

P.E.R.C. NO. 98-113

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WILLINGBORO TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-96-117

EMPLOYEES ASSOCIATION OF
THE WILLINGBORO SCHOOLS
AND JOANN PHELPS,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Willingboro Township Board of Education violated the New Jersey Employer-Employee Relations Act when it denied Joann Phelps a promotion to Supervisor of Transportation in retaliation for her Association support. The Commission concludes that the charging party has established that hostility towards the Association and Phelps as a union official was a motivating and substantial factor in the votes of the majority Board members not to promote her. The Commission concludes that the Board has not established that, absent the illegal motive, it would still not have promoted Phelps.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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EMPLOYEES ASSOCIATION OF THE
WILLINGBORO SCHOOLS AND JO ANN PHELPS,

Charging Parties.

Appearances:

For the Respondent, Hill Wallack, attorneys
(Joan Kane Josephson, on the exceptions)

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

DECISION

On October 24, 1995, the Employees Association of the Willingboro Schools and Jo Ann Phelps filed an unfair practice charge against the Willingboro Township Board of Education. The charge alleges that the Board denied Phelps a promotion to Supervisor of Transportation in retaliation for her Association support. The Association alleges violations, independently and derivatively, of 5.4a(1) and (3) of the New Jersey Employee-Employer Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/}

^{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; [and] (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."

On December 28, 1995, a Complaint and Notice of Hearing issued. On January 2, 1996, the Board filed an Answer denying that Phelps' Association activities motivated its decision not to promote her and asserting affirmative defenses.

On May 14 and 15 and June 18 and 19, 1996, Hearing Examiner Illse Goldfarb conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

Hearing Examiner Goldfarb subsequently resigned from employment with this agency. Hearing Examiner Arnold H. Zudick was assigned to replace her and to issue a report and recommended decision.

On April 15, 1997, Hearing Examiner Zudick recommended that a violation be found. H.E. No. 97-28, 23 NJPER 402 (¶28186 1997). Applying the standards in In re Bridgewater Tp., 95 N.J. 235 (1984) for assessing anti-union discrimination claims, the Hearing Examiner concluded that Phelps was denied a promotion due to the anti-Association animus of a majority of Board members; and that absent this animus, Phelps would not have been denied the promotion. The Hearing Examiner further concluded that the Board had violated 5.4a(3), and, derivatively, 5.4a(1), and that the denial of the promotion independently violated 5.4a(1).

On June 23, 1997, the Board filed exceptions. The Board submits that the process by which the Hearing Examiner was replaced contravenes a rule of the Office of Administrative Law ("OAL") providing for a settlement conference before a replacement

judge issues a decision. The Board further argues that the Hearing Examiner's decision was based upon credibility judgments made without observing witnesses; and the Hearing Examiner's conclusions are unsupported and do not follow from his findings of fact. The Board requests that the Complaint be dismissed or the case be remanded for a new hearing.

On August 4, 1997, the Association filed a response. The Association states that there is no conflict between the OAL's rule and the replacement of the Hearing Examiner in this case; and since neither party objected before the Hearing Examiner's report issued, the Board has waived any such objection. The Association further argues that the record so clearly establishes that anti-union animus motivated the promotion denial that it was not necessary for the Hearing Examiner to observe the witnesses to reach that conclusion. The Association urges adoption of the recommended decision.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (23 NJPER at 402-406) with these additions, clarifications, and observations.

We adopt the Hearing Examiner's findings concerning the several periods of time when Phelps did supervisory duties because there was no supervisor or because the supervisor needed her help. While Phelps had not been called upon to oversee the entire operation or to perform the full range of the supervisor's duties (2T146), she did perform nearly all the duties. She discharged

these duties without any reports of difficulties or compromised loyalties.

Phelps was recommended as the best candidate for promotion by the two most recent Supervisors of Transportation, the Personnel Manager, the Business Administrator, and the Superintendent. The previous Supervisor of Transportation believed she had the experience and knowledge to handle the position (1T24-1T25; 2T54). The Business Administrator supported her because she knew how the school transportation system operated and was a strong leader who could give direction (J-4). The Board objects to the Hearing Examiner's decision not to credit the testimony of Board member Rodriguez that the Business Administrator did not "enthusiastically" recommend Phelps, but we need not decide whether he was enthusiastic about Phelps in that one conversation. We also need not decide whether Rodriguez saw Phelps' resume and, if so, when (3T85-3T86).

The Board asserts that the Hearing Examiner erred in characterizing the Board members' expressed concern about Phelps' supervisory experience as a pretext. We need not decide that question. For purposes of this decision, we will assume that this concern was a real one and played a part in the Board's considerations. We add that while Phelps did not have the five years supervisory experience listed in the advertisement, only one Board member specifically cited that as a concern and the job description itself did not list such a requirement.

We add that Gertraud Lieljuris was not among the initial finalists for the promotion (2T146). We clarify that it was not Phelps' mother, but the wife of Phelps' father who held a title in the same negotiations unit (2T44).^{2/}

Reynolds, the Board president, opposed union endorsements of candidates in Board elections. Reynolds' March 1995 (J-5) newsletter indicated that Reynolds and her slate (Rodriguez, Davis, Wright and John) strongly opposed union election activity. The Association opposed the candidacies of Reynolds and her slate (4T48).

At the meeting where she first opposed Phelps' promotion, Reynolds said she opposed the promotion because "they were involved in the election; bad mouthing." Reynolds also said she had never known anyone in that category who could "make the transition" from union leadership to management and she wasn't going to take any chances on Phelps' dedication (J-4).^{3/} We need not go beyond what was stated in the Board minutes (J-4) to

^{2/} Some citations to the first transcript in finding nos. 9, 10 and 11 should have been to the second transcript.

^{3/} The parties jointly submitted the Board minutes (J-4) and stipulated that the document was a transcription of non-verbatim contemporaneous handwritten notes taken by the Board's secretary (1T42-1T43). Neither party objected to any testimony concerning the document. The Hearing Examiner properly relied on the document as a generally accurate account of the speakers' remarks, and we will not disturb the findings of fact based on it.

decide why Reynolds broke off her remarks and we do not adopt the statements in the Hearing Examiner's analysis about that question.

Rodriguez, the Board vice-president, knew Phelps was the Association vice-president and he, like Reynolds, opposed union endorsements of school board candidates (3T74). He "really believed that Mrs. Phelps could not make the adjustment from being in a union leadership environment" (3T71). He did not cite any evidence that Phelps had not discharged her previous responsibilities loyally and competently. Despite her alleged lack of experience, he stated that he would not have had a problem appointing her to run another department (3T71), and he thought Phelps could perform all the supervisor's duties (3T83).

Board members Davis, John and Wright all knew Phelps was an Association official. John stated he could not see Phelps being able to switch from union to management (4T8, 4T12; J-4). Davis stated that he was opposed to union endorsements of Board candidates because it was a conflict of interest and that all five Board members ran on the same slate because of that shared belief (3T48).

Phelps testified that Board member Cindi Collins and Business Administrator Thomas told her that it was Phelps' union position that led the Board to reject her promotion. Neither Collins nor Thomas denied these admissions (2T69, 2T75-2T76, 2T128; 3T26).

We first consider the exception concerning the OAL rule. N.J.A.C. 1:1-14.13 provides for a settlement conference before a replacement judge is named. N.J.A.C. 19:14.6.4 provides that if a Hearing Examiner becomes unavailable, the Director of Unfair Practices or the Commission may designate another Hearing Examiner to hold a further hearing or issue a report, or both. When a replacement is made, parties should be promptly notified so they can request either a settlement conference or, if necessary, a further hearing. Neither party requested a conference or a new hearing. Moreover, we will not presume that this case would have settled if a conference had been held, and we are satisfied that this case can be fairly decided on this substantial record without a new hearing.

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

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected

as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

Given the facts, the Association has established that hostility towards the Association and Phelps as an Association official was a motivating and substantial factor in the decision of the majority of Board members not to promote her. The mere fact that a person has held a union position is not a legal reason by itself to believe that the person, if promoted, would not be able to perform supervisory duties effectively. See Hackensack v. Winner, 82 N.J. 1, 20 (1980); see also Pacific American Shipowners Ass'n, 98 NLRB No. 99, 29 LRRM 1376 (1952).

Given the facts, the Board has not established that, absent the illegal motive, it would still not have promoted Phelps. Every administrator -- the two most recent Supervisors of

Transportation, the Personnel Manager, the Business Administrator, and the Superintendent -- thought she was the best candidate. She met all the requirements set forth in the job description and had repeatedly and capably filled in when there was no supervisor or the incumbent supervisor needed her help. The Business Administrator believed Phelps was the most knowledgeable candidate and would be the strongest leader. The Board members did not independently investigate her credentials or experience. In light of these circumstances and the strong showing of animus, the Board has not proved that, absent its hostility, any concern about Phelps' supervisory experience would have led it to override the unanimous recommendation of its management team.

We accordingly conclude that the Board violated N.J.S.A. 34:13-5.4a(1) and (3). Absent any exceptions, we adopt the Hearing Examiner's conclusion that the Board independently violated 5.4a(1) and the Hearing Examiner's recommended order.

ORDER

The Willingboro Township Board of Education is ordered to:

A: 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 promote Jo Ann Phelps to Supervisor of Transportation because she exercised rights protected by the Act.

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 refusing to promote Jo Ann Phelps 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 refusing to promote Jo Ann Phelps because she exercised rights protected by the Act.

B. Take this action:

1. Promote Jo Ann Phelps to Supervisor of Transportation retroactive to May 23, 1995, at a salary of at least \$32,000 per year, with seniority in that position from that date.

2. Pay Jo Ann Phelps the difference between \$32,000.00 and what she otherwise earned from May 23, 1995 until she is promoted to Supervisor of Transportation, plus interest on that difference in accordance with R. 4:42-11(a).

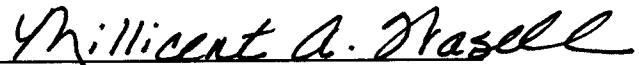
3. Provide Jo Ann Phelps with any other benefits she would have received from May 23, 1995 to the present, as if she had been promoted effective May 23, 1995, including pension, health benefits, sick, vacation and personal leave.

4. 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.

5. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose was not present.

DATED: February 26, 1998
Trenton, New Jersey
ISSUED: February 27, 1998



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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to promote Jo Ann Phelps to Supervisor of Transportation because she exercised rights protected by the Act.

WE WILL cease and desist from engaging in conduct which has the tendency to interfere with, restrain or coerce employees from engaging in conduct protected by the Act, particularly by refusing to promote Jo Ann Phelps because she exercised rights protected by the Act.

WE WILL cease and desist from 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 refusing to promote Jo Ann Phelps because she exercised rights protected by the Act.

WE WILL promote Jo Ann Phelps to Supervisor of Transportation retroactive to May 23, 1995, at a salary of at least \$32,000 per year, with seniority in that position from that date.

WE WILL pay Jo Ann Phelps the difference between \$32,000.00 and what she otherwise earned from May 23, 1995 until she is promoted to Supervisor of Transportation, plus interest on that difference in accordance with R. 4:42-11(a).

WE WILL provide Jo Ann Phelps with any other benefits she would have received from May 23, 1995 to the present, as if she had been promoted effective May 23, 1995, including pension, health benefits, sick, vacation and personal leave.

Docket No. CO-H-96-117

WILLINGBORO TOWNSHIP BOARD OF EDUCATION
(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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 97-28

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

In the Matter of

WILLINGBORO TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-96-117

EMPLOYEES ASSOCIATION OF THE WILLINGBORO
SCHOOLS AND JOANN PHELPS,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Willingboro Township Board of Education violated the New Jersey Employer-Employee Relations Act by failing to promote employee JoAnn Phelps to the position, Supervisor of Transportation because she exercised rights protected by the Act. The Hearing Examiner also found that the Boards actions interfered with Phelps protected rights, and those of other employees.

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.

H.E. NO. 97-28

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

In the Matter of

WILLINGBORO TOWNSHIP BOARD OF EDUCATION,

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Docket No. CO-H-96-117

EMPLOYEES ASSOCIATION OF THE WILLINGBORO
SCHOOLS AND JOANN PHELPS,

Charging Party.

Appearances:

For the Respondent, James P. Granello, Esq.

For the Charging Party, Selikoff & Cohen, P.A. attorneys
(Steven R. Cohen and Carol H. Alling, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 24, 1995, the Employees Association of the Willingboro Schools and JoAnn Phelps (Association or Charging Party) filed an unfair practice charge with the New Jersey Public Employment Relations Commission alleging that the Willingboro Township Board of Education (Board) violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} The Charging Party alleged that the

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

Footnote Continued on Next Page

Board failed to promote Phelps, the Association vice-president, to the position, Supervisor of Transportation, in retaliation for her exercise of rights protected by the Act. The Charging Party further alleged that the Board's actions tended to interfere with, restrain and coerce the Association and its members in their exercise of rights protected by the Act.

The Charging Party seeks an order requiring the Board to appoint Phelps to the Supervisor of Transportation position, plus backpay and interest retroactive to May 23, 1995, with an appropriate cease and desist order.

A Complaint and Notice of Hearing was issued on December 28, 1995, assigned to Hearing Examiner Illse E. Goldfarb. The Board filed an Answer on January 4, 1996, denying it retaliated against Phelps or engaged in any other action violative of the Act, and listed several affirmative defenses.

Hearings were held on May 14, 15, June 18 and 19, 1996.^{2/} Both parties filed post-hearing briefs and reply briefs by August 19, 1996.

1/ Footnote Continued From Previous Page

rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

2/ The transcripts will be referred to as 1T (May 14), 2T (May 15), 3T (June 18) and 4T (June 19).

Hearing Examiner Goldfarb subsequently resigned from the Commission. Pursuant to N.J.A.C. 19:14-6.4(a), this case was assigned to me on or about January 8, 1997, to issue a report and recommended decision.

Based upon the entire record, I make the following:

Findings of Fact

1. JoAnn Phelps has been employed by the Board in a part-time bus/van driver position since 1975 (1T44-1T45). She was a resident of Willingboro Township from the start of her employment until June 1994 (1T45). In 1989, Phelps became the Association vice-president and chief negotiator. She helped negotiate the parties' 1992-1995 collective agreement (J-2) which covered bus and van drivers, custodial, maintenance, and cafeteria employees, aides, and others. She has also been the Association's representative specifically for the special education van drivers (1T52).

From approximately 1991 through 1994, Phelps was editor of the Burlington County Education Association Newsletter for which she wrote both articles and editorials (1T53-1T54). In October 1992, the local county paper, The Burlington County Times, published an editorial (CP-2) supporting the Board's efforts to eliminate health benefits for part time custodial and cafeteria employees. The editorial included a quote from Margaret Reynolds, a Board member, who wanted to eliminate the benefits, and it

attributed to Phelps comments that employees were willing to negotiate cost-saving measures, but would oppose an effort to privatize--or subcontract--their work.

Phelps wrote a response to the Times editorial approximately one week later (CP-1), vigorously opposing privatization and criticizing the paper for imbalanced reporting (1T55-1T58).

2. As a bus/van driver, Phelps is employed in the Board's Transportation Department. That Department includes the drivers, aides and mechanics, and is directed by the Supervisor of Transportation. The Supervisor reports to the School Business Administrator and is responsible for hiring and training bus and van drivers; supervising the maintenance program; establishing the bus and van routes; establishing procedures; preparing reports; maintaining records; ordering supplies and parts; preparing a drivers manual; preparing and presenting a budget for the Department, and other duties (J-1). The Supervisor's job description (J-1) does not require experience, nor does it include bid preparation for vehicle purchases (2T99, 2T164; 3T78).

Over the years Phelps has assisted the Supervisor of Transportation and actually performed the Supervisor's duties on several occasions. She has performed nearly all of the

Supervisor's duties listed on J-1 (1T96-1T99; 1T104-1T108; 1T114-1T135).^{3/}

When Phelps's first Supervisor, Don Petrie, was out ill in the late 1980's, Phelps made sure that every bus/van run was covered each day. She arranged for substitute drivers whenever necessary, or made certain the runs were divided amongst other drivers to ensure their completion (1T59-1T60).

One time, Petrie was out for almost an entire school year. A clerk, Ronny Whelihan, was asked to oversee that Petrie's duties were completed. Whelihan handled the payroll and other paperwork, but Phelps worked with the drivers to make certain the runs were completed (1T60-1T61, 1T84).

Petrie retired sometime in 1986 or 1987, but was not immediately replaced. During much of the next school year (probably the 1987-88 school year) there was no Supervisor of Transportation.^{4/} Whelihan continued to handle the paperwork, Ted Hanson, the mechanical supervisor, oversaw the vehicle

^{3/} There were only a few minor duties Phelps did not perform (1T84, 1T121-1T123).

^{4/} Petrie's successor, William Johnson, was employed as Supervisor of Transportation near the end of a school year, and worked less than two years before being non-renewed, presumably at the end of a school year (1T63, 1T71-1T73). Johnson's successor, Thomas Kurtz, began in September 1989 (1T73). Given those time frames, I infer that Johnson was employed near the end of the 1987-88 school year and worked through the 1988-89 school year. Consequently, I conclude there was no supervisor during most of the 1987-88 school year.

maintenance, and Phelps continued to schedule the runs, arrange for substitute drivers, and make sure the runs were completed. Phelps worked in the office most of that time, driving only if there were not enough substitutes to cover her own run (1T61-1T62).

Phelps was not paid an additional stipend for performing supervisory duties after Petrie's absence, but was paid for additional hours worked (1T62).

3. William Johnson became Supervisor of Transportation during the latter part of the 1987-88 school year. When he began, Phelps returned to driving a van for the remainder of that year (1T63). On the first day of school in the 1988-89 school year, however, Phelps assumed the responsibility to schedule the bus and van runs on an emergent basis because Johnson had failed to prepare the runs during the summer. At that time, Phelps did not drive her van; rather, she stayed in the office with Johnson over several days to permanently schedule the runs. Thereafter, she stayed in the office to assist Johnson unless a substitute was unavailable to drive her van (1T65-1T67).

While working in the office, Phelps assumed responsibility for scheduling the overtime runs because of Johnson's distaste for that assignment. Those runs included field trips, athletic events and programming for handicapped children. Phelps continued performing those duties during the remainder of Johnson's tenure (1T67-1T68). Phelps also assisted Johnson in resolving problems with drivers (1T68).

Sometime later that school year when Johnson was hospitalized, the Board Business Administrator, Wayne W. Thomas, asked Phelps to do what she could in Johnson's absence to keep the Department running. Phelps performed as requested (1T69-1T70).

After Johnson returned, and for the remainder of the 1988-89 school year, Phelps continued to do more, and Johnson less, supervisor duties. Johnson asked Phelps to gather information he needed for a state report. She complied. While Johnson prepared the report Phelps assisted running the Department (1T70-1T71). Johnson was not renewed at the end of that school year.

4. Thomas Kurtz became Supervisor of Transportation in September 1989. Although Phelps returned to driving her own van after he arrived, she continued to have full responsibility for scheduling the noontime preschool handicapped runs throughout the year. She arranged for substitutes when they were needed (1T76).

Prior to the start of the 1990-91 school year, Kurtz had medical problems. He had scheduled most of the new runs, but Phelps finished them. As the year began, Kurtz worked only part-time and Phelps assisted in running the Department. Sometimes Kurtz telephoned directions to Phelps who completed the assignments (1T81-1T82).

By late September, Business Administrator Wayne Thomas told Phelps that Kurtz was leaving the Department. Thomas asked Phelps if she was interested in applying for the job, but Phelps

declined because she did not want to work full time because of her young children. Thomas then asked Phelps to run the Department until a new supervisor was hired. She agreed. In order to avoid any conflict, however, Thomas also asked her to take a leave of absence from her position as Association vice president. Phelps acceded (1T82-1T84).

From late September through the end of October, 1990, Phelps performed the duties of Supervisor of Transportation, except processing payroll. That responsibility was performed, then as now, by secretary Ronny Whelihan (1T84-1T86).

During the time she served as acting supervisor, Phelps interviewed and recommended the hiring of several drivers who were in fact, hired; she participated in discussions that lead to the reprimand of a driver; and she terminated a non-contracted substitute driver (1T86-1T88; 1T97-1T98; 2T30-2T32).

Although Phelps had performed most of the supervisory duties, she did not prepare bid specifications for bus leases or purchases (2T32-2T33), and did not gather payroll information (2T58). The job description (J-1) did not require bid preparation or purchasing experience (2T99).

5. Christopher D'Arcy became Supervisor of Transportation in early November 1990. He remained Supervisor through the 1994-95 school year. During November and early December of 1990, Phelps remained on leave from her Association vice president position to assist D'Arcy (1T89, 1T91; 3T17).

During that time she helped acquaint D'Arcy with the drivers, and assisted him with scheduling and assigning the runs and resolving problems (1T90-1T91). She also sat in with him on disciplinary interviews and commented on how he handled particular matters (1T93).

Phelps continued to assist D'Arcy even after returning to her union position from her leave of absence. She remained responsible for scheduling noontime preschool runs which involved overtime scheduling off the rotation list; she oversaw operation of the Department when D'Arcy was sick or on vacation; and she helped D'Arcy plan the runs and complete the state reports (1T90-1T93, J-6).

6. The Willingboro School Board was reorganized at an April 25, 1995 meeting as a result of elections held one week earlier (J-5, J-8). Three individuals having no prior Board service were elected, Edith Wright, Lloyd Davis and Tony John (3T45; 4T13; 4T32). With the support of the three new Board members, existing Board members Margaret Reynolds and Robert Rodriguez were elected Board president and vice-president, respectively, by a 5 to 4 vote (4T51; J-8).

In March 1995, Reynolds published her Right To Know Newsletter (J-5), endorsing Wright, Davis and John as the "Common Cents Candidates". In that newsletter, Reynolds also warned that the unions were sending letters to certain Willingboro residents ordering them to vote for certain Board member candidates and

seeking to conspire to keep secrets from the public. She also wrote:

...[A]ny candidate who accepts union endorsement has a gross conflict of interest. Labor owns you and you pay back your debt at the bargaining table. Any candidate who carries the favor of the union has no right to sit on a board of education. [J-5 at pp. 2-3]

Reynolds was first elected to the Board in 1978, but lost a close election in 1981, when she was opposed by two unions, the Willingboro Education Association, and the charging party-the Employees Association of Willingboro Schools (4T46-4T47). She was reelected in 1987 and 1990, despite Union opposition, lost again in 1993, but was reelected again in 1994, again opposed by the unions (4T46-4T48).

Rodriguez was first elected to the Board in 1991 and reelected in 1994. He ran on a slate with Reynolds both times, and was opposed by the unions. He and Reynolds had shared a campaign treasurer, and Reynolds endorsed his candidacy in her Right To Know Newsletter (3T74-3T76).

When they were elected in 1994, Rodriguez and Reynolds were known as "minority" members because they opposed union-endorsed candidates and issues (3T49; 3T76; 4T49). But after the April 1995 Board election, Rodriguez and Reynolds, together with Wright, Davis and John, became known as the "majority" members (3T77; 4T50).

Rodriguez believed that he and Reynolds were so alike philosophically, they did not need to discuss their views (3T86). He expressed their "philosophy" as:

We don't believe that there should be Union activity in terms of campaigns or Union activity in terms of picking school board members, or endorsing school board members, because we look at it as a conflict of interest, and that's the basically the general philosophy that we have relative to why we ran together (3T74).

7. Edith Wright's election to the Board in April 1995 was her first run for a Board position. Margaret Reynolds's husband was Wright's campaign treasurer (4T32).

Lloyd Davis's election to the Board in 1995 was his first win in four tries. He previously ran for the office in 1990, 1991 and 1992 (3T45). In 1990, Davis ran on a slate of candidates, with Reynolds. Reynolds endorsed him in her newsletter. Davis and Reynolds contended publicly that "the Board needed to take a tough stance with the unions" (3T46).

In the 1995 Board election campaign, Reynolds's husband served as Davis's campaign treasurer (3T47). Davis explained his view, and purportedly the views of candidates Reynolds, Rodriguez, Wright and John, when he said:

We personally believe it is a conflict of interest for unions to elect school board members that are supposed to be representing the district. (3T48).

Alfred Anthony (Tony) John's election to the Board in 1995 was his first win in three tries. He had also run for the office in

1990 and 1994. In his prior campaigns he had no endorsements, but Reynolds endorsed him in 1995, and her husband served as his campaign treasurer (4T13-4T14).

8. In March 1995, Supervisor D'Arcy decided to accept a position in another school district. He informed Business Administrator, Wayne Thomas, of his intent to leave, then notified Phelps and encouraged her to apply for the job. D'Arcy believed Phelps had both the experience and knowledge to handle the position (1T24-1T25; 2T54). He told Thomas she should be chosen the next Supervisor, based on her knowledge and experience (1T28).

Phelps was concerned about whether her union activities would affect her ability to get the job. She feared that upcoming school Board elections could change the Board composition and hurt her chances, but she decided to apply anyway (1T95). She notified Thomas of her intent to apply, and he encouraged her application (2T116). She submitted a resume for the position in April 1995 (J-6) noting the responsibilities she had and the work she performed in the Department, including her stint as Acting Supervisor. Phelps attached letters of recommendation from both D'Arcy and Thomas Kurtz.

D'Arcy spoke to Thomas, and to Personnel Manager, Oscar Jamerson, about Phelps' qualifications for the Supervisors position. He spoke to Jamerson twice, advising that Phelps was the best candidate because of her experience, and that with her, there would be a smooth transition. D'Arcy made similar remarks to Thomas (1T26-1T28).

9. On April 24, 1995, the Board posted the Supervisor of Transportation position and had it printed in the newspaper. The advertisement listed the qualifications for the position as:

Minimum 5 years supervisory experience.
Knowledge of compulsory education and state and federal transportation laws desirable (R-6a).

The job description, however, did not require such experience (2T164). Applications were due by May 2, 1995.

Phelps' application was submitted before the position was posted. On April 25, 1995, the Board received the application of Gertraud Lieljuris who had experience as a transportation supervisor (R-2a). The Board received approximately twenty applications (2T116).

The procedure for selecting/hiring the Supervisor of Transportation began with interviews by Thomas and Jamerson. They had to agree on a recommendation to Superintendent, Geraldyn Foster. If she agreed with their recommendation, a formal recommendation would be presented to the Board which had the ultimate authority to accept or reject the recommendation (1T149; 2T118).

Thomas and Jamerson interviewed approximately seven of the twenty applicants, including Phelps and Lieljuris (2T117). Thomas had asked D'Arcy for his opinion of Lieljuris. After meeting with her, he told Thomas that Lieljuris was an experienced and capable candidate, but that it did not change his opinion that Phelps was the best candidate for the Willingboro position (1T41-1T42).

Phelps was interviewed by Thomas and Jamerson on May 5, 1995 (2T123). She discussed how she would reduce overtime and deal with driver absenteeism. Thomas asked whether she could go from being a union vice-president to a supervisory position. She explained her primary loyalty was to her family and knew she could be a good supervisor because it would benefit her family. She responded to Thomas's concern about her lack of experience by explaining she could learn anything she needed to know for the job (1T141-1T143). During the interview she requested a salary in the mid \$30,000's (1T148).

Two to three days after the interview, Thomas again spoke to Phelps about the Supervisor job. Noting that as a union leader, Phelps often went directly to Board members to resolve problems, Thomas explained to Phelps that if she became Supervisor of Transportation she would be expected to report directly to him, and not confront Board members with issues pertaining to the Transportation Department. Thomas also discussed with Phelps his concern about her ability to leave the unit to become a supervisor. He was concerned about her loyalty, and how both she and the drivers would handle the change (1T145, 2T137-2T138). Phelps responded that she could report directly to him, and that she was a team player, presumably meaning that once on management's team, she would not have a problem being loyal to the Board (1T145, 2T58, 2T65). Phelps explained she would carry out the Board's requirements if it decided to contract out the bus/van driving duties (2T100).

The following day Thomas informed Phelps that he and Jamerson were recommending her for the Supervisor position (1T146). On approximately May 11, 1995, Jamerson met with Phelps and offered her \$32,000 for the first year as Supervisor. While not completely happy with that salary, Phelps accepted the offer (1T148-1T150, 2T156). That same day Thomas sent a memorandum to Superintendent Foster (J-3), informing her that he and Jamerson were recommending Phelps for the Supervisor position. After discussing that matter with them, Foster concurred with their recommendation (2T155-2T156, 2T177-2T178).

Thomas and Jamerson did not recommend Lieljuris for the position because they were looking for someone who was strong at giving direction, and they believed that she was too tentative (1T141). Their second choice was JoAnn Tomkavich, who in their view, also lacked the ability to give and accept direction (1T144, 1T151).

Thomas and Jamerson felt that Phelps was the best of all candidates for the Supervisor job, and superior to Lieljuris. They believed Phelps had better knowledge of the District, and had the best leadership and communication skills (2T120).

After Phelps was informed that she would be recommended to succeed D'Arcy, she discontinued driving the van and performed duties in the transportation office. D'Arcy notified the County Coordinator for Transportation Services that Phelps had been "offered" the Supervisor position (1T146-1T148).

10. The first Board conference meeting after the Board's April reorganization was held on May 15, 1995. The Board has two types of public meetings. A conference meeting and a public action meeting. Executive sessions can be held at either meeting. The conference meeting is a work session where Board members review and vote upon items they want placed on the agenda for the public action meeting. If a majority of the Board members at a conference meeting fail to support an item, it will not be placed on the agenda for the action meeting and is, therefore, defeated. The public action meeting is the meeting where official votes are taken on agenda items (3T29, 3T64).

Prior to the May 15 conference meeting, the Board members received a conference agenda packet which included a copy of Thomas's written recommendation to Foster (J-3) that Phelps be made Supervisor of Transportation (3T36, 4T6, 4T28). At the meeting, Thomas explained why he recommended that Phelps be promoted to Supervisor (2T124-2T125). He said Phelps had technical knowledge of how a school transportation system operated, and was a strong leader and could give direction. He further explained that she was the union vice-president, and that by leaving the union to assume this job she was risking her position (J-4; 4T17).^{5/}

^{5/} Exhibit J-4 is typewritten, non-verbatim minutes taken at the Board's Executive Session held on May 15, 1995. It is based upon handwritten notes, not upon a tape recording

Reynolds expressed her opposition to Phelps's appointment after Thomas completed his remarks. She said:

Mr. Thomas, I am not going to support this. I have never known anyone in that category [sic] can make the transition. She is good at what she does. I am not comfortable with her being the boss of her own mother. They were involved in the elections; bad mouthing... I am not going to support her. Why would we take any chance she is as dedicated at what she does as I am at what I do (J-4).^{6/}

Rodriguez had not attended the May 15 conference meeting, but having received J-3 in anticipation of that meeting, he spoke to Thomas about the recommendation before the meeting commenced. Rodriguez testified that Thomas did not strongly recommended Phelps. He (Rodriguez) felt Thomas would rather have another person but didn't want to take the time to re-advertise for the position (3T67-3T70). I do not credit that testimony. While Thomas commented that Phelps had never been appointed a transportation supervisor, he was firmly convinced she was the best candidate, and he enthusiastically supported her (2T146-2T147; J-3).

5/ Footnote Continued From Previous Page

(1T42-1T43). At hearing, Thomas questioned the accuracy of the minutes, but did not know what, if anything, was missing (1T126-1T128). Since this document was offered as a joint exhibit without any reservation by either party concerning its accuracy, I rely on the document as a generally accurate report of remarks, attributed to the respective speakers.

6/ There was some evidence that Phelps mother held a title in the same negotiations unit (3T44).

The vote on whether to place Thomas' recommendation on the public agenda initially resulted in a 4 to 4 tie, which was a "no" vote, under the rules. Reynolds, Davis, Wright and John voted no, and Holley, Carter, Collins and Smith voted yes. Rodriguez was absent (J-4).

Following that vote, Superintendent Foster emotionally expressed her displeasure with the Board's failure to support her recommendation. As a result, Board member, Tony John, changed his vote to allow the Phelps recommendation to be placed on the public agenda (3T42; 4T10-4T11; 4T56; J-4).

On the morning of May 16, 1995, Board member Cindi Collins spoke to Phelps about the results of the conference meeting. Collins told Phelps that there were problems regarding her appointment, and that her union activity was not helping her (2T69; 2T73; 3T25-3T26). After listening to Collins, Phelps called Thomas who confirmed there was a problem with her appointment. He said it was "shakey at best", and he offered to withdraw the recommendation if she preferred, but she declined (2T73-2T75; 2T128-2T129, 2T132).

On the afternoon of May 22, 1995, Thomas called Phelps and told her there were major problems with her appointment. She asked if she was going to get the position, he responded "nope." She

asked if it was the "union thing" and he responded, "yup" (2T75-2T76).^{7/}

11. The Board's public action meeting was held on the evening of May 22, 1995. The agenda included the superintendent's recommendation that Phelps become Supervisor of Transportation at \$32,000 per year effective May 23, 1995 (CP-3). No presentation was made regarding the recommendation, but the Board members knew that Thomas, Jamerson and Foster supported the recommendation (2T185 3T27, 3T58-3T59, 3T83, 4T24-4T26, 4T36, CP-3, J-7). The Board, nonetheless, voted 5 to 3 to reject the recommendation. Reynolds, Rodriguez, Davis, Wright and John voted, no (J-7).

The five Board members who voted against Phelps voiced one common theme for their vote; they claimed she lacked experience (3T37, 3T39, 3T70-3T71; 4T8, 4T10, 4T31, 4T44). I do not credit that explanation.

^{7/} Thomas did not recall that conversation but did not deny that it occurred. When asked if he recalled having any conversation with Phelps about whether her union affiliation affected the vote, he said, "I may have", but he did not recall (2T133).

In its post-hearing brief, the Board disputes the reliability of Phelps's testimony of what Collins and Thomas allegedly told her. The Board argued that it could not be relied upon because neither Collins nor Thomas corroborated the testimony. But since neither Collins nor Thomas refuted what Phelps's said, it is appropriate for me to credit her testimony. A trier of fact can credit a witness's testimony, particularly when it is unrebutted. Compare, City of New Brunswick, P.E.R.C. No. 83-26, 8 NJPER 555 (¶13254 1982); Township of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980), aff'd NJPER Supp. 2d 91 (¶75 App. Div. 1981). Accordingly, I credit Phelps's recollection of the events.

Reynolds testified that her "no" vote was based upon her concern over Phelps's lack of experience and what she perceived to be an inability to supervise (4T44-4T46). She also conceded that her (Reynolds) candidacy for the Board was opposed by Phelps's union in 1993 and 1994 (4T48).

Other than reviewing Thomas's recommendation for Phelps in J-3, and listening to his oral recommendation on May 15, Reynolds, and the other four Board members who voted against Phelps, failed to review the job description for the Supervisor of Transportation. Similarly, they did not review Phelps personnel file, her resume, or any letters of recommendation on her behalf, or request any other information (3T27-3T31; 3T54-3T55; 3T78, 3T85; 4T20, 4T36-4T37, 4T54-4T56). None of the Board members were aware of who the other candidates were at that time, and Phelps was not compared to them by the Board when it rejected her for the Supervisor position (3T59, 4T23). The three new Board members did not even know Phelps, and did not know whether she had supervisory experience or not. The one thing that all five Board members who voted "no" knew was that Phelps was a union officer (3T40, 3T57; 4T9, 4T17).

Rodriguez testified that Phelps's lack of experience was the first factor that caused him to vote against her appointment, but the second factor he cited belied the first. He said he "...really believe[d]: that Mrs. Phelps could not make the adjustment from being in a Union leadership environment to management within the same department" (3T71). But he then

testified he would appoint her to run another department, such as communications, and added that Phelps's union leadership position had no bearing on his decision (3T71).

I do not credit Rodriguez's testimony that Phelps's union activity was not a factor in his decision. He testified he couldn't understand how Thomas would recommend someone who didn't have the five years experience noted in the advertisement, yet acknowledged that the Board had not approved the advertisement and that the job description did not require such experience (3T67-3T68, 3T78-3T79). He also acknowledged that Phelps might be able to fulfill all of the duties listed in the job description (3T83). He didn't really think she couldn't perform the job, yet he knew she was vice president of one of the unions which had opposed he and Reynolds in 1994. Rodriguez also said he would normally rely on Thomas for filling a position like this, but this time he said "I was set in my mind" (3T81). I find Rodriguez was "set in his mind" because Phelps was an active union leader and had opposed his Board candidacy.

Davis also testified he did not support Phelps because she lacked experience (3T37, 3T39, 3T41), yet he didn't know what experience she had. He also acknowledged that she could have done a good job representing the Board (3T61). He did know she was in the Association (3T40), and he opposed union involvement in Board matters (3T48-3T49). He had talked to both Reynolds and Wright about the Phelps recommendation, but denied there was a conspiratorial purpose to that discussion (3T37-3T38). I do not

credit his denial. Davis pledged to take a tough stance against the unions (3T46). Reynolds had supported his candidacy and her husband had served on his campaign. The Association had opposed Davis as it had Reynolds and Rodriguez, and I cannot believe Reynolds, Davis and Wright were not discussing Phelps's union activity in deciding whether to support her for the Supervisor job.

Tony John also testified Phelps lacked experience, but then said he couldn't "see" a person from that department being able to "switch", that is, ending her union relationship in order to head the department (4T8-4T9, 4T12, 4T22-4T23). John acknowledged he didn't know Phelps, but that he knew she was in the Association, and immediately said that it "wasn't a big thing" in his mind, and that it was "very insignificant" (4T9). I do not credit that last remark. I believe it reveals, in John's haste to diminish its significance, that he thought Phelps's union position was an important consideration. John didn't know whether Phelps was experienced for the position or not. But he was connected to both Reynolds and Davis and, like them, was opposed to union involvement in Board matters. Under these circumstances, I find John voted against Phelps because Reynolds indicated her opposition to the promotion.

Wright said she voted against Phelps because she wasn't convinced she had the experience (4T31). But she, too, never really knew if Phelps had the experience or not. Wright merely followed Reynolds's lead to vote against promoting the Association vice president.

12. After rejecting the recommendation for Phelps on May 22, the Board, on May 24 and June 1, 1995, readvertised for the Supervisor of Transportation position (R-6d, R-6e). Sometime between May 24 and June 15, 1995, Thomas, Jamerson and Superintendent Foster decided to recommend Lieljuris for the Supervisor position. On June 15, however, Lieljuris notified Thomas that she could not accept the position due to personal reasons (R-5). On June 16, 1995, Foster submitted a memorandum to the Board (R-5) advising that Lieljuris rejected the offer and that an acting supervisor would be hired in the interim, pending a final selection.

On June 19, 1995, Lieljuris sent a letter to Thomas (R-2b), ^{8/} formally notifying him she had declined the position. Another newspaper advertisement was placed on or about June 22, 1995 (R-6f). On June 26, 1995, the Board appointed Grounds Foreman, Jack Gall, as Acting Supervisor of Transportation (R-3). Lieljuris subsequently resolved her personal problem and made herself available for the position. On July 24, 1995, the Board appointed Lieljuris as Supervisor of Transportation with an annual salary of \$36,000 (R-4).

13. When the Association held its elections for union office in May 1996, no member declared a candidacy. Members holding office agreed to continue in their positions. At least one employee was reluctant to run for union office because of what happened to Phelps (3T9-3T11, 3T17-3T19).

^{8/} Exhibit R-2b was addressed to a Mr. Thompson. Testimony demonstrated the letter was meant for Mr. Thomas (2T169).

ANALYSIS

There are two issues in this case. First, did the Board refuse to promote Phelps to the Supervisor of Transportation position in retaliation for her engaging in union activity? Second, did the Board's actions tend to interfere with the Association's ability to represent the employees in its unit?

The Commission and/or the courts have established standards of review to determine whether violations of the Act have occurred. Cases of anti-union retaliation raising 5.4(a)(3) allegations are decided under the standards established by the Supreme Court in In re Bridgewater Tp., 95 N.J. 235 (1984). Cases raising interference and independent 5.4(a)(1) allegations are decided by the standards established by the Commission in New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

The 5.4(a)(3) Allegation

In Bridgewater, the Court held that no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing 1) that the employee engaged in activity protected by the Act, 2) that the employer knew of this activity, and 3) that the employer was hostile toward the exercise of the protected activity. Id. at 246.

If the employer did not present 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 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 to resolve.

Since the Charging Party established that Phelps, as Association vice-president, was engaged in protected activity and that the Board members were aware of her activity, the focus of this case, like most (a)(3) cases, is whether the Board was hostile toward Phelps exercise of her protected activity.

Before directly addressing the hostility issue, however, certain matters require clarification. This case is not about Phelps's level of experience or whether she was "fully qualified" for the Supervisors position. Nor is this case about whether Board members are required to familiarize themselves with the types of experience applicants possess. The Commission is not in the

business of deciding who an employer should hire or promote, but merely to judge the basis for the employer's action and to remedy that action if taken in violation of the Act. Thus, absent a consideration of protected activity or other forms of discrimination, this Board, and any other public employer, is entitled to reject a candidate for promotion because it is dissatisfied with the candidate's level of experience and qualifications, regardless of the experience any other candidate may possess. But if an employer claims it rejected a candidate due to lack of experience and never familiarized itself with the candidate's actual experience, the employer's stated reasons will be suspect.

Additionally, and more pertinent to this case, there is a distinct difference between an employer's rejection of a promotional candidate to a supervisory position merely because of the employee's union affiliation and representational activities, and an employer's rejection of that candidate because it believes that candidate is unable to shed his/her representational role and implement the employer's supervisory directives. The former action violates the Act; the latter action does not. Thus, the Board could lawfully reject Phelps's candidacy for the Supervisor position if it believed she could not "switch hats"; that is, abandon her representation of drivers and implement the Board's directives as a supervisor of those employees. But the Board could not reject her candidacy for promotion merely because as a union representative she opposed certain Board members. Such action violates the Act.

In Black Horse Pike Reg. Bd. Ed., P.E.R.C No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission explained that an employer must differentiate between an employee's status as an employee representative, and the individual's status as an employee of that employer. The Commission wrote:

...where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's's employment. [Id. at 503].

The Commission further explained that an employer could criticize the employee representatives for their conduct (just as Reynolds and Rodriguez criticized the unions for endorsing Board candidates) but it must do so appropriately. A Board 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. [Id. at 504.]

In deciding the hostility issue the focus is on whether the Board converted its criticism of the Unions into adverse action against Phelps. To resolve that issue I must determine whether the reasons advanced by the Board for not promoting Phelps were pretextual.

In UMDNJ (Rutgers Medical School), P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987), the Commission explained that under the Bridgewater standards:

The charging party must prove that an illegal motive contributed to the challenged personnel actions. In determining whether this burden has been met, the trier-of-fact must review the record as a whole, make credibility determinations, resolve conflicts and draw appropriate inferences.

Having applied the UMDNJ requirements, I conclude that long before Phelps applied for the Supervisor position Reynolds and Rodriguez had become hostile toward this Association's exercise of rights under the Act. The Association never supported Reynolds or Rodriguez in their elections for Board seats; they in turn, hardened their feelings towards the Association leadership, including Phelps. Reynolds's remarks in J-5, the March 1995 Newsletter, were particularly caustic toward anyone connected with the Association or receiving its support. Rodriguez adopted the same position when he acknowledged that he shared Reynolds's philosophy which included the belief that the Association should not be involved in endorsing school board candidates. But the Association's (and Phelps's) endorsement of Board candidates is both a free speech right and concerted activity protected by the Act.

In Township of West Windsor v. P.E.R.C., 78 N.J. 98 (1978), the New Jersey Supreme Court held:

Public employees...possess the right to seek to influence governmental decision-making to the same extent and through the same means as all other citizens--through the customary political channels and through the public input provisions of the Administrative Procedures Act.... [Id. at 111.]

The Court explained that public employees do not surrender their rights as citizens by virtue of their public employment, and that they can support candidates and express their views about governmental decisions concerning labor relations. Id. at 111-112.

More specifically, the Commission has held that a union has a free speech right to urge its members to vote against the reelection of school board candidates because of their views on collective negotiations. South Plainfield Bd. Ed., P.E.R.C. No. 94-71, 20 NJPER 63 (¶25025 1993), affirming D.U.P. No. 94-2, 19 NJPER 428 (¶24193 1993).

Since Reynolds's and Rodriguez's hostility toward the Association in general, and toward Phelps in particular was based upon Phelps exercise of protected conduct, it also became the source of their rejection of Phelps's candidacy for the Supervisor position.

In her remarks on May 15, 1995 (in J-4), Reynolds quickly informed Thomas she would not support Phelps's candidacy. She gave three reasons which, standing alone, could have formed a legitimate basis for rejecting Phelps: (1) She (Reynolds) did not know anyone who could make that transition--presumably--the transition from representing employees to representing management; (2) she did not want Phelps to supervise her mother; and (3) she questioned Phelps's dedication to carry out management's philosophy. But I find those reasons are more pretextual than legitimate.

Reynolds let slip the real reason for rejecting Phelps when she said: "They were involved in the elections; bad mouthing..."

(J-4). I find that Reynolds abruptly broke off her remarks because she realized what she was saying; she was directly admitting that Phelps was being rejected because the Associations were involved in the elections--by endorsing and/or rejecting certain candidates--and were "bad mouthing", i.e., rejecting Reynolds and Rodriguez. Consequently, I find that Reynolds and Rodriguez retaliated against Phelps because the Association and she, its representative, rejected their candidacies for the Board and vigorously pursued union interests. I also find that Reynolds's unlawful motive for rejecting Phelps influenced Rodriguez, Davis, Wright and John, consequently rendering their rejection of Phelps equally unlawful.

Rodriguez testified that he did not support Phelps because she could not adjust from being a union leader to being a supervisor. I do not credit that testimony. Rodriguez conceded that Phelps might be able to perform the duties listed in the Supervisor's job description, and that he would appoint her to run another department. Rodriguez, I conclude, had no real basis to reject Phelps for the reasons he claims made her unacceptable. Thomas had specifically questioned Phelps about her ability to transition from being union leader to being a supervisor and I credited her response that she would carry out management's directives.

Davis, like Reynolds and Rodriguez, also assumed his Board position with animus towards the unions and their leadership. The Association, after all, had not supported his candidacy, either.

Davis believed it was a conflict for unions "to elect board members." However, local voters, not employee organizations, elect board members. Davis probably meant that he opposed union endorsement or rejection of Board candidates, and may have felt that way because he was not endorsed by the Association. But such action by the Association and its leaders is a free speech right, and Phelps could not be discriminated against for exercising that right. South Plainfield.

Together with his initial bias, and his apparent obligation to support Reynolds's philosophy, Davis, too, was quick to reject Phelps candidacy for the Supervisor position because of her union activity.

The facts were similar with respect to both John and Wright. Neither one was endorsed by the Association; and they, too, were opposed to union involvement in Board matters. Although they testified that they voted against Phelps because she didn't have the necessary experience to perform well, neither sought to acquaint themselves with her employment experience. I find they voted "no" primarily because Reynolds and Rodriguez were adamantly opposed to her candidacy.

My finding that the Board was hostile towards Phelps's exercise of protected activity was based in part on the unusual facts presented in this case. The Board administrators unanimously recommended Phelps for promotion. They knew her level of experience; knew that she would report to Thomas; and knew that she

was able to "change hats" and carry out Board policy. Rodriguez testified that he normally relied on Thomas's recommendation, but this time he was "set in his mind." I conclude that Rodriguez's mind set was not based upon Phelps's level of experience or lack thereof. He wasn't fully aware of her level of experience. It was the protected activity he was aware of that caused his mind set against her promotion.

I also conclude that the Board's rejection of Phelps's candidacy was not intended to rebuke the Administration. Tony John switched his conference vote to soften rejection of the Administration's recommendation. That left one significant reason for the Board's action, Phelps's protected activity. Consequently, I found that the Board voted against that recommendation because Phelps exercised rights under the Act.

In its post hearing briefs, the Board challenged any reliance on J-4, J-5 and certain remarks attributed to Collins and Thomas to prove hostility. J-4 is the non-verbatim minutes of the May 15 conference meeting. The Board argued that those minutes were inaccurate and should not be relied upon, and that the statements attributed to Reynolds were not ratified or adopted by other Board members.

Exhibit J-4 was a joint document admitted into evidence without objection. The Board did not impugn its accuracy at the time it was admitted. The part of J-4 I found most pertinent was Reynolds's comment that "They were involved in the elections; bad

mouthings..." Reynolds testified in this case and never denied the statement. A hearing examiner can draw a negative inference from a witnesses' failure to deny remarks attributed to her. See State v. Clawans, 38 N.J. 162, 171 (1962); Wild v. Roman, 91 N.J. Super. 410, 414 (App. Div. 1966). Under these circumstances, I found J-4 relevant, and conclude therefrom that Reynolds was hostile toward Phelps because she did not support her Board candidacy. Although other Board members did not formally adopt or ratify Reynolds's remarks in J-4, their own testimonies and/or other evidence have shown their animus.

Exhibit J-5 was Reynolds March 1995 Newsletter. This, too, was admitted as a joint exhibit and the Board did not qualify its admission. The Board argued that no direct reference was made in J-5 to Phelps or her union. That's true, but in J-5, Reynolds wrote that: "Taxpayers need to be aware of hidden agendas and candidates who will be endorsed by the school employee unions." The Association is one of those unions and I inferred that Reynolds targeted it in J-5. I also inferred Reynolds hostility from other remarks in J-5 (See finding No. 6, infra).

The Board also objects to any reliance I may place on the comments by Collins and Thomas that Phelps's union activity was the basis for the Board's rejection of her candidacy. It argued that those comments were hearsay and uncorroborated.

Although those comments are consistent with my earlier findings, I did not rely on either comment to prove a violation. I

relied primarily on testimony by the five board members who voted against Phelps, and on remarks in certain documents, and my credibility determinations.

Finally, the Board relied upon Newark Bd. Ed. and Newark Teachers Ass'n, P.E.R.C. No. 96-17, 21 NJPER 349 (¶26215 1995), aff'd 22 NJPER 255 (¶27132 App. Div. 1996), certif. den. ___ N.J. ___ (1996), to support its contention it did not violate the Act. While that charge also concerned a boards failure to promote an employee involved in union activity, it was not otherwise relevant.

In Newark, three candidates for two openings as Deputy Director of Cafeterias had identical civil service scores. The candidate with residential preference was selected for one position. The remaining candidates were both in the union, but one, the charging party, was more active than the other employee. The union filed a charge when the Board selected the less active employee for the remaining position.

At hearing, the affected employee testified that the administrators who considered her candidacy had no animus toward her. Subsequently, the hearing examiner found that the Charging Party did not prove the hostility requirement under Bridgewater and granted a motion to dismiss. The Commission and Appellate Division agreed.

The facts and findings in Newark are not comparable to those here. In Newark, the Association presented no direct or

circumstantial evidence to support a finding of anti-union animus. Here it did. Similarly, in Newark, the Administration had rejected the Charging Party, but here they recommended promotion.

As discussed above, the majority Board members all knew of Phelps's union activity, but not her level of experience, yet rejected the Administration's unanimous recommendation because the Association had not supported their candidacy for the Board. Unlike Newark, the evidence here showed the Board majority was decidedly anti-union.

Bloomfield Tp. and Pross, et. al., P.E.R.C. No. 88-34, 13 NJPER 807 (¶18309 1987), aff'd NJPER Supp.2d 217 (¶191 App. Div. 1989), certif. den. 121 N.J. 633 (1990), is a case more on point. There the employer failed to promote a fire captain to deputy chief because of his protected activity. The charging party had established animus based on both direct and indirect evidence and the Township failed to prove it would have taken the action for other lawful reasons.

Having considered all of the evidence and the Board's arguments, I find the Board was hostile to Phelps because of her exercise of protected activity. The Board's evidence that it would have taken the same action despite the protected activity was pretextual. It is not believable that the Board rejected Phelps because she lacked experience when they were substantially unaware of her level of experience. Therefore, I conclude that the Board violated subsection 5.4(a)(3) of the Act. Having violated that

subsection, the Board also derivatively violated subsection 5.4(a)(1) of the Act.

The Independent 5.4(a)(1) Allegation

The 5.4(a)(1) standard the Commission set in New Jersey Sports and Exposition Authority provides:

It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. [5 NJPER at 551, note 1]

In Commercial Tp. Bd. Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983), the Commission held that where an employer's conduct deliberately attempts to restrain employee participation in protected activity, it independently violates subsection 5.4(a)(1) of the Act. It further reiterated that proof of actual interference, intimidation, restraint, coercion or motive is unnecessary to prove an independent (a)(1) violation. The tendency to interfere is sufficient. UMDNJ-Rutgers Medical School; Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986).

Having found that the Board refused to promote Phelps because she engaged in protected activity, I also find that the Board's action independently violated subsection 5.4(a)(1) because

it had the tendency to interfere with and coerce Phelps, and other unit members, in the exercise of their rights under the Act. In its post hearing brief the Board argued against a 5.4(a)(1) finding because the Charging Party failed to prove that the Board prevented Phelps from performing her duties as Association vice-president. However, such evidence was not required. A violation of 5.4(a)(1) is properly based on finding that the Board rejected Phelps's promotion because of her protected activity which, in light of her role in the employee organization, inevitably had the tendency to intimidate any employee from engaging in such activity.

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

Conclusions of Law

1. The Board violated subsections 5.4(a)(3) and derivatively 5.4(a)(1) of the Act by failing to promote JoAnn Phelps to the Supervisor of Transportation position because she exercised her rights under the Act.
2. The Board independently violated subsection 5.4(a)(1) of the Act by interfering with, restraining and coercing Phelps and other unit members because they exercised their rights under the Act.

Remedy

In its charge and post-hearing brief, the Charging Party sought an order appointing Phelps to the Supervisor position

retroactive to May 23, 1995 (the day after the Board vote) with back pay, interest and other requirements. The purpose of a remedial order in (a)(3) cases is, whenever possible, to place the affected employee into the position he (she) would have been absent the employers unlawful action. In (a)(3) cases where employers have refused to promote, the Commission has ordered the promotions, back pay, and other benefits. Bloomfield Tp.; State of New Jersey (Department of Human Services and Joseph Seaman), P.E.R.C. No. 87-88, 13 NJPER 117 (¶18051 1987); Township of Clark.

But in Bloomfield Tp., the Commission also explained that in considering a remedy,

...we must consider its effects on innocent parties and must avoid achieving justice for one employee at the expense of others. [13 NJPER at 810]

Nevertheless, in Bloomfield, the Commission ordered the charging party's promotion even though that limited promotional opportunities for other employees because that specific promotional opportunity would not have continued to exist had the Township not violated the Act.

The result is the same here. Although I prefer not to harm Lieljuris, she was considered for the Supervisor position and unanimously rejected by the Administration in favor of Phelps. Had the Board not acted out of animus it would have approved the Administration's recommendation and promoted Phelps. Lieljuris, then, would not have been reconsidered for, or offered, the

position. Placing Phelps in the Supervisor position is necessary to vindicate her rights.

In addition to the promotion, Phelps is entitled to backpay from May 23, 1995, the day after the Board formally rejected her for promotion, plus interest at the Court rate, pension and other benefits allowed or required by law. The 5.4(a)(1) violation can be remedied by an appropriate posting.

RECOMMENDED ORDER

I recommend the Commission ORDER:

A. That the Willingboro Township Board of Education 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 promote JoAnn Phelps to the Supervisor of Transportation position because she exercised rights protected by the Act.

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 refusing to promote JoAnn Phelps to the Supervisor position 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 and refusing

to promote JoAnn Phelps to the Supervisor of Transportation position on May 22, 1995, because she exercised rights protected by the Act.

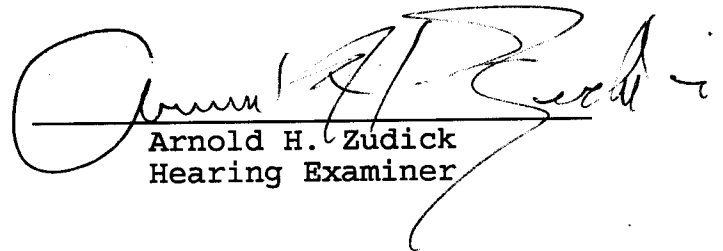
B. That the Board take the following action:

1. Promote JoAnn Phelps to the position, Supervisor of Transportation retroactive to May 23, 1995, at a salary of at least \$32,000.00 per year, with seniority in that position from the effective date.
2. Pay JoAnn Phelps the difference between \$32,000.00 and what she otherwise earned, minus other mitigation, from May 23, 1995 until she is promoted to the position, Supervisor of Transportation, plus interest on that difference in accordance with R. 4:42-11(a).
3. Provide JoAnn Phelps with any other benefits she would have received from May 23, 1995 to the present, as if she had been promoted to the Supervisor position effective May 23, 1995, including pension, health benefits, sick, vacation and personal leave.^{9/}
4. 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.

^{9/} If the parties disagree over how to implement this remedy or how to value its components, it can be resolved in a compliance hearing.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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



Arnold H. Zudick
Hearing Examiner

Dated: April 15, 1997
Trenton, New Jersey



RECOMMENDED



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 cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to promote JoAnn Phelps to the Supervisor of Transportation position because she exercised rights protected by the Act.

WE WILL cease and desist from engaging in conduct which has the tendency to interfere with, restrain or coerce our employees, from engaging in conduct protected by the Act, particularly by refusing to promote JoAnn Phelps to the Supervisor position because she exercised rights protected by the Act.

WE WILL cease and desist from 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 and refusing to promote JoAnn Phelps to the Supervisor of Transportation position because she exercised rights protected by the Act.

WE WILL promote JoAnn Phelps to the Supervisor of Transportation position retroactive to May 23, 1995, at a salary of at least \$32,000.00 per year, with seniority in that position from the effective date.

WE WILL pay JoAnn Phelps the monetary difference between \$32,000.00 and what she otherwise earned, minus other mitigation, from May 23, 1995, until she is promoted to the position Supervisor of Transportation plus interest on that difference.

WE WILL provide JoAnn Phelps with any other benefits she would have received from May 23, 1995 to the present, as if she had been promoted to the Supervisor position effective May 23, 1995, including pension, health benefits, sick, vacation and personal leave.

Docket No. CO-H-96-117

Willingboro Board of Education
(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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"