

H.E. NO. 2001-11

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

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-99-170

IRVINGTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Hunt, Hamlin & Ridley, attorneys
(Raymond L. Hamlin, of counsel and on the brief)

For the Charging Party, Oxfeld Cohen, LLC, attorneys
(Nancy I. Oxfeld, of counsel and on the brief)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On November 30, 1998 and December 17, 1998, the Irvington Education Association (Charging Party, Association or IEA) filed an unfair practice charge and amended unfair practice charge (C-1)^{1/} with the New Jersey Public Employment Relations Commission (Commission) alleging the Irvington Board of Education (Respondent

^{1/} Exhibit designations are as follows: C - Commission; CP - Charging Party; and, J - Joint. There were no separate exhibits submitted by Respondent.

or Board) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a(1) and (3).^{2/}

The IEA contends that the Board, through its agent, Augusta Street School Principal Esmeralda Vargas, violated the Act by the following:

1. On September 14, 1998 verbally directing IEA building representatives Judith Tasoff and Wilda Matthews not be excused from weekly building staff meetings to attend monthly union meetings.
2. On September 16, 1998 issuing a memorandum to Tasoff requesting that grievance matters be discussed privately (i.e., not in public places or in front of parents or students), advising that Tasoff's conduct toward her (Vargas) has undermined her authority, requesting that when future IEA issues are to be discussed with her that both IEA building representatives be present, and suggesting that before grievances are written, the issues be discussed with her.
3. On October 19, 1998 sending a memorandum to Superintendent Peter E. Carter regarding approximately seven (7) issues between Vargas and Tasoff occurring within the previous year and one-half.

On April 1, 1999, a Complaint and Notice of Hearing issued.

A pre-hearing conference was conducted on May 4, 1999.

Pursuant to N.J.A.C. 19:14- 6.3(a)(10), Charging Party requested the Commission decide:

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

1. Whether the September 14, 1998 directive discriminates against Tasoff and Matthews for engaging in protected activity in violation of 5.4a(1) and (3) and violated the parties' past practice of allowing union representatives to miss staff meetings to attend monthly union meetings.
2. Whether the various comments in the September 16, 1998 memorandum (CP-1) violate 5.4a(1) in that they interfere with the IEA's right to conduct Association business and interfere with Tasoff's rights as a union representative.
3. Whether the various comments in the October 29, 1998 memorandum (CP-3) violate 5.4a(1) because they interfere with the IEA's right to select Tasoff as its representative to process grievances on behalf of its members and violate 5.4a(3) because they constitute a deliberate attempt to defame Tasoff's character in retaliation for her engaging in protected activity.

On May 8, 1999, the Board filed its Answer denying the allegations and denying that it violated the Act (C-2).

Hearings were held June 8 and 10, 1999, July 13, 1999 and January 5, 2000.^{3/} At the conclusion of the Charging Party's case-in-chief on June 10, 1999 the Board moved to dismiss certain aspects of the Complaint contending the following:

1. There was no testimony that Vargas prevented Tasoff or Matthews from attending monthly union meetings.

^{3/} The hearing transcripts shall be referred to as 1T, 2T, 3T and 4T, respectively. The fourth day of hearing was originally scheduled for November 30, 1999. Respondent requested an adjournment because its witness, Vargas, who was to continue her testimony from the previous hearing day, was unavailable; she had a death in the family on November 29, 1999 (4T3-4T6). Charging Party objected to the adjournment. I granted the request.

2. There was no testimony that other Board employees were allowed to skip staff meetings to attend monthly union meetings.
3. As to Vargas' September 16th memorandum regarding having both IEA representatives present when discussing grievances, Tasoff agreed it was a good idea therefore it can not be a violation of the Act (2T28-2T33).

Charging Party conceded that it offered no testimony regarding any past practice allowing union members to miss building staff meetings to attend union or other meetings (2T34). It argued, however, that there were disputed facts and the Board was not entitled to judgment as a matter of law (2T33-2T37). The motion was denied on the record (2T40-2T42).

The parties filed post-hearing briefs by June 1, 2000. According to Respondent's Brief, note 1, page 2, Tasoff was transferred from Augusta Street School and was no longer its IEA building representative. It appeared therefore, there were sufficiently changed circumstances since the final day of the hearing to warrant further settlement discussions. By September 15, 2000, however, I was requested to proceed with issuing a report and recommended decision.

Based on the entire record, I make the following

FINDINGS OF FACT

1. Judith Tasoff has been employed by the Board as a teaching staff member for over thirty years (1T12). At the time of the events giving rise to the instant matter, she had been assigned

to Augusta Street School for approximately twenty-four years (1T13). In 1998, she held the title "language arts literary specialist" (LAL) and her job duties involved working with both students and staff members in language arts activities. Her assignments were directed by the school principal and her supervisor (1T12-1T13).

Tasoff was not assigned to a classroom; she worked from a small office in which she met with students (1T13-1T14).

By 1998, Tasoff had been an IEA representative or "building representative" at Augusta Street School for many years (1T13). As building representative, Tasoff operated as a liaison between the IEA, its members, including teachers, secretaries, security guards, and Board management personnel (1T14).

2. In 1998, Wilda Matthews was employed by the Board as a teaching staff member. She was also a building representative for the IEA and held that position for a number of years (1T15- 1T16).

3. Esmeralda Vargas taught english as a second language for approximately nine years during the 1980's (2T82-2T83). She left the district for approximately three years but was rehired in 1992 as an administrative assistant to the superintendent (2T83). Vargas served as an assistant principal at Augusta Street School in 1993 and 1994, Thurgood Marshall School in 1995 and Grove Street School from 1996 until her January 1997 appointment to be principal of Augusta Street School (2T83, 2T94, 2T94-2T95). As principal, she supervises twenty-eight certificated staff and approximately twelve support staff (2T95).

Vargas as Assistant Principal

4. Vargas and Tasoff worked together during Vargas' tenure as assistant principal at Augusta Street School. They interacted daily but had few confrontations (2T84). On one occasion, however, Vargas observed Tasoff discipline a disruptive student by having him sit behind a fire exit door, out of Tasoff's direct line of sight, in violation of Board policy (2T84- 2T85). Vargas returned the student to the classroom and requested Tasoff speak with her later (2T85). Vargas reported the incident to the principal but it is not clear what, if any, action was taken against Tasoff for this infraction (2T85-2T87). Tasoff was very upset at being told by Vargas not to allow students out of her direct sight (2T62).

On another occasion, Tasoff addressed Vargas concerning four instances in which Vargas criticized teachers (including Tasoff) in front of students. The matter was resolved without further incident (1T54-1T55).

Rosemary Brooks-Bittings is a 14-year Board employee currently working as a social studies teacher at Myrtle Avenue School. She was a guidance counselor for two years at Augusta Street School while Vargas was assistant principal (3T107). Bittings observed that Tasoff and Vargas did not get along (3T108). Bittings heard Tasoff make negative comments about Vargas, usually while in the teacher's room (3T108-3T110). Bittings described Tasoff as the "nucleus of the clique" which generally did not like Vargas (3T113). Tasoff questioned Vargas' authority, was "curt", "nasty" and "unpleasant" toward her (3T113-3T114).

Bittings described her own problems with Tasoff. Tasoff was partially responsible for revoking Bittings' assigned parking space (3T135, 3T137). Tasoff told Bittings and others that she (Tasoff) did not like her (Bittings) personally, did not like her hair, the way she walked or the way men paid attention to her (3T137-3T138).

Bittings spoke to then-principal Kevin West about Tasoff but found Tasoff was protected by her status as IEA representative and received certain privileges from West provided no grievances were filed on his watch (3T114, 3T124). According to Bittings, those privileges included exempting Tasoff from covering classes when substitutes were not available and allowing her to deviate from certain schedules involving pulling students from class (3T129-3T131, 3T133).

I credit Bittings' testimony. Tasoff did not file a grievance until Vargas later became principal (1T149). Moreover, West testified in this matter but was not questioned about his alleged preferential treatment of Tasoff nor was it otherwise refuted (4T44-4T56).

Tasoff Votes Against Vargas Becoming Principal

5. During the fall of 1996, a five-member committee interviewed applicants for Augusta Street School's vacant principal position. The committee included the Acting Principal Frank Sica, two PTA representatives, Tasoff and Matthews. (1T52, 2T88). The

committee interviewed applicants, including Vargas, and voted by secret ballot to recommend three applicants for the position; Vargas was not among those recommended and Tasoff specifically voted against her (1T50-1T54).

Leaving her interview, Vargas heard Tasoff state that "she just won't do for our principal" (2T89, 3T71, 4T17, 4T19). Tasoff believed that Vargas was not familiar with the IEA's collective negotiations agreement, was unprofessional and while assistant principal, had tried to divide the staff among those that supported Vargas and those that supported the principal (1T56-1T59). Later, Vargas heard Tasoff tell other teachers she was not competent to be principal (3T49).

Following the committee's three recommendations, the Board appointed a principal but that person resigned before assuming the position amid speculation she had been threatened with physical harm if she took the job (2T69, 2T88). The position was re-posted and Vargas re-applied (2T89). She was re-interviewed, this time by Superintendent Carter and the personnel director.

In December 1996, Vargas was recommended for the position but the Board tabled it because Board members received information that Augusta Street School staff circulated a petition that they did not want her as principal (2T91). Vargas never saw the petition (2T91, 3T71-3T72, 4T20). No facts suggest Tasoff circulated the petition (4T21). Additionally, at that time Vargas was the assistant principal at Grove Street School and received a telephone

call from an unidentified female who told her not to apply for the Augusta Street School position (2T92, 3T72).

Vargas never considered withdrawing her application (2T92). She was appointed in January 1997 and was set to begin in February (2T93). Vargas called the president of the PTA to try to organize a team of parents and teachers to insure a smooth transition of leadership. The PTA president advised her that the Augusta Street School staff made it clear she was not welcome there and she should withdraw her application (2T92, 3T72).

Due to the threats, Superintendent Carter delayed Vargas' start date one month and suggested she organize a reception to introduce herself to the staff. Vargas arranged and paid for a brunch reception to introduce herself to parents and staff. Fifteen parents and Vargas' secretary attended; the rest of the staff did not attend (2T108).

The Sign-Out Sheet Issue

6. When Vargas became principal, she promptly changed the school's early dismissal policy. Although some employees complained, no formal grievances were filed (2T95-2T101). Vargas also posted a notice requiring teaching staff to sign-out when leaving the building during their duty-free lunch (1T16, 2T101-2T106).

Tasoff approached Vargas in the hallway and, with students present (3T24), said "[y]ou know, we are not supposed to sign in

and out, I mean that's a given" (2T102-2T103). Vargas explained that she simply wanted a procedure to keep track of staff who may be leaving the building during the school day (2T103). Tasoff responded that it was against past practice and Vargas requested documentation to support her contention. Tasoff's response was, "[w]ell, I am sure that it exists somewhere" (2T103).

Vargas did not rescind the sign-out requirement. During a school day, Tasoff went to the main office and with students and staff present addressed Vargas stating "Oh, I see that the blue book [sign out book] is still on the counter." Vargas responded, "Yes Ms. Tasoff." Tasoff stated, "I thought you were going to remove it." When Vargas said no, Tasoff responded, "Well, we are just going to have to grieve this" and walked out. At some point in the exchange, Vargas asked Tasoff to join her in her private office to continue the conversation but Tasoff refused (3T24).

The matter was grieved and eventually resolved with Superintendent Carter's intervention. The sign-out sheet was removed (1T16, 2T103-2T106).

The Board Meeting Boycott

7. The Board rotated its regular meetings among the schools. Traditionally, when the Board met at a particular school, the staff at that building attended the meeting as a sign of support for the administration (1T31). In September 1997, the beginning of Vargas' first full year as principal at Augusta, the Board was scheduled to meet at Augusta.

On the day of the meeting, Vargas received a telephone call from an assistant superintendent stating he had heard that Augusta teachers intended to boycott the Board meeting (2T141, 3T79). Matthews attended the meeting and afterwards telephoned Tasoff telling her there were rumors that the teachers boycotted (1T32).

The day after the meeting Tasoff advised Vargas that the IEA was not involved in any type of boycott (1T32). Tasoff explained that since there was "history" between she and Vargas, she felt obligated to reassure her that the Association had nothing to do with a boycott (1T33). Tasoff never told anyone not to attend the meeting but did hear teaching staff members state they intended to skip the meeting (1T31). Vargas heard from various staff that Tasoff made comments in the teacher's room suggesting "[l]et's not show up for the meeting at all" but no one advised Vargas that Tasoff had specifically told them not to go to the meeting (2T141, 3T76).

According to Vargas, Tasoff "could have been" lying when she told her the IEA had nothing to do with the boycott and speculated Tasoff may have made a telephone call to the assistant superintendent about the boycott (3T80). Vargas was suspicious because Tasoff was the only staff member to talk to her about the boycott (3T81).

The Class Coverage Issue

8. At Augusta Street School if a substitute is not available when a teacher is absent, a special (i.e., a LAL such as Tasoff) is used to cover the class (1T36). Before Vargas became principal the absent teacher's schedule was generally divided so that no single teacher was required to cover more than one or two periods (1T36-1T37). In 1997-1998 Vargas directed Tasoff to cover a class for the entire day. The verbal exchange, according to Tasoff, went as follows:

I simply asked Mrs. Vargas why she had asked me to cover the class for the entire day since it had always been her practice to divide up the class, one special subject teacher would cover for a couple of periods, and then another for a couple of periods and so on.

I said to her, 'Mrs. Vargas, who will take the class for the rest of the day?'

'You are.'

I said, 'I had them already.'

She said, 'You will.'

I said, 'But I mean for the rest of the day?'

She said, 'You will, Ms. Tasoff.'

I said, 'Aren't we splitting them up the way we always do?'

She said 'I need for you to cover the class.'

I said, 'No, Mrs. Vargas, you don't need for me to cover the class. You need for the class to be covered. You are just choosing to give it to me for the whole day and I don't think it is fair'

She said, 'Are you refusing to cover the class?'

I said, 'No, you are the principal, if you tell me to cover the class I will cover the class. I

just don't think it is fair for me to cover the whole day.' [1T36-1T37].

At the time of this incident, Tasoff received neither a verbal nor written reprimand (1T38).

Vargas contends Tasoff refused to cover classes according to the pre-determined schedule she - Vargas prepared (3T98). Instead, Tasoff would go ahead on her own and see if other staff were available and inform Vargas that the other people had agreed with her to alter the schedule (3T99). If Vargas required her to cover the class, Tasoff would give her various excuses why she should not be required (3T100-3T104). When directed to cover, Tasoff did so with a disgruntled attitude noticeable even to students (3T153).

I credit Vargas' description of Tasoff's conduct and reaction in this circumstance; it is consistent with Bittings' characterization that under the previous administration Tasoff was accorded certain privileges including being exempt from class coverage (3T129-3T131, 3T133). It is logical she would dislike the privileges being discontinued.

There was no reference to Tasoff's refusal to cover classes in her 1997-1998 evaluation (CP-4). Vargas explained that the evaluation "is a compilation, not just the instances that she had with me that I thought [were] personal, but a lot of the indicators here have to do with her relationship with students, with parents and in the classroom." (3T143). The absence of negative references in Tasoff's evaluation is consistent with Vargas' effort to keep

Tasoff's personal problems with her separate from her professional performance.

Student Complaints about Tasoff

9. During the 1997-98 school year, three sixth grade girls gave Vargas a written complaint claiming that Tasoff referred to them as "black monkeys, jerks and ignorant" (CP-3, 1T38-1T39). Vargas showed the complaint to Tasoff (1T38). Tasoff denied the allegation (1T135, 3T156). When asked if she believed that Tasoff had used those words with students, Vargas replied, "Well, that's not what I believe, it's what was reported to me" (3T155). At the time the students complained, Vargas did not inform the superintendent; she documented the incident by placing notes in an incident file (3T157).

The "In-Class v. Pull-Out" Issue

10. Before the 1997-98 school year, Tasoff "pulled-out" students when she worked with them, she took them from their classrooms to her office to provide special assistance. Vargas preferred Tasoff work in the student's classroom. In September 1997, Tasoff, her supervisor, Jean Ferrucci and Vargas discussed the pros and cons of "pull-out versus in-class" (1T40). Tasoff stated that "for once in my life I didn't say too much because I thought here are the two administrators, I don't think Mrs. Vargas will listen to me, maybe she will share some ideas with Ms. Ferrucci." (1T40).

Vargas was firm on the in-class practice and therefore Tasoff continued in class instruction (1T40). Tasoff said, "I never even discussed it with her. There are classroom teachers who still want to argue with her and I had said to them, don't even bother. She is firm in her belief about this and this is what she wants" (1T41). Vargas, however, said that after she told Tasoff to stop pulling students out of classrooms, she (Tasoff) continued to do so throughout the 1997-98 school year (3T145). Vargas explained that she "...did not argue with Ms. Tasoff, I allowed her then to pull out several of the children because she was adamant about having it that way....I told her she could pull out those children that she felt, in her ability, and in her professional estimate, that needed to be pulled out (3T147-3T148). Tasoff's evaluation for 1997-98 (CP-4) however, did not indicate that she was pulling students out of class in violation of Vargas' directive (3T146, 3T149).

I credit Vargas. I find that Tasoff's conduct in continuing to pull out students and reluctance to adhere to Vargas' schedule is consistent with Bittings characterization that under the previous administration Tasoff was accorded certain privileges including being allowed to deviate from student/classroom schedules (3T129-3T131, 3T133). It is logical she would dislike the privileges being discontinued. The absence of negative references in Tasoff's evaluation is consistent with Vargas' effort to keep Tasoff's personal problems with her separate from her professional performance.

Prior to the 1997-98 school year, when Tasoff was pulling students out of classrooms, she had prepared lesson plans (1T41). When she was directed by Vargas to work in the classrooms during 1997-1998, she was working with the classroom teachers' lesson plans and no longer prepared her own lesson plans (1T41-1T42). Vargas never previously directed Tasoff to prepare lesson plans and never reprimanded Tasoff for not preparing lesson plans (1T42).

In the fall of 1998, Tasoff received a memorandum from Vargas indicating she had not received lesson plans from her (1T42-1T43). After Vargas requested Tasoff to submit lesson plans, she did submit some documents but Vargas contends they were not in the same form as what other teachers submitted as lesson plans (1T42, 3T167-3T168). Vargas' testimony was consistent with Donnelle L. Williams' observations. Williams was a secretary in the school's main office and was responsible for collecting various reports and paperwork from the staff, including lesson plans. It was her opinion that Tasoff was reluctant to follow Vargas' directives as she (Tasoff) was routinely delinquent in providing certain reports and paperwork in the proper form (2T50-2T53, T55-2T56).

S.L.O.P. Issue

11. The Board receives funding from the State for a number of after school activities (1T43). One of these activities is the school level operational plan (SLOP) intended to improve student achievement in reading, math and writing (3T6-3T7). It is typically

administered by teachers. When SLOP positions were posted in 1997 or 1998, however, Vargas said she learned from several teachers in strict confidence that Tasoff told people in the teacher's room not to apply so the program would not run (3T6, 3T8, 3T83). Vargas was unable to give specific names (3T84, 3T88) or other facts to support the allegation. Instead, she stated that "I was made aware of the fact that there was an influence" (3T88) and that Tasoff made statements to influence people not to support the program (3T90). Vargas conceded she did not know if any staff member chose not to apply because of having other after school commitments and she never asked the staff, individually or in a group, why there was not more support for the program (3T91).

I credit Tasoff's testimony on this matter; she never told teachers not to apply (1T43, 1T146) and she took no position one way or the other (1T147).

Keep It In The Building Issue

12. In 1997 and 1998, Ms. Forahin, LAL district supervisor and Dr. Richard Hangee, supervisor of staff development, advised Vargas that Tasoff reported to them certain teachers were having difficulty with language arts resources at Augusta Street School (3T169, 3T172, 3T180). Additionally, during 1997-1998, Supervisor of Language Arts Ferrucci (Tasoff's supervisor), asked Tasoff how a first-year teacher at Augusta was doing and Tasoff replied that she was providing her with assistance in the language arts program. In

a subsequent conversation, Ferrucci then told Vargas she understood that Tasoff was helping the first-year teacher. Later, Vargas called Tasoff into her office and indicated she was "very angry" that Tasoff had taken information about the teacher "out of the building" (1T44).

Vargas believed that Tasoff's discussions with Forahin, Hangee and Ferrucci were intended to make Vargas look bad (3T171, 3T173-3T174) and adversely affected her ability to be the instructional leader in the school (3T5). Vargas felt it was inappropriate for Tasoff not to advise her, as the principal, of these matters but instead going to a supervisor was contrary to "professional courtesy" and that Tasoff "overstepped her boundaries" (3T171).

Former principal Kevin West was employed by the Board for 18 years as a teacher, assistant principal and principal. He served eight years as a principal (4T44), including four years at Augusta. West preferred that his teachers come to him prior to speaking to a subject supervisor about the staff in his building but there was no procedure or regulation forbidding such an action and there are certain times that it would be appropriate (4T46-4T47).

There is no written policy requiring staff members to bring their concerns about another staff members only to the building principal, not to supervisors (3T171).

The Computer Issue

13. When West was principal at Augusta Street School he allowed Tasoff to take one of the school computers home over the summer (4T45-4T46). West filled-out the appropriate paperwork to allow Tasoff to take the computer, and to document within the school system that Tasoff had the computer with his permission (4T46, 4T50-4T52, 4T54). In June, 1997, Vargas went to Tasoff's room and noted that Tasoff had one computer. Tasoff advised her that she actually had two computers; one at school and one at home with West's permission. Vargas directed her to return the computer from her home (1T34). It was not returned right away (3T97).

Tasoff, angered by Vargas' request that she return the computer (2T143) told Vargas to speak to Ferrucci about it as it might have been purchased with LAL funds and thus subject to restrictions on non-departmental use (1T35, 1T133). Tasoff, however, was the one that spoke to Ferrucci before returning the computer. According to Vargas, Tasoff sought Ferrucci's intervention so she would not have to return the computer (3T94). Ferrucci then called Vargas and they discussed the matter (2T143). The computer was returned to the school in July 1997 (3T96). Tasoff was not reprimanded (1T34-1T35) and Vargas did not write-up Tasoff for having school property at home without permission (3T98). Vargas never questioned West whether he had given Tasoff permission to have the computer at home (4T45-4T46).

September 1998 Grievances

14. On the first day of school in September 1998 Vargas issued two directives which led to grievances by the IEA. One was a determination that staff could no longer take personal business days off on the day preceding or following a vacation or holiday (1T21, 2T119-2T120), the other was that permission had to be given prior to leaving the building during a preparation period (1T23). Vargas did not discuss either directive with IEA building representatives Tasoff or Matthews before implementation (3T74-3T75).

As to the personal business day issue, Tasoff, who along with another teacher had been denied a personal business day off, went to speak to Vargas on September 14, 1998. The conversation started with Tasoff questioning Vargas from the threshold of Vargas' office within the main office, with secretaries and students present (2T121, 3T26). They disagreed over whether Vargas had the authority to issue the directive. Tasoff contended it violated past practice and Vargas requested documentation of the alleged past practice (2T121). Since the other teacher had filed a grievance over the denial of her personal business day Tasoff allowed that matter to proceed and did not file her own grievance (1T21-1T22). Vargas requested Tasoff step into her private office; Tasoff refused.

At some point following the discussion Vargas put a memo in Tasoff's school mail box suggesting that pending further research she would rescind both directives (1T24). On September 15, 1999, at approximately 9:30 a.m., Tasoff went to the front office to clarify with Vargas whether certain personal business days previously denied

had been granted in light of the September 14 memo (1T25). Tasoff saw Vargas on the other side of the front counter, in the outer office, (1T119-1T121, 2T122) and with students and a parent present (3T27) asked Vargas, in a normal voice - not a whisper - if the memo meant she was granting the personal business days (2T122). Vargas requested Tasoff step into her private office; Tasoff refused (3T27).

Vargas did not feel that it was appropriate to discuss that particular issue in public in the outer office with students and teachers present and while people were coming and going. She "was in the middle of taking care of a parent, and I asked Ms. Tasoff, I said, 'No, we can't discuss it right now.' Her voice got high, what does it mean, so what does it mean? I said, 'Ms. Tasoff, I prefer that we discuss these issues in my office and not here in public.' Ms. Tasoff walked outside the office." (2T123).

Tasoff described her meeting with Vargas as follows:

The next day in school Mrs. Vargas and I were on opposite sides of the counter, which is not even as wide as this table, and I leaned across and said, 'Mrs. Vargas, I read the memo last night, I'm not sure what you mean, are you granting the personal business days or not?'

To me it seemed she became upset or angry. She called me into her private office and took great objection to me addressing these issues to her in what she called in public.

I said, 'We were in the outer office, we were the only people, there were two secretaries who happened to be IEA members anyway.'

I was speaking very softly. I asked one of the members if she heard anything I said, and she said no.

When we went into her office I said, 'I didn't know that bothered you, okay, I won't say anything to you if we are not in your office anymore.' [1T25].

Although they could not be specific as to the substance of any meetings or discussions, two witnesses supported Vargas' characterization of Tasoff's conduct toward her.

Donnelle L. Williams was hired as a secretary at Augusta Street School in March 1998. Her desk is located in the main office, just feet away from the door to Vargas' private office (2T44, 2T53). She observed, on at least two occasions while she was working at her desk, Tasoff and Vargas engaged in unpleasant conversations (2T45). She could not recall the precise dates nor is she aware of the substance of their dispute but described hearing their voices through Vargas' closed office door. Additionally, she described one particular incident in which one of their closed-door discussions was apparently over. Tasoff and Vargas emerged into the main office but Tasoff seemingly continued the conversation; Vargas responded by suggesting they go back into her office. According to Williams, other people, including students, were present in the main office at that time and Tasoff was visibly upset and loud-spoken (2T46-2T47, 2T57).

Similarly, kindergarten teacher Doris Smeltzer, a 20-year Board employee with nine years at Augusta Street School who has also known Tasoff for nine years, had numerous occasions to observe Tasoff's conduct with and toward Vargas. While she could not specify the date or substance of the conversation, Smeltzer observed

Tasoff and Vargas discussing a matter in the main office. Vargas was obviously trying to explain her position on some matter but according to Smeltzer, Tasoff had a look on her face as if to state "what this woman [Vargas] was saying couldn't be important, wasn't important almost like disrespect is the only way I can describe it like she was humoring her by even letting her talk." (2T63). She described Vargas' tone as positive, pleasant, "above and beyond in patience" (2T63, 2T67). She described Tasoff as condescending (2T64), "patronizing, not nice, not a true mature adult discussion the way it should be, professional" (2T67). Smeltzer observed Tasoff jump up and down in glee when she learned Vargas was out one day (2T67). Additionally, she observed Tasoff fomenting discontent by whispering about Vargas in the halls near her office (2T78). She heard Tasoff refer to Vargas as "her royal highness" (2T64).

Although Smeltzer had previously sought and received union advice from Tasoff and generally thought she was a good IEA representative (2T65), she believed Tasoff's goal was to make Vargas look bad and have her replaced (2T68). She observed that prior to Vargas' arrival, Tasoff routinely resolved matters with the principal informally. Since Vargas' arrival all Smeltzer hears from Tasoff is "grieve, grieve, grieve" (2T65). Smeltzer did not believe Vargas was anti-union (2T66), but Tasoff and a small group of staff had not given her a chance since before she became principal (2T73).

Tasoff conceded that after her discussions with Vargas, if issues were not resolved, typically she responded "[w]ell, then we

will put it in as a grievance and we will get it settled that way one way or the other." (1T26). Vargas perceived the statement as ridiculing and threatening due to Tasoff's tone of voice and demeanor (2T125).

Based on Williams' and Smeltzer's characterization of Tasoff, I credit Vargas' testimony as more accurately describing the verbal exchanges between her and Tasoff on September 14 and 15, 1998. Moreover, I find Tasoff more likely than not discussed union business in the presence of students, parents and other employees in the hallways and outer office (2T124, 2T131, 3T35), and in the classroom (3T51-3T52).

Both the personal business day matter and preparation period issue were grieved and on September 24, 1998 Superintendent Carter sent a letter to the IEA indicating that the grievances were resolved on September 14th when Vargas issued the memo to Tasoff indicating that pending further research she was rescinding her directives (CP-5, 2T106, 3T75-3T76).

Vargas acknowledged that the grievances were resolved after consultation with Carter (3T163). Tasoff also acknowledged that even if she did not consider the matters finally resolved, further processing of the grievances were likely untimely (1T157). Nevertheless, Tasoff and the other teacher each had the use of their personal business days (1T154-1T155).

September 14, 1998 Union Meeting Release Issue

15. For many years Augusta Street School staff meetings were held weekly on Tuesdays, while IEA meetings attended by officers, building representatives and other representatives were held monthly on Mondays, causing no conflict. For the 1998-1999 school year Augusta Street and several other schools switched staff meeting days to Monday (1T46, 2T115).

Tasoff spoke to Vargas in the hallway with students passing-by (2T116, 3T26) in September 1998 about the scheduling conflict but IEA President Madeline Edwards was working with an assistant superintendent to resolve the matter. Vargas relayed Tasoff's concerns to the assistant superintendent who apparently suggested the IEA representatives alternate attendance at IEA meetings. Vargas conveyed the suggestion to Tasoff (2T116).

When the conflict was not resolved by Edwards and the assistant superintendent, Tasoff revisited the issue with Vargas. Tasoff suggested she and Matthews would get notes of the building meetings from other teachers, the building meetings ran from 3:00 to 4:00 pm and the union meetings did not start until 3:45 p.m., therefore, they would only have to be released at 3:30 p.m., and two other building principals had no problem releasing their building representatives (1T47, 1T126). Vargas explained that she had spoken to the superintendent or an assistant superintendent about the matter and did not have to grant release (3T15-3T16). Tasoff then responded "...make sure you find out because you are responsible for it..." (2T126- 2T127). Vargas did not, however, prevent either

Tasoff or Matthews from attending the IEA meeting, nor did she threaten disciplinary action if they did not attend the building meeting (2T117-2T118, 3T15). Moreover, Tasoff acknowledged she could have gone to the IEA meeting but chose not to (1T128).

Historically, IEA representatives were not dismissed from staff meetings to attend union meetings (3T113).

When Tasoff and Vargas could not resolve the matter, it was grieved to Superintendent Carter on September 21, 1998 (see CP-5). Carter's response to the grievance was to cite three provisions of the parties' collective negotiations agreement:

1. Article XX, #16 provides that "Up to six (6) Association representatives shall be released at 3:15 in order to attend no more than one Association meeting per month, September through June."
2. Article XXI, #3 provides for start and stop times for teachers but notes exceptions for certain meetings, including principal's meetings, and includes a negotiations re-opener clause in the event of "practical problems associated with implementation" of meeting schedules.
3. Article XXI, #4 addresses when Administrative meetings may be held.

In his September 24, 1998 letter, Superintendent Carter suggested the two representatives alternate attendance at the meetings (CP-5). Tasoff and Matthews decided that was not acceptable (1T47-1T48, 1T127-1T128). Despite the limiting provisions of Article XX, #16, Tasoff contends that she is exempt from participating in the staff meetings because of the collective negotiating agreement (1T123). It has not been an issue since 1998 and the IEA did not appeal Carter's determination (2T119).

September 16, 1998 Memorandum

16. On September 16, 1998, Vargas issued a memorandum (CP-1) to Tasoff which was copied to her personnel and IEA files stating as follows:

This is to reiterate my points of discussion with you on 9/15/98 regarding IEA issues and concerns.

Please cease from addressing me in hallways or outer office[s] to discuss grievance matters. I would like to request that such matters be discussed privately.

On repeated occasions you have undermined my authority as principal by making public threats to "grieve" the issue in question. I am also aware that you speak negatively about my person and leadership to other staff members. I find your actions unprofessional and unethical.

This behavior is unproductive, damaging to our school environment and not in the best interest of staff and students. I do not intend to tell you how to conduct IEA business, but, I do insist on your respect for my authority.

In the future, I would also request that IEA issues to be discussed with me, shall be discussed with both you and Ms. Matthews, alternate IEA representative in my office. I truly believe the goal is to work collaboratively and cooperatively as professionals to resolve issues at the building level.

Perhaps you and the grievant staff member should discuss concerns and areas of disagreement with me, prior to writing a grievance. I'm confident, that through open, fair and just reflection and consideration for children and adults, we can resolve many problems.

Vargas indicated that the major point of the memorandum was that it addressed "...issues that affected the successful operation of my building and the teaching environment of...my entire school community" (3T16).

On October 13, 1998, Tasoff wrote a rebuttal (CP-2) to the memorandum with copies sent to the personnel file, IEA President Madeline Edwards, Superintendent Carter and an assistant superintendent (1T28-1T29). Tasoff responded because she believed the memorandum contained serious charges about her conduct. Tasoff wanted to assure that others would see that she did not agree with the memorandum (1T75). Her rebuttal states as follows:

This rebuttal is in response to your allegations about my conduct as an IEA representative. Your allegations contain numerous inaccuracies and gross distortions. Here are the facts:

You requested that I cease from discussing grievance matters with you in hallways or in the outer office. There had only been one or two such occurrences and those had been brief questions asked in an extremely quiet and respectful tone of voice that no one else could have overheard. Even so, when you made this request to me one or two days before your written memo, I politely told you that I had had no idea that this bothered you, but that I would certainly not do it anymore. I considered this matter to be settled and was thus quite surprised to find a reference to it in your memo.

I take grievous exception to your claims that I have undermined your authority as principal and have made public threats to grieve an issue. Obviously, you are the principal of Augusta Street School and, as such, are acknowledged by all of us on staff to have the rights, privileges, and authority accorded to that position. I have always acknowledged your authority, as well as the authority of all previous principals for whom I have worked.

You say I speak negatively about you to other staff members. Not only do I have a Constitutional right to freedom of speech, and not only have I expressed no opinion that isn't shared and echoed by the vast majority of the staff, but, as I have told you previously, I can

not be responsible for the lies or distortions that might be told to you.

In the matter of potential grievances, each time I have informed you that I felt a grievance needed to be put into written form, I have stated this quietly, respectfully, and in the privacy of your office-never "in public". I highly resent your use of the inflammatory word "threat". My statements to you that "we'll have to put it in as a grievance and get it settled" have, again, always been made quietly and respectfully, and always after fruitless efforts to resolve matters at the building level.

In your final paragraph you express a desire to have areas of disagreement discussed with you prior to writing the grievance. This is exactly what has been attempted, always to no avail. Your position on every single issue has been an unequivocal "no", or reasons that make no sense to the IEA members on staff.

The one sentence in your memo with which I heartily agree is that all future IEA-related discussions between us should also be attended by Mrs. Matthews, the other IEA representative in the building. I truly feel that I need the "protection" of a witness to our discussions. After having been an IEA rep for approximately 25 years, and never having had to file a grievance until March of 1997, I feel I am now being harassed for simply doing my job in upholding our contract.

In conclusion, I hereby request that your written allegations against me be removed from all files, including my Personnel File, and that you send me a letter agreeing to this request.

Vargas refused to remove the September 16th memorandum (CP-1) from Tasoff's personnel file (2T138) because she believed the issues contained therein needed to be memorialized (3T17).

Vargas/Edwards Conversation

17. Madeline Edwards has been employed as a classroom teacher by the Board for 20 years, and has been IEA president for four years (2T6). A few days before seeing a memorandum dated October 29, 1998 (CP-3, 2T15), Edwards went to Augusta Street School on a regular visit to perform her duties as IEA president. She described those duties as including, in part, meeting with principals and supervisors to try and resolve management and IEA issues (2T16).

When Vargas saw Edwards in the lobby she requested that she step into her office for a conversation (2T9). According to Vargas, they were good friends and Edwards was assisting her with her dissertation. Among other reasons to meet with her, Vargas sought Edwards' assistance in resolving personal problems with Tasoff (3T13). At some point in the conversation Vargas asked Edwards "[p]lease you have to do something about Ms. Tasoff, this is not good." (2T9- 2T10). Vargas told Edwards that she did not feel Tasoff was working out as a building representative.

Despite describing her IEA president duties as including trying to resolve management and IEA issues (2T16), Edwards stated that Tasoff was the elected representative. When Vargas indicated there had been no election, Edwards explained that when there was no opposition to a candidate for an elected position, the person received the position by nomination, but was considered to be elected (2T9-2T10).

Vargas told Edwards that she felt she could work with Matthews. Although Matthews had filed a grievance, they had a good working relationship because Matthews was more professional in her discussions (3T8, 3T19, 3T193). Matthews never threatened grievances (3T63). Edwards responded that it was up to the representatives as to how they divided the work and Vargas offered that "[y]ou know Madeline, to you this is business but for me it is not. This is personal and I have the proof" (2T12). Edwards and Vargas then discussed other unrelated topics.

October 29, 1998 Memorandum

18. On October 29, 1998, Vargas sent Carter, Personnel Director Walter Rusak, Tasoff and the IEA a memorandum (CP-3) concerning Tasoff's rebuttal to the September 16th memorandum.

This memo is in response to Judy Tasoff's rebuttal dated 10-13-98 and Level I Grievance filed on 10-13-98. Ms. Tasoff is a reading specialist at Augusta Street school and one of two IEA representatives. Ms. Tasoff does not have a regular classroom. Her duties and responsibilities are to provide language literacy support services to students demonstrating academic need in reading, writing, and speaking. In addition, she serves as a resource to classroom teachers in language arts literacy.

Since my inception as Principal Ms. Tasoff has made it known to the staff that she does not accept my leadership as principal and has embarked on a series of actions to undermine my leadership and authority. I also wish to inform you that Ms. Tasoff was part of the search committee to select a principal for this building and I was not her choice for recommendation. To fully capture the heart of the many problems, let me cite specific examples of her negative and unprofessional conduct toward me:

1. Ms. Tasoff does speak negatively about my leadership abilities and competence to other staff quite frequently. This takes place in teacher's room, hallways, and classrooms. I have personal knowledge of this fact. She uses her IEA position to negatively influence staff and circumvent my authority. For example; In September 1997 she allegedly told teachers not to attend the public board meeting held at Augusta to make it appear as if they were not in support of me. Coincidentally, that night there was a phone call to the Assistant Superintendent advising her that teachers at Augusta were going to boycott the board meeting held at Augusta St. School.
2. In June 1997, I discovered that Ms. Tasoff had two Mac computers in her possession. One she had in her classroom, not being used at all, and the other she had at her home. She claimed Mr. West had told her to take it home to practice. However, I could not find any documentation authorizing such action. When informed that I was transferring the computer from her room to another class, Ms. Tasoff became extremely angered and told me the computers belonged to the "reading department" and she had to consult with Jean Ferrucci before I removed them from her room. This can be confirmed with Mrs. Ferrucci.
2. Unprofessional conduct and insubordination have been demonstrated by Ms. Tasoff on several occasions when asked to cover a class without a substitute for one or two periods at most. She questions why she had to be the one to cover the class and why don't I send another person. Ms. Tasoff is very reluctant to cover a class and seems bothered that she has to do it.
3. Her poor conduct and unprofessional behavior extend to the classroom she is asked to cover. There have been reports from students that Ms. Tasoff has called them "black monkeys, jerks, and ignorant". (Documentation on file)

4. Ms. Tasoff is assigned to assist and provide new teachers with language arts literacy resources and to team-teach in the classes where students have been identified as needing reading assistance. In an effort to implement an in class tutorial model, Ms. Tasoff was asked to go to the classes where students need extra reading assistance and work cooperatively with the classroom teacher to provide the students with reinforcement of skills. She proceeded to argue that she should be allowed to continue taking a small group of children to her room for tutoring. At present, she is going to some classrooms to assist students and teachers, however, for the record, it must be noted that to date I have not received lesson plans from Ms. Tasoff.
5. Most of my initiatives for planning and implementing improvement efforts at the building level are met with resistance from Ms. Tasoff. When a posting appeared to hire after-school teachers for SLOP activities, I have it under good authority that Ms. Tasoff suggested to teachers that they not apply at all. Not one of the veteran teachers applied. Obviously, the students' best interest was not her concern.
6. District supervisors have informed me that Ms. Tasoff informs them directly when teachers she works with in the classroom are having difficulty instead of informing me so that I may provide additional support for those teachers.
7. In regard to her statement that I am retaliating against her because she writes up the teachers' grievances, I wonder why, if we have two reps, Ms. Tasoff is the only person presenting and initiating the grievance notices. At a recent meeting to discuss the object of her written reprimand, I asked Ms. Tasoff, in the presence of Ms. Matthews, the second IEA rep, why she disliked me and what had I done to her to make her behave in such manner toward me. Ms. Tasoff alluded to an incident that had taken place between her and I during my time as Assistant Principal here

at Augusta. Her comments are a clear indication that she has a personal axe to grind with me, Ms. Tasoff does not have the right to say she speaks for the majority of the staff nor the Constitutional right to malign and sabotage my efforts to lead the school forward. I invite you to visit the school, poll my staff and see all the good things that are taking place here in spite of Ms. Tasoff. On the contrary, I am doing the best job that I can to be an effective and efficient principal. Our students deserve the best.

In closing, I want you to know that I believe you recommended me for this position because you trusted in my professional abilities and leadership. I ask that you continue to provide that support. I have invested much time in the students and staff of Augusta because they are worth it. I look forward to continuing to do so with your guidance in this matter.

Vargas indicated that the purpose of the memorandum was to place Tasoff's rebuttal in the context of an overall contentious relationship (2T139, 3T69); that when she wrote it she was not concerned with whether what she placed in the memorandum was true or not, she had written it to "clarify...what was written in the rebuttal" (2T139). She indicated that when she wrote the memorandum she was "...documenting the issues that had taken place in my building" (3T159). According to Vargas, the letter was sent to Carter as her supervisor (3T158- 3T159).

Tasoff acknowledged that Vargas' memorandum was a chronology of events and Vargas's opinions regarding those events involving Tasoff during Vargas' principalship (1T135).

Tasoff, Edwards and Superintendent Carter met at some point during 1999 and discussed the October 29, 1998 memorandum (CP-3).

Carter advised Tasoff that "he didn't put any stock in it and that he was withdrawing it." (1T45). It was not sent to Tasoff's personnel file (1T45).

Tasoff's Admissions and Additional Facts

19. Tasoff did not care for Vargas and would not oppose seeing her replaced as principal (1T49, 1T60). She conceded that she was publicly critical of Vargas in the teacher's lounge and made negative statements about Vargas' leadership (1T27, 1T95-1T96). However, she stated that "I don't see myself discussing my opinion in the teacher's room as undermining her authority" (1T96).

Tasoff told Vargas that her personal problem with her dated back to when Vargas was assistant principal at Augusta Street School (3T10-3T11).

Tasoff recognizes that Vargas has a busy schedule (1T60) and it may be difficult to find time to discuss IEA matters with her. Additionally, the parties collective agreement, Article XVI, B, #9, specifies that grievance proceedings, including level one oral discussions with the immediate supervisor, are not to be scheduled during working hours (J-1, p. 26; 1T62) and per Article XVI, C, Vargas has a right to attend all grievance proceeding (J-1, p. 26).

IEA President Edwards acknowledged that IEA business should not be conducted in front of students or parents, should be confined to before or after school or during the lunch hour and should not disrupt work (2T13-2T14).

According to Respondent's Brief, note 1, page 2, Tasoff is no longer assigned to Augusta Street School and is no longer its IEA building representative.

ANALYSIS

5.4a(1) Standard of Review

An employer independently violates subsection 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sorts and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient to prove a violation. Mine Hill Tp. Thus, initially a party asserting an independent violation of this section of the Act must establish that the employer engaged in some action which would tend to interfere with, intimidate, coerce or restrain an employee in the exercise of statutory rights.

5.4a(3) Standard of Review

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates subsection 5.4a(3) of the Act. Under Bridgewater, 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.

1. The union meeting release issue

The Board did not violate the Act with respect to the union meeting release issue.

The IEA and its members have the statutory right to communicate and attend meetings regarding union business. This right, however, is limited by various provisions in the parties' agreement. Article XX, #16 (J-1, p. 34) specifies the number (6) of Association representatives that shall be released at 3:15 to attend no more than one monthly Association meeting. The agreement does not specify the release of two representatives per building as the IEA seemingly contends.^{4/}

^{4/} Given that the district is comprised of at least four school buildings (high school, Thurgood Marshall, Grove Street and Augusta Street), it is not clear that the parties intended Article XX, #16 (J-1, p. 34) to require the release of two Association representatives per building. Such an interpretation would total eight, not six as specified in the agreement.

Additionally, Article XXI, #3 provides start and stop times for teachers but notes exceptions for certain meetings, including principal's meetings, and includes a negotiations re-opener clause in the event of "practical problems associated with implementation" of meeting schedules. Moreover, Article XXI, #4 addresses when administrative meetings may be held. All three provisions were noted by Superintendent Carter in his September 24, 1998 response to the IEA's grievance on this issue (CP-5).

It appears there is a dispute between the parties over the interpretation of these three articles of the agreement and more specifically, whether the refusal to release Tasoff and Matthews violates it. It is not our policy to interpret or decide whether the parties' agreement has been violated. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Instead, the parties must attempt to resolve such disputes through their negotiated grievance procedure. Id.

Based on the above, the union release issue is not one properly before the Commission for resolution. Human Services; Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995) aff'd. App. Div. Dkt. No. A-2999-95T1, 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. and notice of app. disp., 149 N.J. 35 (1997). Thus, I cannot find that the Board's or Vargas' action violated provisions 5.4a(1) or (3) of the Act with respect to the union meeting release issue. See State of New Jersey (Dept. of Human Services), P.E.R.C. No. 99-65, 25 NJPER 93 (¶30040 1999).

2. The September 16, 1998 Memorandum (CP-1)

With the exception of paragraph five regarding Vargas' request that IEA issues be discussed with both Tasoff and Matthews present, the comments and collateral discipline contained in the September 16, 1998 memorandum (CP-1) do not interfere with the IEA's right to conduct Association business or Tasoff's rights as a union representative. The IEA seemingly contends that the memorandum impermissibly disciplines Tasoff for having engaged in protected activity. I disagree.

Article I, paragraph 19 of the New Jersey Constitution provides that public employees have the right to present proposals to their employers and make known their grievances "through representatives of their own choosing." In Dover Tp., P.E.R.C. No. 77-43, 3 NJPER 81 (1977), the Commission held that N.J.S.A. 34:13A-5.3 implemented this constitutional provision through the selection of majority representatives chosen by employees in an appropriate unit. The Commission explained that public employees are guaranteed the right to negotiate and present grievances through representatives they choose.

Vargas' request in paragraph five, requiring both IEA representatives be present to discuss grievance matters, does tend to interfere with internal union affairs, specifically the IEA's right to designate its representatives to process grievances. See generally, N.J. Const. Art. I, ¶19; Calabrese v. PBA, Loc. 76, 157 N.J. Super. 139 (Law Div. 1978); Dover Tp. The Board offered no

legal or procedural justification for requiring both Tasoff and Matthews to be present to discuss grievance matters with Vargas.

Vargas had, I believe, a practical purpose for wanting Matthews present - to act as a buffer between herself and Tasoff - but that practical purpose did not supercede the Association's right to choose its representative for grievance processing. Without specific contractual support for such a procedure, Vargas' requirement that both IEA representatives be present for grievance discussions, although well-intentioned, tended to interfere with Association rights.

As to the remainder of the memorandum, and specifically the disciplinary nature of it, the Commission has balanced the relative rights and responsibilities of public employees serving as union representatives. In City of Hackensack, P.E.R.C. No. 78-74, 4 NJPER 214 (¶4107 1978), the Commission held in pertinent part,

an employee may not act with impunity even though he may be engaged in what might constitute protected activity in certain circumstances. An employee's rights under the Act must be balanced against the employer's right to maintain order in its operations by punishing acts of insubordination. [4 NJPER at 215]

* * *

The claimed shield of protected activity is not a license to flagrantly disregard an employer's work rules. Id. All employees including union officers and activists are expected to adhere to such rules. Where . . . a rule places reasonable limits on the actions of a union representative (and all other employees), those representatives cannot violate the rule under the guise of serving in their representative capacities.

[Id. at 216.]

Thereafter, the Commission in Hamilton Tp. Bd. Ed., P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979) established parameters to protect an employee's conduct under the Act. Relying on Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (7th Cir. 1965), the Commission held "[a]s long as the activities engaged in are lawful and the character of the conflict is not indefensible in the context of the grievance involved, the employees are protected under . . . the Act." 5 NJPER at 116. In Hamilton, the employee filed a grievance over a reprimand for failing to have lesson plans. During the grievance meeting the employee forcefully struck the table with his fist and moved around the small room while angry and shouting in what some believed was an intimidating fashion. Disagreeing with the hearing examiner's recommendation, the Commission found that the employee's conduct was protected.

By those two cases (Hackensack and Hamilton), the Commission established that while vigorous actions may fall within the realm of protected activity, that realm was not limitless, and employees and union representatives will be expected to adhere to a standard of reasonableness.

As to the appropriateness of employer criticism of a union representative's conduct, the Commission held in pertinent part that "[a] public employer is within its right to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations. . . ." Black

Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502, 503 (¶12223 1981). Relying on Black Horse Pike, the Commission in State of New Jersey (Dept. of Ed.), P.E.R.C. No. 85-85, 11 NJPER 130 (¶16058 1985) upheld an employer's reprimand of a union steward because of insulting and intimidating behavior. The Commission found that "[a]n employee is not insulated from adverse action by his or her employer for impermissible conduct simply because the employee is a union representative." Id. at 131. Read together, these cases suggest that free speech neither justifies nor protects abusive speech or conduct in the context of labor relations. Additionally, these cases demonstrate the Commission's preference for a result that preserves the rights of both parties.

Based on the record as a whole I note three specific areas in which the parties' interests must be balanced in determining the propriety of Vargas's memorandum.

First, Tasoff's entitlement to discuss grievance matters with Vargas at level one of the grievance procedure is subject to the terms of the parties' collective agreement. Article XVI, B, #9 (J-1, p. 26) provides that grievance proceedings shall not be scheduled during working hours. Thus, Vargas' memorandum and collateral discipline of Tasoff for continuously seeking to discuss level one grievance matters with her during work hours (see Findings of Fact 6, 14, and 15) constitutes a legitimate, albeit partial, invocation of Article XVI, B, #9 (J-1, p. 26).

Second, labor organizations and their representatives, like public employers and their representatives, are obligated to conduct themselves and deal with each other in good faith. Tasoff's conduct in seeking to engage Vargas in level one grievance discussions during work hours, in front of students, parents and other employees (see Findings of Fact 6, 14 and 15) falls outside the boundary of good faith. Vargas' reiteration of her desire to conduct IEA discussions privately is consistent with the parties' agreement. It does not work any hardship on the members Tasoff represents; they are entitled to receive representation under the Act, but within the confines of the parties' agreement.

Moreover, the memorandum itself does not preclude Tasoff from raising IEA grievance matters with Vargas, even during work hours as the contract proscribes. Rather, Vargas merely requested that IEA business be conducted privately, away from students and parents. Vargas' request was not only consistent with the spirit of the parties agreement, but was consistent with IEA President Edwards' position that IEA business should not be conducted in front of students or parents, should be confined to periods before or after school or during the lunch hour and should not disrupt work (see Findings of Fact 19). Vargas' memorandum was an appropriate comment upon those activities or attitudes of an employee representative which she believed was inconsistent with good labor relations. Black Horse Pike Reg. Bd. Ed., 7 NJPER at 503.

Third, as demonstrated in City of Hackensack, New Jersey Department of Education, and Atlantic County Judiciary, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992) aff'd 21 NJPER 321 (¶26206 App. Div. 1994) (offensive and disrespectful speech not protected) an employer is entitled to take disciplinary or other appropriate action against an employee/union representative whose conduct is outside the bounds of protected activity.

Except for paragraph five, the IEA has not established that the memorandum would tend to interfere with, intimidate, coerce or restrain the IEA, Tasoff or any other IEA member in the exercise of statutory rights. It has not established by a preponderance of the evidence on the entire record, that any protected conduct was a substantial or motivating factor in Vargas issuing the memorandum. To the contrary, the record establishes that Tasoff and Vargas did not get along on a personal level and that personal hostility, more than anything else, motivated Tasoff's conduct toward Vargas - in both her employee and IEA representative capacities.

Vargas sought to resolve her issue with Tasoff about seeking to engage in level one grievance discussions during work hours, in front of students, parents and other employees by informally speaking with Tasoff and then IEA President Edwards. When those efforts failed, she issued the September 16, 1998 memorandum. Although it has a disciplinary component, titled "Conduct unbecoming of a professional" I read it as Vargas' continued effort to try and resolve a combined labor and employee conduct matter.

In less than two years, Tasoff demonstrated disrespect for Vargas' authority as principal in at least seven circumstances; the sign out sheet issue, class coverage issue, in-class v. pull out issue, lesson plan matter, computer issue, personal business day grievance, and union release issue (see Findings of Fact 6, 8, 10, 13-15). Four of those matters were personal in nature to Tasoff (class coverage issue, in-class v. pull out issue, lesson plan matter, computer issue) having little, if anything, to do with the IEA or her status as building representative. Moreover, Tasoff demonstrated poor judgment and engaged in inappropriate conduct when she sought to engage Vargas in level one grievance discussions during work hours, in front of students, parents and other employees (see Findings of Fact 6, 14 and 15).

Against that backdrop, the September 16, 1998 memorandum is a carefully measured, balanced response to a pattern of disrespectful conduct by an employee seeking to cloak herself in the protection of her status as union representative. Ultimately, the circumstantial evidence that Tasoff and Vargas had reasons to dislike each other is insufficient to support a finding of illegally motivated personnel action. Fairview Bd. of Ed., P.E.R.C. No. 87-107, 13 NJPER 542 (¶18200 1987).

3. The October 29, 1998 Memorandum (CP-3)

The various comments in the October 29, 1998 memorandum (CP-3) do not violate 5.4a(1) or 5.4a(3). They do not interfere

with the IEA's right to select Tasoff as its representative to process grievances on behalf of its members and do not constitute a deliberate attempt to defame Tasoff's character in retaliation for her engaging in protected activity.

The memorandum was in response to Tasoff's October 13, 1998 rebuttal (CP-2) to the September 16, 1998 memorandum (CP-1). In the rebuttal, Tasoff contended that Vargas' September 16, 1998 memorandum contained "numerous inaccuracies and gross distortions..." and purported to state the "facts" (CP-2).

The "facts" according to Tasoff's rebuttal (CP-2) were not supported by the record in this proceeding. As to her contention that she only discussed grievance matters on one or two occasions in the hallways or outer office and they were "brief questions asked in an extremely quiet and respectful tone of voice that no one else could have overheard" I found otherwise (see Findings of Fact 6, 14 and 15). As to her contention that she always acknowledged Vargas' authority as principal, I disagree (see Findings of Fact 6, 8, 10, 13-15 and her admission in CP-2, ¶ 4 that she spoke negatively about Vargas to other staff members). As to her contention that Vargas typically denies grievances at level one of the procedure necessitating invocation of step two and submitting the grievance in writing, that is precisely the procedure outlined in the parties agreement (J-1, p. 26).

The September 16, 1998 memorandum (CP-1) that began the written exchanges was sent to Tasoff, the IEA and Tasoff's personnel

file. Tasoff's October 13, 1998 rebuttal (CP-2) was sent to Vargas, the personnel file, Edwards, Carter and an assistant superintendent (1T28-1T29, CP-2). Vargas sent the October 29, 1998 memorandum (CP-3) to Carter, as her supervisor (3T158-3T159), the Board's personnel director, Tasoff and the IEA (CP-3).

The October 29, 1998 memorandum (CP-3) was a follow up to the September 16th memorandum, prompted by Tasoff's rebuttal thereto. While it documents numerous issues that have arisen by and between Tasoff and Vargas, it does not purport to be a binding statement of facts, particularly of the various allegations lodged against Tasoff. While it is not a flattering depiction of their working relationship, in my view, it is not substantially different from the version of each of the events testified to in this matter. Moreover, the memorandum was not copied to Tasoff's personnel file and according to Tasoff, Carter "didn't put any stock in it and [...]was withdrawing it" (see Findings of Fact 18).

Based on the foregoing, the IEA has not established that the October 29, 1998 memorandum (CP-3) tends to interfere with, intimidate, coerce or restrain Tasoff or any other employee in the exercise of statutory rights. The IEA has not proven, by a preponderance of the evidence on the record as a whole, that union animus or any protected conduct was a motivating or substantial reason for Vargas' October 29, 1998 memorandum (CP-3). Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶8050 1987). The circumstantial evidence that Tasoff and Vargas disliked each other

is insufficient to support a finding of illegally motivated personnel action. Fairview Bd. of Ed., P.E.R.C. No. 87-107, 13 NJPER 542 (¶18200 1987).

I recommend that the IEA's 5.4a(1) and (3) allegations regarding the October 29, 1998 memorandum (CP-3) be dismissed.

CONCLUSIONS OF LAW

1. The Board violated 5.4a(1) of the Act with respect to paragraph five of the September 16, 1998 memorandum (CP-1) by requiring two IEA representatives to attend grievance processing meetings with Principal Vargas.

2. The Board did not otherwise violate 5.4a(1) of the Act.

3. The Board did not violate 5.4a(3) of the Act.

RECOMMENDATION

I recommend the Commission **ORDER:**

A. That the Board cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; specifically by requiring two IEA representatives to attend grievance processing meetings with Principal Vargas.

B. That the Board take the following action:

1. Redact paragraph five of the September 16, 1998 memorandum (CP1).^{5/}
2. Notify the Chair within twenty (20) days of receipt what steps the Respondent has taken to comply with the ORDER.
 - C. That the 5.4a(3) allegations be dismissed.
 - D. That except as recommended in paragraph A above, the 5.4a(1) allegations regarding the September 16, 1998 memorandum and the October 29, 1998 memorandum be dismissed.

Kevin M. St.Onge
Hearing Examiner

Dated: October 25, 2000
Trenton, New Jersey

^{5/} The reason I do not recommend posting a notice in this case is because I find that Vargas' directive was a well intentioned effort to maintain good working relations with the IEA despite obvious personal difficulties with Tasoff. I do not believe she intended to interfere with the IEA's legitimate right to designate its representatives. Instead, under the circumstances of this case, I believe Vargas thought she was acting within the spirit of the Act and within the spirit of the parties' agreement, endeavoring to improve labor relations, resolve disputes fairly and equitably and with the least disruption to the school day possible. Despite her intentions, the directive does have a tendency to interfere with the IEA's statutory rights. However, Tasoff is no longer assigned to the Augusta Street School and posting a notice at this time, over two years removed from the underlying events, would seem contrary to the Acts goals and parties' interests in improving their overall relationship.