

H.E. NO. 96-6

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

In the Matter of

MANALAPAN-ENGLISHTOWN  
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-94-171

MANALAPAN-ENGLISHTOWN  
EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Manalapan-Englishtown Board of Education did not transfer certain teachers who were Association members and activists in retaliation for exercising their rights protected by the New Jersey Employer-Employee Relations Act. The Hearing Examiner found that the Association failed to establish that the Board was hostile to the employees participation in Association activity.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the 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.

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Appearances:

For the Respondent, Cassetta, Taylor & Whalen  
(Raymond A. Cassetta, consultant)

For the Charging Party, Wills, O'Neill & Mellk  
(Arnold M. Mellk, of counsel)

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

On December 3, 1993, the Manalapan-Englishtown Education Association ("Association" or "Charging Party") filed an Unfair Practice Charge (C-3)<sup>1/</sup> with the Public Employment Relations Commission ("Commission") against the Manalapan-Englishtown Board of Education ("Board" or "Respondent"). The Association alleges that

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<sup>1/</sup> Exhibits referenced in the record as "C" refer to Commission exhibits, those referenced as "CP" refer to Charging Party Exhibits and those referenced as "R" refer to Respondent exhibits. Transcript citations 1T refers to the transcript taken on February 14, 1995 and 2T refers to the transcript taken on February 16, 1995.

the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically sections 5.4(a)(1) and (3),<sup>2/</sup> by transferring certain teachers represented by the Association in retaliation for exercising their right to participate in activity protected by the Act.

On April 21, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On February 10, 1995, in reliance upon its statement of position, the Respondent filed its answer (C-2). Hearings were conducted on February 14 and 16, 1995 at the Commission's offices in Trenton, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing, the parties waived oral argument and a briefing schedule was established. On April 20, 1995, the Charging Party filed its brief. Respondent did not file a brief.

Upon the entire record, I make the following:

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<sup>2/</sup> These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

FINDINGS OF FACT

1. The parties stipulated that the Board is a public employer and the Association is a public employee representative within the meaning of the Act (1T8-1T9).

2. In 1988, the Board began discussing plans to build a new middle school for grades 7 and 8 (1T63). The Manalapan-Englishtown Middle School ("MEMS") opened in September, 1992 (1T66). When MEMS opened, the Board simultaneously initiated a fundamental change in the teaching approach from that which it previously employed. A departmentalized teaching model was used at the Pine Brook Junior High School, the school which previously housed the 7th and 8th grades in the district. At MEMS, an interdisciplinary team teaching approach employing learning communities was adopted (1T85). When MEMS opened, the district went from five to six school buildings and the Board was required to hire many new teachers (1T86). Significant district-wide changes occurred. The Milford Brook School was converted to a kindergarten through 3rd grade school (1T85). The Board initiated a whole language program and sought new hires who had training in that area (1T86). The Board was concerned with maintaining a balance within each school of newly-hired and veteran teachers (1T88). As a result, significant numbers of teacher transfers occurred at the beginning of the 1992-1993 school year.

3. Early in the planning process, in an attempt to limit the disruptive effect of moving from the Pine Brook Junior High to MEMS, the Board decided that it would move intact, teachers assigned

to the core subject areas of reading, English, math, social studies and special education (1T87). Thus, only teachers in the non-core subjects such as physical education, music, nursing and basic skills would be transferred from Pine Brook to schools other than MEMS in order to achieve some balance between newly hired and veteran teachers (1T88).

4. Before MEMS opened in September, 1992, Margaret Schroeder taught music at the Pine Brook Junior High School (1T66). Two music teachers were assigned to Pine Brook (1T90-1T91). In September, 1992, Schroeder was transferred to Lafayette Mills School rather than to MEMS (1T65; 1T89-1T90). The music program at Lafayette Mills needed improvement (1T90). Lafayette Mills School is smaller than Pine Brook, thus, only one teacher is assigned to its music program. Since Schroeder was considered a strong, capable music teacher, she was transferred to Lafayette Mills to handle the music program herself, and the music teacher assigned to Lafayette Mills was transferred to Pine Brook to work in tandem with the other music teacher assigned there (1T90-1T91).

5. While assigned to Pine Brook School, Schroeder served as senior building representative for the Association (1T66). In her capacity as senior building representative, Schroeder was regularly at odds with building principal Gail Petricek (1T66-1T67). Petricek became assistant principal of Pine Brook in November, 1991, and took over as principal in January or February, 1992 (1T71-1T72). If Schroeder were transferred to MEMS with the

other teachers, Petricek thought she would have difficulty running the school (1T66-1T67). Superintendent Joseph Scozzari wanted Petricek to succeed and thought that Schroeder was interfering with Petricek's performance (1T75).

6. Alan Resnick was a member of the Board between April, 1989 and August, 1994 (1T62). During his tenure on the Board, Resnick served on the finance, facilities and personnel subcommittees (1T63). He served as Board president between April, 1992 and March, 1993 (1T63). In February, 1993, Petricek's reappointment to the principal position for the next school year came before the Board. Scozzari supported Petricek's continuation; Resnick was against it (1T72-1T73; 2T55). While Petricek never told Resnick that she was having problems with Schroeder, Schroeder and other teachers told him that teachers, parents and children were having problems with Petricek (1T79-1T80). Resnick's friend or neighbor told him about an incident involving a child and Petricek (2T56). On the basis of that incident, Resnick decided that the needs of the child were not resolved because of a lack of communication between the principal and others (1T80; 2T56). In an early vote, the Board decided not to rehire Petricek for the succeeding school year. However, after the Board election in April, 1993, the composition of the Board changed, and the new Board voted to retain Petricek for the next school year (1T72-1T73; 1T80-1T81). The discussions by the Board pertaining to Petricek's retention were occasionally heated and at times Resnick and Scozzari yelled at each

other (1T73). Resnick became upset after the Board voted to retain Petricek (2T56).

7. During subcommittee meetings, Resnick and Scozzari would discuss various issues (1T69). In or about March, 1992, before MEMS was completed, he and Scozzari were attending a facilities subcommittee meeting. Before the meeting began, Resnick and Scozzari talked about personnel matters. Resnick testified that Scozzari said, "...when the new middle school opens, we're going to shake up the union" (1T64). Scozzari testified that he never made that comment to Resnick (2T58-2T59).

8. Lucille Benedetti has been a Board member for nine years, has served two or three times as vice president and twice as president (2T7). She was a Board member in calendar years 1992 and 1993, served on various subcommittees including the personnel subcommittee with Resnick (2T7-2T8). Benedetti never heard Scozzari threaten to shake up the Association, nor did she ever hear Scozzari say that he planned to take any retaliatory action against the Association (2T8).

9. Michelle Gottesman has been a member of the Board for six years and has served as vice president four times (2T15). She has never heard Scozzari say that he is going to "shake up" the Association, nor has she heard him say that he planned to take retaliatory action against the Association.

10. Thomas Dufner has been a member of the Board since April 1988 (2T52). In April 1992, Dufner served on the facilities

subcommittee, among others, and attended the vast majority of meetings (2T53-2T54). While he has not overheard every conversation between Resnick and Scozzari, Dufner never heard Scozzari threaten to do anything to harm or retaliate against the Association (2T54, 2T57).

11. I find that the record contains insufficient evidence to conclude whether or not Scozzari said he would "shake up" the Association. Resnick flatly asserted that Scozzari made the comment, and Scozzari, with equal conviction, denied it. The fact that none of the other Board members heard Scozzari make such a statement does not prove that he did not; they were not privy to all of the conversations between Resnick and Scozzari. However, Resnick was the only person who has ever heard Scozzari make negative or retaliatory comments regarding the Association. Resnick was at odds with Scozzari over the reappointment of Petricek. Consequently, the Association has failed to carry its burden of persuasion, so I make no finding regarding whether Scozzari said that he would "shake up" the Association, and I draw no inferences concerning that alleged statement.

12. On March 18, 1993, an ice storm occurred leaving parking lots and sidewalks slippery when teachers and students arrived at the beginning of the school day (1T19; 1T45). Parent/teacher conferences were scheduled for later that day, consequently, it was previously arranged for students to be released after four hours (1T20-1T21). In the past, if the superintendent



determined that the weather was sufficiently inclement to warrant the closing of schools after the arrival of staff and students, the superintendent would then direct the cancellation of school after four hours and staff and students would go home (1T19-1T20). The parties collective agreement contains a provision relating to inclement weather and provides for staff to leave after students are dismissed (1T21).

13. On March 18, 1993, Association president Joseph Murphy contacted Scozzari and urged him to postpone the parent/teacher conferences and release the staff in light of the inclement weather. At approximately 10:30 a.m., Murphy spoke to Scozzari. Scozzari told him that he found the outdoor conditions to be poor and conferred with the building principals to confirm that poor conditions existed at the various schools. Scozzari told Murphy that the person who was contracted to clean the ice failed to appear (CP-1). Murphy told Scozzari that the teachers were afraid to return to schools for the scheduled conferences. Scozzari said he intended to send the students home and cancel the conferences (1T21-1T22). Although the students were released and the parent/teacher conferences were cancelled, building principals told staff that they had to remain for the balance of the regular work day (1T22; 1T45). Although Scozzari would not accept Murphy's phone calls, Principal Petricek was able to reach Scozzari and confirmed that teaching staff were to remain at work (1T23-1T24). Some teachers left school without permission (1T27; 1T46). The teachers'

actions prompted Scozzari to issue two memoranda. In the memorandum issued on March 19, 1993 (CP-1), Scozzari briefly reviewed the preceding day's events and stated that he was responsible and authorized to make the operational decisions affecting the district. He advised the staff that his decision to cancel conferences and retain staff for the full work day was based upon the information he had available to him at that time, and his observation that conditions were improving. In the memorandum issued to Milford Brook School staff on March 29, 1993 (CP-2), Scozzari responded to a prior letter submitted to him by Milford Brook teachers (not in evidence) and reiterated that the determination of the work day, under the circumstance of the ice storm, was an administrative decision. Scozzari pointed out that there were members of the community that hold educators in low regard because of a perception that they are always "off". In part, his decision not to release teachers early was to avoid lending support to that view. The last paragraph of the teachers' letter referenced the issue of "respect." In his memorandum, Scozzari responded as follows:

I agree that we want to encourage mutual respect between administration and teachers, and teacher/teacher and parent/teacher. We are all in the same profession with the same goal. The next statement will be controversial but it needs to be said candidly. I do not believe many of you appreciate what some of our newer teachers confide to administrators over and over. It is usually done in secrecy for obvious reasons. You have a right to belong to a labor organization because you need labor protection. I understand and appreciate the necessity in our society.

However, newer teachers, without solicitation, tell administrators that they fear the Association much more than administrators. Fear as a weapon against people by individuals who profess to represent them is really a pathetic state of affairs. I suggest that just as the administration critiques its own actions that Milford Brook professionals examine the role of the MEEA in their professional lives. I believe that holding employees to fair work requirement standards is not a respect issue at all. [Emphasis in original.]

14. Teachers who left before the end of the workday were docked pay and issued letters of reprimand (1T46). The Association filed grievances contesting the superintendent's actions (1T24; 1T46). Murphy and Kenneth Weber, another Association officer, were among those who filed grievances (1T55). The grievances proceeded to arbitration where the arbitrator determined that the ice storm constituted an inclement weather day under the collective agreement and that the staff should have been afforded early dismissal (1T28; 1T48). The arbitrator ordered that one hour of compensatory time be returned to any teacher who had been docked an hour's pay and that those who did not leave early should be credited with one hour of compensatory time off (1T48). The arbitrator further held that the letters of reprimand given to teachers who left before the end of the regular work day should be revised and remain in the employees' files for one year. Thereafter, the letter of reprimand must be removed if no other disciplinary action had been taken against the employee during that year (1T48).

15. The district-wide reorganization did not end when MEMS opened. The administration continued to implement its overall philosophy that (1) each school should contain a mix of experienced and "rookie" teachers and (2) MEMS should develop a working relationship in a collegial team setting. New teachers would possess whole language experience (1T97). To implement its philosophy at MEMS, the administration sought to bring in one new teacher in each of the core subject areas (1T97). Since vacancies did not exist in all core areas, the administration recognized that transfers would have to occur. In identifying the teacher to be transferred, the administration looked at the teacher's prior experience, particularly within the district, and the teaching certification held by that person (1T97). The administration intended to effectuate the transfers for school year 1993-1994. Numerous other teachers without regard to their Association activity were transferred into and out of learning communities at MEMS and throughout the district for school year 1993-1994 (1T99-1T109).

16. Beginning in January, 1993, the administration met bi-weekly to discuss teaching staff changes at MEMS and the other schools (1T94-1T95). Attending these meetings were the six school principals, four assistant principals, four supervisors, the pupil personnel director, two assistant superintendents and Superintendent Scozzari (1T96). The superintendent advised this committee of administrators of the projected student enrollment for the following school year, staff retirements and leaves of absence. A database

showing all vacancies and position reductions was distributed to the committee members. As the committee of administrators focused on a particular academic area, e.g., technology and science, the members would discuss the means by which the district's reorganization objectives would best be accomplished. A determination would be made as to whether a teacher should be transferred, or whether a new teacher should be hired (1T96; 2T23). The decision regarding whether to hire or transfer was ultimately arrived at by the committee members reaching a consensus (2T27; 2T32; 2T36; 2T44). Issues discussed and considered during the administrators' meetings included the teacher's experience with the grade level, training in team teaching concepts and the teacher's certification (1T109). After a consensus on all of the personnel actions required for the next school year was reached among the administrators, the meetings ended and the proposed personnel actions were sent to the Board for final action (1T110).

17. During one of the administrators meetings concerning personnel actions to become effective during the 1993-1994 school year, then Association President Joseph Murphy's name was raised as a transfer candidate. The issue of an Association reaction to Murphy's transfer was discussed. Scozzari told the administrators that they should be concerned only with what was best for the school district and not with an individual's degree of involvement with the Association. Scozzari told the administrators that the decision to transfer a teacher would not be based on Association involvement

(2T24-2T25). Murphy's name was contained on the list of potential transfers presented to the Board. Upon review of the proposed transfer list, the Board became concerned that some of the transfers, including Murphy's, were "politically" motivated (1T68-1T69; 1T71; 2T18). "Political" was understood to relate to the teachers' involvement in Association activity. The Board's personnel subcommittee voted against transferring Murphy, because it was concerned that his transfer would be misinterpreted as union related. However, since the administration still sought to transfer one teacher from each department, including Murphy's department, the administration suggested that Kenneth Weber be transferred instead (1T70; 1T98-1T99; 2T18; 2T20-2T21).<sup>3/</sup> The personnel subcommittee and ultimately the Board voted to approve Weber's transfer from MEMS to Pine Brook (1T52; 1T71). Although Weber's transfer was not popular with the community, it was not the first unpopular transfer which the Board had approved. In the past, the Board voted against some of the administrations recommended transfers and some were approved (1T82-1T83).

18. Three teachers in the social studies department at MEMS (Murphy, Weber and Briggs) possessed teaching certifications which would allow them to teach at the K-6 grade level. Only Murphy

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<sup>3/</sup> Kenneth Weber served as Association treasurer during school year 1992-1993 (1T44-1T45). In May, 1993, Weber became vice president (1T45). He has been a member of the Association's negotiations team for 10-12 years, the last 4 contracts (1T49).

and Weber had prior K-6 grade teaching experience with the district. Although Bernstein participated in hiring Briggs and was aware that her background included teaching at the elementary school level in another district, she (Briggs) was not chosen for transfer, because she had not taught elementary school in the Manalapan-Englishtown District, and because she had background in particular areas which the administration sought for teachers assigned to MEMS (1T99; 1T118-1T119).

19. Marlene Franklin was a resource room, special education teacher at the Pine Brook School during the 1992-1993 school year (1T31). She was advised by the school principal that she would be transferred to MEMS beginning with school year 1993-1994. Franklin spoke to Bernstein and her immediate supervisor Susan Vonsover, Director of Pupil Personnel Services, who was also responsible for special education (1T32). Franklin told Bernstein and Vonsover that she had been transferred before and that she held an after school position which she would lose if the transfer were implemented (1T33). Franklin also told them that she was a senior building representative for the Association and if transferred, she would have to also relinquish that position. Bernstein told her that she was unaware that she held either position (1T33). Vonsover also did not know that Franklin was a senior building representative for the Association (2T47).

20. Linda Kligman taught a neurologically impaired class at the Clark Mills School (2T44). Clark Mills housed grades K-3. In

May or June, 1993, it was determined that the neurologically impaired class would be discontinued (2T45). Early in school year 1992-1993, Vonsover and Kligman had a discussion concerning a change in Kligman's teaching position, and Kligman indicated an interest in moving out of a self-contained class and into a resource center (2T46). Vonsover believed that since the neurologically impaired class was to be discontinued, the best course of action would be to move Kligman from her K-3 grade setting into a 4-6 grade resource center. This way, Vonsover could take advantage of Kligman's reading background and move Franklin from a 4-6 grade setting into MEMS. Vonsover did not think that moving Kligman from a K-3 grade level setting to a 7th & 8th grade school was a good idea because a move from the early elementary grades to middle school represented a more radical change than a move to the upper elementary grades (2T46-2T47). Bernstein agreed (1T105-1T106). Thus, Kligman was transferred into Franklin's position and Franklin was transferred to MEMS (1T105-1T106; 2T47).

21. Maxine Saum taught 4th grade at the Lafayette Mills School during school year 1992-1993 (1T34). In or about June 1993, Saum was told that she would be transferred to the Pine Brook School. Prior to this transfer, she had been transferred seven or eight times (1T38). While at Lafayette Mills, Saum held two Association offices: Instructional Counsel Chairperson and Assistant Grievance Chairperson (1T36). There is no evidence showing that the administration was aware of the Association offices



Saum held. Saum was transferred from Lafayette Mills to Pine Brook because a 4th grade class was moved for the next school year from Lafayette Mills School to Pine Brook (1T106).

22. During school year 1992-1993, Jerianne Sarubbi taught 7th and 8th grade special education at MEMS (1T40). In June, 1993, Sarubbi was told by Principal Petricek that she would be transferred to the Lafayette Mills School (1T41-1T42). Sarubbi served as an Association representative (1T40). As Association representative, she assisted teachers in drafting rebuttal statements to observations and told teachers about discussions which took place during Association meetings. If teachers had complaints or messages to convey to Association leadership, they would contact Sarubbi and she would raise them during Association meetings (1T41). Sarubbi had been transferred approximately seven times before her September 1993 transfer from MEMS to Lafayette Mills (1T42). One prior transfer, and the September 1993 transfer out of MEMS were involuntary (1T42-1T43). When Sarubbi was transferred she said to Petricek, "I hope it's [the transfer] not for vindictive reasons and she [Petricek] said what would ever make you think that..." (1T42).

23. Director of Pupil Personnel Services Vonsover was Sarubbi's supervisor during the Spring of 1993 (2T44; 2T47). Sarubbi was one of four self-contained special education teachers under Vonsover's supervision (1T47). Two of the special education teachers, Piupiass and Wilfong had more experience teaching 7th and 8th grade than Sarubbi (2T48). The other special education teacher,

Reinking, was not renewed for school year 1993-1994 (2T48). Vonsover knew that Sarubbi had elementary special education experience and considered her a strong, creative teacher. Vonsover wanted to infuse Sarubbi's teaching ability into the 4-6 grade neurologically impaired class, and, therefore, selected Sarubbi for transfer (2T48). Sarubbi told Vonsover that she was being transferred because Petricek wanted her out of MEMS. Vonsover agreed but told Sarubbi there was nothing she could do about it (2T66). At the time of the transfer, Vonsover was not aware that Sarubbi was an Association representative (2T48).

24. Prior to the 1993-1994 school year, Susan Maraza taught an academically talented class in the Pine Brook School (1T103). Previously, Maraza expressed an interest in transferring to the middle school (1T104). The administration wanted Maraza's experience and expertise as a teacher of academically talented students in MEMS because those students, who were placed in a self-contained class in Pine Brook, would be included in a heterogenous class setting in MEMS. Also, while at Pine Brook, Maraza worked in a collaborative environment with other teachers of academically talented students (1T104). Maraza was transferred from Pine Brook to MEMS for the 1993-1994 school year (1T103). There is no evidence that Maraza was involved in Association activity.

25. Ruth Sondik, a basic skills reading teacher, was transferred from Taylor Mills School to Milford Brook School for school year 1993-1994 (1T107-1T108). Sondik applied for and was

given the position of reading recovery teacher at Milford Brook School. Sondik's transfer was voluntary (1T108). There is no evidence that Sondik was involved in Association activity.

26. On September 16, 1992, Association Executive Secretary Sue Kelton sent an Association Representative's List to Barbara Turner, Bernstein's secretary (1T58-1T59; CP-3). Kelton prepared the list in response to Turner's request. Bernstein instructed Turner to obtain a listing of Association representatives so Turner would be able to know all of the representatives to whom she should send copies of letters and memoranda (1T60-1T61; 1T110-1T111). A listing similar to CP-3 has been prepared for Bernstein's office for the last three or four years (1T59-1T60). Bernstein did not have possession of the list, nor was she familiar with its contents (1T111). Bernstein did not know who all of the Association's officers and representatives were (1T11).

27. In school year 1991-1992, administrators began to receive training in middle school philosophy (1T119-1T120). The Board decided to adopt a middle school "learning community" concept. This concept provided for a commingling of teachers from various academic disciplines to create a single cohesive unit. MEMS contained eight learning communities each consisting of approximately 120 students (2T34-2T35). The learning community concept is designed to allow teachers and students to know each other better and create a more intimate learning situation. Learning communities enhanced relationships between academic

disciplines, fostered quicker resolution of problems, and allowed for more fluidity in the various academic areas (2T34).

28. During school year 1991-1992, George White was retained as a consultant to assist the Board in opening MEMS and to ease the transition into the learning community paradigm (2T30; 2T35). In late fall 1991, a steering committee of administrators and teaching staff was established to make recommendations concerning the transition from Pine Brook Junior High School to MEMS (2T67; 2T69). White guided the committee in the study of the learning community's approach to a middle school instructional setting (2T67). Murphy, Palmer and Assistant Superintendent of Curriculum Weiner were on the committee (2T69). Concerned with the issue of involuntary teacher transfers, during a steering committee meeting, Murphy asked White to address the transfer issue. White indicated that learning communities should be left intact for at least three years, because the move to a new building, in itself, was a major event (2T68-2T69).

29. During the winter of 1993, administrators and teachers including Weiner and Weber attended a conference at Lehigh University (1T51; 2T38; 2T71-2T72). Nancy Doda was a keynote speaker. During her address, Doda advanced the position that learning communities should remain intact for a minimum of three years, because it takes that long to learn to understand the dynamics of the community and work out problems arising from its formation (2T72). During the 1993-94 school year, the Board

retained Doda as a consultant (2T37). On December 12, 1993, Doda issued a memorandum summarizing her observations and recommendations concerning the learning community program at MEMS (CP-7). The memorandum set forth six areas in which she made specific recommendations. With regard to the use of learning community team planning time, Doda stated, "Certainly, maintaining the same communities over a number of years enables communities to evolve in their competence as operating units. I do hope that communities will remain stable for the next several years" (CP-7). Doda also recommended the establishment of a program improvement counsel (2T76). Not all of Doda's recommendations were implemented (2T76-2T80).

30. The Board never adopted as part of its middle school learning community philosophy the idea that learning community teaching staff would continue intact for a period of at least three years (1T120; 2T35).

#### ANALYSIS

This case requires that a determination be made regarding whether the Board illegally transferred the teachers at issue here in retaliation for their protected activity. Such transfers involve exercises of the Board's managerial prerogative, Ridgefield Park Ed. Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978) and are only subject to review to determine whether the transfer decision

was illegally motivated. Middletown Tp. Bd. of Ed., P.E.R.C. No. 86-142, 12 NJPER 521 (¶17194 1986), aff'd NJPER Supp.2d 175 (¶155 App. Div. 1987). See also, Dennis Twp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985)

In Bridgewater Tp. v. Bridgewater Public Works Association, 95 N.J. 235 (1984), the New Jersey Supreme Court established the test used in determining whether an employer's actions violate subsection (a)(3) of the Act; motive is a necessary element. Under Bridgewater, no violation will be found unless the charging party has proved a prima facie case by a preponderance of the evidence on the entire record, sufficient to support the inference 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 (1) that the employee engaged in protected activity, (2) the employer knew of this activity, and (3) the employer was hostile toward the exercise of the protected activity. Id. at 242, 246.

If a Charging Party satisfies those tests, the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. If the employer did not present any evidence of a motive not illegal under the Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. However, sometimes the record demonstrates that an employer's adverse personnel action taken

against an employee was motivated by both lawful and unlawful reasons. 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/or the Commission to resolve.

In its charge, the Association asserts that certain teachers were involuntarily transferred because of their Association activity and membership. The Association argues that the transfers constituted a punitive action against particular Association members. The unfair practice charge identifies specific individuals who were transferred for allegedly improper reasons. In part, the Association contends in its unfair practice charge that Linda Kligman, Ruth Sondik and Suzanne Maraza were involuntarily transferred because of their union activity and membership. But the Association failed to introduce any evidence regarding those employees. The Association did not call those employees to testify, and there is no evidence showing that they even engaged in protected activity during the relevant time period. Accordingly, there exists no basis for finding that their protected conduct was a substantial or motivating factor in their transfers.

The Association also alleges that Marlene Franklin was involuntarily transferred in retaliation for her Association activity and membership. Franklin was advised that she would be transferred from the Pine Brook School to MEMS beginning with school year 1993-1994. Since the Association failed to adduce direct evidence that Franklin's transfer was related to her protected activity, it must show through circumstantial evidence that the Board violated the Act by transferring Franklin. The facts show that she was a senior building representative for the Association and, in that capacity, engaged in protected activity. However, the Association has failed to establish that the employer was aware of her protected activity. Neither Bernstein nor Vonsover was aware that she served as a senior building representative for the Association. There is no evidence that any other member of the administration knew of Franklin's Association activity. Although Franklin's name is listed on the Association representative list (CP-3), the evidence does not establish that Bernstein or any other member of the administration knew of all of the teachers listed in the memorandum. CP-3 was created to be used by Bernstein's secretary, Barbara Turner, and created in response to Turner's request for such a list. Bernstein did not have possession of the list nor was she familiar with its contents. Thus, the Association has failed to establish that Franklin's transfer violated the Act. See, State of New Jersey (Department of Human Services), H.E. No. 95-22, 21 NJPER 196 (¶26130 1995), adopted P.E.R.C. No. 96-20, \_\_\_ NJPER \_\_\_\_\_ (¶ 1995).



Maxine Saum was transferred from the Lafayette Mills School to the Pine Brook School for school year 1993-1994. Although Saum held two Association offices, there is no evidence showing that the administration was aware of Saum's Association activities.<sup>4/</sup> Consequently, the Association has failed to prove by either direct or circumstantial evidence that the Board violated the Act by transferring Saum.

Jerianne Sarubbi was transferred from MEMS to Lafayette Mills for school year 1993-1994. I find that the Association has failed to prove by a preponderance of the evidence that Sarubbi's Association activity was a substantial or motivating factor in her transfer. In her role as Association representative, Sarubbi assisted teachers in drafting rebuttal statements to observations and told teachers about discussions which took place during Association meetings. The evidence shows that Sarubbi acted as a conduit between teachers who had complaints or messages and the Association leadership. There is no evidence that Sarubbi, as Association representative, interacted with the Board or its administrators. Sarubbi's immediate supervisor, Vonsover, did not know that Sarubbi was an Association representative. Even though Vonsover agreed with Sarubbi when Sarubbi told her that she was being transferred from MEMS because Petricek wanted her out, the record contains no evidence establishing that the reason that

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<sup>4/</sup> I note that Saum's name does not even appear on CP-3.

Petricek sought Sarubbi's transfer was because of her Association activity. Even assuming that the Board is ascribed with knowledge of Sarubbi's limited Association activity through its agent, Principal Petricek, the record is devoid of any evidence establishing that the Board was hostile towards Sarubbi's exercise of protected conduct. The only person attending the committee of administrators meeting who was presumably aware of Sarubbi's Association activity was Petricek. The record contains no evidence supporting the proposition that Petricek was hostile toward Sarubbi's Association activities and wanted to transfer Sarubbi for reasons relating to her protected conduct. Petricek's response to Sarubbi's comment that she hoped her transfer was not for vindictive reasons was "...what would ever make you think that...." Petricek's response does not satisfy the standard required for a finding of hostility. See, Middletown Tp. Bd. of Ed. Vonsover, Sarubbi's immediate supervisor, was not aware that she was an Association representative. She supported Sarubbi's transfer because the other two potential transfer candidates had more experience teaching 7th and 8th grades, and Vonsover thought Sarubbi would do a good job teaching the 4-6th grade neurologically impaired class. Accordingly, I find that Sarubbi's transfer was not in violation of the Act.

Kenneth Weber was transferred in school year 1993-1994 from MEMS to the Pine Brook School. Weber was active in the Association holding the office of treasurer and, subsequently, vice president.

Weber has been a member of the Association's negotiations team for over a decade. He was among the employees who filed a grievance regarding the dispute arising from the collective agreement's provision on inclement weather resulting from the ice storm which occurred on March 18, 1993. Clearly, Weber was engaged in protected activity and the Board knew of this activity. The Association alleges that Weber's transfer was in retaliation for his participation in Association activity. To establish a prima facie case that Weber's protected conduct was a substantial or motivating factor in his transfer, the Association must still prove that the Board was hostile toward Weber's exercise of protected activity. The Association offers no specific evidence that would indicate that either the Board or the administration was hostile toward Weber's exercise of protected activity, in particular. Rather, the Association raises various incidents which it argues demonstrate the existence of an environment which was hostile toward the exercise of protected activity, in general.

The Association argues that Margaret Schroeder was not transferred to MEMS from the Pine Brook Junior High School along with the other Pine Brook teachers in September, 1992, because of her Association activity. The Association argues that in her capacity as senior building representative, Schroeder was regularly at odds with Petricek. The Association asserts that Petricek recruited Scozzari's support to have Schroeder transferred to the Lafayette Mills School rather than MEMS. The Board states that it

transferred Schroeder to Lafayette Mills because she was a strong, capable music teacher and able to handle the music program at Lafayette Mills on her own. Whether Schroeder's transfer in September, 1992, constituted an unfair practice within the meaning of the Act is not at issue in this case and the propriety of her transfer is not resolved herein. No finding is made concerning whether Schroeder was transferred because of her exercise of rights protected by the Act, or because her ability as a music teacher was best employed at the Lafayette Mills School. Consequently, I do not infer from Schroeder's transfer that the Board was hostile towards her participation in Association activity.

The Association cites that a "major conflict" arose between the Association and the Administration due to an ice storm which occurred in March, 1993, the day on which parent/teacher conferences were scheduled. Teachers who left the building without permission from the administration were disciplined, but the Association successfully challenged the disciplinary action through the grievance procedure. The Association asserts that this dispute over "...the contract rights of the teaching staff was disputed in a most aggressive and threatening way by the superintendent."<sup>5/</sup> In support of its argument, the Association cites Scozzari's memoranda, CP-1 and CP-2.

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<sup>5/</sup> Association brief, April 12, 1995, at p.2.

In Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502, 503 (¶12223 1981), the Commission stated the following:

A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal.

A balance must be struck between conflicting rights: the employer's right to free speech, against the employees' or employee organization's right to be free from coercion, restraint or interference when exercising protected rights. County of Mercer, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985); State of New Jersey, D.U.P. No. 92-25, 18 NJPER 327 (¶23142 1992). Scozzari's memoranda do not contain statements violative of the Act. The statements are not disrespectful of the majority representative, nor are they inherently threatening or coercive. State of New Jersey.

Nor do I find the Association's characterization that the dispute concerning the contractual inclement weather provision to have been pursued by the superintendent "...in a most aggressive and threatening way..." to be accurate. Since the parent/teacher conferences were cancelled and weather conditions were improving, Scozzari made an administrative determination that the early release of teachers was unnecessary and directed that teachers remain for the full school day. Scozzari interpreted the collective

agreement's inclement weather provision to support his determination that teachers remain at work.

The administration acted upon its administrative determination, the Association disagreed with the administrative action and challenged that action pursuant to the negotiated grievance procedure, through the binding arbitration level. The Association prevailed and the administration effectuated the prescribed remedy. Although the parties maintained adversarial positions with respect to the inclement weather dispute, its resolution was pursued in accordance with the parties mutually agreed upon dispute resolution procedure. While the Board may have been aggressive in maintaining and defending its administrative determination, it did not do so in a threatening or coercive manner and has not acted in a manner violative of the Act.

The Board retained consultants White and Doda<sup>6/</sup> to assist it in opening MEMS and to ease the transition into the learning community model. Both consultants expressed the view that learning communities should be left intact for at least three years. The Association contends that the Board's true motivation in transferring teachers into and out of the learning communities before the three years had elapsed was due to the Board's hostility toward the Association. I find that the record does not support

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<sup>6/</sup> Doda was not retained until the beginning of school year 1993-1994. The transfer decisions were made in the Spring of 1993. Doda's report did not issue until December, 1993.

this argument. When MEMS opened in September, 1992, the number of schools in the district went from 5 to 6. Opening a new school required many teachers to be hired and results in a heightened level of turmoil. In an attempt to reduce confusion, the Board transferred core subject teachers from Pine Brook to MEMS intact. However, the Board anticipated at the outset that additional transfers would be necessary the following year in order to accomplish its goal of maintaining a mix of novice and experienced teachers. The Board never adopted as part of its middle school learning community philosophy the idea that learning community teaching staff would continue intact for a period of at least three years. Moreover, there were numerous teachers in addition to active Association members who were transferred into and out of learning communities at MEMS. Thus, I find that the transfers, including Weber's, instituted by the Board for school year 1993-1994 were not the result of employer hostility toward the Association or employees exercising rights protected by the Act. The evidence on the entire record does not support the inference that protected conduct was a substantial or motivating factor in these staff transfers.

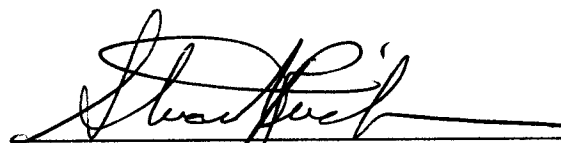
Accordingly, on the basis of the entire record and the analysis set forth above, I make the following:

CONCLUSIONS OF LAW

The Manalapan-Englishtown Board of Education did not violate N.J.S.A. 34:13A-5.4(a) (1) and (3) by transferring certain teaching staff members in school year 1993-1994.

RECOMMENDATIONS

I recommend that the Commission ORDER that the Complaint be dismissed.

  
Stuart Reichman  
Hearing Examiner

Dated: October 10, 1995  
Trenton, New Jersey