

P. E. R. C. NO.-87-10

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WHARTON BOROUGH BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-268-156

WHARTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge filed by the Wharton Education Association against the Wharton Borough Board of Education. The charge alleged the Board violated the New Jersey Employer-Employee Relations Act when it harassed and penalized Thomas Keffer, the Association's grievance chairperson, in retaliation for his Association activity. The Commission, in agreement with the Hearing Examiner, finds that the Association failed to prove any of the alleged violations by a preponderance of the evidence.

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Appearances:

For the Respondent, Fullerton, Porfido & Wronko, Esqs.
(Eugene J. Porfido, of Counsel)

For the Charging Party, Bucceri & Pincus, Esqs.
(Sheldon H. Pincus, of Counsel)

DECISION AND ORDER

On March 28, 1984, the Wharton Education Association ("Association") filed an unfair practice charge against the Wharton Borough Board of Education ("Board"). The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, specifically subsections 5.4(a)(1), (2) and (3),^{1/} when it harassed

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; 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."

and penalized Thomas Keffer, the Association's grievance chairperson, in retaliation for his Association activity. The charge specifically alleged that the Board had criticized the number of grievances filed and had penalized Keffer by eliminating facilities for, and certain aspects of, a peer counselling program he conducted; eliminating a portion of his preparation time; giving him negative observations and evaluations; excluding him from a grievance meeting; and reprimanding him several times.

On June 29, 1984, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Board then filed an Answer denying that it had taken any retaliatory actions against Keffer and asserting that Keffer's observations, evaluations, and reprimands were justified and that it had a managerial right to change the peer counselling program.

On September 24 and 25 and November 1 and 5, 1984 and on February 7, March 15, April 3 and May 1, 17, and 31, 1985, Hearing Examiner Arnold H. Zudick conducted hearings. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by December 25, 1985.

On May 16, 1986, the Hearing Examiner recommended dismissal of the Complaint. H.E. No. 86-55, 12 NJPER ____ (¶____ 1986). He found that the Association had failed to prove any of the alleged violations by a preponderance of the evidence.

On June 23, after receiving an extension of time, the Association filed exceptions. It asserts, summarily, that the

Hearing Examiner's findings of fact and conclusions of law should be reversed. It also attaches its post-hearing brief.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-62) are thorough and accurate. We adopt and incorporate them here. We also agree with the Hearing Examiner's cogent and exhaustive analysis of the issues and adopt his conclusions of law.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. Commissioners Hipp and Reid were not present.

DATED: Trenton, New Jersey
July 24, 1986
ISSUED: July 25, 1986

H.E. NO. 86-55

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

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SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Wharton Borough Board of Education did not violate the New Jersey Employer-Employee Relations Act when its agents made certain verbal and written warnings to, and issued reprimands to, and had discussions with employee Thomas Keffer. The record shows that ample business justification existed for the Board's actions.

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.

H.E. NO. 86-55

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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For the Charging Party

Bucceri & Pincus, Esqs.
(Sheldon H. Pincus, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on March 28, 1984 by the Wharton Education Association ("Association") alleging that the Wharton Borough Board of Education ("Board") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Association alleged that the Board violated §§5.4(a)(1), (2), and (3) of the Act by harassing and penalizing Thomas Keffer, Association grievance

chairman, because of his exercise of protected activity.^{1/} The Association specifically alleged that the Board criticized the number of grievances filed, and that it sought to penalize Keffer for his participation in Association activities by eliminating facilities for, and certain aspects of, a program he had coordinated; eliminating a portion of his preparation time; giving him negative observations and evaluations; excluding him from a grievance meeting; and, reprimanding him with regard to telephone calls, emergency lesson plans, submission of student grades and progress reports, leaving school early, and handling a disruptive student.

The Director of Unfair Practices issued a Complaint and Notice of Hearing on June 29, 1984. The Board filed an Answer on July 20, 1984 denying the Charge. The Board asserted that although it was concerned about the number of grievances filed it did not criticize the filing of grievances; that it did not exclude Keffer from a grievance meeting; that it had the managerial right to change a program; and, that Keffer received negative observations and evaluations because of his performance as a teacher.

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

Hearings were held in this matter on September 24 and 25, and November 1 and 5, 1984, February 7, March 15, April 3, May 1, May 17 and May 31, 1985 in Newark, New Jersey, at which time the parties were given the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. The Association filed a post-hearing brief on October 2, 1985, and the Board filed a reply brief on December 24, 1985.^{2/}

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, exists, and after hearing and after consideration of the post-hearing briefs, this matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record I make the following:

^{2/} The hearing ended on May 31, 1985 but the last transcript was not received until July 25, 1985. On that same day, July 25, I sent a letter to the parties and established September 27, 1985 as the date for receipt of post-hearing briefs. I allowed two months due to the length of the hearing and in consideration of the parties' summer vacation schedules. The Association's brief was received on October 2, 1985. On November 12, 1985 the Board mailed a letter to me which was received on November 15, 1985 advising me that it waived a post-hearing brief, but requesting two weeks to file a reply brief. However, I left for vacation on November 12, 1985 and did not return until after Thanksgiving (December 2, 1985). During my absence the Association sent me a letter on November 15, 1985 objecting to giving the Board additional time to file the brief. After reviewing the correspondence I informed the parties by letter of December 9, 1985 that the Board could file a reply brief by December 23, 1985. The Board's brief was received on December 24, but had been sent by express mail on December 23, 1985. I have accepted the brief as timely filed.

Findings of Fact

1. The Wharton Borough Board of Education is a public employer within the meaning of the Act.

2. The Wharton Education Association is a public employee representative within the meaning of the Act, and Thomas Keffer is a public employee within the meaning of the Act.

3. Thomas Keffer has been employed by the Board as a physical education and health teacher for approximately 20 years. The Board operates a K-8 program through two schools which are physically attached. The Duffy School includes grades K-5, and the McKinnon School includes grades 6 through 8 (T1 p. 147, T3 p. 65). Keffer teaches students in both schools. Beginning as early as 1969 Keffer became involved in union activities. He was chairman of the negotiating team in 1971, and served as vice-president or president of the Association between 1974 and 1976 (Transcript ("T") 1 p. 118). He was a member of the negotiating team from 1982-83, and chairman of the grievance committee from 1980-1984 (T1 p. 119). In the Fall of 1983 Keffer was involved in filing grievances, and in participating in other Association activities (T1 pp. 27, 34, 38-42, 123).

4. Allied Teachers Stipend, Contract Negotiations, Concerted Activity September 1983

On January 12, 1981 the Association filed an unfair practice charge against the Board, Docket No. CO-81-199-162, alleging that the Board unilaterally increased the workload of

"allied teachers" by assigning them homeroom duty in place of a duty free period.^{3/}

A hearing was held in that matter on September 9, 1981, and Tom Keffer, one of the affected allied teachers, was the Association's main witness. On September 15, 1982 the Commission issued its decision in that matter, Wharton Bd.Ed., P.E.R.C. No. 83-35, 8 NJPER 570 (¶13263 1982), and found that the Board violated the Act. The Commission ordered the Board to negotiate with the Association concerning compensation for allied teachers who performed homeroom duty, and it ordered the Board to rescind its decision compelling allied teachers to perform homeroom duty until it negotiated over workload and compensation. On September 29, 1982, Superintendent Richard Ruffer sent a letter (Exhibit CP-1) to all teaching staff members requesting staff participation in helping him to make certain that assignments to extra-classroom duties were reasonable, and equitably distributed. He requested this participation prior to negotiations over homeroom duty. The Association President, Daniel Makosky, rejected Ruffer's offer for staff participation in favor of formal negotiations (T1 p. 20). Ruffer again requested staff participation but it was again rejected, and the parties then commenced negotiations in the Fall of 1982 (T1 pp. 20-22). Those negotiations included negotiations for

^{3/} Allied teachers are those teachers who work with the Individual Guided Education Program and do not teach major subject areas, i.e. math and reading, and are not assigned to regular classrooms. They teach physical education, industrial arts, art, home economics and music.

the allied teacher stipend as well as negotiations for a new collective agreement. Keffer was included on the Association's negotiations team along with Makosky who was also an allied teacher, and both men were involved in negotiating the allied teacher stipend (T1 p. 22, T3 p. 25).^{4/} The Association's chief negotiator for allied teachers and a new contract, however, was Aaron Feldman, a consultant with the New Jersey Education Association (NJEA), and not Keffer (T1 pp. 22-23). Keffer did not take an active role during the face-to-face negotiations with the Board negotiating team (T4 p. 168). The negotiations for the new contract and the allied teacher stipend took approximately 18 months and did not conclude until approximately February 1984 (T1 p. 24, T3 p. 28).

At one point during the negotiations for the allied teacher stipend Mrs. McKinnon, then Board President, told the Association's negotiations team that "you'll not get more than \$5.00 for that assignment" (T1 p. 121). Makosky admitted that the Board had

^{4/} The Association referred to the allied teachers' case as "Keffer's case," and argued that Keffer was the "prime mover" (T1 p. 15, T3 p. 25). Although Makosky was not personally affected by the decision in Wharton Bd.Ed., supra, the record, nevertheless, shows that Makosky is an allied teacher (T3 p. 25) and that he would eventually benefit from any stipend negotiated for homeroom duty. In addition, there were at least two other allied teachers who directly benefited from the decision in Wharton (T3 pp. 6, 10, 18, 24).

maintained the \$5.00 offer for allied teachers performing homeroom duty for a long period of time (T1 p. 29).^{5/}

Additionally, when Makosky was asked whether the Board negotiating team showed any hostility toward Keffer, Makosky responded that the Board's negotiating team was "supposedly annoyed at the way Mr. Keffer and myself...were talking to each other at the table...." (T1 pp. 32-33). I do not credit that testimony to show hostility toward Keffer. Makosky did not actually know what the Board's reaction was, because Feldman, and not Makosky, spoke to the Board over the incident, and Feldman did not testify at this hearing. There was no showing that the Board's reaction was addressed to Keffer in particular as an individual. If anything, the Board's reaction was toward both Makosky and Keffer as part of the negotiating team, and in the context of negotiations, but certainly not toward Keffer alone.

Nevertheless, when the negotiations were concluded the parties agreed to a retroactive and prospective payment of \$200.00

^{5/} Keffer characterized McKinnon's remark as manifesting hostility to him, and he said that she used an expression similar to "come hell or high water" (T1 p. 21). Since Keffer could not remember the expression McKinnon used I cannot rely on his testimony as to what McKinnon said. I also cannot credit Keffer's assertion that McKinnon addressed the \$5.00 remark to him. Makosky admitted that the Board had maintained a \$5.00 offer for a long time. I find that McKinnon's remark was made in negotiations and to the negotiations team, and that any hostility exhibited by McKinnon was within the context of a negotiations posture toward the Association as a whole during an admittedly long and acrimonious negotiations period, and not against Keffer in particular.

to any allied teacher who did--or would--perform homeroom duty (T3 pp. 21-22). The record reflects that there were a total of three (or 3 1/2) allied teachers, not just Keffer, who directly benefited from the \$200 retroactive settlement for homeroom assignments (T3 pp. 6, 10, 24; T5 p. 18).^{6/}

The record then reflects that the Board's actual cost for allied teacher stipends was not substantial. The Board paid \$400 for 1982-83, \$200 for 1983-84, and nothing for 1984-85 because there were no allied teacher homeroom assignments that year (T6 pp. 66-68).^{7/}

When the contract negotiations reached impasse in the Fall of 1983 Keffer supported the Association's negotiations position by

6/ In addition to the remark by McKinnon during negotiations, the Association--Keffer in particular--alleged that Rodney Harrah, the Board's chief negotiator, also made a remark about Keffer. Harrah apparently made a remark during a negotiations session in front of both negotiating teams (T2 p. 78) that "hunting is a superficial reason to use a personal day." Keffer testified that: "someone behind the scenes had to mention to Rod that I was a hunter" (T1 p. 126). Keffer later admitted, however, that although he thought the remark was aimed at him, Harrah did not use his name or allude to him as being the teacher who took off to hunt, nor was he ever criticized for taking a personal day to go hunting (T2 p. 78). I do not credit Keffer's assertion or belief that Harrah's remark was directed at Keffer. Keffer's name was never used, and Keffer's testimony that "someone" had to mention it to Rod, is unsupported and speculative testimony that is insufficient to prove the assertion that Harrah knew that Keffer had been the teacher who wanted to hunt.

7/ Although Ruffer testified that the Board's cost for allied teachers in 1982-83 was \$400, I believe it may actually be \$600 or \$700 because the record reflects that three or 3 1/2 teachers were affected that school year.

wearing Association buttons, distributing flyers to the community regarding the Association's position in negotiations, and by participating in a job action on Election Day. (T1 pp. 27, 34-35; T3 pp. 31-33).

When negotiations finally concluded in February 1984, Allen Fox, an NJEA representative, asked Board attorney Eugene Porfido, and Superintendent Ruffer, for a guarantee that hostilities between the parties would cease (T1 p. 92). Porfido agreed to Fox's suggestion, and he and Ruffer indicated that they would bring it back to the Board (T1 pp. 92-93).^{8/}

5. Peer Counseling Questions and News Release

In 1980 Tom Keffer proposed that the Board develop a peer counseling program where high school students from the Morris Hills School District would provide counseling to students in the Wharton School District (T1 pp. 145-147). Keffer was authorized to develop and administer the peer counseling program.

^{8/} The record shows that Ruffer made no response to Fox's cessation of hostilities suggestion other than to bring it back to the Board. The Association presumably inferred from that "no response" that Ruffer would not cease hostilities towards the Association and/or Keffer. I do not draw that inference from Ruffer's actions. Ruffer testified that it was not his role or responsibility to take part in negotiations other than to be available to answer questions (T5 p. 31). I credit that testimony. I found Ruffer to be a consistently credible witness throughout the hearing. His demeanor and candor impressed me. Thus, once Porfido responded positively to Fox's suggestion, there was no reason for Ruffer to respond. Porfido, not Ruffer, was the Board's spokesman at that meeting with Fox, and there is no reason to assume that Porfido's response was not made in good faith.

In April 1983 English teacher Judy VanDunk conducted a class project and had her students develop a questionnaire (Exhibit R-1) regarding the peer counseling program. The students then questioned several people regarding the peer counseling program, including then vice-principal Thomas Morton, who became principal in 1983-84. The questions asked of Morton and the other interviewees, and their answers, were compiled in R-1 and distributed as a news release item in the school (T1 p. 153; T3 pp. 74, 77; T7 p. 28).^{9/}

On or about April 22, 1983 Keffer sent Morton a memorandum regarding the peer counseling program (Exhibit R-22) which contained the following line:

9/ The specific questions asked of Morton, and his answers, in R-1, are provided as follows:

Mr. Morton, who is Vice Principal.

- Q). Do you think that students abuse the privilege to go to Peer Counseling?
- A). I feel that students must earn the privilege to go.
- Q). Do you think that the program is effective?
- A). For some it is too early to tell. But for some there has been a change.
- Q). Have any problems been caused from this?
- A). There have been a few, but I feel these were caused by students who treat the program as a joke.
- Q). What is your role in the program?
- A). My role is to oversee what Mr. Keffer does, to take care of any problems that might come up, and to help select students.

Attached find a neat little news item worked up by the kids and Mrs. VanDunk re Peer Counseling.

A copy of R-1 was attached to R-22.^{10/}

Subsequent to Morton's receipt of R-22 a meeting took place between VanDunk, Morton and Keffer in VanDunk's classroom. VanDunk had apparently told Keffer that she thought every interviewee's comments on R-1 were positive except Morton's (T3 p. 78; T4 pp. 117-118). Keffer first admitted that Morton made a positive comment but that it was bland (T1 p. 153). Keffer later stated that Morton's answers could have been more positive, but he did not interpret Morton's remarks as a reflection upon him, rather, as a reflection on the program (T3 pp. 70-71).

At the meeting in VanDunk's classroom Keffer asked Morton why his answers in R-1 were cool to the program or were not enthusiastic (T1 p. 153; T3 p. 78). Morton denied that his answers were unenthusiastic (T1 p. 153). Keffer asked Morton to change his answers, but Morton stated that he could not change his answers because he could not change the questions. Morton did, however, offer to answer any additional questions that the students might ask (T7 p. 79).

^{10/} R-22 contains a date stamp of April 29, 1983, and Morton testified that he believed that was the date he received it (T7 p. 40).

At that point in the conversation Keffer became angry, left the room, and slammed the door. (T7 p. 30; T8 p. 79). VanDunk suggested to Morton that he speak with Keffer and Morton agreed because he felt that he only responded honestly to questions posed by the students (T7 p. 30; T8 p. 79). After leaving VanDunk's classroom Morton followed Keffer to his (Keffer's) home (it was the end of the school day) where they again discussed Morton's answers in R-1.^{11/}

During that discussion Morton advised Keffer that there was a good chance that he (Morton) would be principal next year (1983-84) and he did not want their relationship to start off the wrong way (T7 p. 31; T8 p. 82). Morton then offered to undergo another interview by the students, but he did not offer to change

^{11/} Keffer denied slamming the door and leaving VanDunk's classroom in an angry manner (T3 p. 86; T10 p. 30). I do not credit that remark. The Association agrees that Morton followed Keffer to his home to discuss the incident, and it did not dispute Morton's testimony that VanDunk suggested he talk to Keffer. The facts show that Morton had never been to Keffer's home before, and it is not reasonable to expect that he (Morton) would have gone there had the meeting in VanDunk's classroom ended in a quiet or harmonious manner. Rather, for the sequence of events to make reasonable sense it is far more likely that Keffer did leave the meeting in an angry manner which prompted VanDunk to suggest to Morton that he speak to Keffer, both of which immediately prompted Morton to follow Keffer home. I therefore credit Morton's testimony on that point.

his responses in R-1.^{12/} That meeting ended in a friendly manner.

6. Grievance Filings and Statements by Morton

Beginning in September 1983 Keffer, as grievance chairman, filed or processed several grievances on behalf of the Association. One grievance involved the assignment of additional playground supervision, another grievance involved bulletin board assignments, a third grievance involved supervision of the nurse's office, and a fourth grievance involved Duffy School teachers picking up students in the morning (T1 pp. 38-43).

On or about September 29, 1983 Morton conducted a grievance hearing regarding playground supervision which was his first such hearing since becoming school principal. (T6 p. 111, T7 p. 10). Keffer was present as grievance chairman, and teachers Barbara Myers and Valerie Monzel were also present to represent the Duffy School Staff (T6 p. 112; T7 p. 10; T8 p. 16). Morton resolved that grievance to the Association's satisfaction at the first step (T1 p. 129; T6 p. 112; T7 p. 11). Immediately after that meeting Keffer spoke to Morton expressing his appreciation for the way Morton

^{12/} Keffer alleged that Morton "agreed that he would change his remark to something more positive." (T1 p. 154; see also T4 p. 121). Keffer admitted, however, that he never subsequently saw any alterations in Morton's answers to R-1, but he alleged that VanDunk told him that Morton changed his answers (T4 p. 121). I do not credit that testimony. This incident was important to Keffer, yet he never saw or asked to see Morton's alleged changes to R-1, nor did the Association present any physical evidence of such changes, nor did VanDunk testify to confirm the statement attributed to her by Keffer. I credit Morton's testimony that he only offered to submit himself to another interview.

handled that grievance (T6 p. 112; T7 pp. 18-19).^{13/}

Shortly after the playground supervision grievance, a grievance regarding a bulletin board assignment involving Duffy teacher Lana Wright was filed. Morton required all Duffy teachers, including Wright, to attend a meeting (before school) at which he discussed the bulletin board assignments. Wright was embarrassed because Morton's discussion covered issues raised by her grievance (T1 pp. 129-131). The Association, through Keffer, then filed a grievance on November 2, 1983 (Exhibit R-17) over Morton's decision to discuss the bulletin board grievance with the faculty. On November 7, 1983 (attachment to R-17) Morton formally denied the November 2 grievance. Keffer appealed to the

^{13/} Keffer's recollection of the facts concerning the playground supervision grievance differed from Morton's. Keffer testified that the meeting with Morton over the playground supervision grievance occurred in October, and that only he and Morton were present (T3 pp. 35-36). Additionally, Keffer alleged that at some point during that first step grievance hearing Morton allegedly told Keffer that "he's a man and has to stand up as a man during these grievances." (T1 p. 128; T3 p. 34). Keffer apparently interpreted that alleged remark as showing displeasure with his filing of grievances (T1 p. 128). Morton, however, denied making that remark (T6 pp. 111-112; T7 p. 14), and he testified that there was no reason to make that remark since it was his first grievance as principal and he resolved it at the first step (T6 p. 112). Morton also testified that Myers and Monzel were at the grievance hearing (T7 p. 10; T8 p. 16). I credit Morton's recollection of the handling of this grievance. On cross-examination Keffer could not remember during which grievance the alleged remark by Morton was made, and even after his recollection was refreshed he was not entirely sure about the remark (T3 pp. 33-35). I found Morton to be very certain and clear about the facts surrounding that grievance.

superintendent on November 8, 1983, as a result of which Morton, on November 17, 1983 (attachment to R-17), advised Keffer that he (Morton) would not discuss grievances with the faculty. At that point that grievance was resolved (T1 p. 135).^{14/}

During the time that the above grievances were being processed Morton had observed Keffer talking with other teachers in the hallway during class time (work time), and also observed him during class time talking to a teacher who had been crying (T7 p. 25). Those observations prompted Morton to remark to Keffer that he (Morton) was concerned that his (Keffer's) students were going to suffer because he was conducting Association business during school time (work time)(T1 p. 143, T3 p. 67). Keffer admitted that he occasionally provided assistance to employees during school time (T1 p. 143), and Morton admitted he made that remark (T7 p. 25). Although Morton also testified that he had no particular problem

^{14/} Keffer alleged that during the faculty meeting regarding the bulletin board grievance Morton referred to Wright as "porky pig," and that he (Keffer) sought an apology from Morton over that remark (T1 p. 134, T3 pp. 44-47, T4 p. 114-115). Morton denied making any such remark (T6 p. 127, T8 p. 29). The record shows that Keffer was not at the faculty meeting regarding bulletin boards (T2 p. 101, T3 p. 42), and the Association did not present any witness who did hear the alleged "porky pig" remark. Since Morton denied making the remark, and since the Association did not prove by a preponderance of the evidence that the remark was made, I credit Morton's testimony. Additionally, since the alleged "porky pig" remark was not proved, the record only supports a finding that Keffer's request for an apology by Morton referred to his conducting the faculty meeting, and not because he made a remark concerning Wright.

with Keffer talking to the teacher who was crying, he emphasized that he simply wanted Keffer to return to his class as soon as possible (T3 pp. 25-26). Keffer testified that he interpreted Morton's remark as an attempt to restrict his union activity, yet he admitted on cross-examination that Morton did not say that he did not want Keffer to conduct Association business at all (T3 p. 68).^{15/}

7. Elimination of the Gym Leaders Program

The record shows that from 1968 up through the 1983-84 academic year the Board permitted Keffer, and the female physical education teacher, to operate a gym leaders program. That program was similar to the peer counseling program discussed infra. In the gym leaders program older students, (7th and 8th graders, for example) who were in a free period or in an allied class (such as art, music, or industrial arts), but not those in an academic class (such as math or English) were called out of their class and into Keffer's (or the female physical education teacher's) physical education classes to lead the students in warm up exercises, and assist in instructing students in a variety of skills (T1 p. 151, 156, T2 p. 89).

^{15/} Keffer also testified that in the Spring of 1984 he asked Morton if they could "bury the hatchet." (T1 p. 144). Morton responded that there was "no hatchet to bear" and that he bore no ill-will toward Keffer (T7 p. 26). I credit Morton's testimony that Keffer then said that "someone is going to get hurt" (T7 p. 26), and he (Morton) responded "yes, it is possible someone could get hurt...." (T7 p. 26).

Sometime prior to the 1983-84 academic year the Board instructed Superintendent Ruffer to terminate or curtail the call out programs (T5 pp. 90-92, 99), and the Superintendent then informed Morton to curtail such programs (T8 p. 20). On the first day of school in September 1983 Morton informed Keffer that the gym leaders program was eliminated (T1 p. 156, T2 p. 91, T3 p. 89).^{16/}

Keffer initially resisted the elimination of the gym leaders program, but on September 29, 1983 he agreed to eliminate the program. I credit Morton's testimony that after the playground supervision grievance was resolved on September 29, Keffer told Morton that he would drop his concerns about the elimination of the gym leaders program (T6 pp. 112-113; T8 pp. 18-19). Morton then told Keffer that he would follow up that discussion with a memo (T6 p. 113, T8 p. 19), and on that same day Morton then sent Keffer (and the female physical education teacher) a memo (Exhibit R-20) eliminating the gym leaders program.

8. Dermott Kavanaugh Incident

In October 1983 teacher Dermott Kavanaugh sent a progress report home with student Stacey Lynn. The student's mother, Mrs. Kathleen Lynn, signed the report and wrote a comment on it.

^{16/} Keffer testified that he thought that the decision to eliminate the gym leaders program was Morton's unilateral decision (T2 pp. 91-92). However, Keffer admitted that he was not aware that the Board had previously decided to eliminate call-out programs (T3 p. 90). I find that based upon Ruffer's and Morton's testimony, Morton merely carried out the Board's and Superintendent's directive to curtail call-out programs.

Kavanaugh either read or discussed Mrs. Lynn's comments with the class which prompted Mrs. Lynn to write a letter to Kavanaugh (Exhibit CP-39) and a letter to Morton (Exhibit CP-40) both dated October 26, 1983 concerning Kavanaugh's behavior (T7 pp. 16-17). In CP-40, Mrs. Lynn advised Morton of her availability to discuss the matter.

Although Morton did not interpret CP-39 or CP-40 as a matter which might lead to discipline (T8 p. 133), he asked Kavanaugh to meet with Mrs. Lynn since she requested a meeting (T8 p. 133). Kavanaugh responded by asking Morton to attend the meeting with him, and Morton agreed to attend, and Morton indicated that he would arrange the meeting (T7 p. 17, T8 pp. 133-134). Morton scheduled the meeting with Lynn for 8:00 a.m. one morning.

Kavanaugh subsequently discussed the incident with Keffer, but Kavanaugh did not ask Keffer to attend the meeting with Lynn (T3 pp. 49-50). Keffer, nevertheless, advised Kavanaugh to request a postponement of the meeting to enable him (Kavanaugh) to discuss the matter with an NJEA representative (T1 p. 137, T3 p. 50).

The night before the scheduled meeting Keffer telephoned Morton and asked him if he (Keffer) could represent Kavanaugh at the meeting (T7 p. 18). Morton denied Keffer's request and said that it was not a matter of discipline and therefore it was not appropriate for union representation (T7 pp. 18-19). Keffer then asked Morton if the meeting between Kavanaugh and Mrs. Lynn could be cancelled. Morton replied that the meeting was arranged upon Kavanaugh's

request, and if he (Keffer) cancelled it he would have to answer to Morton and the Superintendent (T7 p. 19).

Subsequent to that conversation Kavanaugh telephoned Morton and asked if he (Kavanaugh) could postpone the meeting. Morton apparently gave his consent to cancel the meeting as long as Ruffer also agreed.^{17/} Kavanaugh attempted to contact Ruffer, but was unable to reach Ruffer to obtain his permission to cancel the meeting (T10 p. 35). Nevertheless, Kavanaugh telephoned Mrs. Lynn and cancelled the meeting explaining that an Association meeting had been scheduled for that morning (T7 p. 20).^{18/}

When Morton and Ruffer learned the next morning that Kavanaugh had cancelled the meeting with Lynn without Ruffer's permission, they met with him and criticized him for cancelling the meeting and indicated that he should not have put his union activity

^{17/} Kavanaugh did not testify at this hearing. It was Keffer who testified as to what Kavanaugh said. Keffer testified that Kavanaugh told him that Morton said it was okay to cancel the meeting if Ruffer was "aware of it." (T3 p. 50, T10, pp. 31). However, on recross-examination Keffer acknowledged that Ruffer's "permission" was needed to cancel the meeting with Lynn (T10 pp. 34-35). I credit this latter testimony. It would not make sense for Morton to agree to cancel the meeting with Lynn based only upon Ruffer's "knowledge" of the cancellation. I am certain that Morton expected Kavanaugh to obtain Ruffer's "permission" to cancel the meeting.

^{18/} Although both Keffer and Morton testified that they were not certain who cancelled the meeting with Lynn (T3 pp. 52-53, T7 p. 21), Keffer then testified that Kavanaugh "tried to use an excuse that would not offend the parent" (T3 p. 53), and Morton testified that Kavanaugh told him that he cancelled the meeting (T7 p. 23). Thus, I am certain that Kavanaugh cancelled the meeting.

ahead of the meeting with a parent (T7 p. 22). Morton then made a remark to Kavanaugh that he (Morton) would not let "this WEA shit get in the way of running his school." (T3 p. 53, T7 pp. 23-24). Keffer was not present during Kavanaugh's meeting with Morton and Ruffer, nor was Morton's remark made to Keffer (T3 p. 53).^{19/} There is no evidence that Morton subsequently discussed this matter with Keffer, and Morton did not discipline Kavanaugh for cancelling the meeting with Lynn (T7 pp. 23-24).^{20/}

On October 31, 1983 Kavanaugh sent Mrs. Lynn a letter (Exhibit CP-41) explaining his comments to the progress report and answering her letter to him, CP-39. Kavanaugh concluded that Mrs. Lynn consider transferring her daughter out of his class.

^{19/} Keffer testified that Morton's "WEA" remark was a reflection upon the Association and upon himself since he gave Kavanaugh advice. (T3 p. 55)

^{20/} Morton testified that Kavanaugh told him that Keffer told Kavanaugh that he (Kavanaugh) could cancel the meeting with Mrs. Lynn (T7 p. 23). Since Kavanaugh did not testify to corroborate that testimony, I cannot credit such double hearsay to prove that Keffer told Kavanaugh to cancel the meeting. Morton did testify that he did not discipline Kavanaugh because he believed Kavanaugh followed Keffer's advice (T7 p. 23), but that is not enough to prove what Keffer told Kavanaugh. In fact, Keffer specifically denied telling Kavanaugh not to go to the meeting (T3 p. 50). I note that at T7 p. 23, line 14 the transcript reflects that Morton told Kavanaugh that he could cancel the meeting with Lynn. However, at the hearing on May 1, 1985 Morton testified that if he did say that it was a mistake, and that it was Mr. Keffer who told him (Kavanaugh) to cancel the meeting (T8 pp. 139-140). I accept Morton's correction of that testimony, but for the same reasons stated above, I do not credit that testimony to prove that Keffer told Kavanaugh to cancel the meeting.

9. Arriving Late From Lunch Incident

On October 28, 1983 at approximately 12:10 p.m. Keffer and McKosky requested a meeting with Morton to discuss a grievance. Morton met with them during part of the lunch period (the lunch period was 12:15-1:00 p.m.) after which Keffer went home for lunch (T7 p. 67). After arriving home Keffer telephoned Morton's office and informed a secretary that an emergency had arisen and he could not get back on time. Keffer specifically admitted that he telephoned that he might be late and that he asked to have his 1:00 class covered. (T10 pp. 25-26)

As a result of Keffer's telephone call Morton directed Vice-Principal Richard Bitondo to ask the female physical education teacher, Eileen Stamler, to cover Keffer's class (T7 pp. 67-68, T 9 p. 78). Stamler testified that Keffer did arrive late and that she observed his class for approximately 15 minutes (T9 pp. 67, 77-78), Keffer denied he arrived late (T10 p. 41, Exhibit CP-16), however, I credit Stamler's testimony.^{21/}

Keffer's testimony that he arrived back on time is also discredited based upon two other facts. First, Keffer admitted that

^{21/} Keffer testified that Stamler's testimony regarding the late arrival was totally inaccurate, and he accused her of having a motive to lie, yet he admitted that he had no idea what that motive was (T10 p. 41). I find Keffer's totally unsupported assertion regarding Stamler's testimony to be so weak that it must create the inference that Stamler was telling the truth. In addition, since Stamler was not even employed by the Board at the time she testified it is unlikely that she would have any motive to lie.

when he came back to school he saw Stamler standing at the door connecting the two gymnasiums and it "appeared as though she was observing both sides..." (T10 p. 25). Since Stamler testified that she had to observe both sides of the gym, Keffer corroborated her testimony. Second, Morton testified that Keffer told him (Morton) that he (Keffer) deserved a full lunch (T7 p. 69). Keffer admitted in CP-16 that he told Morton he had to eat and rushed back. I credit Morton's testimony regarding the incident and infer from that testimony (T7 pp. 68-69) that Keffer admitted that he was late.

At a later time Morton asked Keffer why had had been late and Keffer responded that an emergency arose (T7 p. 68). Morton then asked Keffer to provide him (Morton) with a personal day form for the incident, which prompted Keffer to say that he (Keffer) deserved a full lunch (T7 p. 69). Morton initially decided to make no record of the incident (T7 p. 69), however, when Morton issued Exhibit CP-15 on December 12, 1983 cautioning Keffer about leaving work early, he also expressed his displeasure with Keffer arriving late on October 28, 1983.

10. Peer Counseling Changes

When Keffer developed and began administering the peer counseling program it was first made available to the 6th, 7th and 8th grade students, but was expanded to include 4th and 5th grade students (T1 pp. 148, 149). From the program's inception both the principal and superintendent supported peer counseling and complimented Keffer for his administration of the program (Exhibits

CP-3 and CP-4)(T2 pp. 94-95). During the summer of 1983 the Board decided to curtail call-out programs, such as the gym leader and peer counseling programs (T5 pp. 90-93), and Ruffer directed Morton to curtail those programs (T8 p. 20). As a result, in September 1983 Morton asked Keffer to concentrate the peer counseling program on the 8th grade students. Morton wanted Keffer to curtail the program regarding 6th and 7th grade students (T8 p. 53). Keffer testified, however, that Morton told him to concentrate peer counseling from the 6th grade up (T2 pp. 97-98, T3 p. 93).^{22/}

Prior to September 1983 the Board experienced an increase in the enrollment of kindergarten and 5th grade students. Both of those groups were required to have physical education classes which Keffer was responsible for teaching. Prior to September 1983 Keffer was assigned two periods to coordinate peer counseling. Those were assigned duty periods. He also received his one contractual planning period per day. In order to provide the additional physical education class for 5th graders (the kindergarten class was combined with the existing kindergarten class) Keffer was reassigned from one of his peer counseling periods leaving him one peer counseling period and his contractual planning period (T5 pp.

^{22/} I credit that part of Keffer's testimony that he misunderstood Morton's remarks, and that he did not interpret those remarks as being a significant cut in the peer counseling program (T2 p. 98, T3 p. 94). I am not discrediting Morton's testimony, however, I am simply finding that Keffer misunderstood Morton's remarks.

100-101, T7 pp. 49-51). Ruffer testified that this decision was made in the summer of 1983, and that the loss of one peer counseling period for Keffer influenced the Board's decision to cut back on the peer counseling program (T5 p. 101).^{23/}

Since Keffer misunderstood Morton's remarks regarding a cut back of the peer counseling program he continued to offer the program for at least 7th and 8th grade students. By early December 1983, however, the Board formally decided to curtail the peer counseling program, which prompted Ruffer and Morton to tell Keffer that the peer counseling program was limited to high school students working with 8th grade students (T3 pp. 94-96, T5 p. 90, T6 pp. 36-38).

Shortly before that meeting with Ruffer and Morton, Keffer learned that the location where he conducted peer counseling was moved from a storage room which was near his office to the multi-purpose stage in the Duffy School which was a significant distance from his office (T1 pp. 158-159). During the first year of peer counseling Keffer used his own physical education office for

^{23/} The Association specifically alleged in the Charge that the Board "eliminated a portion of Keffer's preparation time with respect to his peer counseling...responsibilities." That specific allegation is not literally accurate and was not proved. The use of the proper terminology is important. The Board did not eliminate any of Keffer's "preparation time." It did reassign him from a peer counseling period (which was a duty period) to a 5th grade gym period which meant he lost one period that he used to coordinate the peer counseling program. I credit both Ruffer's and Morton's testimony regarding that issue.

peer counseling, but in 1982-83 he requested a better location and was permitted to use the storage room (T1 p. 158). In the late Fall 1983 Keffer learned, just before a peer counseling session was about to commence, that peer counseling had been moved to the Duffy stage (T1 p. 159).

The record shows that the Board had a serious lack of storage space which prompted the McKinnon School to store gym mats on top of the gym bleachers. The mats slipped one night in late Fall 1983 and injured a parent. The Board immediately ordered that the mats be removed from the gym, and Ruffer concluded that the storage room was the only place to store the mats. In the Fall of 1984 the storage room was converted into the attendance office and the mats were placed in the gym until a new storage facility could be completed (T5 pp. 104-110, T6 pp. 51-55).^{24/}

On December 8, 1983 Keffer sent Ruffer a letter (Exhibit CP-5) expressing his disappointment over the curtailment of the peer counseling program, and over the Board's failure to give him

^{24/} I credit Ruffer's testimony that the peer counseling program was relocated to the Duffy stage because of severe storage problems. Morton, and even Keffer to a certain extent, corroborated Ruffer's testimony. Morton testified about the storage problem and the incident where a parent was injured (T6 pp. 134Q-135R). He also testified that the students involved in peer counseling preferred the new location (T6 p. 138U). Finally Morton testified that he did not consider moving peer counseling back to Keffer's office because Keffer had previously indicated that his office was inappropriate (T6 p. 139V)(Exhibit CP-6). Keffer admitted that there was a storage problem and that a parent was injured by falling mats (T3 pp. 100-107).

adequate advance notice of the change in the location for peer counseling. On December 12, 1983 Morton sent Keffer a letter (Exhibit CP-6) indicating that he did not relocate peer counseling to the physical education office because of Keffer's previous concerns about using that office for that purpose. Keffer responded to CP-6 on December 13, 1983 (Exhibit CP-9) and advised Morton that he would prefer using his office rather than the Duffy stage. Morton responded to CP-9 on the same day (Exhibit CP-7) and advised Keffer that the stage would be used for peer counseling. On December 13 Keffer also sent a letter to Ruffer (Exhibit CP-10) concerning the general lack of communication, including a comment about the relocation of peer counseling. Ruffer also responded (to CP-10) on the same day (Exhibit CP-8) and reviewed the reasons why peer counseling was relocated, and also emphasized that the program was limited to high school students working with 8th graders. On December 19, 1983 Keffer responded to both CP-7 and CP-8. In Exhibit CP-11 Keffer again asked Morton to reconsider using the physical education office for peer counseling. In Exhibit CP-13 Keffer questioned why Ruffer did not allow his (Keffer's) input in deciding to curtail the peer counseling program, and he once again questioned the decision to relocate peer counseling to the stage. On December 21, 1983 Morton again informed Keffer (Exhibit CP-12) that peer counseling would be moved to the stage. On December 22

Keffer again wrote to Morton (Exhibit CP-14) questioning the relocation of peer counseling.^{25/}

On May 4, 1984 Ruffer wrote Keffer (Exhibit R-2) that he had just learned that 7th grade students were being scheduled for peer counseling despite his (Ruffer's) earlier directive to limit the program to 8th grade students. Keffer was directed to cease scheduling 7th grade students and was required to meet with Ruffer. Keffer testified that he misunderstood Ruffer's December directive (CP-8) and that he made a mistake (T3 pp. 94-99). Ruffer accepted that explanation and there was no further problem (T3 p. 95).

11. Leaving Early Incident

On December 8, 1983 Morton was meeting with Ruffer in the classroom adjacent to the parking lot when he observed Keffer, and teacher Robert Comeau, leaving the building four minutes before the end of their workday (T7 p. 56, T8 p. 90). The following day, December 9, at approximately 2:40 p.m. Morton met separately with Comeau and Keffer and discussed the incident. Morton met with Comeau in the aides' room and informed him that he left early. Comeau admitted that he and Keffer left early and he (Comeau) told Morton that he was sorry and would not do it again (T9 pp. 103, 108). Comeau testified that Keffer did not hear his (Comeau's)

^{25/} Keffer sent copies of CP-9, CP-10 and CP-14 to his NJEA representative. But there was no evidence that Keffer was going to be disciplined over the relocation of peer counseling, or that he even requested union assistance over the matter.

discussion with Morton, nor did he (Comeau) hear Morton's discussion with Keffer. Comeau also testified that Morton was very nice about the incident and that he (Comeau) did not use any harsh language toward Morton (T7 p. 60, T9 pp. 104-105).^{26/} Morton did not issue Comeau any memorandum regarding the incident.

After his discussion with Comeau, Morton went into the industrial arts room to discuss the incident with Keffer. Makosky was also in the room (T1 p. 163, T7 p. 60). Morton advised Keffer that he saw him and Comeau leave four minutes early. Keffer admitted that he responded by saying "bullshit, I did not." (T1 p. 164, T7 p. 61). Morton responded that Keffer did leave early and Keffer alleged that there was a problem with the clocks and that he

26/ I credit Comeau's testimony, as well as Morton's, that Comeau told Morton that he (Comeau) and Keffer left early, that he was sorry, and that he (Comeau) did not use harsh words to Morton. Both Keffer and Makosky testified that on December 10, 1983 Comeau told them that he (Comeau) also told Morton "bullshit, I did not leave early." (T10 pp. 4, 15-16). Under cross-examination Comeau vigorously denied talking with Keffer and Makosky, and specifically denied saying "bullshit" (T9 pp. 109-110). I do not credit Keffer and Makosky. On balance, Comeau was the witness who had the least to gain and the least to lose by testifying on this issue. There was no reason for him to intentionally misrepresent the facts. Keffer, of course, had the most to gain and to lose, and both Makosky and Morton were deeply involved in the matter. Neither Keffer nor Makosky actually heard the conversation between Morton and Comeau. Morton testified that Comeau admitted he and Keffer left early, and Morton has proved to be a more credible witness than Keffer throughout this hearing. Most important, however, was that while Keffer, Makosky and Morton were present throughout the hearing, Comeau was present only on May 17, 1985, the day he testified, and his testimony on the issue corroborated Morton's testimony even though Morton testified on April 3 and May 1, 1985.

did not leave early (T1 p. 165, T7 p. 61). Morton testified that as a result of Keffer's reaction to the incident he (Morton) was forced to put the incident in writing. Morton told Keffer that he (Morton) would check the clocks and that if they were all the same he (Morton) would write him (Keffer) a memo telling him he left early (T7 pp. 61-62). Morton did check all the clocks in the building and found that all but one clock (that clock was not material to this incident) had the same time (T7 pp. 62-64, T8 p. 95).

After checking the clocks Morton, on December 12, 1983, gave Keffer a memorandum (Exhibit CP-15) regarding the incident. In CP-15 Morton concluded that Keffer had left early on December 8, and had arrived late from lunch on October 28, 1983. Morton emphasized that these actions were unacceptable. Keffer responded on December 13, 1983 and advised Morton in Exhibit CP-16 that there had been problems with the clocks, that he (Keffer) really believed he left on time, that he thought Morton was joking about leaving early, and that he thought he was on time on October 28. Keffer's last paragraph in CP-16 began with:

I have been to and from school on time every day. I challenge you to prove that I have not.

As a result of that challenge Morton checked the records of principals' correspondence and found that Keffer had received a memorandum in May 1980 (Exhibit R-7) from the former principal about arriving late to school.^{27/}

^{27/} Keffer responded to R-7 by his own letter (Exhibit R-6) in June 1980.

12. Removal of Gym Equipment

On December 8 (Thursday) or 9 (Friday), 1983 Morton asked Keffer and Stamler to remove the gym equipment from the gym in preparation for a basketball game scheduled for Monday, December 12, 1983 (T7 p. 74, T9 pp. 64-66). Morton explained that although the physical education teachers had always taken the equipment in and out of the gym, Keffer, in front of Stamler, refused to move the equipment and stated that it was the custodian's job (T7 p. 74, T9 p. 63).^{28/} Since Keffer refused to help, Morton assisted Stamler in removing the equipment from the gym by Friday, December 9, 1983 (T7 p. 75, T9 pp. 65-66, 76).

On Monday, December 12, 1983 Morton sent Keffer and Stamler a memo concerning "Gym Equipment" (Exhibit R-14), which they both received, explaining that the gym had been cleaned and that at the end of the day only mats and the balance beam should be left in the gym. On December 13, 1983 Keffer, in response to R-14, sent Morton a memo (Exhibit R-15) asking why he (Keffer) was "excluded from planning" the storage of equipment, and complaining that his office was used to store equipment, that the heavy equipment he used had

^{28/} Keffer testified that he did not recall Morton asking him to clean up the gym for the December 12 basketball game, nor did he recall saying that it was the custodian's job. I do not credit that testimony to show that it did not happen. Rather, I specifically credit Morton and Stamler that Keffer was told to move the equipment, but that he refused and said it was the custodian's job. Even if Morton's testimony was questioned, there is no basis to question the credibility of Stamler's testimony.

been removed from the gym, and that his scoreboard was missing.

Keffer concluded R-15 by saying:

This would have been ok if, and I say if, someone had told me about these changes and the reasoning behind them.

Morton testified that Keffer had been told and asked to assist (T7 p. 77), and Stamler corroborated that testimony (T9 pp. 62-63). I credit their testimony and find that Keffer knew about the need to remove the equipment from the gym.^{29/}

13. Bitondo's Observation of Keffer - December 1983

On December 15, 1983 Vice Principal Bitondo observed Keffer teaching his (Keffer's) kindergarten physical education class, and he (Bitondo) prepared a formal observation report (Exhibits CP-17 and CP-20-30) and conducted a conference with Keffer on January 4, 1984. There were only two possible ratings on the report, "satisfactory" and "needs improvement," and out of 36 items to be rated, Keffer received 32 satisfactorines and 4 needs improvement.

^{29/} On cross-examination Keffer testified that he did not receive R-14 dated December 12, until after his observation by Bitondo which was conducted on December 15, 1983 (T4 pp. 74-76). His testimony is sheer fabrication. R-14 was entitled "Gym Equipment" and dated December 12. Keffer began R-15 by saying:

I was very upset upon receiving your memo of December 12, 1983 regarding "Gym Equipment."

R-15 was dated December 13, 1983. Keffer testified that the date on R-15 could be faulty (T4 p. 44), but I also find that unsupported assertion to be nothing more than wishful imagination. Keffer received R-14 on December 12 and he responded to it on December 13.

Keffer submitted an addendum (Exhibit CP-18) to the observation report contesting Bitondo's needs improvement ratings.

The record shows that Bitondo had begun his employment with the Board in late Summer 1983 and had not known Keffer prior thereto (T8 p. 156). Bitondo's observation of Keffer on December 15 was the first and only time he observed Keffer (T9 p. 122). When Morton assigned Bitondo to observe Keffer in November 1983, he (Morton) did not tell Bitondo how to observe Keffer or what to find (T8 pp. 157-158).

In CP-17 Bitondo found that Keffer needed improvement in four areas: Thorough Preparation; Attention to Detail; Attention to Basic Skills Development; and Teaching Techniques. Bitondo listed eight recommendations to improve Keffer's skills, four ways to improve his plan book, and he commended Keffer in four areas.

Bitondo explained the reasons for the needs improvement ratings. Under "Thorough Preparation" Bitondo found that the gym was not prepared for the class because Keffer was still carrying mats into the gym (T8 p. 160). Bitondo explained that Keffer could have prepared the gym between 8:00 and 8:30 rather than reading the newspaper (T8 p. 168).^{30/}

^{30/} Keffer argued that the observation occurred on a Monday and that when he came into the gym all the equipment that he had used the week before had been moved out unbeknownst to him (T2 p. 6). I do not credit that response. The observation was on December 15, 1983, a Thursday. Keffer had received R-14 on

Under "Attention to Detail" Bitondo explained that Keffer had not provided for any spotter for children climbing ropes, and that he did not provide enough mat coverage for those children on the rings (T8 pp. 161-162). Keffer admitted that a child dismounting the rings landed in a spot where Bitondo wanted an additional mat, but he (Keffer) thought that since he was there, no problem existed (T2 p. 8).^{31/}

Under "Teaching Techniques" Bitondo explained that Keffer should have taught forward rolls in a more progressive manner because children were rolling off the mats (T8 p. 164). Keffer admitted that it was the first time those students were being taught forward rolls but he felt he used the right technique, and also complained about not being able to retrieve enough mats (T2 p. 11).

Under "Attention to Basic Skills Development" Bitondo explained that Keffer had not coordinated activities well and that

30/ Footnote Continued From Previous Page

Monday, December 12, see note 29 infra, and he knew on December 15 that the equipment had been removed from the gym and where it was stored. I credit Bitondo's testimony on that issue.

31/ When asked about spotting Keffer replied that he had an excellent safety record and he accused Bitondo of lacking experience to observe him. I find that that explanation reinforced Bitondo's criticism. Even though Keffer stated that he did not leave the ring area, the fact is that since he had no spotter by the ropes, if he had to leave the ring area a child could have fallen where the mats were thin. Certainly Bitondo's criticism was to prevent that circumstance from ever occurring.

stretching was done improperly (T8 pp. 162-163). Keffer responded that he had taught the students the basic skills for a variety of functions and that the class was now enforcing those skills. Keffer then asked Bitondo to change the observation, but Bitondo declined (T2 p. 10).

Keffer admitted that he discussed his planning book with Bitondo, he (Keffer) agreed that it was hard to read, and he (Keffer) agreed to make it clearer. Keffer acknowledged that Bitondo subsequently remarked that he (Bitondo) noted an improvement in the book (T2 pp. 14-15).

In CP-18 Keffer indicated that Bitondo did not possess sufficient knowledge of physical education to substantiate his criticisms. On February 1, 1984 Morton sent Keffer a memo (Exhibit CP-19) indicating that Bitondo possessed a Principals Certificate and was therefore qualified to observe him.

14. Graffiti Incident

On or about December 29, 1983, the day before taking their Christmas vacation (but during the time the staff was on vacation), Morton and Bitondo were in the school and Morton noticed graffiti on the outside of the building which used Keffer's name in a vulgar manner (T7 pp. 124-126). Morton told Bitondo what he had found and that they had to tell the custodians (T7 p. 126).

Later that day Morton told police officer Frank Weatley of the graffiti (T7 p. 126).

On January 1, 1984 Keffer was informed of the graffiti by a friend and he checked with the police. Keffer filed a police report about the graffiti and he learned that Officer Weatley had been informed of the incident by Morton, and that Morton had told Bitondo that the graffiti had to be taken care of (T4 p. 149).

When Morton returned to school on January 3, 1984 he told Chester Puco, head custodian, to remove the graffiti (T7 p. 127), and Puco removed the graffiti that day (T9 pp. 29-30).

Morton subsequently received a request by Keffer to investigate the matter and file a police report. Morton testified that although it was not the Board's policy to file reports over such incidents, he telephoned the police and was informed that Keffer had filed a report. Morton further testified that when Keffer subsequently asked him if a report had been filed he (Morton) said yes, knowing that Keffer had filed the report (T7 pp. 127-129).^{32/} In approximately the third week of January, Keffer learned the identity of the student who placed the graffiti on the wall (T4 p. 152).^{33/}

^{32/} I credit Morton's testimony that he did not file a formal report because Keffer had filed one himself.

^{33/} Keffer alleged that after he asked Morton to investigate the graffiti incident Morton sent him a memo stating that it (the graffiti incident) was a silly thing and that he (Morton) would do what he could to find out who had done it (T4 pp. 152-153). I do not credit Keffer's testimony to show that Morton considered the graffiti incident a silly thing or that he (Morton) sent such a memo. No such memo was offered for evidence.

15. Emergency Lesson Plan Incident

The record shows that teachers (including Keffer) are required to provide a timely lesson plan when necessary, but must keep emergency lesson plans on file to be used only when a timely plan cannot be supplied (T7 p. 80).

On or about November 1, 1983 Keffer called in sick but did not provide a lesson plan. The School used his emergency plan instead. Subsequently, Morton told Keffer that in the future if the emergency plans were to be used, to call that information into the coordinator of substitutes (T3 p. 132). On January 5, 1984 Keffer called the coordinator and asked her to use his emergency lesson plans that day. Morton sent Keffer a memo (Exhibit CP-21) that day asking Keffer why a more timely plan could not have been called in. Keffer responded that the emergency plans were fine and that he was too sick to call in a plan (T7 p. 81). On January 6, 1984 Keffer sent a memo (Exhibit CP-22) to Morton indicating that he was too sick to call in plans on January 5.

Attached to CP-22 was a substitute report filled out and signed by the substitute teacher, Stephen Luke, who substituted for Keffer on January 5 and used Keffer's emergency lesson plans. Luke indicated that "no one knew where they were in the book." Morton testified that Luke had assigned a specific chapter only to find that the students had read it (T7 p. 83). Morton concluded that although Keffer's plans were "well developed," they were the wrong plans for that class, and that the class was unorganized and

the students were misbehaving because of the poor plans (T7 pp. 84-85). On cross-examination regarding the emergency lesson plans Morton expressed his concern over the fact that Keffer had sent a copy of CP-22 to his New Jersey Education Association ("NJEA") representative. When asked why he was concerned Morton responded that his concern was over a number of documents Keffer sent to his NJEA representative (T8 p. 106). The record shows that between November 2 and December 22, 1983 Keffer sent copies of six memos or letters to the NJEA; they were Exhibits R-17, CP-9, CP-10, CP-16, R-15, and CP-14. I find that none of Morton's actions were unlawfully prompted by - or in reaction to - Keffer's sending certain documents to the NJEA. Certainly Keffer's actions contributed to the deterioration in his relationship with Morton, and certainly Morton was suspicious of Keffer's actions, but Morton took no action against Keffer because he (Keffer) sent documents to the NJEA.^{34/}

^{34/} Morton testified that:

Keffer seemed to have a feeling that he was being picked on all the time, his fear seemed to be without basis, and I tried to assure him of that. T8 p. 106.

Morton further testified that it seemed that Keffer was trying to build a case to cause conflict with him (T8 p. 107). Morton concluded that:

Keffer's belligerent reaction to any suggestion I gave him led me to believe that he felt that his comments along the lines that you are out to get me, our relationship has deteriorated, always directed to me from him, led me to believe that he was trying to set something up.... T8 p. 108.

I credit Morton's testimony as to why he was concerned about Keffer sending copies of certain letters to the NJEA. I do not find that that testimony demonstrates any anti-union animus towards Keffer. Rather, it demonstrates the bases for Morton's concern over the deterioration of his relationship with Keffer.

16. Telephone Call Incident

During the sixth period (between 1:00 p.m.-1:45 p.m.) on Thursday, January 12, 1984, secretary Rosemary Gyure was working in the Duffy office covering for secretary Alice Peterson who was out sick that day (T9 pp. 37, 95). Gyure received a telephone call from Paul Demberg for Keffer regarding officiating a basketball game (T9 p. 96). Gyure took a written message that said:

Demberg called asking [you] Keffer to call him whenever [you] he could regarding officiating a game and to call him at his place of business (T9 p. 97).

Although Keffer testified that the message said it was "important" to call Demberg (T4 p. 4), Gyure specifically testified that neither the word "emergency" nor the word "important" appeared on the written message (T9 pp. 98, 101), and I credit her testimony.^{35/}

^{35/} I cannot credit Keffer's entire line of testimony regarding the telephone call incident. Keffer has previously proved to be an unreliable witness on material facts, and the instant record shows, as to be discussed infra, that Keffer has occasionally misrepresented the facts of this incident. I find Keffer's testimony regarding the telephone message to be inconsistent. At the hearing on September 25, 1984 Keffer testified that the student who picked up the message said to him, "There's a very important message for you." (T2 pp. 24-25). Keffer then looked at the message and testified that it said "Paul Demberg." (T2 p. 25) At the hearing on Novem-

Gyure then pushed a button sounding the buzzer in the gym (T2 p. 24, T9 p. 96), causing Keffer to answer the intercom over which Gyure informed him that:

...he had a phone message in his letter box. Before he left, please, pick it up. (T9 p. 96, 100).^{36/}

In response to Gyure's verbal message, Keffer sent a student to the office who brought him the written message. Keffer then went into the girls' side of the gym and asked Stamler to watch his class (T2 p. 25), and he then went to the main office to call Demberg. Keffer telephoned both Demberg and a Mrs. Matthews and both calls concerned a basketball game which was not connected to the Wharton School District (T2 pp. 25-26, T7 p. 90). Keffer admitted that Morton overheard the telephone conversations (T2 p. 26, T7 p. 90, T8 p. 109), and he admitted that he failed to record the calls in the log book which was a School requirement (T2 p. 28, T4 p. 5).

35/ Footnote Continued From Previous Page

ber 5, 1984, however, Keffer testified that the message said "important call Paul Demberg" (T4 p. 4). In Exhibit CP-25 Item 4(1a) which Keffer sent to Morton on January 17, 1984 he (Keffer) alleged that both the student and the message used the word "important."

In contrast, Gyure was essentially a disinterested witness. Her testimony on direct and cross-examination was consistent and there was no evidence whatsoever to discredit her testimony.

36/ Although Keffer testified that the intercom was not working (T2 p. 24, T4 p. 3), I credit Gyure's testimony that it was.

After observing Keffer make the calls Morton followed him back to the girls side of the gym and observed him walk back to the boys gym (T7 pp. 91-92, T8 pp. 110-111). Morton asked Stamler if she was watching Keffer's class and she confirmed that she was (T7 p. 92).

Later that day Morton met with Keffer to discuss the incident. Keffer asked if they could talk "man to man" and Morton agreed (T7 p. 92, T8 p. 113). Morton then expressed his concerns over Keffer having left a class to make telephone calls and his failure to log the calls (T7 p. 93). On January 13, 1984 Keffer sent Morton a letter (Exhibit CP-23) with a copy to his NJEA representative, expressing his reaction to Morton's concerns.

On Tuesday, January 17, 1984, Morton responded to CP-23 by sending Keffer Exhibit CP-24 wherein he reviewed his concerns regarding Keffer's behavior on January 12.^{37/} Morton specifically noted in CP-24 that Keffer had not recorded the calls in the phone log.

After receiving CP-24 on January 17 Keffer went to the office and recorded his January 12 telephone calls into the log book

^{37/} Morton testified that his understanding of the "man to man" conversation was a discussion between him and Keffer and that would be the end of it (T7 p. 94, T8 pp. 113-114). In fact, Morton did not intend to write Keffer up after their discussion (T7 pp. 93-94). However, once Keffer prepared CP-23, Morton thought it was then his responsibility to record the incident (T7 pp. 94-95, T8 p. 114). I credit Morton's testimony.

(Exhibit R-8) on a blank page, but he placed the date of January 12 on the log as if it were the date he recorded the calls. After Keffer filled in the log secretary Alice Peterson, acting upon Morton's prior instructions, placed that day's date - January 17 - on the log above Keffer's entry, and then photocopied that page of the log and gave Morton a copy (T9 pp. 47-48). Although Keffer testified that he made the log entry on January 12 (or 13)(T2 p. 28, T4 pp. 11-13, 15, 19-20), and that Peterson was holding the log pages when he (Keffer) came in to record the calls (T2 p. 28, T4 pp. 15-16, 21-22, 135, 174-175), I discredit that testimony. Keffer was not a reliable witness. Peterson testified that she was out sick on January 12 (T9 pp. 37-38) and therefore the encounter between her and Keffer could not have occurred on that day. She further testified that she placed the date of January 17 above Keffer's entry that day (T9 p. 47), and that the log was fastened into a three-hole binder at the time Keffer made the entry (T9 pp. 44-48). I fully credit her testimony.

After filling in the log Keffer, also on January 17, 1984, responded to CP-24 by sending Morton Exhibit CP-25. In that Exhibit (CP-25) Keffer said "I recorded the phone calls in the log book yesterday."^{38/} On January 23, 1984 Morton sent Keffer a

^{38/} The record shows that Peterson was out sick on January 11 and 12, 1984, but was working on Friday, January 13, 1984 (T9 pp. 37-38). The school was closed on Monday, January 16, 1984 for Martin Luther King's birthday, and Peterson was working on Tuesday, January 17, 1984 (T9 p. 38). Keffer could not have

one-sentence memo (Exhibit CP-26) as to the truthfulness of CP-24.

17. Superintendent's Meeting - January 1984

In the early part of the 1983-84 school year Morton apparently sought to limit the number of meetings the Association held after school with its membership (T5 pp. 39-40). The Association filed a grievance over the incident which was not resolved by Morton at the first step of the grievance procedure.

When a grievance proceeds to the second step of the grievance procedure, the superintendent's level, the grievance chairperson sends the superintendent a letter requesting that the grievance move to the second step with the rationale as to why the grievance should be granted (T5 p. 41, T6 p. 9). In addition, the grievance chairperson is present to discuss the grievance. On

38/ Footnote Continued From Previous Page

entered his telephone calls in the log on January 12 because Peterson was out that day, and even Keffer admitted that he had a confrontation with Peterson when he did make his log entry. He could not have made his entry on January 13 because Peterson was there that day but credibly testified that it did not happen that day, and if I credited Keffer's entry it shows that the entry occurred on January 12, not January 13. Finally, since Keffer could not have made the entry on January 16 because the school was closed, he could only have made the entry on January 17, as Peterson testified.

Similarly, Keffer's statement in CP-25 that he "recorded the phone calls in the log book yesterday" is also inaccurate. CP-25 was dated January 17, and the "yesterday" - January 16 - was a holiday. It is more likely that Keffer prepared CP-25 on the evening of January 17 and delivered the memo on January 18, and that the "yesterday" referred to therein was really January 17 (T4 pp. 173-174).

January 20, 1984 Makosky sent Ruffer a handwritten memo (Exhibit R-18) requesting a meeting between him (Makosky) and Ruffer about the grievance filed over Association meetings. In R-18 Makosky said, "...I'm taking these grievances to the next step."

Having received R-18 Ruffer's reaction was that the Association was entitled to meet and that Morton was wrong (T5 p. 40, T6 p. 10). Since the request to meet about the grievance over Association meetings was made by Makosky, the Association president, and not by Keffer, grievance chairperson, which would have been the normal routine, Ruffer thought Makosky wanted to have an off the record discussion with him to resolve the issue (T5 pp. 46-47, T6 p. 10). Ruffer then thought it would be wise to have all the Association officers involved in the discussion, thus, he invited the Association officers to a meeting (T2 p. 81, T3 p. 57, T6 pp. 10-11). Those officers included Tim McGrail, Frank Greb, Mary Schiffner, Peg Bunting and Makosky (T5 p. 45, T6 p. 12). Keffer did not receive an invitation to attend (T2 pp. 81-82, T3 p. 57).

The meeting was held in late January 1984 between 2:30-3:00 p.m. (T6 p. 12). Ruffer was unaware that Makosky had invited Keffer to attend the meeting (T1 pp. 44, 139). When Keffer entered the room Ruffer, Morton, McGrail, Greg, Schiffner, and Bunting were present, but Makosky had not arrived (T5 p. 45, T6 pp. 12-13). Since Ruffer did not believe it was a grievance meeting, and since he had invited only Association officers, Ruffer asked Keffer if he could help him, and Keffer replied that he was there for the

grievance meeting (T5 p. 45, T6 pp. 13-14). Ruffer told Keffer that it was a meeting with just Association officers and Keffer was asked to leave (T5 p. 46, T6 pp. 14-15).

After leaving the meeting Keffer passed Makosky in the hallway and informed him that Ruffer had asked him to leave (T1 p. 52). Makosky entered the meeting room and asked Ruffer why Keffer had been excluded, and Ruffer responded that he (Keffer) was not an officer of the "WEA." (T5 p. 46). Makosky explained, however, that he thought it was a grievance meeting and since Keffer was grievance chairman he was entitled to attend (T5 p. 46). Ruffer responded that he misinterpreted Makosky's request for the meeting and that since it was a grievance meeting he agreed that Keffer could attend (T5 pp. 46-47).

After leaving the meeting Keffer intended to file a grievance over his exclusion from the meeting (T1 p. 141, T3 p. 60). He was quickly called back to the meeting, however, and apparently did not file such a grievance.

When Keffer reentered the meeting room Ruffer openly apologized to him for excluding him earlier, he (Ruffer) explained that he did not realize that it was a grievance meeting and he did not intend to exclude him from a grievance meeting, and he asked him to attend the meeting (T1 p. 142, T2 p. 86, T3 p. 61, T5 p. 48). Ruffer then conducted the meeting which resulted in a resolution of the underlying grievance. After the meeting Ruffer again told Keffer that he misinterpreted the purpose of the meeting and did not

intend to exclude him (Keffer) from the meeting (T3 pp. 62-63, T5 pp. 49-50).^{39/}

18. The Overko Incident

On February 1, 1984 Keffer was assigned to conduct a health class in a room other than the one he had previously used. He began by assigning the students to specific seats, and asked student Joey Overko to sit in the front row. Keffer had known Overko, and the Overko family, prior to that date, and he knew that Overko had previously been suspended, and continued to have certain behavioral problems.

Overko at first ignored Keffer's request that he sit up front, and although he then grudgingly complied, he continued to agitate. Overko's behavior then caused Keffer to tell Overko that he must not love his mother to bring her such trouble (T2 pp. 32, 108; Exhibit CP-29). Overko immediately responded: "bullshit," which prompted Keffer to ask him to leave the classroom (T2 pp. 33, 108-109). When Overko did not leave, Keffer firmly grabbed him by the shoulders and ushered him over to the door, and sent a student for Vice Principal Bitondo, the school disciplinarian (T2 p. 34).

^{39/} I credit Ruffer's entire line of testimony regarding this incident. Although Keffer characterizes the conversation between himself and Ruffer in different terms, he admitted that Ruffer apologized both before and after the meeting for excluding him therefrom (T1 p. 142, T2 p. 86, T3 pp. 61-63). To the extent their testimony conflicts, I credit Ruffer's testimony. Keffer was generally not a credible witness throughout this hearing.

Bitondo quickly came to Keffer's classroom but by then Overko had left the room, but he appeared at the end of the corridor while Bitondo was talking to Keffer (T8 p. 170, T9 pp. 115-116). Bitondo briefly discussed the incident with Keffer and then escorted Overko to his (Bitondo's) office (T9 pp. 115-116).^{40/}

Ruffer was informed of the Overko incident either February 1 or 2 by a combination of Morton and Bitondo advising him of it, and by parents telephoning him about the incident (T5 pp. 119-122). He requested a written report of the incident (T5 p. 122) which caused Exhibit CP-27 to be sent to Keffer on February 6 asking for such a written report. On February 7 Keffer wrote a short response on CP-27. Later that same day Bitondo sent a memo (Exhibit CP-28) to Keffer requesting a detailed written report of the incident, causing Keffer to prepare Exhibit CP-29 on February 9, 1984 (T6 p. 77). In CP-29 Keffer admitted making the remark about Overko's

^{40/} Keffer testified that (Overko) was standing with him when Bitondo arrived, and that Bitondo told (Overko), "...This is the last straw, you're not coming back in this school again." (T2 p. 34). Bitondo said that (Overko) was standing at the end of the hall, and he (Bitondo) also testified that he did not make any remark to (Overko) about coming back to school or this being the last straw (T8 pp. 170-171). Bitondo did not deny making a "last straw" remark to Keffer, he only denied making it in front of (Overko) - and at the time he came to Keffer's classroom. In Exhibit CP-30 Bitondo reminded Keffer that he (Bitondo) made a "last straw" remark to him (Keffer) during the period following the incident with (Overko) - and (Overko) was not present. I credit Bitondo's testimony and CP-30. I find that Bitondo had a more accurate recollection of the pertinent events than Keffer.

mother, and admitted that he grasped Overko's shoulders and ushered him to the door.^{41/}

Having received CP-29, and having discussed the incident with Bitondo and several parents who had telephoned, Ruffer determined that the students were very upset over the incident (T6 p. 75), and he felt it was a serious allegation that required an investigation (T5 pp. 88, 122, 129-131, T6 p. 76). He contacted the Board attorney who recommended that he question the students on what occurred in the classroom (T5 pp. 124-125). As a result of that recommendation Ruffer and Morton arranged to question several students who had witnessed the incident. Although certain elements of the student's account(s) of the incident as set forth in their questionnaires varied from Keffer's recollection of the events, the students confirmed Keffer's own admission that he made a remark about Overko's mother, that Overko said "bullshit," and that Keffer

^{41/} In CP-29 Keffer again alleged that Bitondo made a "last straw" remark in front of Overko when he (Bitondo) came to Keffer's classroom. On February 14, 1984 Bitondo responded to that allegation by issuing CP-30 and reminding Keffer that he (Bitondo) made the last straw remark the following period outside Overko's presence. On February 16, 1984 Keffer sent Bitondo a memo (Exhibit CP-31) in response to CP-30, indicating that his recitation of the facts in CP-29 was the way he perceived the facts. I do not credit Keffer's testimony, or CP-29 and CP-31, concerning this issue. As discussed *infra*, Keffer's recollection of pertinent facts has generally proved to be unreliable. I observed both Keffer and Bitondo and found Bitondo to have a much better and more consistent recollection of the facts. Thus, I credit Bitondo's testimony and CP-30.

physically removed Overko from his seat (T5 pp. 67-69).^{42/} The students' questionnaires were not placed in Keffer's personnel file (T6 pp. 84-85, 87).

Having completed the investigation Ruffer decided that it was not necessary to rely on the students' questionnaires, in fact he recognized that they may have exaggerated (T5 p. 87-88). Ruffer - primarily in reliance on Keffer's own admissions - concluded that Keffer used poor judgment in referring to Overko's mother, and in physically removing Overko from the classroom rather than waiting for the Vice Principal to remove him (T5 pp. 87-89, T6 pp. 91, 93-96).^{43/}

^{42/} The Board sought to introduce questionnaires prepared from questions asked of the students regarding the Overko incident, but it was not seeking to introduce them for the truth of the statements (T5 p. 64). The Association objected to their introduction and I sustained that objection (T5 p. 85).

^{43/} In its post-hearing brief the Association - in attempting to prove that Ruffer had an unlawful motive in conducting the Overko investigation - alleged that Ruffer's "true feelings" were seen in his demeanor at hearing when he became "red and infuriated" over questioning about the investigation. That allegation is a mischaracterization of Ruffer's testimony and the inferences to be drawn therefrom. On March 15, 1985 while on redirect, not cross-examination, Ruffer did, in response to a question by his attorney, become "red" and raised his voice and answered the question in a very forceful manner. But contrary to the Association's inference, I find that Ruffer's demeanor and voice inflection emphasized the honesty of his response and his deeply held belief that Keffer acted improperly. Ruffer testified in pertinent part that:

I simply said, my God, you [Keffer] made a mistake and I have a right to say that. I have a right to have that put into his personnel file, that if he does it again, I have something to refer to. He was wrong and he was wrong because the kids

As a result of his conclusions Ruffer, on March 2, 1984, sent Keffer a letter (Exhibit CP-32) reprimanding him for using poor judgment in the Overko incident. In CP-32 Ruffer specifically criticized Keffer's remark about Overko's mother, and in not seeking assistance in removing Overko from the classroom.^{44/}

19. Keffer's Failure to Issue Progress Reports

At a faculty meeting on January 3, 1984 Morton reminded the staff of the criteria for sending progress reports to students and their parents. He explained that any student that dropped two academic grades from one marking period to another, or who was in danger of failing, should receive a progress report sometime during the marking period (T7 pp. 106-108).^{45/}

43/ Footnote Continued From Previous Page

reacted in such a tremendously negative way. It was wrong of Mr. Keffer. I'll say it now and I'll say it a thousand years from now. If he did it again, he's wrong. T6 p. 95.

44/ In CP-32 Item No. 4 Ruffer concluded that Keffer instructed (Overko) not to say "bullshit" in his class. Keffer denied making that remark. The only evidence suggesting that Keffer made that remark came from the students' remarks in the questionnaires prepared during the investigation. Since I did not admit those documents into evidence, and since the contents of those documents were not being offered for their truth, I am not finding that Keffer made that remark.

45/ Keffer testified that he did not recall any discussion about progress reports (T2 p. 42, T4 pp. 138-139), but I do not credit that testimony as proof that no such discussion was held. Morton specifically recalled discussing progress reports as the first item on the agenda at the January 3 meeting (T7 p. 107), and I credit his testimony.

On or about February 10, 1984 Morton sent a memo to four teachers reminding them of the criteria for sending progress reports (T4 pp. 27-28, T7 p. 106) Keffer received one of those memos (Exhibit CP-33) wherein Morton advised him that three or more students in his class whose grades dropped two letter grades did not receive progress reports. Morton concluded CP-33 by asking Keffer to watch that situation closely so that it would not happen again. On February 16, 1984 Keffer responded to CP-33 by sending Morton Exhibit CP-34 wherein he explained that he was not aware until the end of the marking period that certain students had dropped two grades and he did not feel that progress reports were warranted at that time. Keffer admitted the same facts in his testimony (T4 pp. 28-29).

Later on February 16, 1984 Morton responded to CP-34 by sending Keffer Exhibit R-10 wherein he (Morton) instructed Keffer to send progress reports even up to the last day of the marking period.

20. Incident Regarding the Number of Grievances Filed

Sometime between late January and early March 1984 (T1 p. 47, T5 pp. 32, 172) Ruffer had a conversation with Makosky regarding the number of grievances that had arisen during the 1983-84 academic year. Ruffer defined grievances as formal and informal. Formal grievances were apparently those grievances actually filed in writing and pursued through the contractual grievance procedure, while informal grievances were those situations where unit members met with the principal to discuss a problem (T5 pp. 34, 171-172).

The incident occurred during a meeting between Makosky and Ruffer which had been requested by Makosky concerning a grievance (T5 p. 32). Ruffer asked Makosky if he (Makosky) was aware that there had been approximately 36 grievances filed that school year, and then Ruffer said: "I'm going to do something about it" (T5 p. 33). Ruffer explained in his testimony that he made that remark as a positive statement, that it was obvious to him that some problem existed, and he wanted to resolve the problem (T5 p. 33). Makosky's account of Ruffer's remark though slightly different (T1 p. 47) essentially confirmed what Ruffer said. Makosky admitted that Ruffer did not say what he (Ruffer) was going to do about the number of grievances, and he (Makosky) did not contradict Ruffer's testimony that he (Ruffer) made the remark as a positive statement. I credit Ruffer's explanation of the remark and infer therefrom that he (Ruffer) wanted to do something positive about resolving the problem(s) that caused the large number of grievances.^{46/}

Ruffer did not make that remark to Keffer, nor was Keffer present at that meeting. Ruffer did not take any action against Keffer or any other employee regarding the number of grievances filed, nor was his remark directed toward Keffer or any grievance

^{46/} I note that the Association did not agree that 36 grievances had been filed. I find, however, that the actual number of grievances is not material. The issue is really whether Ruffer's remark was unlawful. I find that it was not. Notwithstanding that finding, I accept Ruffer's explanation that there were formal and informal grievances.

Keffer filed, nor did he (Ruffer) tell Morton how to decide any grievance (T5 pp. 36-37).

21. Morton's Observation of Keffer - March 1984

On March 19, 1984 Morton observed Keffer teaching a 4th grade class. Keffer was not notified that he would be observed, but he admitted that he has never been previously notified in advance of an observation (T4 p. 141). Morton issued his observation report (Exhibits CP-20-31 and R-25) on or about March 21 wherein he found that Keffer needed improvement in four areas: Attention to Basic Skills Development, Utilization of Learning Situation, Provision for Student Practice of Skills, and Teaching Techniques. The first and last of those items were two of the four items Bitondo had found in CP-20-30, but the other items were new.

Morton in his report complimented Keffer on his praise of the students, and on improving his teaching of warm-up techniques and preparing his plan book. Morton, however, criticized Keffer for failing to plan greater student participation in wrestling skills; for failing to adequately teach volleyball serving; and, for allowing students to shoot a bow and arrow on the first such class in the Fall.

On March 30, 1984 Morton conducted a conference with Keffer concerning the observation. Keffer attempted to convince Morton to alter certain elements of the report but Morton refused (T2 p. 46). Shortly after the conference Keffer submitted a response (addendum) to the observation listing several items that Morton failed to note

in conducting the observation. On April 24, 1984 Morton responded to Keffer's addendum by submitting his own addendum (attachment to Exhibit R-25).

Keffer objected to Morton's issuance of an addendum to his addendum, causing him (Keffer) to file a grievance with the superintendent (T2 pp. 47-48). The superintendent resolved the grievance in Keffer's favor and directed Morton to remove his (Morton's) addendum from Keffer's file.

22. Alleged Attempt to Withhold Keffer's Increment

On March 15, 1985 Keffer received a form letter from Ruffer (Exhibit CP-2) advising him of a Board meeting scheduled for March 28, 1984 at which the Board would consider employment issues. Ruffer testified that every teacher received the same form letter on March 15 to comply with State requirements that the employees be notified that a Board meeting concerning staffing was scheduled for March 28, 1983 (T5 p. 51). Both Keffer and NJEA representative Alan Fox admitted that CP-2 was sent to all employees (T1 p. 102, T2 p. 72). Fox also admitted that nothing in CP-2 suggested that Keffer's increment would be withheld (T1 p. 102), and Keffer admitted that there was no direct communication from Ruffer or Morton that his increment would be withheld (T2 p. 73). CP-2 did provide that employees could exercise their right to have their future employment with the Board discussed in a public meeting if they so notified the Board. Keffer - as a result of Fox's suggestion (T1 p. 97) - chose to have his future employment discussed at a public session and

delivered the written request (Exhibit R-11) to Ruffer's office on the morning of March 19, 1984.

The meeting scheduled for March 28 was rescheduled for April 11, 1984. The Board, however, did not discuss Keffer's employment on that day and took no action at any time to withhold Keffer's increment (T1 p. 99). During a break in the April 11 Board meeting Fox questioned Ruffer about whether the Board intended to withhold Keffer's increment (T6 p. 21). Ruffer responded that the Board took no action (T6 pp. 22, 62). Fox alleged that during that April 11 discussion Ruffer responded to his (Fox's) question that: "[Keffer] would be lucky if only his increment is withheld." (T1 p. 99). Fox admitted, however, that he was only "paraphrasing," and in a very uncertain manner he qualified Ruffer's alleged response by introducing it as "words to the effect that." (T1 p. 99). It is obvious from Fox's own testimony that Ruffer did not actually say that "Keffer would be lucky if only his increment is withheld." Ruffer specifically denied making that statement (T6 pp. 22-23). He testified that it was not his policy to discuss personnel matters with anyone (presumably outside the administration)(T6 pp. 22, 62-63). Thus Ruffer only responded that no action was taken (T6 p. 62).^{47/}

^{47/} I credit Ruffer's testimony. Fox obviously did not recall what Ruffer had said, and Ruffer was certain he did not make the remark attributed to him, and he (Ruffer) advanced a logical explanation why he would not make such a remark. I found Ruffer to be a credible witness throughout this hearing, and there is no basis to discredit his testimony.

Fox testified that he formulated the opinion that the Board would withhold Keffer's increment based upon several incidents. His opinion was based upon Ruffer's response to him (Fox) regarding the Overko incident; the tone of Ruffer's and Morton's responses to Keffer on a variety of matters; the graffiti incident; Keffer's receipt of CP-2, and Ruffer's alleged remark to Fox on April 11, 1984 (T1 pp. 108-111). Fox admitted, however, that when he formulated that opinion he had not read CP-32 (Ruffer's decision in the Overko incident), and he was unaware (because Keffer did not tell him) that all teachers received the same form letter as CP-2 (T1 pp. 108, 110-111).

In addition to denying the April 11 remark attributed to him, Ruffer testified that in his conversation with Fox regarding the Overko incident he only told Fox that he (Ruffer) had not at that time investigated the matter and had not decided on any action (T6 pp. 60-61). Although Ruffer admitted that after the instant Charge was filed on March 28, 1984 the Board's attorney recommended that Keffer's employment status not be discussed publicly (T5 pp. 98-99), he testified that he never intended to withhold Keffer's increment (T5 p. 54), that he never recommended to the Board that Keffer's increment be withheld (T5 p. 55), and that he never

suggested to Keffer that his increment would be withheld (T5 pp. 54-55).^{48/}

23. Denial of Professional Day

On March 26, 1984 Keffer submitted a written request to Morton (Exhibit R-3) to have a professional day on March 29 to go to the Morris Hills High School to do work related to the peer counseling program. The purpose for the request as stated in R-3 was: orientation of new high school peer counselors and training; child study team assistance; distribute new schedules; and, discuss problems with guidance department. The record shows that there were only two new counselors in the Spring of 1984 who needed training as peer counselors (T3 p. 112, T4 p. 125, T7 p. 52, Exhibits R-4, R-5).

Keffer spoke to Morton about the request and explained that he needed the additional time because his one peer counseling assignment period was not enough to accomplish his objectives (T4 p. 124). He emphasized that he needed to discuss certain ideas with the child study team, he wanted to distribute new schedules, he had to talk to the two new counselors, and he had to talk to someone in the guidance department (T4 pp. 124-125). Keffer may have also

^{48/} The Association alleged that there was no coincidence between Keffer's delivering R-11 to Ruffer's office the morning of March 19, 1984, and Morton's observation of Keffer later that day. The record shows, however, that Ruffer was not in his office the morning of March 19, he had a dental appointment (T6 p. 47, Exhibit R-21). I find that on March 19 Ruffer was unaware of the receipt of R-11, and unaware that Keffer was being evaluated that day, thus it was merely coincidence that those events occurred on the same day.

intended to recruit additional counselors for the Fall, but he did not mention that intention to Morton.

Morton denied the request for the professional day and explained to Keffer that since there were only two new counselors he could do it during his peer counseling planning period (T7 pp. 53-54).^{49/}

24. Morris Hills Play Remark

The record shows that Keffer, in addition to his employment by Wharton, was a basketball coach for the Morris Hills School District. On one occasion Keffer cut a student from the basketball team which prompted the student to write a play about Keffer and his children (who were students at Morris Hills) using their name(s) in a derogatory fashion (T2 p. 63). The play was

^{49/} On cross-examination on November 1, 1984 Keffer alleged that he also wanted the professional day to recruit peer counselors for the Fall, and he alleged that he discussed that with Morton (T3 p. 113). Keffer also denied that the discussion he had with Morton was that he only had two new counselors in the program and that it would not take a full day to orientate those students (T2 pp. 113-114). I do not credit Keffer's responses. First, when Keffer prepared R-3 he did not list the need to recruit additional counselors, and on redirect examination on November 5, 1984 when Keffer was asked what he told Morton, he (Keffer) did not say anything about recruiting counselors for the Fall (T4 pp. 124-125). Having testified on November 1 about wanting to recruit counselors I do not believe Keffer would simply have forgotten about it by November 5 if it really had occurred. Rather, I believe that on November 5 Keffer did not mention recruiting because he had not discussed it with Morton. Second, I credit Morton's testimony that he (Morton) and Keffer discussed the fact that there were only two counselors who needed training which could be accomplished during the planning period.

disseminated to the students in written form which caused Keffer to contact the Morris Hills Principal, Mr. Kwitakoski, to make certain that the play was not further distributed (T4 pp. 60-61). Keffer admitted that he presented Kwitakoski with a letter presumably protesting the play and the letter mentioned possible legal action (T4 pp. 61-62).

Either or both the Morris Hills superintendent or principal informed Keffer that either Morton or Ruffer asked them whether Keffer was going to sue the teacher who allowed the play to be written (T2 p. 64, T4 p. 146). On June 18, 1984 Keffer discussed the matter with Morton who acknowledged that he was aware of the play and had discussed it with Kwitakoski (T2 pp. 68-69). That same day Keffer also discussed the matter with Ruffer who acknowledged that he was aware of it and had discussed it with Superintendent MacNicol of Morris Hills (T2 p. 70, T5 p. 115).

Immediately after he discussed the matter with Keffer, Ruffer followed Keffer into the school parking lot and told him that he (Ruffer) had raised the topic with MacNicol (T4 p. 146, T5 p. 116). On June 19, 1984 Ruffer sent Keffer a memo (Exhibit R-12) wherein he admitted that he had raised the subject with MacNicol. Neither Ruffer nor Morton had any other involvement in that matter.

25. Morton's Evaluation of Keffer - June 1984

On or about June 18, 1984, the next to last day of school, Morton presented Keffer with his end of year evaluation (Exhibit R-16), and asked Keffer to sign it (T2 pp. 48-49). The

evaluation noted five areas that needed improvement: cooperation (under Professionalism); Accepts Constructive Criticism and Suggestions; Demonstrates Professional Ethics; pupil-readiness (under Provides Appropriate Learning Atmosphere); and, Demonstrates Positive Staff Relations. All other items were marked as satisfactory. In the last several years prior to 1983-84 the former principal, Margaret Steele, gave Keffer all satisfactories on his end of year evaluations (Exhibits CP-20-20 through CP-20-29).

After June 18 Keffer requested a conference with Morton to review R-16 and a conference was scheduled for September 13, 1984 and then rescheduled for September 20, 1984 (T2 pp. 50-51). On September 20 Keffer requested that Makosky be present when his (Keffer's) evaluation was discussed, but Morton objected to Makosky's presence, and, to date, no conference on that evaluation has ever occurred (T2 pp. 51-52, T4 pp. 141-142).

26. Dirty Gym - Bolted Lockers Incident

On Keffer's first day back from summer vacation on September 4, 1984 (which was not a reporting day for students), he found, unlike in previous years, that the gym had not yet been cleaned. The bleachers were spread out and dirty, and gym equipment and mats were spread throughout the gym (T2 pp. 52-54). He also found that the top row and two bottom rows of lockers in the locker room were bolted shut (T2 p. 55, T4 p. 49).

Keffer admitted that as soon as he noticed the dirty gym he spoke to one of the custodians who told him that they (the

custodians) were going to clean the gym (T4 p. 48). Keffer did not complain to Morton about the dirty gym (T7 p. 118), and although he was not expected to or required to - he decided - on his own volition - to clean the gym. It took Keffer, with the assistance of three students, three hours to clean the gym (T2 p. 54, T4 pp. 47-48).

Morton admitted that he knew that the gym was not ready on September 4, but he indicated that it was scheduled to be cleaned (T7 p. 118). Head custodian, Chester Puco, testified that it was his responsibility to clean the gym and it would have been cleaned on September 4, 1984 (T9 pp. 27-28).

Although Keffer testified that he did not realize that the lockers had been bolted, he admitted that he had discussed it with the custodians and suggested that it was something that should be done, and he requested that it be done (T2 p. 55, T4 pp. 49-50, T9 pp. 5-9). Keffer had discussed the bolting of lockers with Bitondo (T8 pp. 149-151), and he knew that Morton and Bitondo locked several of the lockers on the bottom row (T4 pp. 50-51).

I find that Keffer had been consulted about the bolting of lockers and that he knew that some lockers would be bolted over the summer (T9 p. 22).^{50/}

^{50/} Custodian Vigilante testified on cross-examination that he and Keffer did discuss the fact that more lockers would be bolted over the summer (T9 p. 22). I credit Vigilante and Bitondo. I do not credit Keffer's assertion that he was not consulted about the lockers, or that they were bolted "unbeknownst" to him.

27. Missing Chairs Incident

The record shows that for approximately six years Keffer had two red or orange plastic molded chairs in his physical education office with his name on the back (T2 p. 56). When Keffer returned to school in September 1984 those chairs were not in his office. On or about September 5 or 6, 1984, the first or second day of school, Keffer asked the custodians where his chairs were and he learned that the custodians had tried to put all the same colored chairs in the same classroom (T2 p. 57). Keffer found the classroom with red/orange chairs, and despite the fact that the teacher, Lorraine O'Nei1, was instructing the students in a homeroom setting, he entered the class, nodded to O'Nei1, asked the students to look for his chairs which were then located, and then took those chairs from students who had been using them and left the classroom leaving two students standing (T9 pp. 86-88).

O'Nei1 then opened the connecting door to the adjacent classroom and asked Mr. McGrail for extra chairs but he only gave her one folding chair. O'Nei1 then sent two students to find a custodian to replace the two chairs she needed (T9 p. 86). Those students encountered Bitondo in the hallway and informed him they needed two chairs for O'Nei1's classroom and Bitondo located one chair and asked the head custodian to find another (T8 p. 148).^{51/}

^{51/} Keffer testified that he asked O'Nei1 if he could take "my chairs" (T2 p. 57), that O'Nei1 asked the students to look for them and that she told him he could take them (T2 p. 57,

O'Neiol informed Morton of the circumstances and he then discussed the matter with Keffer. He told Keffer that his (Keffer's) priorities were misplaced, that he should not have left students standing, and that his chairs could have been obtained by the head custodian (T7 pp. 122-123). The following day Keffer told Morton that no students were left standing (T2 p. 62, T7 p. 123), and Morton spoke to O'Neiol again and she informed him that there were no extra chairs in the room (T7 p. 123).

No other action was taken against Keffer regarding this incident.

Analysis

The Charge alleges that the Board penalized and harassed Keffer by changing and moving the peer counseling program; by eliminating his peer counseling preparation period; by negative

51/ Footnote Continued From Previous Page

T4 p. 55), and that he did not leave two students standing (T2 p. 62). O'Neiol testified that Keffer only nodded to her, and that she did not ask the students to check their chairs nor did she give permission to take the chairs. Morton corroborated O'Neiol's testimony (T7 pp. 121-123).

I credit O'Neiol and Bitondo. Keffer has not proved to be a credible witness throughout this hearing. Keffer testified that O'Neiol was mistaken regarding most of her testimony and that she must have had a motive (T10 pp. 38-40). He also testified that Bitondo must have been mistaken about having to find a chair for O'Neiol's students, and he alleged that no such incident occurred (T10 pp. 38-39). I dismiss Keffer's testimony in that regard as nothing more than unsubstantiated speculation.

comments on his observations; by reprimanding him over the telephone call incident; the emergency lesson plan incident; the progress report incident; the leaving early incident; the Overko incident; and the exclusion from the Superintendent's meeting. The Association did not amend its Charge to include the Morris Hills Play remark, the dirty gym-bolted lockers incidents, the missing chairs incident, and others. Nevertheless, I have considered the facts of all of the incidents both individually, and collectively as a pattern, and find that the Board did not violate the Act. The issue in this case is whether any of the actions taken against Keffer, or any of the comments made to him individually or collectively were taken or made as a result of his union activity. I find that they were not. Certain actions or comments by Morton were an outgrowth of the deterioration in his relationship with Keffer and were not as a result of Keffer's protected activity. The majority of actions or comments, however, were based upon legitimate business or educational concerns.

There are two standards that I considered in reviewing the instant facts to determine whether a violation occurred. The standard for finding a 5.4(a)(1) violation of the Act does not require proof of motive. N.J. College of Medicine and Dentistry, P.E.R.C. no. 79-11, 4 NJPER 421 (¶4189 1978); N.J. Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Proof of motive, and proof of actual interference or coercion is unnecessary to establish an independent 5.4(a)(1)

violation of the Act. "The tendency" of an employer's conduct to interfere with employee rights is the controlling element.

Commercial Twp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd App. Div. Docket No. A-1642-82T2 (12/8/83); City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd App. Div. Docket No. A-3562-77 (3/5/79); City of Hackensack (City of Hackensack v. Winner), P.E.R.C. No. 77-49, 3 NJPER 143, 144 (1977), rev'd on other grounds 162 N.J. Super. 1 (App. Div. 1978), aff'd as modified 82 N.J. 1 (1980).

The standard for finding a 5.4(a)(3) violation of the Act does require proof of an anti-union motive. Boro of Haddonfield Bd. of Ed., P.E.R.C. No. 77-36, 3 NJPER 71 (1977); Cape May City Bd. of Ed., P.E.R.C. No. 80-87, 6 NJPER 45 (¶11022 1980). But even where such motive exists, no violation may be found in cases where the employer demonstrates that its actions were based upon legitimate business considerations. Such cases have been termed "dual motive" cases, and in Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984) the New Jersey Supreme Court adopted the private sector dual motive test in analyzing public sector cases.^{52/} Under the dual motive test the charging party must make a prima

^{52/} The Court in Bridgewater merely adopted the dual motive test that had been developed by the U. S. Supreme Court and the NLRB, and that had been previously adopted by our Appellate Division. See NLRB v. Transportation Mgt. Corp., _____ U.S. _____, 113 LRRM 2857 (1983); Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977); Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980); E. Orange Public Library v Taliaferro, 180 N.J. Super. 155 (1981).

facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's actions. If that showing is made the burden of proof shifts to the employer to show that the same action would have taken place - based upon legitimate business considerations - even in the absence of protected activity. The court in Bridgewater added that to make a prima facie case the existence of protected activity must be shown, the employer's awareness of the protected activity must be shown, and it must be shown that the employer was hostile toward the protected activity, i.e., manifested anti-union animus.

Bridgewater, 95 N.J. at 246.

There was no dispute that Keffer was generally actively engaged in protected activity and that the Board was aware of that activity. It does not follow, however, that Keffer was engaged in protected activity in each of the 27 episodes discussed above. Notwithstanding that, I find that the Board was not hostile toward Keffer because of his union activity, and to the extent it may have been hostile towards Keffer in any episodes, I find that ample business justification existed for the Board's actions.

The facts were analyzed individually and collectively to determine whether a violation existed.

I. Individual Analysis

Allied Teachers Stipends, Contract Negotiations

Although Keffer was an allied teacher and participated in negotiations for the allied teacher stipend, the Association did not

prove that the litigation - or negotiations over allied stipends, standing alone - violated the Act. I did not credit the Association's position that the allied stipends case was "Keffer's case." I found that several other teachers benefited from that case and the negotiations resulting therefrom. I further found that the Association did not prove that the \$5.00 remark by McKinnon, or the hunting remark by Harrah, was directed toward Keffer. Finally, I found that the Board's alleged "annoyance" over Keffer and Makosky's talking to each other during negotiations, was not supported by credible evidence.

The facts of the allied stipends negotiations can certainly be considered in analyzing whether a pattern violation occurred, but standing alone, neither the allied stipends litigation nor the events in the subsequent negotiations presented circumstances that were a violation of the Act. There was no credible evidence of hostility directed toward Keffer.

Peer Counseling Questions & News Release

The facts surrounding the peer counseling news release did not demonstrate a violation of the Act. First, those facts occurred in April 1983, one year before the filing of the instant charge, and thus were well outside the statute of limitations. N.J.S.A. 34:13A-5.4(c).

Second, and more important, Morton's response to the questions asked of him could not have reasonably been interpreted as

being inappropriate or uncomplimentary toward Keffer, thus, certainly could not be evidence of anti-union animus. The Association's assertion that Morton's comments were unlawfully based is not supported by the evidence. Keffer admitted that he did not interpret Morton's comments as a reflection upon him, and the assertion that Morton's comments were "cool" or "unenthusiastic" has absolutely no weight in the Association's burden of proving the prima facie case. No inferences could be drawn from Morton's remarks that Keffer acted improperly. In fact, Keffer's involvement in peer counseling was not protected activity, it was the performance of educational duties, and Morton's answers to the questions were restricted to the operation of the program. Morton's answers to the questions did not involve a consideration of Keffer's exercise of protected activity.

Grievance Filings & Morton's Statements

Having found that Morton did not make an "I am a man" remark, or a "porky pig" remark, I find that he did not violate the Act in his handling of the playground supervision, and bulletin board grievances. Morton's remarks regarding Keffer's conducting Association business during school time (work time) was similarly not a violation of the Act. While the Act gives public employees the right to engage in union activity, employees are not entitled to engage in union activity during work time.^{53/} Morton took no action against Keffer over the incident and did not attempt to

restrict Keffer from engaging in union activity on his own time.

Finally, Morton committed no violation by responding to Keffer that someone could get hurt. Morton's remark was not a threat. He merely agreed with what Keffer had already said.

Elimination of the Gym Leaders Program

The elimination of a program like gym leaders is a managerial prerogative and could only be a violation if the elimination of the program was in reaction to protected activity rather than based upon educational or business considerations.

Ridgefield Park Ed. Assn. v. Ridgefield Park Bd. Ed., 78 N.J. 144, 156 (1978); Ramapo-Indian Hills Ed. Assn. v. Ramapo-Indian Hills Bd. Ed., 176 N.J. Super. 35, 46 (1980); Rutgers, The State University,

53/ Work time can be distinguished from break time and lunch time. Work time generally is defined as the period of time that is spent in the performance of actual job duties not including lunch or break time. Essex International Inc., 211 NLRB No. 112, 86 LRRM 1411, 1412 (1974). Employees are entitled to engage in union activity during their break and lunch time, but not entitled to engage in such activity while they are supposed to be working.

The difference between work time and non-work time, and the right to engage in union activity during non-work time - but not during work time - is a commonly accepted labor law principle, but one that normally arises in union organizing and solicitation for employee interest. See Republic Aviation Corp. v. NLRB, 324 U.S. 793, 16 LRRM 620 (1945). In County of Bergen, P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983) the Commission considered the difference between engaging in union activity during work time and non-work time in relationship to the right to solicit employee interest for organizational purposes.

P.E.R.C. No. 79-89, 5 NJPER 226 (¶10125 1979); Newark Bd. Ed.,
P.E.R.C. No. 84-156, 10 NJPER 445 (¶15199 1984). Here the credible
evidence shows that the Board decided to eliminate call out programs
in favor of giving students more classroom time, thus demonstrating
that the decision was based upon educational considerations.
Neither Keffer nor the Association had any right to participate in
that decision.

Notwithstanding that finding, the evidence shows that
Keffer dropped his concerns over the elimination of the gym leaders
program when the playground supervision grievance was resolved.
Thus, the Board did not violate the Act by eliminating the program.

Dermott Kavanaugh Incident

Morton's comments during the Kavanaugh incident did not
violate the Act. The Charge alleges that the Board intimidated or
harassed Keffer. The Association never alleged that Kavanaugh was
harassed or that he exercised protected activity. The only
conversation between Keffer and Morton regarding this incident was
when Morton denied Keffer's request to "represent" Kavanaugh when he
(Kavanaugh) met with Mrs. Lynn. Morton's denial of that request,
and his comment to Keffer not to cancel the meeting, were not
violations of the Act because they did not even have the tendency to
interfere with Keffer's rights.

Even Morton's "WEA" remark did not violate the Act. That
remark was not made to Keffer or even in his presence. The record
shows that it was Kavanaugh who cancelled the meeting, and even if

Morton thought that Keffer told Kavanaugh to cancel the meeting, Morton never discussed the cancellation of the meeting with Keffer, and never referred to Keffer when he made the remark and took no action against Keffer because Kavanaugh cancelled the meeting.

Keffer's assertion the the "WEA" remark was a reflection upon the Association and upon himself because he gave Kavanaugh certain advice, is not the inference I draw from the remark. Kavanaugh was not engaged in protected activity when he asked Morton to schedule the meeting with Lynn, and the meeting did not concern discipline. Morton specifically informed Kavanaugh that the meeting could not be cancelled without Ruffer's permission, yet he cancelled it without that permission. Morton was angry that Kavanaugh acted without authority and his anger was directed at Kavanaugh for disregarding the importance of meeting with a parent over a student-teacher relationship. In the context of these circumstances Morton's remark certainly did not have the tendency to interfere with Kavanaugh's protected activity (that was not even alleged), and it would have had even less of a tendency to interfere with Keffer's exercise of protected activity since the remark was not made about him or in his presence.

Finally, the disposition of the "WEA" remark is similar to the result in Ocean County College, P.E.R.C. No. 82-122, 8 NJPER 372 (¶13170 1982). In that case I found that a remark by a college official - although not made directly to the charging party - violated §5.4(a)(1) of the Act. The Commission reversed that

finding and held that the charging party had not specifically alleged that the remark alone constituted an independent 5.4(a)(1) violation. The Commission found that the remark was cited only in an attempt to prove anti-union animus. The Commission concluded that in its context, the remark did not prove such animus.

The result here is the same. The Association did not specifically allege that Morton's "WEA" remark, standing alone, was an independent 5.4(a)(1) violation. I find that the Association only introduced that remark in an attempt to prove Morton's anti-union animus. I find that in the context of the remark, however, it does not reflect such animus.

Arriving Late From Lunch Incident

Morton did not violate the Act by questioning Keffer about arriving late from lunch, nor did he violate the Act by noting the incident in CP-15. This incident does not involve Keffer's exercise of protected activity. I credit Stamler's testimony that Keffer arrived late from lunch. Morton had every right to question Keffer about that incident and to memorialize it in CP-15 which also concerned Keffer leaving work early.

It is altogether reasonable to expect that a school principal would be concerned about a teacher's late arrival to a class, as such, Morton had every right to caution Keffer over the incident. Morton's business justification for his actions overrides any possible anti-union animus.

Peer Counseling Changes

The Board's changes in the peer counseling program do not demonstrate anti-union animus. Keffer was not engaged in protected activity in directing the peer counseling program and he was not entitled to participate in the decision making process to curtail the program or to relocate the counseling area. The decision to curtail and relocate the program was a managerial prerogative since it involved the Board's exercise of responsibility to provide students with a thorough and efficient education. Ridgefield Park, supra; Ramapo-Indian Hills, supra; Rutgers, supra. It could only have been a violation of the Act if the Board's decisions were based upon Keffer's exercise of protected activity rather than for educational reasons. Rutgers, supra.

I found, however, that the credible evidence showed that in the Summer of 1983 the Board made an educational policy determination to curtail peer counseling in favor of additional classroom instruction. The Board was also faced with an increase in enrollment that necessitated the teaching of an additional physical education class. The Board did not eliminate Keffer's planning period. The planning period was contractually provided for and was not disturbed. The Board did eliminate one of Keffer's peer counseling assignment periods - a duty period - and assigned other duty - teaching a physical education class.

Although an increase in pupil contact time as a result of an assignment from a non-teaching duty period to a teaching period is a workload increase and mandatorily negotiable, Byram Twp. Bd.

Ed., P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd 152 N.J.Super. 12 (App. Div. 1977); Newark Bd. Ed., P.E.R.C. No. 79-38, 5 NJPER 41 (¶10026 1979), aff'd App. Div. Docket No. A-2060-78 (2/20/80); City of Bayonne Bd. Ed., P.E.R.C. No. 80-58, 5 NJPER 499 (¶10255 1979) aff'd App. Div. Docket No. A-954-79 (1980), pet. for certif. den. 87 N.J. 310 (1981); Dover Bd. Ed., P.E.R.C. No. 81-110, 7 NJPER 161 (¶12071 1981) aff'd App. Div. Docket No. A-3380-80T2 (3/16/82); Buena Reg. Bd. Ed., P.E.R.C. No. 79-63, 5 NJPER 123 (¶10072 1979); Bridgewater-Raritan Reg. Bd. Ed., P.E.R.C. No. 83-102, 9 NJPER 104 (¶14057 1983); Buena Reg. School District, P.E.R.C. No. 86-3, 11 NJPER 444 (¶16154 1985),^{54/} I am not finding that such a workload increase and its concomitant violation occurred in this matter. First, the Association did not even allege that the Board unlawfully increased Keffer's workload, nor did it seek any remedy to negotiate over a workload increase. Rather, the Association only alleged that Keffer's loss of a peer counseling assignment period was done in retaliation for his exercise of protected activity - which I decline to find. Second, I do not believe that the facts regarding any possible workload increase were fully and fairly litigated, thus,

^{54/} The assignment from one teaching duty to another teaching period or instructional period is not a violation of the Act. Caldwell-West Caldwell Bd. Ed., P.E.R.C. No. 80-64, 5 NJPER 536 (¶10276 1979), aff'd in part and rev'd in part 180 N.J.Super. 440 (App. Div. 1981); North Plainfield Bd. Ed., P.E.R.C. No. 76-16, 2 NJPER 49 (1976). Similarly, the assignment from one non-teaching duty to another non-teaching duty is usually not a violation of the Act. Fair Lawn Bd. Ed., P.E.R.C. No. 83-48, 8 NJPER 609 (¶13289 1982).

pursuant to Commercial Twp. Bd. Ed., 8 NJPER 550, supra, and Passaic Valley Water Commission, P.E.R.C. No. 85-4, 10 NJPER 47 (¶15219 1984), I could not find such a violation.

Similarly, the Association did not make a prima facie showing that the change in the location for peer counseling was a violation of the Act. Even assuming that the Association made a prima facie showing, I find that the Board had ample business justification for the location change. The Board had a serious lack of storage space, and often used the gym for storage. But in the Fall of 1983, after a parent was injured from equipment stored in the gym, the Board decided to move the equipment out of the gym and it had no alternative but to use the so-called "peer counseling room" for storage. Keffer was not entitled to participate in that decision since use of its facility was the Board's managerial prerogative, and even though the Board did not use that room for storage the following year, that decision was not evidence of union animus.

Leaving Early Incident

The Association did not make a prima facie showing that Morton violated the Act by disciplining Keffer over leaving early on December 8. I credit Comeau and Morton that Keffer did leave work early on that date. Morton had every right to issue Keffer a warning over the incident.

Although Comeau did not receive a written warning over his leaving early, Morton did not violate the Act by issuing CP-15 to Keffer. Morton did not intend to issue written warnings to either

Comeau or Keffer. When Keffer belligerently denied leaving early, however, and blamed it on the clocks, Morton acted prudently in memorializing the incident in writing.

By December 1983 the relationship between Keffer and Morton was already poor - based primarily upon Keffer's unsupported suspicions about Morton's actions. When Keffer angrily denied leaving early after Morton had witnessed the event himself, and after Comeau had admitted that he and Keffer left early, Morton instinctively decided to issue CP-15. The issuance of CP-15 was not an act of disparate treatment or evidence of anti-union animus. I conclude that it was the exercise of sound judgment. Morton knew that Keffer left early and he (Morton) issued CP-15 to protect himself and the Board in the event that future actions were taken against Keffer.

Similarly, Morton's review of prior records to determine whether Keffer had been late in the past was not a violation of the Act. In CP-16 Keffer challenged Morton to prove that he (Keffer) had ever been late. Morton did review the prior records which showed that Keffer had received a warning in 1980 about arriving late. Keffer was not engaged in protected activity with regard to this incident, and Morton's legitimate actions were in response to Keffer's attitude, and not his exercise of protected activity.

Removal of Gym Equipment

The Association did not allege that the removal of gym

equipment was an independent 5.4(a)(1) violation of the Act. The Association apparently argued that the Board's alleged failure to tell Keffer about the reason for removing the gym equipment was evidence of anti-union animus, but the Association failed to make a prima facie showing. I once again credit Stamler and Morton that Keffer knew about the need to remove the equipment and was asked to help. The equipment was moved to prepare the gym for a basketball game, not to somehow intimidate Keffer.

Keffer's statement in R-15 was presumptuous. Morton was not required to explain to Keffer the reasoning for his (Morton's) decision to remove the equipment, nor was he (Morton) required to get Keffer's approval. The Board has the managerial right to control the use - and determine the location of - its equipment where, as here, it was not motivated by anti-union animus. See generally County of Middlesex, P.E.R.C. No. 79-80, 5 NJPER 194 (¶10111 1979), aff'd App. Div. Docket No. A-3564-78 (6/19/80); Jersey City Bd. Ed., P.E.R.C. No. 82-52, 7 NJPER 682 (¶12308 1981); Keansburg Bd. Ed., P.E.R.C. No. 85-55, 10 NJPER 649 (¶15313 1984). Keffer had no right to participate in that decision making process, and he was not engaged in protected activity regarding that incident. Nevertheless, Morton did explain the reasoning to Keffer and requested his assistance. But Keffer refused to help. Morton's actions were based upon legitimate business considerations.

Bitondo's Observation of Keffer

Bitondo's observation of Keffer did not violate the Act.

Bitondo was new to the district in 1983, and he had no prior contact with Keffer. Morton did not tell Bitondo how to observe Keffer or what to find, thus, there was no basis for Bitondo to have any anti-union motive in observing Keffer.

The Association did not make a prima facie showing, but even if it had, there was ample educational justification for each of Bitondo's needs improvement ratings. Keffer knew that the gym equipment had been removed from the gym and should have prepared the gym for his class before the students arrived. Although Keffer challenged Bitondo's observation regarding spotting, forward rolls, and basic skills by arguing that Bitondo lacked experience to judge those items, that was not the issue in the case.

The issue was whether the "needs improvement" ratings were given in retaliation for Keffer's exercise of protected activity. I find that they were not. Even if Bitondo lacked experience in judging certain items, and even if Keffer taught forward rolls and basic skills properly, Bitondo's concerns were all educationally based. He was concerned about the safety of the students and whether they received proper instruction. His ratings were not at all influenced by Keffer's union activity. If Keffer wished to challenge Bitondo's observation based upon its merits, he could have done so. I am not aware of any such challenge.

Graffiti Incident

The Association apparently alleged that Morton's failure to

file a formal written police report of the graffiti incident, or his failure to launch a school-wide investigation, was intentional - allegedly because of Keffer's exercise of protected activity - which therefore allegedly demonstrated anti-union animus. I do not agree. The Association's contention is a wholly unsupported allegation that could only have contributed to the deterioration in Morton's and Keffer's relationship.

Morton told a police officer about the graffiti the day he discovered it during the Christmas vacation, he told Bitondo that it had to be cleaned up, and on the first day back to school after the Christmas vacation he told the custodian to remove the graffiti and it was removed that day.

Morton was reluctant to file a formal police report because it was not Board policy. He, nevertheless, telephoned the police to file a report because Keffer was so upset, only to learn that Keffer had already filed a report.

Morton was not responsible for the graffiti being placed on the wall, and he acted promptly in having the graffiti removed therefrom. His handling of the matter was done in an expeditious, reasonable and intelligent manner. The Association's allegation had no foundation.

Emergency Lesson Plan Incident

The Association did not make a prima facie showing that Morton's questioning of Keffer over use of emergency lesson plans,

or his issuance of CP-21, was based upon anti-union animus. Morton's questions and issuance of CP-21 were prompted only by substitute teacher, Stephen Luke, who expressed concerns over Keffer's lesson plans. Morton was merely conscientiously exercising his responsibilities as principal in following up on Luke's concerns by asking Keffer about his emergency lesson plans. The development, substance, and format of teacher lesson plans concerns educational policy and is not negotiable. Edison Twp. Bd. Ed., P.E.R.C. No. 83-100, 9 NJPER 100 (¶14055 1983); West Amwell Twp. Bd. Ed., P.E.R.C. No. 78-31, 4 NJPER 23 (¶4012 1977). There was absolutely no anti-union motive. Morton was concerned about the timeliness and content of lesson plans in order for a substitute to conduct a meaningful class. He wanted to make certain that Keffer had timely emergency lesson plans. In CP-21 Morton was not threatening or disciplining Keffer, rather he (Morton) was simply attempting to ascertain the facts.

Surely, the Association would not suggest that an employee's participation in protected activity would somehow exempt that employee from being required to properly follow teaching-related requirements. Morton was only attempting to make certain that Keffer was properly complying with requirements regarding the emergency lesson plans.

Telephone Call Incident

Morton's handling of this incident, and his issuance of CP-24 and CP-26 did not violate the Act. The Association apparently

alleged that CP-24 was issued because of Keffer's exercise of protected activity making it evidence of anti-union animus, rather than because Keffer acted improperly. The Association's case rested upon its ability to prove that Keffer did receive an "important" message, and that he entered the phone calls in the log on January 12, 1984. The Association, however, failed to make a prima facie showing.

I did not credit Keffer's testimony. I found that he was intentionally misleading. I credit Gyure, Peterson, and Morton. Keffer did not receive a message saying it was "important" to call Demberg, and he did not record his telephone calls in the log book on January 12 as was required. Morton had every right to question Keffer about the incident.

The irony of the situation, however, was that after discussing the matter with Keffer, Morton did not intend to issue any written directive regarding the incident. It was Keffer who chose to put the incident in writing (CP-23) which, because of its inaccuracies, inevitably forced Morton to issue CP-24 to accurately set forth the facts. Under those circumstances it would have been irresponsible for Morton not to correctly set forth the facts of the incident.

Superintendent's Meeting - January 1984

Ruffer's initial refusal to allow Keffer to attend the meeting regarding the scheduling of Association meetings was not a violation of the Act. The Association did not meet its burden of

proving that Keffer was denied admittance because of the exercise of protected activity.

I fully credit Ruffer that he was not under the impression that the meeting was a grievance meeting. Makosky had not followed the normal grievance procedure when he requested a meeting with Ruffer. Once Ruffer received R-18 he was under the impression that Makosky wanted to settle the matter with him (Ruffer) informally. Ruffer thought it wise to invite all Association officers to attend that meeting and he did not invite Keffer since he was not an officer. Consequently, Ruffer was surprised when Keffer entered the meeting and he (Ruffer) asked Keffer to leave only because he thought the meeting was restricted to officers.

Once Makosky convinced Ruffer that the meeting was a "grievance" meeting, however, Ruffer agreed that Keffer was entitled to be present, and Ruffer openly apologized for initially excluding Keffer and for misunderstanding Makosky's intent in R-18. In fact, Ruffer apologized twice - both before and after the meeting. Those apologies were not an admission that Keffer was excluded because of the exercise of his protected activity. Rather, they were an admission that he (Ruffer) misunderstood Makosky's request in R-18. That admission was not a violation of the Act.

It would have made little sense for Ruffer to call a meeting regarding a grievance and then exclude Keffer, the grievance chairperson, in front of all Association officers because he (Keffer) participated in union activity. It makes far more sense

that Ruffer did not believe he was calling a grievance meeting, but, rather, a meeting with officers, and therefore excluded Keffer because he was not an officer. Thus, this incident was not a violation of the Act.

The Overko Incident

The Association's argument that Ruffer's handling of the Overko matter, his conduct of the investigation, and his issuance of CP-32, demonstrated disparate treatment toward Keffer and was in reaction to Keffer's exercise of protected activity, was devoid of any foundation. There is no credible evidence - and no reasonable inferences could be drawn - that Ruffer's handling of this incident violated the Act. To the contrary, I find that the entire weight of the evidence shows that Ruffer acted in a most responsible, professional, and in fact, judicious manner in handling this matter. Ruffer's actions were based entirely upon his business/educational concerns.

Keffer clearly mishandled a classroom situation. He incited Overko's remark by improperly referring to Overko's mother, and then by physically removing Overko from the classroom without first requesting Bitondo's assistance. There was a significant parental and student concern over the incident and Ruffer acted responsibly in giving the students an opportunity to discuss the matter with him. Ruffer did not rely on the students' remarks in issuing CP-32, he relied on Keffer's own admission. Consequently,

the Association's argument that the investigation somehow demonstrated anti-union animus is of no weight.

This incident was created entirely by Keffer, not Ruffer. It was Keffer who incited Overko and physically removed him from the classroom, Ruffer merely reacted to those facts. Keffer was not entitled to benefit - or receive special treatment - because of his union activity. This was a serious offense and an excessively poor exercise of judgment by Keffer. The Board was entitled to discipline Keffer for his actions.

In fact, I believe that if there was disparate treatment it was in Keffer's favor. Ruffer's discipline of Keffer was very lenient. Ruffer could have imposed greater discipline, and I believe that Ruffer primarily chose the lenient discipline in CP-32 only because Keffer was a vocal union official.

Nonetheless, there was overriding business justification for Ruffer's actions and he did not violate the Act.

Keffer's Failure to Issue Progress Reports

The Association did not even inferentially establish that Morton sent Keffer CP-33 and R-10 because of his exercise of protected activity. Keffer was treated the same as other employees. He received CP-33, like other employees, to remind him to send progress reports. Keffer's participation in union activity does not render him immune from following district policy, and Morton had every right to insist that Keffer follow that policy.

Morton's actions were based solely upon educational considerations, and neither CP-33 or R-10 were letters of discipline.

Grievance Filings

The conversation between Makosky and Ruffer over the number of grievance filings was apparently presented in an attempt to demonstrate Ruffer's alleged anti-union animus, and his alleged animus toward Keffer. The Association, however, did not meet its goal. I credit Ruffer's testimony that he wanted to resolve problems with the Association in hopes of reducing the number of grievances. He was not being critical of the Association - or Keffer - for filing grievances, he was just interested in improving the parties' relationship to cause a decrease in the number of grievances filed. Keffer was not involved in that discussion and there is no evidence that Ruffer made his remark because of Keffer's actions as grievance chairperson.

Morton's Observation of Keffer

Morton found that Keffer needed improvement in four areas based upon legitimate educational concerns. There was no reliable independent evidence to challenge Morton's conclusions on the areas needing improvement. Keffer certainly disputed Morton's findings, but I did not credit Keffer's testimony.

The only area where Morton erred was in issuing a response to Keffer's addendum to the observation. Morton's error, however, was not a violation of the Act because it was not made as a result of Keffer's exercise of union activity. It was made as a result

of the poor relationship and distrust between Morton and Keffer brought about by the arriving back late from lunch incident, the leaving early incident, the graffiti incident, the telephone call incident, and others.

Morton was obviously concerned that Keffer's addendum might give the wrong impression, thus he responded thereto. But Ruffer ordered Morton's response removed from the observation report thus giving Keffer the opportunity to present his unchallenged view of the observation. Morton's action, though inappropriate, was not unlawful. It was not motivated by anti-union animus.

In addition, I find that Morton's response to Keffer's addendum did not have the tendency to interfere with Keffer's rights. Many of the incidents complained of: arriving back late from lunch, leaving work early, the telephone call incident, progress reports, and the Overko) incident, were created or caused by Keffer - but which, nonetheless, caused a breakdown in the relationship between Keffer and Morton. Keffer does not have the right to assert that a "tendency to interfere" existed because these other events have occurred. Keffer caused those events to occur and he cannot now benefit by those events by arguing that because of them a tendency to interfere existed in this particular incident.

Attempt to Withhold Increment

The Association's argument that the Board (Ruffer) intended to withhold Keffer's increment was not based upon any credible evidence. The Association position was based upon conjecture,

speculation, and its own inferences. The fact is, that Ruffer never intended to - and did not - seek to withhold Keffer's increment.

Ruffer did not make the remark attributed to him by Fox, and he (Ruffer) was unaware of the receipt of R-11 on March 19, and unaware of the March 19 observation of Keffer by Morton, until after that date.

Denial of Professional Day

The Association did not establish that Morton denied Keffer's request for a professional day because of Keffer's union activity. The credible and conclusive evidence was that Morton denied the professional day because he believed that Keffer could train the two new peer counselors during his one peer counseling assignment period. Keffer did not advise Morton that he (Keffer) also wanted to recruit peer counselors for the Fall.

Morris Hills Play Remark

The Association apparently introduced evidence regarding the Morris Hills play remark in order to show anti-union animus by Ruffer and/or Morton against Keffer. The Association, however, failed in its proofs.

Neither Ruffer nor Morton were responsible for the Morris Hills play regarding Keffer and his family. Ruffer may have raised and discussed the matter with MacNicol, but that fact is devoid of any illegal motive. Keffer was one of Ruffer's teachers. Once he (Ruffer) learned of the Morris Hills play it was reasonable of him to discuss it with MacNicol who was the Morris Hills

Superintendent. There is not even a scintilla of evidence that Ruffer's actions were motivated by anti-union animus.

Morton's Evaluation of Keffer

Prior to R-16 Keffer had received all satisfactories on his end of year evaluations. Those prior evaluations, however, were performed by Steele, not Morton. Once he became principal, Morton was entitled to use his own judgment in assessing Keffer's teaching and working abilities. Morton was not bound by Steele's prior action.

The record shows that R-16 was based, in part. upon, and consistent with, the results in Bitondo's observation (CP-17 & CP-20-30) and Morton's own observation (R-25 & CP-20-31) of Keffer. There is no evidence to suggest that Morton found five "needs improvement" areas because of Keffer's protected activity. Certainly, I could draw the inference that Morton acted because of Keffer's union activity, but that would be an unfounded inference. Keffer was not a believable witness. Morton was. Morton and Keffer obviously had a bad relationship, but Morton had ample business justification to find the needs improvement items he checked on Keffer's evaluation.

For example, Keffer did not cooperate with Morton regarding acceptance of the peer counseling changes or by providing timely emergency lesson plans. Under "Accepts Constructive Criticism" Keffer appeared to resent any criticism from Morton. Keffer could not accept criticism when he returned from lunch late, when he left

work early, when he failed to issue progress reports, and he could not accept Bitondo's criticisms in CP-17. Keffer showed a lack of "Professional Ethics" when he lied about the telephone call incident. Keffer did not demonstrate pupil readiness based upon several items set forth in Bitondo's observation report of his performance. Finally, Keffer did not demonstrate "Positive Staff Relations" as evidenced by his hostile reaction to Stamler and Comeau for disagreeing with his position.

Morton may even have found the "needs improvement" items because he did not like Keffer and/or because he did not trust him. But I am certain that he did not find them because Keffer was active in the Association. Thus, Morton's issuance of R-25 did not violate the Act.

Finally, Morton's refusal to allow Makosky to attend Keffer's evaluation conference was not a violation of the Act; there was no showing that the conference could lead to discipline which would have justified Keffer's request for union representation pursuant to NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975); and East Brunswick Bd. Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part and rev'd in part App. Div. Docket No. A-280-79 (6/18/80).

Dirty Gym - Bolted Lockers

Keffer knew that he was not required to clean the gym and knew that the custodians would clean it, yet he chose to do it himself. Keffer also knew that additional lockers would be bolted. I credit Puco, Vigilante and Bitondo.

The Association's allegation that the gym was not cleaned and that additional lockers were bolted supposedly without Keffer's knowledge was evidence of anti-union animus or somehow intended to intimidate Keffer, was wholly unsupported by the credible evidence.

Missing Chairs Incident

This was another incident where the Association failed to develop even a scintilla of evidence to support its allegation. This was also another incident, like the Overko incident, which was created by Keffer's own poor judgment.

Even if Keffer was right that he did not leave two students standing, he exercised poor judgment in disrupting a classroom full of students to retrieve his office chairs which could have been done at another time. But then I credit O'Neiol that he disrupted the class even further by removing the chairs and, in fact, leaving two students standing. Keffer's priorities were obviously misplaced, and Morton had the right to make that point.

Keffer's assertion that O'Neiol and Bitondo must be mistaken was nothing more than wishful thinking. O'Neiol's and Bitondo's testimony corroborate each other. O'Neiol testified that she sent students to get more chairs, and Bitondo testified that he met O'Neiol's students in the hall and that they needed chairs.

II. Pattern or Collective Analysis

As the trier of fact I am entitled to draw inferences from the many incidents Keffer was involved in which, when considered together, theoretically could result in finding that a pattern of

harassment existed which would be a violation of the Act. Republic Aviation Corp. v. NLRB, supra, 16 LRRM at 623. In order for any particular fact or incident to be considered in determining whether a pattern violation existed, however, there must be some evidence, or minimally, some indication that Keffer was exercising a protected activity regarding the incident; or where such activity was somehow related to the incident; or where such activity had some affect on the Board's handling of the incident. But I will not consider as part of a pattern those incidents which did not involve - were not related to - and which were not affected by - Keffer's union activity. The Association cannot benefit by my considering incidents which are totally unrelated to Keffer's union activity.

I begin with the arriving back late from lunch incident; the leaving early incident; the telephone call incident; the Overko incident; the dirty gym-bolted lockers incidents; and the missing chairs incident. They were all created by Keffer, not the Board, they did not in any way involve or relate to Keffer's exercise of protected activity, nor was the Board's handling of the incidents affected by Keffer's union activity. If Keffer had come back from lunch on time, not left work early, recorded the telephone calls in the log book when he made them as was school policy, and not incited Overko, none of those incidents would have occurred. Keffer was not engaged in protected activity when he created those problems, and he was not immune from reasonable criticism over those incidents merely because he was grievance chairperson. Morton or Ruffer took minimal

- and only reasonable - action in addressing those particular incidents, and Keffer's union activity played no role in their handling of those matters. Keffer also created the dirty gym/bolted lockers and missing chairs incidents. He was not expected to - nor asked to - clean the gym; he personally suggested bolting more lockers; and, he was the one who used poor judgment in retrieving his chairs. His union activity was not involved or related to those incidents. Consequently, none of the above incidents carry any weight in considering whether a pattern violation existed.

Similarly, Keffer's union activity was not at all involved in or related to the graffiti incident or the Morris Hills play remark. Those incidents were created by students and were not within Morton's or Ruffer's control. However, Morton and Ruffer acted responsibly in handling those matters.

Several incidents were clearly educationally based and were not even peripherally based upon Keffer's exercise of protected activity. The elimination of gym leaders; the cut back - in and relocation - of peer counseling; the removal of gym equipment; the requirement for updating emergency lesson plans; the requirement to issue progress reports; the denial of a professional day; and even Bitondo's observation report were all based upon legitimate educational/business considerations. Thus, these incidents carry no weight in considering whether a pattern violation existed.

The alleged intent to withhold Keffer's increment was nothing but unsubstantiated speculation and similarly cannot be considered as part of a pattern to harass Keffer.

The remaining facts show that coming into the Fall of 1983 Keffer was active in negotiations and had been involved in the allied teachers case. He filed several grievances in September/October 1983 and the grievances were eventually resolved. The evidence does not support a finding that the Board took any action against Keffer because of the allied teacher or grievance matters.

The only incidents that could have potentially been in reaction to Keffer's union activity were the Superintendent's meeting and Morton's observation and evaluation of Keffer. I am convinced beyond any doubt, however, that Ruffer excluded Keffer from the meeting only because he was not an officer. There was no other motive.

I am also convinced that Morton observed and evaluated Keffer without regard to Keffer's exercise of protected activity. There was ample evidence to support Morton's "needs improvement" ratings. Morton may have acted inappropriately in issuing a response to Keffer's addendum, but that was because he did not trust Keffer, not because of anti-union animus.

In addition, neither the Kavanaugh incident nor Ruffer's remark about the number of grievance filings demonstrated any pattern of harassment toward Keffer. Morton's "WEA" remark was not criticism of Keffer or the Association for scheduling a union meeting, it was criticism of Kavanaugh for cancelling the meeting with Mrs. Lynn. Ruffer's remark about grievances was intended to resolve problems, not create them.

Timing in this case proved not to be a critical element. Certainly most of the incidents occurred within a relatively short time period (September 1983-April 1984), but most of the incidents were unrelated to one another, and they were based upon independent credible evidence supporting the Board's actions. Having reviewed all the facts collectively, there is no basis to find a pattern violation. It appears to me that Keffer refused to accept constructive criticism, and developed a serious resentment toward Morton, and to a lesser degree toward Ruffer, which precipitated the mistrust that existed between himself and the administration. Keffer's union activity was not the reason for these incidents.

Finally, the Association did not prove that the Board, or its agents, dominated or interfered with the administration of the Association by any of its actions.

Accordingly, the entire Charge should be dismissed.

Recommendation

Based upon the above findings and analysis I recommend that the Commission ORDER that the Complaint be dismissed.


Arnold H. Zudick
Hearing Examiner

Dated: May 16, 1986
Trenton, New Jersey