsibilities (2T82-2T83). On or about June 1, 2004, McGinley accepted the Academy's offer of employment for the 2004-2005 academic year as a high school basic skills/math teacher (3T87-3T88; CP-26). On May 11, 2005, she was notified her employment would not be renewed (3T153; CP-42), and her employment was terminated at the end of the 2004-2005 academic year, officially in August 2005. Based upon McGinley's full time work history with the Academy it appears that she would not reach three full years towards tenure until December 2005 assuming she had been reemployed for the 2005-2006 school year.

2. When McGinley began her employment with the Academy she had a degree in art but did not possess her permanent teacher's certification. She had a certificate of eligibility and was enrolled in the alternate route program for certification (2T58, 2T67; 4T60). Based upon her then eligibility and the alternate route program, she was authorized to teach both art and basic skills, N.J.A.C. 6A:9-9.2(b)2v. (4T59-4T60, 4T86-4T88). That rule provides:

(b) The teaching endorsements below authorize the holder to teach specific populations, subjects, ages and/or grade levels:

2. Elementary school: This endorsement authorizes the holder to:

v. Teach reading, writing, arithmetic, and spelling for basic skills purposes only, in grades six through 12.

She obtained her permanent art and elementary certifications in February 2004 (2T100-2T101; CP-7; CP-8). She is now also certified in math.

3. Upon assuming the elementary art position McGinley began to transform the art program. She was the first art teacher to have her own classroom (2T79; 5T86). McGinley invested her own funds painting murals on the walls, purchasing and hanging art posters, purchasing some furniture for the room, and creating an art library (2T80-2T81). She took students to see the Barnes Foundation art collection and created art displays including the work of both artists and students in several locations throughout the school (2T83-2T87). Other staff members were impressed by her work, her classroom and her reputation as an art teacher was very positive (1T48, 1T76; 2T16, 2T33).

In November 2003, Dr. Gloria Bonilla-Santiago, Chairperson of the Academy Board of Trustees, visited Ms. McGinley's art room, expressed how impressed she was with the work, and invited McGinley to come to the Academy's upcoming formal gala fund raising event held at an off-site location. Santiago asked McGinley to bring student art work and the students with her so the work could be presented to guests. The executive director of the Geraldine R. Dodge Foundation was being honored at the event

(2T89-2T90; 7T119-7T120). The Dodge Foundation executive director encouraged McGinley to apply for a Foundation professional development grant (2T92; 3T47).

By letter of April 15, 2004 (CP-53), the Foundation notified McGinley she had been awarded a grant to study art in Mexico. On April 16, 2004, McGinley sent an e-mail to Academy Superintendent Dr. Stephanie Branch with a copy to Dr. Santiago notifying them of the grant and thanking Branch and the Academy Board for supporting her as the art teacher (CP-54). On April 20, 2004, Dr. Santiago e-mailed a copy of CP-54 to the LEAP community notifying them of the award for McGinley (CP-16), but not offering congratulations (3T48). Branch issued a memorandum that same day, April 20, congratulating McGinley for receiving the grant (CP-17; 3T51; 7T113-7T114). From January through April 2004, McGinley was LATA's chief union organizer. A Commission conducted representation election was held on April 21, 2004. Despite McGinley having received the Dodge Foundation grant, the Academy did not renew her in an art position for 2004-2005 (3T51-3T53).

On October 14, 2003, McGinley received a satisfactory observation from the Academy's then Director of Curriculum Dr. Lynette Smith (CP-5; 2T96). On November 19, 2003, McGinley received an outstanding rating by Dr. Smith on the evaluation used to obtain her permanent certification (CP-6; 2T99-2T100).

4. In addition to the Dodge Foundation grant which was related to her art program, McGinley applied to the Campbell Soup

Foundation for a grant for its summer 2004 sailing program which McGinley believed would benefit the Academy's athletic program and help make graduating students attractive to university's with sailing programs (2T102-2T103). The grant was approved. With the support and apparent approval of Neirida Cintron, the Academy's Director of the LEAP elementary school, McGinley in January 2004 began making plans for the summer program including introducing information about oceans and sailing into the school curriculum. The program was implemented in July 2004 (2T104-2T106).

McGinley attempted to implement the same program for the summer of 2005. Campbell's approved the grant, but Dr. Branch would not approve the program, turning down the grant (2T107-2T108).

5. Jack Smulktis is currently the LATA president (1T102). He achieved tenure with the Academy in 2001 or 2002 (1T105). He was involved in an earlier effort to organize the teachers. Prior to obtaining tenure he contacted the New Jersey Education Association (NJEA) and distributed authorization and designation cards to the employees.

During that time period, Dr. Santiago had a conversation with teacher Maureen Gibbs about the organizing. Gibbs testified that Santiago:

...stood directly in front of me with about two other people around me and said that there will be no God damn union in her school, and if there is she will shut the school. [1T66]

That spring, after the organizing effort failed, Smulktis realized he had not received a contract offer for the following school year. When he inquired he was told to speak with Santiago. With her finger pointed at him, Santiago told Smulktis she knew he had gone to the union and that if he continued to pursue the union she would hold his contract, but if he gave it up they could sign the contract. Smulktis felt threatened by the remark, and because he needed the job he signed a new contract and avoided any union activity until after he was tenured (1T97-1T100, 1T106-1T107).

I credit both Gibbs and Smulktis. There was no evidence contradicting their testimony. Santiago was not called as a witness in this case.

6. In February 2004, McGinley took the lead to organize LEAP teachers (2T109). She contacted the NJEA and distributed and collected authorization and designation cards. A representation petition was filed on February 20, 2004 (Docket No. RO-2004-080). On February 5, 2004, Dr. Branch issued the following memorandum to all faculty and staff (CP-9).

No faculty or staff members are to contact the media without the approval of the Board Chair and the Superintendent.

As a result of the petition, a conference seeking a consent for an election was held on March 22, 2004 with a Commission staff agent. McGinley and an NJEA representative attended for LATA, and Santiago, Branch, Wanda Garcia, Santiago's assistant,

and an attorney attended for the Academy (1T110-1T112; 2T116-2T117, 2T136). An election was scheduled for April 21, 2004.

Marie Green is a LEAP teacher who did not support the organizing effort. She had a good relationship with school director Cintron. Both Green and Cintron knew McGinley was LATA's chief organizer (1T45). Green rejected McGinley's request to sign an authorization and designation card for LATA, and Green discussed McGinley's organizing efforts with Cintron (1T41-1T44). Green also discussed the organizing effort with parent coordinators Carmen Rivera and Norma Rose who also opposed the NJEA (1T47).

The Academy minutes of March 30, 2004 (CP-10) confirmed its consent to the Commission sponsored election and also noted that its Personnel Committee recommended salary increases for teachers which were approved along with an increase in the pay for performance percentages.

7. Sometime in March 2004, presumably after the March 22 consent conference, McGinley distributed a flyer in support of the organizing effort (CP-15; 1T45). On April 1, 2004, Dr. Branch issued a memorandum (CP-11) to all teachers noting she did not support the NJEA, that LATA's flyer, CP-15, contained "misrepresentations and manipulations", and she noted that she had enclosed a handout (CP-12) correcting information contained in CP-15. The Academy's handout concluded with:

Say No to NJEA's Manipulative Tactics And
Misinformation! Vote No on April 21st.

On April 2, 2004, Drs. Branch and Santiago held a faculty meeting (CP-13). Dr. Branch that day also distributed a memorandum (CP-14) to all staff advising them of the salary increases and pay for performance percentage increases the Academy passed at its March 30th meeting. During the faculty meeting, Branch and Santiago referred to the pay for performance percentage increases and voiced their opposition to the organizing effort. McGinley spoke in favor of LATA (2T142-2T151; 3T45). Green testified that Branch and Santiago made it clear to the teachers that if the union won, the performance increases would be "off the table" (1T46). I credit her testimony.

Sometime subsequent to April 2nd, but prior to the election, Green was called into a meeting with Santiago, Cintron and Garcia. Cintron asked her if a particular teacher would vote no, and then produced a list of teachers hoping to learn how they would vote. Green did not know about that particular teachers' preference, and although they (Santiago and Cintron) knew she did not support LATA, Green declined to discuss how other teachers might vote (1T35-1T39).

Prior to her involvement in union activity, McGinley had a cooperative and professional working relationship with Cintron, and an even friendlier working relationship with Carmen Rivera, an academic coordinator (2T71-2T72, 2T74-2T75; 3T106). But both Cintron and Rivera opposed the organizing effort and after it began their relationship with McGinley changed (6T68-6T70). The relationship with Cintron deteriorated and became more stressed

(2T77, 2T79; 3T108). The relationship with Rivera was even worse. Rivera ignored and avoided McGinley (2T72-2T73).

8. On April 21, 2004, McGinley was an election observer on behalf of LATA (1T41, 1T101, 1T112; 2T118). That same day students with "vote no" signs walked into and around Smulktis' classroom (1T101-1T102), and McGinley observed Classroom Aide Carmen Perez leading a group of students in the hallway with "vote no" signs (3T55-3T57). LATA won the election. The Academy filed election objections on April 28, 2004, but the Director of Representation rejected those objections and certified LATA as the majority representative by decision on July 14, 2004. LEAP Academy University Charter School, D.R. No. 2005-1, 30 NJPER 277 (¶95 2004).

McGinley, Teacher Peter Law who opposed the organizing effort, and coordinator (and parent) Carmen Rivera all spoke to newspaper reporters on April 20 and/or April 21 regarding the election. One newspaper article was printed on April 21 (CP-18), and two articles were printed on April 22 (CP-19; CP-20). McGinley was quoted as seeking greater job security, working conditions and competitive salaries and said the Academy had not been fair to the teachers. Law was quoted as saying the union would benefit him but hurt the school's mission. Rivera said "she sent her child to LEAP to get away from the NJEA" (CP-19).

On April 22, 2004, Santiago distributed a memorandum to all LEAP staff (CP-21), informing them of the election results and explaining that if they become official the teachers would no

longer be able to individually negotiate with the Academy. Between April 20, 2004 and April 27, 2004, the Academy Board of Trustees received nine letters from teachers (including one from Peter Law) and one letter from a parent/Board member regarding the LATA organizing effort (CP-50). In several letters, the authors expressed that they were threatened, pressured and harassed to support the union, some specifically accusing McGinley of such conduct. The Board member's letter accused McGinley of being disrespectful and recommended she be removed from the LEAP staff.

The nine letters comprising CP-50 became one of the reasons for the Academy's decision to challenge the results of the election. The Director of Representation considered those letters but upheld the election results. LEAP Academy University Charter School. Although those letters did not concern McGinley's work performance, they were, nevertheless, placed in her personnel file (4T26-4T29).

On April 28, 2004, McGinley was found "insubordinate" according to a written memorandum by Branch for speaking with reporters without prior approval (CP-22). CP-22 provided:

A memo indicating the appropriate protocol for handling the media was distributed to all faculty and staff February 5, 2004. As indicated in the memo that no faculty or staff members are to contact the memo [media] without the approval of the Board Chair and the Superintendent.

On two occasions Tuesday, April 20 and Wednesday, April 21, 2004 you violated this directive from the Superintendent.

Your actions were NOT acceptable and are viewed as insubordination.

Neither Law nor Rivera were given a similar memorandum (7T59).

CP-22 referred to Branch's memorandum of February 5, 2004 (CP-9) restricting media contact. McGinley interpreted CP-9 to mean she could not represent herself as a spokesperson for the Academy nor arrange for the media to come into a classroom without approval, but she did not believe it applied to her in other capacities (2T120-2T121).

Branch admitted that she opposed the NJEA and did not support their efforts (7T86; CP-11). She drafted and distributed CP-12 because she wanted the staff to know that she did not want an NJEA union at LEAP (7T87-7T88; CP-12). Some teachers felt intimidated by Branch for questioning them about the union (1T70-1T71). Based upon CP-11, CP-12 and her own testimony, I find that Branch was openly hostile to the NJEA's organizing effort, and that her earlier testimony that she did not personally oppose the NJEA organizing LEAP was not credible (7T81-7T83).

Branch considered CP-9 to be a blanket directive that applied for media contacts occurring on LEAP time and property but she admitted that CP-9 did not so indicate (7T88-3T91). She first said she recalled that McGinley's remarks to the media occurred on LEAP time and property, then said she was not sure (7T90-7T91). I find she was unsure.

Branch claimed that CP-22 was only a warning, not discipline such as a reprimand (7T58-7T59, 7T97). But CP-22 does not

contain limiting language, it was placed in McGinley's file, and Branch considered McGinley's conduct to be insubordinate (7T96-7T97). I find CP-22, even if only meant to be a warning, was a rebuke or reprimand for speaking to the press about the basis for the election and therefore was evidence of hostility by Branch toward McGinley for having engaged in protected conduct.

Branch also claimed that neither Law nor Rivera were disciplined for speaking to the press because they asked her for permission to speak to the media. In fact, she said Law came to her office to ask for permission but she admitted there was nothing in writing (7T59-7T60, 7T97-7T99).

Law testified that he did not ask either Branch or Santiago for permission to speak to the media. Although he said Branch reminded him of the media clause in the contract, he was not reprimanded for his remarks to the media regarding the election (6T26-6T29). I credit Law's testimony on this point, not Branch's. Branch's open hostility to the organizing effort made her testimony on this point highly suspect.

Rivera said she received permission to speak to the media while in a discussion with Santiago and Branch (6T73, 6T86-6T89). I credit that testimony.

9. On May 10, 2004, McGinley signed a satisfactory evaluation she received from Branch based upon a May 5 observation (CP-23). But after further review of the points earned in her evaluation she e-mailed Branch on May 13, 2004 (CP-24) questioning the point value which ultimately would not have

resulted in her getting an outstanding rating, but could have affected her salary for the following school year (3T73-3T83; 5T7-5T12; 7T127).

On May 21, 2004, the Academy Board approved a resolution (CP-25) including that pay for performance and a number of matters affecting teachers would not be negotiated.

10. Despite the fact that McGinley was willing and able to continue as the elementary art teacher for the 2004-2005 academic year, by the middle of May 2004, Branch decided not to renew McGinley in that position, and, on June 1, 2004, offered her a contract as the basic skills/math teacher at the high school. Branch testified she did that because she needed a math teacher, knew McGinley could teach basic skills math, and believed it was easier to find an art teacher than a math teacher (7T51-7T53; 7T115). But Branch admitted that any elementary teacher could have filled that position and they could have, but didn't, seek to hire another elementary teacher (7T53, 7T115-7T116).

Prior to June 1, 2004, McGinley did not know she was being reassigned, no one discussed the matter with her (3T88). On June 1, 2004, however, she signed and accepted a basic skills job offer for the 2004-2005 academic year (CP-26). On July 15, 2004, McGinley sent a memorandum to Branch (CP-27) asking why she had not been renewed as the elementary art teacher, suggesting she was moved due to her organizing conduct and raising other issues. Branch testified that she told McGinley she was transferred because of the need at the high school and her prior basic skills

experience (7T54). McGinley testified that while Branch commented regarding at least one of the concerns she raised in CP-27, neither Branch nor Cintron in a later conversation explained why she was reassigned (3T92-3T93, 3T105-3T106). I credit McGinley's testimony about that matter, and I do not credit Branch's explanation for reassigning McGinley to basic skills in 2004.

Sometime after the April 21, 2004 election and during the time the Academy was appealing the election results, a rival labor organization, the LEAP Professional Organization, was formed by teachers who had opposed LATA. Peter Law was included in that group (3T96-3T97). That organization distributed a flyer (CP-28) for a new member meeting on July 1, 2004. The first item on its agenda was supporting McGinley's reinstatement to the elementary art position (3T100).

11. On July 14, 2004, a decision issued rejecting the Academy's objections to the election and certifying LATA as the majority representative of LEAP teachers. LEAP Academy University Charter School. Shortly thereafter, McGinley became a member of the LATA negotiations team and attended approximately five negotiation sessions which included Santiago and Branch. McGinley remained on LATA's team through the end of her LEAP employment (4T16-4T19).

12. Most of McGinley's organizing efforts in early 2004 were in the elementary school where most teachers joined the union. After being relocated to the high school for basic

skills/math in September 2004 McGinley sought to inform the high school faculty about the benefits of the union and seek their membership in LATA (4T20-4T21).

A physical altercation between two students occurred at the high school on September 30, 2004. Peter Law was instrumental in resolving the situation. At 9:30 a.m. on October 1, McGinley notified Branch of the fight by e-mail (CP-29) and stressed how it was unsafe for students and staff, and she raised a number of related issues (3T109-3T111). After learning of the fight and that Law had been there, Branch asked him for an account of the incident (7T62-7T63, 7T101; CP-30). At approximately 12:30 p.m. Law e-mailed Branch his account of the incident (CP-30). His account explained that he encountered McGinley coming upstairs loudly stating it was out of control and someone should do something. CP-30 was placed in McGinley's personnel file by Branch as an attachment to her response to McGinley's e-mail (7T102). McGinley was unaware of CP-30 until preparing for this hearing. She had no reason to think that her version of the incident was unacceptable (3T112-3T113).

On October 5, 2004, Branch sent McGinley a memorandum (CP-31) containing six items in response to McGinley's October 1 e-mail. McGinley responded to CP-31 with her own e-mail on October 6, 2004 (CP-32) raising three other issues (3T115-3T116). Branch responded to CP-32 with a memorandum that same day (CP-33) answering McGinley's three questions.

During the five day exchange of e-mails and memos between Branch and McGinley, Branch never suggested McGinley had created a hostile or unsafe environment in the school (3T117). But on October 7, 2004, Branch issued McGinley a memo (CP-34) accusing her of harassing faculty during instructional time, creating a hostile unsafe environment affecting the school's mission, and intimidating and interfering with teachers. CP-34 provides:

It has been brought to my attention by various staff members and students that you have been harassing the faculty and staff at the high school and lower Leap regarding union issues during instructional time. Thus, creating a hostile unsafe environment and ultimately effecting the school culture and mission. Your intimidation and interference with other teachers and staff who take the initiative to support the LEAP mission and engage in problem-solving with the administration goes against our school culture and will not be tolerated. Please note that such conduct is in direct violation of our Personnel Policy, under the Prohibitions and Infractions, section A.15 ("Action that is or can be reasonable [sic] expected to be detrimental to other employees, the school or its reputation"). This kind of behavior must stop immediately.

The primary focus at LEAP Academy is to enhance opportunities for the children and families of Camden City, not to hinder opportunities for quality education. Your actions have limited our student's ability to receive a quality education.

Focus on student academics and student success.

CP-34 noted a copy was placed in McGinley's personnel file.

Branch considered CP-34 to be a warning, not discipline, to McGinley that instructional time was for instruction (7T66,

7T109). The "Inappropriate Behavior" at the top of the memo referred to harassing faculty regarding union activities during instructional time (7T66). Three teachers, Susan Carter, Crawford Burley and Peter Law, had allegedly complained to Branch that McGinley was harassing them about union membership as they entered the building and during their instructional time when McGinley allegedly came to their classroom door to talk to them (7T65-7T66, 7T103-7T104). All three had sent letters to the Board of Trustees after the April 2004 representation election complaining of McGinley's union conduct (7T104-7T105; CP-50).

Branch did not allow McGinley to respond to the accusations before issuing CP-34, and there were no specific examples in the document. Carter and Burley were not called to testify, and Law did not testify he was harassed by McGinley or that she interrupted his instructional time. Branch testified that she witnessed McGinley harassing teachers coming into the school as she (Branch) was driving to work, but she could not have known what was being said (7T107-7T108). Branch concluded her cross-examination testimony regarding CP-34 agreeing that McGinley's union discussions were what she (Branch) thought would be detrimental to other employees and the school (7T109).

I find CP-34, even if only a "warning," was a reprimand for engaging in protected conduct--talking to teachers about LATA on their way into school--rather than for interrupting teachers during their instructional time regarding union activity. I find insufficient evidence that instructional time was interrupted and

since Branch could not have known what was said to teachers as she drove by, I do not credit her testimony that McGinley harassed teachers. Therefore, I find that CP-34 was issued to threaten and intimidate McGinley for continuing to engage in protected activity.

13. Edna Fuentes was a Spanish teacher at the Academy during the 2004-2005 school year (3T125; 7T6). During November 2004 through sometime in January 2005, Fuentes had surgery and chemotherapy which caused her to use more sick time than she had been allotted for the year (7T17-7T19). In February 2005, she was asked to attend a meeting in Branch's conference room with Santiago and Branch (7T6, 7T67-7T68). Branch and/or Santiago suggested Fuentes take a leave of absence or go on disability leave (7T7, 7T69). They did not say she would be terminated (7T14). Fuentes told Branch and Santiago she wasn't planning on taking leave (7T8).

Branch/Santiago's remarks made Fuentes angry, nervous and upset causing her to immediately go to McGinley as a union representative. Fuentes asked for her help (7T8-7T10, 7T16). McGinley went to Branch's office, saw the conference room ajar, and not knowing the nature of the meeting at that time, went in, looked at Branch who acknowledged her (3T128). Branch agreed she looked at McGinley when she walked into the room but said it was as if to say "What is going on" (7T72). McGinley interpreted the look as an acknowledgment she could enter (7T128). While either explanation is plausible, it was reasonable for McGinley to

believe she was allowed to enter the room. McGinley explained she was there to represent Fuentes, that she believed the remarks made to Fuentes violated her rights and that she would notify the NJEA and pursue the matter on Fuentes' behalf (3T130; 7T71).

McGinley testified that Santiago responded:

I don't recognize you . . . I don't recognize
the teachers association and I do not
recognize the NJEA, get out of my office
(3T131; 4T50).

I credit that testimony. Branch's recollection of Santiago's remarks were less clear, but she did not dispute McGinley's testimony (7T71-7T72). Santiago was not offered to rebut the testimony.

14. Branch evaluated McGinley on March 15, 2005 for which she received an overall satisfactory ranking. They met on March 22, 2005 to discuss the evaluation which was signed that day (CP-35). CP-35, unlike CP-5, McGinley's 2003 evaluation, did not contain ratings on any of the individually listed criteria. Branch did not give any explanation for the lack of individual ratings, nor did she give McGinley any indication that she was in danger of non-renewal (4T133). In the Concluding Comments of CP-35, Branch made generally complimentary comments regarding McGinley in the Instruction, Classroom Management and Professional Responsibilities categories. The "Recommendations" section of CP-35 provided:

- (1) In order for ample time to be spent on the lesson, I am recommending that a timer be used to assist you in keeping track of time.
- (2) Inform the students the purpose of the

lesson. (3) State the directions for the assignment several times in order for all students to understand the directions. (4) Review periodically classroom expectations and rules in order to assist in the management of the class. (5) Increase involvement in the area of leadership.

On or about March 17, 2005, a letter from a parent (R-2) was placed in McGinley's personnel file. That same day Branch issued a memorandum to McGinley (R-5) accusing her of inappropriate behavior on four occasions in early 2005. They included:

1. February 25, 2005, interrupting a meeting with Santiago.
2. March 4, 2005, wanting to excuse students from community service and refusing to tutor a student.
3. March 11, 2005, contacting the Fire Marshall about the number of students permitted in the cafeteria, and
4. March 15, 2005, her email allegations regarding an incident between a Board member and a student.

McGinley responded to R-5 with an e-mail on March 18, 2005 (R-4), explaining the items raised in R-5. She provided a detailed response to R-5 on April 20, 2005 (CP-52), disputing Branch's comments.

On April 6, 2005, Branch observed McGinley again, approximately three weeks, but only three instructional days (3T144; CP-40), after the March 15 observation in CP-35. Branch and McGinley reviewed the second observation on April 12, 2005. Once again, there were no individual ratings in the observation document (CP-36), but McGinley was given an overall unsatisfactory rating (5T81-5T82). Branch signed CP-36 on April 12, McGinley didn't sign that day but she wrote on the document

"choosing not to sign based on 18A:27-3.1" and signed her name on April 15, 2005. In the Concluding Comments section of CP-36, Branch criticized McGinley in most categories. The Recommendations section provided:

The following recommendations should be implemented in future classes immediately:

- (1) Use a variety of teaching techniques,
- (2) Use the entire class period for mathematics instruction, use class time wisely,
- (3) If there is a change in lesson plans this change should be documented on the plans,
- (4) Prepare challenging, meaningful mathematics lessons each class period,
- (5) Place objective on the board,
- (6) If projects are collaborated during the course of the day, such as the completion of the poems for the Walt Whitman poetry contest, there should be indicated in your plans how it will be incorporated into a math lesson. For example, did the criteria of the contest indicate the size of the paper to be used (8 1/2 x 11, 8 1/2 x 14, etc.) how is this configured? Provide open ended math questions pertaining to the requirements of the contest such as on an 8 1/2 x 11 sheet of paper how many lines are on the paper, the poem has to contain how many lines, how many words? Etc. Provide higher level of thinking questions in which to challenge the students.

On April 18, 2005, McGinley sent an e-mail to the high school director, Ms. Lopez (R-3), concerning a student who needed additional assistance in math. McGinley explained she didn't have a math certification or the resources to teach a separate curriculum for the student. She said she explained that to the student and told her she needed to look into a way to get her up to grade level (5T44).

That same day, April 18, Peter Law sent a memo to Branch (CP-41) advising her that on April 14, 2005, McGinley showed him an e-mail she was planning to send to the Philadelphia Inquirer. That memo was placed in McGinley's personnel file (6T30-6T31).

On April 25, 2005, just seven instructional days after McGinley's April 12 conference regarding CP-36 (3T145), Branch again evaluated McGinley, and without providing individual ratings, gave her an overall unsatisfactory rating (CP-38). In the Concluding Comments section of CP-38, Branch again criticized McGinley in most categories but did conclude "Ms. McGinley is proficient in the concepts that she is teaching." The Recommendations section provided:

Recommendations are to be viewed constructively to assist in the professional growth of the teacher: (1) Copies of lesson plans should be available at all times. (2) Use the more advanced students as assistance [sic] to help other students and provide them with more advanced assignments. (3) Research other instructional methods. (4) Relocate disruptive students. (5) Positive leadership toward the betterment of LEAP is necessary for the students to achieve.

McGinley did not sign CP-38, rather, she wrote on the document, similar to CP-36, that she wasn't signing pursuant to statute and signed that comment. Later that day McGinley sent Branch a memorandum (CP-37) in response to the negative evaluation in CP-36. In CP-37, McGinley charged in part that by Branch conducting three evaluations so close together and late in the year she (McGinley) was not given sufficient time to make any

improvements. On May 5, 2005, McGinley sent Branch a detailed response (CP-39) to CP-38, the April 25 evaluation.

On May 11, 2005, Santiago signed a letter (CP-42) to McGinley informing her she would not be renewed for the 2005-2006 school year. Although several other teachers were also non-renewed at that time (4T92-4T93; 7T74), McGinley was non-renewed -- having just held the basic skills/math position at the high school -- despite the fact that the art positions at both the elementary and high schools -- for which McGinley was certified and had excelled during the 2003-2004 school year -- were available for the 2005-2006 school year (4T34; 7T117-7T120). Branch did not offer a plausible explanation for not offering McGinley an art position for 2005-2006.

On May 23, 2005, McGinley sent Santiago two letters, one requesting a statement of reasons for the non-renewal (CP-43), the other requesting to appear before the Academy Board of Trustees regarding the non-renewal (CP-44).

Branch provided McGinley with a statement of reasons for the non-renewal by letter of June 20, 2005 (CP-45). The pertinent portion of that letter provided:

My decision to non-renew your employment contract for the 2005-2006 school year was based primarily upon your classroom evaluations. All of your evaluations during your employment at LEAP reflect room for improvement. However, your most recent evaluations revealed more significant shortcomings. Examples of these problems include: difficult to follow lesson plans, students not understanding the rationale or expectations of the lessons, an inability to

manage the classroom and keep track of time, and a failure to address students concerns regarding assignments. In addition, there have been complaints from your fellow teachers, parents and students regarding your behavior which have distracted from the mission of LEAP Academy.

In summary, your performance has been less than what LEAP Academy requires from its teaching staff members. Despite LEAP's efforts to assist you in improving, your ability to perform the functions of a teacher at LEAP Academy is unsatisfactory. Therefore, I did not offer you an employment contract for the 2005-2006 school year.

On direct examination, Branch testified that McGinley was non-renewed based primarily on the last two evaluations which were unsatisfactory. Branch claimed McGinley did not address the needs of the students and was not satisfactory in the classroom, yet also said McGinley had the potential for being an outstanding teacher (7T75). Branch knew that McGinley would have received tenure if renewed for 2005-2006 (7T75-7T76), and denied transferring her to the basic skills/math position in 2004-2005 and recommending her non-renewal for 2005-2006 because of her support of LATA (7T79-7T80). I do not credit Branch's testimony.

Even Branch recognized that McGinley had potential to be an outstanding teacher. I believe she said that because McGinley had already demonstrated her excellence in the 2003-2004 elementary art position. But when asked on cross-examination why she did not reappoint McGinley to an art position for 2005-2006, Branch first testified that McGinley had not been very successful in the art position (7T118), but then through cross-examination,

she begrudgingly acknowledged McGinley had received the Dodge grant for her work, that Santiago was impressed with what her students had accomplished, and that the Academy had already admitted those facts (7T118-7T120; C-2B ¶23). I infer from Branch's evasive testimony that McGinley wasn't reappointed to an art position for 2005-2006 because of the exercise of protected conduct.

Finally, I find Branch undermined her credibility about her acceptability of the NJEA organizing effort. When originally asked on cross-examination whether she opposed the NJEA organizing LEAP, Branch said "Personally, no, I did not oppose [it]" (7T82). In subsequent testimony Branch acknowledged she wrote CP-11, the April 1, 2004 memorandum she distributed to teachers wherein she said she did not support NJEA's efforts, and she acknowledged she was opposed to the NJEA organizing the Academy (7T83). In later cross-examination regarding CP-12, Branch acknowledged telling teachers they did not need the NJEA and when asked:

That you were opposed to NJEA, that is part and parcel of your position why you opposed NJEA; is that correct? She responded, That is correct. (7T86)

I infer from Branch's lack of credibility on this point her hostility toward McGinley's organizing effort and the NJEA which is further demonstrated by the following exchange:

Q. Throughout your career at LEAP your mindset never changed, did it?

A. No.

Q. And in the 2004-2005 school year, which ran, I guess, through the summer of 2005, you felt the same way, is that right?

A. That's correct.

Q. And you emphasized that point to the staff, did you not?

A. Yes.

Q. In fact when you gave the staff the document marked CP-11, Superintendent's position toward NJEA and Union activity, you asked the staff to read it very carefully, correct?

A. Yes.

Q. You told them that it contained your feelings.

A. Yes.

Q. And you repeated it, you said "It contains my feelings on what I think needs to have happened"; is that correct?

A. Yes.

Q. What needs to have happened is that they vote not to have an NJEA affiliated Union at LEAP?

A. That's correct.

Q. And at the time that you made these statements you knew that Tammy McGinley was the lead organizer of the effort by the NJEA to unionize LEAP?

A. That's correct.

McGinley renewed her request to appear before the Academy Board by letter of June 29, 2005 (CP-46). She appeared before the Board on July 28, 2005, and by letter of July 29, 2005 (CP-

47), Branch advised McGinley that the non-renewal recommendation was affirmed.

15. On July 22, 2005, McGinley had an exit interview with LEAP representative Anthony DePetris and completed an exit interview form (R-1; 4T111; 5T75). On R-1, McGinley indicated she had received no direct supervision and no feedback, that she was "non-renewed" rather than resigned, and when asked whether she would consider re-employment she responded, "No". McGinley responded "No" to re-employment because she objected to the notion of having to reapply or seek reinstatement to LEAP for a job she had and believed from which she was illegally removed. She believed reinstatement through legal channels was more appropriate for her situation (7T74).

ANALYSIS

The primary issue in this case is whether the Academy interfered with and/or discriminated against Tammy McGinley for the exercise of protected conduct. An employer's actions that tend to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification violates 5.4a(1) of the Act. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), established the test for determining if an employer's conduct is discriminatory and in violation of 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging

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

The decision on whether a Charging Party has proved hostility is based upon consideration of all the evidence, including that offered by the Respondent, as well as the

credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, 13 NJPER at 116.

Based upon the above facts, I find the Academy -- particularly through Branch's actions -- interfered with and discriminated against McGinley in each of the four litigated counts because of her efforts to organize and support LATA. This was a fact intensive case. The Academy relied upon the testimony -- and credibility -- of its one witness -- Superintendent Branch -- to support its argument that its actions vis-a-vis McGinley were legitimately based. Except for her blatant admissions in CP-11 and related testimony opposing the NJEA and the organizing effort at LEAP, however, I found her an unreliable witness. Branch knew McGinley was responsible for organizing the teachers and she took action against her to punish her for that effort. I did not credit her explanations for issuing the April 28 (CP-22) and October 7, 2004 (CP-34) written "warnings," nor her explanations for not reoffering McGinley the elementary art position in the spring of 2004 and for McGinley's non-renewal in the spring of 2005.

I found Branch to be an intelligent and prepared witness. She knew what she was saying. But at best I found her explanations for reassigning McGinley to basic skills in 2004 and non-renewing her in 2005 to be contrived, and at worst, her testimony that Law asked her permission to speak to the media and that she witnessed McGinley harassing teachers without possibly

knowing what was being said as she (Branch) drove by to be misrepresentations of fact and demonstrates her union animus.

Count One

The Academy violated the Act in two ways by issuing CP-22 to McGinley. It interfered with her right to discuss the reasons for her organizing efforts with the media, and it discriminated against her for exercising protected conduct.

Public employees have the right to speak to the media about a variety of employment related situations affecting them, not the least of which is the right to organize under the Act. See Williams v. Civil Service Comm'n, 66 N.J. 152 (1974); Jackson Twp., H.E. No. 88-49, 14 NJPER 293, 304 (¶19109 1988), adopted P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981).

Even if McGinley's media discussion occurred on LEAP time and property, they did not occur in the classroom or during an instructional setting or involve the students. Those discussions occurred in direct proximity to the April 21 election and any teacher or administrator was free to share their feelings about the election and organizing effort with the media. Despite the requirement in CP-9, permission from Branch or Santiago was not needed in the context of the election. The requirement in CP-9 was too broad and over reaching to displace the employees rights in this case. Issuing CP-22 to McGinley, therefore, even if it was only a "warning," had the tendency to intimidate and harass

her for the exercise of a protected right, hence the 5.4a(1) violation.

Assuming for this discussion that Rivera had obtained permission to speak to the media, had Branch issued a similar "warning" to Law for talking to the media it might have supported the Academy's argument that CP-22, though still an a(1) violation, was nothing more than an even handed warning not to violate Academy directives. Branch testified that Law asked for and she gave him permission to speak to the media. She didn't. She knew he opposed LATA and she had no intention to prevent Law and Rivera from expressing their anti-union sentiments to the media. By treating Law and McGinley differently with respect to CP-9 and CP-22, Branch--hence the Academy--were discriminating against McGinley for the exercise of protected conduct in violation of 5.4a(3).

It isn't just coincidental that CP-22 was issued on April 28, the same day the Academy filed its objection to the election and just after the receipt of the nine letters comprising CP-50 which attacked McGinley for "pressuring and harassing" teachers during the election campaign to support the union. There is no evidence that McGinley overstepped her right to campaign for the union. Vigorous campaigning--even if it includes non-threatening pressure on employees to consider supporting the union -- is part of the process. By issuing CP-22 to McGinley and knowing that the CP-50 letters were included in her personnel file, Branch was sending a supporting message to those employees who opposed the

union and at the same time a threat to McGinley for exercising her rights. The letters comprising CP-50 were nothing more than complaints about McGinley's organizing effort which related to her role as a union representative, not to her conduct as a teacher. CP-50 had no place in McGinley's personnel file and by placing those letters in that file and immediately thereafter issuing CP-22, I find the Academy was threatening McGinley's role as a teacher for the actions she engaged in as a union representative. Such threatening action is in direct violation of Black Horse Pike and its progeny. Township of Jackson, P.E.R.C. No. 2006-12, 31 NJPER 281 (¶110 2005); Willingboro Twp. Bd. Ed., P.E.R.C. No. 98-113, 24 NJPER 171 (¶29085 1998), aff'd Willingboro Tp. Bd. Ed. v. Employees' Ass'n of Willingboro Schools, 25 NJPER 322 (¶30138 App. Div. 1999).

Count Two

Prior to June 1, 2004, McGinley had no idea she would be offered a basic skills assignment for 2004-2005 instead of remaining in her elementary art position. She had an exceptional year as the art teacher and had received a satisfactory evaluation from Branch on May 5, 2004. Branch's cursory explanation for McGinley's reassignment made some sense. The Academy needed a basic skills/math teacher at the high school and McGinley had that experience in 2002-2003. But in the context of the facts and knowledge of Branch's hostility towards McGinley's union activity I find Branch's explanation hollow.

Branch knew of McGinley's passion for art, the popularity of her classroom and artwork, her efforts to obtain grants to enhance the program, and her commitment to art and the LEAP mission. She was also keenly aware of her union activity. While I believe there was a need for a basic skills math teacher at the high school, Branch could have moved any elementary teacher and/or advertised for another elementary teacher for that position. She didn't, I find, because McGinley's prior basic skills experience provided Branch with a convenient excuse to reassign her as punishment for having unionized the LEAP teachers.

Branch's conduct met the Bridgewater standards and violated 5.4a(3) of the Act. The Academy's--Branch's--offered business justification for its actions was pretextual. The Academy's argument in its post hearing brief that other than McGinley's personal preference there's no evidence suggesting why basic skills would be a less desirable position is naive at best. The record overwhelmingly demonstrates why an art position would be more desirable here.

Timing is an important factor in assessing motivation. Township of Jackson, 31 NJPER 281, 283; Downe Tp. Bd. Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). The successful election in which McGinley played a pivotal role and which impacted how LEAP would operate in the future occurred on April 21, 2004. The nine letters comprising CP-50 were filed immediately thereafter, the objections to the election and the

threatening warning issued to McGinley were then sent on April 28, 2004. A little more than a month later McGinley, without any warning, was notified of her reassignment during the time the election was being contested.

Much has been made about whether McGinley was certified to teach basic skills/math. She was. But N.J.A.C. 6A:9-9.2(b)2.v. and 6A:9-9.2(b)3iii, apparently gives that authority to all elementary certified teachers. While there may have been some advantage for the Academy to move McGinley to basic skills because they knew she could teach it, that would result in them losing McGinley's artistic talents which had made a significant impact on the elementary school community. Why would the Academy sacrifice such a successful program and the prestige McGinley generated by the grants she obtained when it could have hired or moved another elementary teacher to teach basic skills? The answer is in the facts.

McGinley's year as an art teacher coincided with her organizing effort. Most of the organizing didn't begin, however, until January 2004. By then, McGinley had already captured the elementary school's and Santiago's attention with her art work and she had applied for the Dodge Foundation grant. But by the time the Dodge grant was awarded in mid-April 2004, McGinley was deeply involved in the organizing effort and relationships with Cintron, Rivera, Branch and Santiago had changed. The grant would have been a great personal opportunity for McGinley. While Branch congratulated McGinley for receiving the grant, it is

hardly surprising--given Branch's hostility to the organizing effort -- that she would not renew McGinley in an art position despite having received the grant. The timing was so close it was apparent McGinley was being punished for organizing LATA.

But the punishment did not end there. Branch moved McGinley to the high school--away from the more significant union support and membership she had developed in the elementary school, and away from her coveted art position--because she had successfully organized the teachers, a result Branch had vehemently opposed. Branch could have assigned another elementary teacher or hired another teacher to teach basic skills to keep McGinley in the art room.

The Academy's business justification for reassigning McGinley is based entirely upon Branch's explanation -- her credibility. But she was not a reliable witness and lacked credibility. Consequently, I reject the Academy's offered business justification and find that McGinley was reassigned in retaliation for organizing LATA thereby violating 5.4a(3) of the Act.

Count Four

By the time LATA was certified as the majority representative most elementary teachers had joined the union. In the fall of 2004--after her reassignment--McGinley sought to convince most high school teachers to join LATA. She was issued CP-34 for inappropriate behavior on October 7, 2004. The incident that occurred on September 30, 2004 resulting in an

exchange of e-mails into October does not appear to be the basis for CP-34.

Branch testified CP-34 was issued because McGinley "harassed" teachers--presumably about joining the union--as they entered the building and during their instructional time. If McGinley interrupted teachers during their instructional time to conduct LATA business she was out of line. Barring some emergent reason such conduct would not be protected and a "warning" such as CP-34 might be a protected employer response. Here, however, the issuance of CP-34 relative to McGinley's attempt to sign-up the high school teachers makes the document suspect, and the Academy failed to prove that McGinley interrupted instructional time. No teacher was offered to testify that McGinley interrupted their instructional time. Additionally, since the three teachers Branch named, Carter, Burley and Law had all sent letters to the Academy in April 2004 complaining about McGinley's union activity (CP-50) which were improperly placed in her personnel file, Branch's testimony that they complained to her in the fall of 2004, and her own hostility toward McGinley, make it impossible for me to rely on Branch's testimony on the topic.

Branch's testimony that she personally witnessed McGinley harassing teachers as they came into school is also not reliable. At most, Branch--while driving by--saw McGinley talking to teachers as they entered the school. Branch did not know what was being said and it certainly was not during instructional time. CP-34 could not have been warranted on that basis.

Consequently, I find that CP-34, whether a warning or a reprimand, given the history here, had the tendency to interfere with McGinley's exercise of protected conduct in violation of 5.4a(1).

I am not, however, finding that CP-34 violated 5.4a(2) or 5.4a(4). Although the charge in this case was filed on September 8, 2004, just one month before CP-34 was issued, the Charging Party did not establish that CP-34 was in reaction to the charge nor directly interfered with LATA's administration. The Charging Party sought such a finding based upon inference and timing. I make no such inference.

Although I found that CP-34 had the tendency to interfere with McGinley's protected right to convince teachers to join LATA and that the Academy failed to prove that she interrupted instructional time--I am not convinced that such an instructional intrusion didn't occur. Thus, it was for the Charging Party to conclusively prove--without the benefit of inference--that the charge was even in part the basis for CP-34 or interfered with the administration of the union. It was not proved. Therefore, I recommend the 5.4a(2) and (4) allegations with respect to this count be dismissed.

Count Six

By 2005 McGinley had organized LEAP faculty with an NJEA affiliate, convinced most teachers to join LATA, assisted in filing an unfair practice charge against the Academy and joined the negotiations committee for face to face negotiations with

LEAP administrators. Based upon various comments, documents and testimony attributed to Santiago and Branch which demonstrated their hostility to the NJEA and McGinley for her protected conduct, they could not have been pleased.

In February 2005 when McGinley--as a union representative--intervened on Fuentes behalf Santiago told McGinley she didn't recognize her, the teachers association or the NJEA. Santiago was not offered to rebutt that testimony, Branch couldn't dispute it, and I otherwise found McGinley a credible witness. Thus, I find Santiago said it and because it was not rebutted, I infer therefrom her hostility toward McGinley and the NJEA for organizing the LEAP teachers. Compare, State v. Clawans, 38 N.J. 162, 171 (1962); Wild v. Roman, 91 N.J. Super. 410, 413-416 (App. Div. 1966); International Automated Machines, Inc., 285 NLRB 1122, 129 LRRM 1265 (1987). That statement had the tendency to interfere with McGinley's exercise of protected rights in violation of 5.4a(1).

As the spring of 2005 approached Branch knew that if McGinley was renewed for the 2005-2006 school year she would likely obtain tenure. Thus began a curiously accelerated evaluation scenario.

McGinley received a satisfactory evaluation from Branch based upon a March 15, 2005 observation. On March 17 she received a memorandum from Branch (R-5) accusing her of inappropriate behavior in part due to her attempt to represent Fuentes in February 2005. On April 6 Branch again observed

McGinley and this time gave her an unsatisfactory evaluation. On April 18 Peter Law sent a memorandum to Branch (CP-41) advising her that McGinley was planning on sending an e-mail to the Philadelphia Inquirer and Law's memo was placed in McGinley's personnel file. Branch observed McGinley again on April 25 issuing her another unsatisfactory evaluation followed by the non-renewal notice on May 11, 2005.

McGinley's encounter with Santiago in February 2005 regarding Fuentes, and any intention she may have had in April 2005 to send an e-mail to the Inquirer were protected conduct. Branch's accusation in R-5 that the Fuentes incident was inappropriate behavior, and the placement of CP-41--Law's April memorandum to Branch--into McGinley's file interfered with her protected rights. Those events occurring just before the issuance of the April 6 and April 25 evaluations, respectively, contribute to tainting the reliability of those evaluations.

Branch testified that the two April 2005 unsatisfactory evaluations were the primary basis for McGinley's non-renewal. She provided McGinley with a statement of reasons for her non-renewal on June 20, 2005 (CP-45). In addition to listing several academic/classroom issues in that letter she also said there had been complaints from fellow teachers, parents and students regarding her behavior. I believe that the "complaints" remark predominantly referred to the letters comprising CP-50 which concerned McGinley's April 2004 organizing activity and were improperly placed in her personnel file, the teacher complaints

about McGinley's organizing efforts at the high school in the fall of 2004, and Law's April 18, 2005 memorandum to Branch which was also improperly placed in McGinley's file and advised Branch that McGinley might go to the press. All of those activities were protected activities--engaged in by McGinley in her role as a union representative--and I find Branch used that information against McGinley in her role as a teacher to non-renew her which violated the holding in Black Horse Pike. In that case the Commission explained:

The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity. [7 NJPER at 504]

While I am not suggesting there was no legitimacy to some of Branch's comments in the April evaluations (CP-36 and CP-38) that McGinley needed to improve on certain academic/classroom standards, I am finding that given Branch's overt hostility toward McGinley's union activity and her effort to punish her as a teacher for her actions as a union representative so taint those evaluations as to render their veracity unreliable. I do not believe CP-36 and CP-38 would have received an unsatisfactory grade but for McGinley's consistent exercise of protected conduct.

McGinley had taught basic skills/math in 2002-2003, was not unsatisfactorily evaluated, and Branch apparently had enough confidence in her ability to teach that subject she reassigned her to that position for 2004-2005. McGinley received a relatively good -- satisfactory-evaluation in March 2005, yet just weeks later received two unsatisfactory evaluations in a subject she had nearly two years of experience teaching. Even if McGinley was not an outstanding teacher in basic skills/math and had room for improvement, that does not justify the back to back evaluations and lack of adequate time to demonstrate improvement which Branch seemed to strategically create to justify a basis for non-renewal. Nor did any weakness McGinley had in basic skills/math justify her non-renewal when both LEAP art positions, an area in which she previously excelled, were available for 2005-2006.

The timing, Branch's history of hostility and the combination of other evidence make it impossible for me to accept the Academy's--Branch's--explanation for McGinley's non-renewal. I am convinced it was because she engaged in protected conduct, Branch and Santiago were hostile to that conduct and they were determined not to allow her to receive tenure. The Academy's actions violated 5.4a(1) and (3) of the Act.

It would be easy for me to include or add on a 5.4a(4) violation to this Count. It's not a stretch to infer that given Branch's and Santiago's hostility to protected conduct they would be hostile to LATA's and McGinley's filing and pursuing this

charge. But my goal is not to pile on. It is to carry out my responsibility to find and interpret the facts, make appropriate inferences and in this case recommend an appropriate remedy.

I believe Branch's hostility toward McGinley was put in motion by McGinley's organizing effort and merely exacerbated by her continued efforts on LATA's behalf. While I certainly expect that Branch and Santiago were angered by the charge, there is no independent evidence of hostility on their part to the filing or prosecution of this case. Consequently, I do not recommend a 5.4a(4) violation, nor -- for similar reasons -- a 5.4a(2) violation.

Remedy

The Academy had filed--and renewed in its post-hearing brief--a motion to strike the Charging Party's requested relief in Count Six which sought--in part--McGinley's reinstatement in an art or substantially equivalent teaching position retroactive to the commencement of the 2005-2006 school year. Recognizing in this case that if McGinley was reinstated retroactive to the 2005-2006 school year she would likely obtain tenure, the theory behind the motion was that only the Commissioner of Education and not the Commission had the authority to return a tenure eligible former teaching staff member to work in a public school. Essentially, the Academy is arguing that by considering whether to implement the requested remedy the Commission would unlawfully be putting itself in the position of determining whether a public school teacher deserved tenure. The Academy further argued that

the Charging Party should have raised this issue to the Commissioner of Education and having failed to do so cannot obtain the requested relief from the Commission.

The Charging Party opposed the motion. It argued that pursuant to N.J.S.A. 34:13A-5.4c, the Commission had the "exclusive power" to prevent anyone from engaging in any unfair practice listed in 5.4a and b. It noted that the Supreme Court in Galloway Twp. Bd. Ed. v. Galloway Twp. Assoc. of Ed. Secretaries, 78 N.J. 1, 10 (1978) ruled in favor of such Commission authority, and it cited supporting examples.

The appropriate remedy in a non-renewal or termination case that violates the Act is reinstatement with back pay. In this case, in addition to remedying Counts One, Two and Four, the remedy for Count Six is to require the Academy to offer reinstatement to McGinley as if--for remedial purposes such as seniority, pension, pay grade and consecutive days worked leading to tenure -- there had been no break in service. That does not mean, however, that the time between McGinley's non-renewal in August 2005 and any reinstatement in 2008 will be credited toward the three years plus one day needed for tenure. I believe McGinley must work for the Academy the approximately three remaining months needed for tenure.

The reinstatement, therefore, is somewhat of a legal fiction. Had McGinley been renewed by the Academy in an art or basic skills position for the 2005-2006 school year, she would, by my calculation, have had to work into December 2005 to

complete her three full years and obtain tenure. Regardless of the Academy's illegal conduct, she must still work the remaining three months as an Academy employee to obtain tenure. Thus, assuming McGinley accepts an offer for reinstatement, her return to the Academy must be as if there had been no break in service (as if she were returning in the fall of 2005) and it is part of my recommendation that she would need to work the next approximately three months to obtain tenure. The actual number of days needed to be worked could be obtained through the State Department of Education.

The decision in Logan Township Bd. Ed., P.E.R.C. No. 82-23, 8 NJPER 546 (¶13251 1982), aff'd NJPER Supp.2d 138 (¶119 App. Div. 1983), is on point with this case and provides the basis for denying the Academy's motion. In Logan, the union's vice-president was non-renewed ostensibly for educational reasons. The hearing examiner and Commission found that the vice-president's protected conduct motivated the non-renewal and the Commission ordered her reinstatement. The board of education in that case had objected to any determination on whether the vice-president was entitled to tenure.

In Logan, the affected employee vice-president had three months left to complete her tenure requirement. In ordering reinstatement the Commission addressed the board's tenure concern as follows:

She has not completed three years of continuous service, and will not be eligible for tenure until she has completed

approximately three more months of service. Therefore, her reinstatement pursuant to this order will not present the issue of her tenure status until she has completed three months of continuous service. This period of time will give the Board an opportunity to evaluate her present performance and to reevaluate her past performance free of the taint of unlawful discrimination based on her Association activities. [8 NJPER at 548].

That same statement must apply here. If McGinley accepts reinstatement she must work at least three months before acquiring tenure during which time the Academy will have the opportunity to evaluate her teaching performance. Based upon my reinstatement recommendation discussed above, and the Commission's holding in Logan, the Academy's motion to strike is denied.

The Academy must remedy Counts One and Four by withdrawing the "warnings" -- CP-22 and CP-34 -- as well as the CP-50 letters, CP-41 and any other documents unrelated to McGinley's teaching performance from her personnel file. It must also refrain from imposing the media directive, CP-9, to the exercise of protected conduct. It must remedy Count Two by offering reinstatement to McGinley into an art position, preferably in the elementary school. Because this remedy might mean the displacement or non-renewal of a current teacher I am not suggesting it must be implemented during the 2007-2008 school year. Rather, if the Commission adopts this decision I recommend the reinstatement be required to be implemented no later than the beginning of the 2008-2009 academic year.

Count Six will be remedied in part by the reinstatement remedy for Count Two. But the Academy must also withdraw CP-36 and CP-38--the tainted April 2005 evaluations--and CP-42 and CP-45 from McGinley's file, reimburse McGinley with back pay and interest at the rate provided in the rules of Court minus mitigation from the time of termination in August 2005 to the time of reinstatement. The back pay must be calculated based upon the salary McGinley would have received at the Academy for 2005-2006, 2006-2007 and 2007-2008 according to the rates provided for those years as set forth in LATA's collective negotiations agreement or any memorandum of agreement for those years. McGinley must also be made whole for any other salary, benefits and seniority she would have had or accrued had she been continuously employed by the Academy. For example, if LATA and the Academy negotiated a retroactive rate increase for teachers employed in 2004 - 2005 and continuously employed, McGinley should receive that retroactive increase.

If McGinley chooses to reject the offer for reinstatement all other elements of the remedy must still be implemented.

Accordingly, based upon the above findings and analysis, I make the following:

CONCLUSIONS OF LAW

1. The Academy violated 5.4a(1) of the Act by restricting McGinley's access to the media, placing letters of warning/reprimand in McGinley's personnel file for engaging in protected conduct, and by placing additional letters and e-mails

in her file that concerned her activities as a union representative and not her teaching performance.

2. The Academy violated 5.4a(3) and derivatively a(1) of the Act by failing to renew McGinley as an art teacher for the 2004-2005 academic year, by issuing her unsatisfactory evaluations and by non-renewing her for the 2005-2006 year because of her exercise of protected conduct.

RECOMMENDATION

I recommend the Commission ORDER:

A. That the Academy cease and desist from:

1. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to renew McGinley to an art position for 2004-2005, by issuing her unsatisfactory evaluations in April 2005, and by non-renewing her for the 2005-2006 year in retaliation for her exercise of protected conduct.

2. Engaging in conduct which has the tendency to interfere with, restrain or coerce its employees from engaging in conduct protected by the Act, particularly by imposing a media contact restriction regarding protected activities, placing letters of warning/reprimand in McGinley's personnel file in April and October 2004, and by placing additional letters and e-mails in her file complaining of her actions in her role as a union representative all because she exercised rights protected by the Act.

3. Discriminating in regard to the tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to offer McGinley an art position for the 2004-2005 academic year, issuing two unsatisfactory evaluations to McGinley in April 2005, and by non-renewing her for the 2005-2006 year because of her exercise of protected conduct.

B. That the Academy take the following action:

1. Offer Tammy McGinley reinstatement to an art position by the beginning of the 2008-2009 academic year with all rights (excluding tenure), salary, benefits, seniority, longevity, etc., as if there had been no break in her service for the Academy.

2. Pay Tammy McGinley the difference between what she earned since August 2005 and her return to the Academy -- or rejection of the offer to return -- less mitigation -- and what she would have earned as an Academy teacher that entire time compensated at the rate agreed upon in the collective negotiations agreement or memorandum of agreement between LATA and the Academy plus interest at the rate set by the rules of Court.

3. Remove the two unsatisfactory April 2005 evaluations, the notice of non-renewal and the statement of reasons for the non-renewal, and the April and October 2004 warnings/reprimands from McGinley's personnel file and expunge them from all Board records.

4. Remove all other letters, memoranda and e-mails from McGinley's personnel file which predominantly concern her conduct or actions as a union representative and not her teaching performance.

5. Refrain from imposing absolute media contact restrictions on McGinley and others regarding their exercise of protected conduct.

6. Agree not to interfere with or discriminate against Tammy McGinley for the exercise of rights guaranteed her by the Act if she accepts the offer of reemployment.

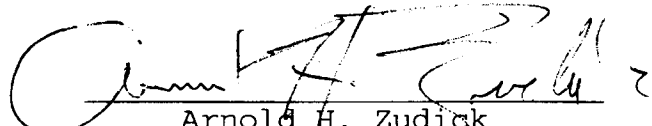
7. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

C. That the 5.4a(2) and (4) allegations be dismissed.

D. That Counts Three and Five of the Charge which include the 5.4a(5) allegation be dismissed unless the Charging Party can

establish before the Commission that those Counts are still viable.



Arnold H. Zudick
Hearing Examiner

DATED: December 19, 2007
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 December 31, 2007.



NOTICE TO EMPLOYEES



PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to renew McGinley to an art position for 2004-2005, by issuing her unsatisfactory evaluations in April 2005, and by non-renewing her for the 2005-2006 year in retaliation for her exercise of protected conduct.

WE WILL NOT engage in conduct which has the tendency to interfere with, restrain or coerce its employees from engaging in conduct protected by the Act, particularly by imposing a media contact restriction regarding protected activities, placing letters of warning/reprimand in McGinley's personnel file in April and October 2004, and by placing additional letters and e-mails in her file complaining of her actions in her role as a union representative all because she exercised rights protected by the Act.

WE WILL NOT discriminate in regard to the tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to offer McGinley an art position for the 2004-2005 academic year, issuing two unsatisfactory evaluations to McGinley in April 2005, and by non-renewing her for the 2005-2006 year because of her exercise of protected conduct.

WE WILL offer Tammy McGinley reinstatement to an art position by the beginning of the 2008-2009 academic year with all rights (excluding tenure), salary, benefits, seniority, longevity, etc., as if there had been no break in her service for the Academy.

WE WILL pay Tammy McGinley the difference between what she earned since August 2005 and her return to the Academy -- or rejection of the offer to return -- less mitigation -- and what she would have earned as an Academy teacher that entire time compensated at the rate agreed upon in the collective negotiations agreement or memorandum of agreement between LATA and the Academy plus interest at the rate set by the rules of Court.

WE WILL remove the two unsatisfactory April 2005 evaluations, the notice of non-renewal and the statement of reasons for the non-renewal, and the April and October 2004 warnings/reprimands from McGinley's personnel file and expunge them from all Board records.

WE WILL remove all other letters, memoranda and e-mails from McGinley's personnel file which predominantly concern her conduct or actions as a union representative and not her teaching performance.

WE WILL refrain from imposing absolute media contact restrictions on McGinley and others regarding their exercise of protected conduct.

WE WILL agree not to interfere with or discriminate against Tammy McGinley for the exercise of rights guaranteed her by the Act if she accepts the offer of reemployment.

Docket No. CO-2005-060

LEAP Academy University Charter School
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372