P.E.R.C. NO. 96-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TABERNACLE TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-94-80

TABERNACLE EDUCATION ASSOCIATION
and JUDITH DINDINGER HORNER

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Tabernacle Education Association and Judith Dindinger Horner against the Tabernacle Township Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act by failing to renew Horner's employment contract because she had engaged in activity protected by the Act and because the Association had filed a grievance on her behalf. The charge further alleges that the Board's action interfered with the right of Association members to complain about working conditions. The Hearing Examiner found that Horner engaged in protected activity and that the Board knew of that activity. But he also found that the charging parties did not prove that the Board was hostile to the exercise of that activity or that Horner was not renewed because she participated in that activity. The Commission accepts these findings and, accordingly, adopts the Hearing Examiner's conclusions of law and dismisses the Complaint.

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

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Charging Parties.

Appearances:

For the Respondent, Cassetta, Taylor and Whalen, labor relations consultants (Bruce Taylor, consultant)

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

DECISION AND ORDER

On September 15, 1993, the Tabernacle Education Association and Judith Dindinger Horner filed an unfair practice charge against the Tabernacle Township Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),[1/] by failing to renew Horner's employment contract because she had engaged in activity protected by the Act and because the

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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. (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"

Association had filed a grievance on her behalf. The charge further alleges that the Board's action interfered with the right of Association members to complain about working conditions.

On January 3, 1994, a Complaint and Notice of Hearing issued. The Board filed an Answer denying that it violated the Act.

On May 3, 4 and 18, and June 16, 1994, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On March 13, 1995, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 95-20, 21 NJPER 136 (¶26086 1995). He found that Horner was not renewed because of her failure to accept a classroom transfer in good spirit -- not because of her sick day grievance.

On April 26, 1995, the charging parties filed exceptions. They claim that the Hearing Examiner erred: in finding that the superintendent did not discourage Horner and another teacher from engaging in protected activity; in finding that the superintendent did not retaliate against the two teachers when she transferred them immediately after a health and safety incident; in accepting the Board's rationale for the nonrenewal; in failing to consider Horner's extensive protected activity; in failing to consider the timing of Horner's sick leave grievance; and in finding that a letter from a principal to the superintendent supported the Board's reasons for the nonrenewal. The charging parties contend that

substantial evidence demonstrates the Board's hostility to Horner's protected activity. On June 1, the Board filed an answering brief supporting the Hearing Examiner's findings of fact and conclusions of law.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-28). We do not draw negative inferences from the fact that the charging parties did not recall Horner to reassert testimony that they had already delivered.

We summarize the facts. In October 1991, Horner and another teacher, Catherine Caputo, were exposed to fumes from xylene, a sealant that was being applied to the exterior of their school. Horner raised several concerns over the incident. The superintendent was responsive to those concerns, but wanted only the superintendent and the Board president to speak for the Board to the press.2/ In February 1992, Horner was exposed to fumes during a termite extermination. Later that year she became ill from furniture polish.

To meet the needs of a handicapped student entering the fourth grade during the 1992-93 school year, the Board moved two fourth grade classes from the intermediate to the primary school.

2/ We clarify finding 4 to find that although the superintendent may not have told Caputo or Horner that they could not discuss their views of the xylene incident, Horner could have reasonably inferred that the superintendent was concerned about how the incident was discussed and that Horner should be careful in how and with whom she discussed the incident.

Only the primary school was handicapped-accessible. To make room for those changes, the Board moved one third grade class and the music room to the intermediate school. Horner was the music teacher and Caputo was the third grade teacher transferred.

Horner then raised several concerns about the transfer, many of which the Board accommodated. It refused, however, to bus students from the primary school to Horner's new classroom at the intermediate school and Horner had to teach her primary school classes from a music cart. Horner had a difficult time accepting the transfer decision. Despite that difficulty, she received a very positive year-end evaluation.

In September 1992, Horner became ill from fumes caused by a local farmer spraying his fields with a pesticide. The Board's insurance carrier concluded that Horner did not have a worker's compensation claim so the Board refused to pay her medical bills and charged her with a sick day. In November, the Association filed a grievance seeking payment for the medical bills and no loss of sick time.

As the school year progressed, Horner continued to be upset by her transfer. She stopped talking to the primary school principal and was emotionally upset most of the time, crying frequently.[3/] Nevertheless, Horner continued to receive very positive classroom observations. No negative concerns were

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3/ We have no basis to reject the Hearing Examiner's determinations crediting the testimony of the primary and intermediate school principals.

expressed in her written observations or post-observation conferences. Both principals testified that it was district practice to confine evaluation/observations to the lesson observed. The primary school principal made a conscious decision not to tell Horner about the concerns she had with Horner's behavior, a decision she came to view as a mistake.

In December 1992, the superintendent notified the Association that, as an act of good faith, the Board would pay Horner's medical bills, but her sick day would not be restored. In February, the Association demanded binding arbitration of Horner's grievance. Horner's grievance was the first one to go beyond the Board level during the superintendent's tenure. A week later, the primary school principal sent a handwritten memorandum to the superintendent questioning whether Horner should be granted tenure since she had "not adjusted to teaching schedule in good spirit." Horner was completing her third year and beginning a fourth year would have afforded her tenure under N.J.S.A. 18A:28-5.

The primary school principal discussed her recommendation with the intermediate school principal who then asked the superintendent if Horner could be placed on probation for a year before being considered for tenure. The superintendent checked into that possibility and later informed the principal that probation was not permissible. The intermediate school principal then supported the decision not to renew Horner's contract.

In April 1993, the Board's new labor relations consultant recommended that the Board restore Horner's sick day. The Board adopted that recommendation. It also adopted the recommendation not to renew Horner's contract for 1993-94. On May 10, Horner received a list of reasons for her nonrenewal in response to her request.

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

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

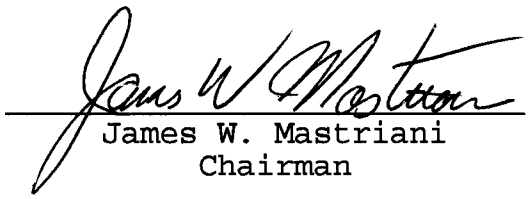
for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The Hearing Examiner found that Horner engaged in protected activity and that the Board knew of that activity.[4/] But he also found that the charging parties did not prove that the Board was hostile to the exercise of that activity or that Horner was not renewed because she participated in that activity. We accept these findings. Accordingly, we adopt the Hearing Examiner's conclusions of law and dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. Commissioner Boose abstained from consideration. Commissioner Klagholz was not present.

DATED: November 27, 1995
Trenton, New Jersey
ISSUED: November 28, 1995

4/ We disagree with the Hearing Examiner's statement that the protected activity involving the xylene, termite spray, and furniture polish incidents were too distant in time to have formed a basis for this charge involving Horner's nonrenewal. But we note that the Hearing Examiner nevertheless found no nexus between Horner's activity surrounding those incidents and the transfer and nonrenewal decisions.

H.E. NO. 95-20

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

In the Matter of

TABERNACLE TOWNSHIP BOARD OF EDUCATION

Respondent,

-and- Docket No. CO-H-94-80

TABERNACLE EDUCATION ASSOCIATION and
JUDITH DINDINGER HORNER

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the Tabernacle Board of Education did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by not renewing the employment of music teacher Judith D. Horner. The Hearing Examiner found that Horner was not renewed because of her failure to accept a classroom transfer in good spirit, and behavior she exhibited as a result of the transfer, rather than because she was the subject of a grievance involving one sick day.

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. 95-20

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

In the Matter of

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Appearances:

For the Respondent, Cassetta, Taylor and Whalen, Labor Relations Consultants
(Bruce Taylor, consultant)

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

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 15, 1993, Tabernacle Education Association and Judith Dindinger Horner acting together ("Charging Party") filed an unfair practice charge with the New Jersey Public Employment Relations Commission alleging that the Tabernacle Township Board of Education violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A.34:13A-3 et seq.[1/] In a

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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. (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."

two count charge the Charging Party alleged first, that in April 1993, the Board voted not to renew Horner's employment contract because she had engaged in activity protected by the Act, and because the Association had filed a grievance on her behalf. Second, it alleged that by non-renewing Horner, the Board has interfered with and restrained the Association and its members in the exercise of their rights to complain about working conditions. The Charging Party asserted that the Board's stated reasons for its actions were pretextual.[2/] The Charging Party seeks an Order reinstating Horner with full back pay and other rights and benefits, and other affirmative action.

A Complaint and Notice of Hearing was issued on January 3, 1994. The Board filed an Answer on January 20, 1994 denying it violated the Act.

Hearings were held on May 3, 4 and 18, and June 16, 1994.[3/] Both parties filed post-hearing briefs, and the Charging Party filed a reply brief, all of which were received by November 7, 1994.

2/ Just prior to the close of hearing the Charging Party moved to amend its charge to allege two additional theories of recovery. The first under the New Jersey law against discrimination, the second under the Americans with Disabilities Act. The Board opposed the motion. I denied the motion holding that the Commission did not have jurisdiction to consider violations of those laws in this proceeding (4T101-4T103).

3/ The transcripts will be referred to as 1T (May 3), 2T (May 4), 3T (May 18), and 4T (June 16).

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Judith Dindinger Horner was originally hired by the Board as a part-time music teacher beginning in the Fall of 1986 (2T7).[4/] She remained employed as a part-time music teacher for the Board for the 1986-87, 1987-88, and 1988-89 school years (2T7, 2T9, 2T11). During her three years of part-time employment, Horner was based in the primary school where most of her teaching was performed, but in 1987-88 she also taught one class in the middle school, and in 1988-89 she taught in the primary and intermediate schools (2T7, 2T12-2T13). The Board offered Horner part-time employment for the 1989-90 school year, but she declined the offer and resigned at the end of the 1988-89 year to accept full time employment at a private school (2T16-2T17, CP-54).

During each of her three years of part-time employment for the Board, Horner received a classroom observation report (CP-39, CP-41, and CP-44) and an end of year evaluation or performance report (CP-40, CP-42, and CP-45) from Betty Shine, the principal of the primary school (2T8-2T11, 2T14-2T15). In March of 1989 Horner also received a classroom observation report (CP-43) from Betty Lou Kishler, principal of the intermediate school (2T13-2T14).

4/ When she was originally employed by the Board, and until the Spring of 1993, Horner was known as Judith Dindinger, and most of the exhibits reflect that name. After her marriage in 1993, "Horner" was added to her name. To avoid confusion she will be referred to as "Horner" throughout this decision.

All of the observation and performance evaluation reports Horner received for her part-time work were very positive. There were no negative comments on these documents, and neither Shine nor Kishler made negative comments at the performance conferences held with Horner (2T9, 2T11, 2T14-2T16).

2. The Board rehired Horner for the 1990-91 school year, but as a full-time music teacher. Horner was interviewed for that position, at least in part, by Betty Shine, who also interviewed another candidate. Horner was selected for the full-time position and was again based in the primary school under Shine's supervision (2T18-2T19). Horner had her own classroom in the primary school where approximately 80% of her classroom teaching was performed. The remaining 20% of her classroom teaching was performed in the intermediate school under Kishler's supervision (2T19-2T20).

During the 1990-91 school year Horner received two classroom observation reports from Shine (CP-46 and CP-48), and one from Kishler (CP-47). She also received a performance evlauation report (CP-49), including comments by both Shine and Kishler. All of the reports were very positive in nature, they did not contain negative comments or markings. Conferences were held with Horner after each of those documents were prepared. Only positive remarks were made about Horner at those conferences, there were no negative concerns expressed about any aspect of her performance, and, no concerns were expressed about her performance that could affect her continued employment with the Board (2T21-2T26).

During that school year Horner recommended the music program be upgraded by hiring a part-time instrumental music teacher. Her proposal was accepted and implemented (2T26-2T27).[5/]

At the conclusion of the 1990-91 school year Horner was renewed as a full time teacher for 1991-92, plus increment (2T27, 2T30). At that time no one expressed concerns to her that could affect her continued employment (2T28).

During the Summer of 1991, Horner was asked to prepare the Board's music curriculum for the primary grades. She did, and the Board implemented and continues to use that curriculum (2T29-2T30).

In the Fall of 1991, Horner was again based in the primary school where she retained her classroom. She again taught approximately 80% of the time in the primary, and 20% of the time in the intermediate school (2T30-2T31).

3. Catherine Caputo has been employed as a primary grade teacher by the Board since 1974, and had been assigned to the primary school from 1980-81 through the 1991-92 school years (1T19-1T20). At the end of the 1989-90 school year Caputo received a teacher recognition award signed by Betty Shine (CP-2). On May 8, 1991, Caputo sent Superintendent Diane DeGiacomo a letter (CP-3) expressing her concerns over whether it was safe to use chlorine bleach in the school bathrooms (1T21). Caputo noted that she had

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5/ In April of 1991 Horner also directed children in a musical program at a church which Kishler attended. Kishler praised Horner for her performance (CP-55).

protested the use of bleach many times. On or about October 7, 1991, Shine gave Caputo a memorandum (CP-4) which contained the procedure for the use of bleach in the bathrooms. By note of October 9, 1991 (CP-5), Caputo thanked Shine for CP-4, but continued to express concerns over the cleanliness and supplies in the bathrooms, and that chlorine fumes could affect respiratory systems (1T24).

4. On October 24, 1991, a mason repairing brick at the primary school sprayed a sealant called Xylene on the building causing fumes to enter the school. At least one student and several teachers, including Caputo, and particularly Horner, were affected by the Xylene (1T26, 2T32). Caputo was diagnosed with chemically induced pneumonia and lost a few days of school (1T26). Horner was more seriously affected. Shine drove her home, then drove her to a doctor. Horner was eventually diagnosed with an acute pulmonary condition and missed ten weeks of school. The Board paid her medical bills and did not deduct sick leave (2T32-2T38).

A number of forms, memorandums and letters were prepared documenting the Xylene incident (CP-6, CP-7, CP-8, CP-10, CP-12, R-3, and CP-58). Horner raised several concerns over the incident with DeGiacomo and Shine (2T39-2T40), but Caputo was far more aggressive in raising concerns over the incident (1T30-1T36, 1T42, 1T46-1T50, 1T73-1T78). She and DeGiacomo exchanged several memorandums regarding the incident (CP-9, CP-11,CP-16, CP-17, CP-19, CP-20, and CP-22) wherein Caputo voiced her disagreement over how the incident was reported.

Since Caputo and Horner continued to have concerns over the incident, Association President Jackie McNaughton suggested to DeGiacomo that she hold a meeting with those teachers to discuss the matter (3T14). DeGiacomo followed with a memorandum regarding the matter on January 10, 1992 (CP-21), and a meeting was eventually held with DeGiacomo, McNaughton, Caputo and Horner regarding the incident (1T41-1T42, 2T52, 3T15).

At the meeting the parties discussed the incident and the accident report (1T53), Caputo raised concerns about the accuracy of newspaper articles regarding the incident (3T17-3T18), and DeGiacomo wanted to know who was talking to parents about the incident (2T42). During the meeting DeGiacomo explained that the Superintendent and the Board President were the spokespersons for the Board to the press, and she cautioned the employees to be careful how they answered questions regarding the incident (3T19-3T20, 3T99-3T100). But there is no evidence that DeGiacomo told Caputo, Horner, or anyone else that they could not discuss their views on the incident. In fact, when asked on cross-examination whether "people were free to give their own views to reporters", DeGiacomo responded, "If they were contacted, I have no control over what they did" (3T100).

Subsequent to that meeting the Board adopted a "crisis intervention plan" which included the following section on media access:

> Only the Superintendent or his or her designee will speak to the reporters. No student, nor

> staff member may be interviewed without permission. (3T100)

DeGiacomo indicated that by that section the Board was attempting to regulate what could be said (3T100), but there is no evidence that Caputo or Horner were aware of the language or that they, or any other Board employee, was prevented from, or disciplined for speaking about the incident.

In its post hearing brief, the Charging Party argued that DeGiacomo had discouraged Caputo and Horner from discussing the incident and attempted to regulate what they could say to the media, from which it inferred that DeGiacomo discouraged Caputo and Horner from exercising their protected rights. I make no such finding.

DeGiacomo told Caputo and Horner to be careful how they answered questions regarding the incident, but neither teacher testified that DeGiacomo told them not to talk about the incident, and neither teacher indicated any knowledge of the crisis intervention language adopted by the Board. I find that the Board's intent in adopting that language was to delineate who could be an official spokeperson for the Board, and absent any evidence that any employee was adversely affected by that language, I do not infer that it violated the right of employees to participate in protected activity.

The Charging Party also argued in its brief that DeGiacomo discouraged Caputo and Horner from engaging in protected activities by telling McNaughton that further pursuit of this matter could

affect an Association member because it was her husband who sprayed the Xylene. While DeGiacomo had a conversation with McNaughton regarding that subject (3T96-3T97), there was no evidence that Caputo or Horner were aware of the conversation. McNaughton did not testify at this hearing, thus, there was no showing that she or any other employee, perceived that discussion as intimidating employees in the exercise of their protected rights. In fact, DeGiacomo explained that McNaughton was also concerned about that matter (3T97). Consequently, I find that the evidence regarding that matter does not establish that DeGiacomo discouraged Caputo and Horner from engaging in protected activity.

5. In February 1992 the intermediate school had been sprayed for termites. Upon entering the building Horner became ill and was taken to the primary building. Horner was able to return to work that day or the following day, she incurred no medical bills and no sick leave was deducted (2T37-2T38). Horner expressed her concerns to DeGiacomo over the content of the termite spray and the lack of ventilation in the building (2T39-2T40).

Later that same school year Horner became ill from furniture polish that was used in the office. She expressed her concerns over the lack of ventilation in that office (2T40).

6. On March 11, 1992, Horner was observed by Kishler and received an excellent report (CP-50). On April 2, 1992, DeGiacomo sent Horner a letter (CP-59), complimenting her for her production of "The Color Factory." Many parents and students also complimented her for that performance (CP-67).

7. During the 1991-92 school year, a handicapped student in a wheelchair was enrolled in a third grade class in the primary school. Since all of the fourth grade classrooms were in the intermediate school which was not handicapped accessible, the Board knew it would need to make special arrangements for that student for the 1992-93 school year (3T22).

DeGiacomo first held faculty meetings with the teachers at each school, asked for their suggestions on how to accomodate the need, and asked for volunteers to deal with the problem (3T24). Then, through various meetings and committees, including the Facility Committee, the Board decided it would move two fourth grade classes from the intermediate to the primary school. The Board did not want to move just one fourth grade because it preferred that the teacher have another fourth grade teacher on site (3T23). Two rooms had to be vacated in the primary school to make room for the fourth grade classes. The Board decided to move one third grade class and the music room (3T22, 3T23). The third grade class was selected because there were already some third grade classes in the intermediate school (3T23), and the music room was selected because music and/or art teachers usually lose their room due to overcrowding (3T36). Movement of the music room meant Horner's classroom would be moved to the intermediate school.

After the plan was announced DeGiacomo met with the three third grade teachers who were eligible for transfer, and asked for a volunteer. None did (3T24). Kindergarten, first grade, and second

grade teachers volunteered for the transfer, but the Board was not moving those grade levels (1T67, 3T25).

Of the three available third grade teachers, Shine apparently recommended Caputo be transferred (CP-23). DeGiacomo met with Caputo on May 21, 1992 and asked her to put her feelings about transferring a third grade teacher into a letter (2T54-2T55). In her letter of May 25, 1992 (CP-23), Caputo expressed her opposition to changing classrooms. She argued that Shine recommended her as a form of punishment for speaking out about the Xylene incident, and that Shine was showing favoritism to another teacher (2T55).

By letter of May 28, 1992 (CP-24), DeGiacomo notified Caputo that her third grade had been transferred to the intermediate school for the 1992-93 school year. DeGiacomo selected Caputo for transfer over the other two teachers because she thought Caputo was the strongest of the three and most able to handle the transfer (3T26). DeGiacomo also believed that one teacher would have difficulty using the stairs at the intermediate school, and noted that the other teacher had a history of working with handicapped students and it made sense to have that teacher in the same building as the handicapped student (3T25-3T26). Caputo neither grieved, nor filed a charge over her transfer (1T67-1T68).

In June 1992 Shine gave Caputo a good evaluation for the 1991-92 school year noting, in part, that although it had been a trying year for her, it did not dimish the quality of her classroom performance (1T60). Caputo received a teaching award from the Governor in August 1992 (CP-1).

In its post-hearing brief the Charging Party argued that Caputo's transfer was done as punishment for engaging in protected activity (the Xylene incident), and it argued that there was no true educational purpose. From those arguments it sought to draw a nexus between Caputo's and Horner's transfers, and the Board's eventual decision to non-renew Horner. I reject the Charging Party's arguments. I particularly find that the Charging Party's assertion that the transfer was not based upon an educational purpose is without any legitimate evidentiary basis.

DeGiacomo testified that two fourth grade classes had to be moved from the intermediate to the primary school to accomodate a handicapped child, and, therefore, a third grade class and the music room had to be transferred to the intermediate school. The Charging Party offered no evidence of any kind to dispute that testimony, thus, I find that testimony established a legitimate educational basis for the transfer.

DeGiacomo also testified why Caputo and Horner were selected for transfer. Rather than move two third grade classrooms, it made more sense to move the music room (Horner's classroom) and one third grade class, and Caputo was selected because she could best handle the transfer, and because there were particular reasons for keeping the two other third grade teachers at the primary school. Although they were opposed to being transferred, neither Caputo nor Horner disputed the basis for keeping the other third grade teachers in the primary school, and Caputo did not dispute

that she was the most capable of handling the transfer. The Charging Party did not offer any other witness to dispute DeGiacomo's testimony.

I observed DeGiacomo very carefully. I found her to be a solid, honest and reliable witness, and I credit her testimony. Therefore, I find that the Board had a legitimate business/educational basis for transferring both Caputo and Horner which was not at all based upon their having engaged in protected activity.

8. Horner discussed the classroom transfer with DeGiacomo late in the school year telling her that since the majority of her classes were in the primary school, moving her classroom and the equipment she used would be detrimental to the music program (2T54). Horner had earlier discussed with Shine and Kishler suggestions on how to overcome the problems she had with the transfer. She primarily suggested that students be bused to the intermediate school for music class, and she made her recommendation to DeGiacomo. DeGiacomo did not agree with the recommendation (3T40), but she told Horner to put her proposal in writing (2T54-2T55). By letter of June 16, 1992 (CP-65), Horner put her suggestions in writing and presented them to DeGiacomo (2T56).

In CP-65 Horner stated that it was too crowded to conduct music class in the primary school's classrooms, rather than her music room, that having another teacher in the room was distracting, that the piano and other equipment could not be moved from room to

room, that students from the primary school could be bused to the intermediate school for music, and that she wanted to limit her exposure to toxic substances.

The following day, June 17, 1992, Horner received her 1991-92 end of year performance evaluation from Shine (CP-51). It was a very good evaluation and Shine complimented Horner for her performance. There were no concerns raised about her performance or her ability to adjust to administrative changes (2T49-2T51). During that school year Horner felt Shine had been very helpful and supportive of her in dealing with the problems she had that year (2T89). Horner was rehired for 1992-93, and received a full increment (2T51).

On or about June 25, 1992, DeGiacomo telephoned Horner informing her that she and the Board were opposed to busing students to the intermediate school for music because of the loss of instructional time (3T40). During that conversation DeGiacomo told Horner to come into the school and remove her things from the primary school classroom because another teacher would be moving into that room (2T57). DeGiacomo confirmed that conversation by letter of July 22, 1992 (CP-66), reminding Horner that the Board had rejected her busing recommendation, but advising her that the Board might convert a locker room in the primary school into an office/storage room for her use, and giving her the opportunity to order more books and other supplies. Horner became more upset over the room transfer after receiving DeGiacomo's telephone call and July letter, than she was earlier (2T98).

9. On August 3, 1992, Horner sent Shine a long handwritten letter (R-2), expressing her dismay over her room transfer, and listing several other concerns and requests that she had dealing with the change. Several remarks Horner made in R-2 demonstrated her state of mind regarding the room transfer. The pertinent language appears as follows:

> I have to honestly admit to you that I am still reeling from these decisions that were made and the way it was done.
>
> I am writing this to you because I've spent the last 6 weeks in turmoil over this room situation. I've lost sleep and--at times--found myself really getting upset.
>
> I'm going to spend August working on my attitude--which means putting things in perspective. My main focus is that I am happy to have the job.
>
> With that in mind, I'm asking you to at least re-do the music schedule to make some relief out of a miserable situation.
>
> I've listed some thoughts on the following pages. Please consider some of them. Other than these suggestions there is little more I can do so I'll put myself at your mercy and I'll spend the remaining weeks trying not to think about it.

Horner noted that she considered this to be a personal letter, not one to be read by other people.

In R-2 Horner stated she did not understand why it was not "in the best interest of the students" to bus them for music, and she requested Shine try to get DeGiacomo to bus at least one specific class for music. Horner also asked Shine to adjust her schedule to allow her to be in one place in the morning, which also involved busing some students.

Horner concluded R-2 with a list of "Other Concerns." She noted that: 1) the piano should be moved to her new room, 2) she expected classroom teachers to leave their room while she was conducting music class, 3) she expected to have chalk board space and an electrical outlet in each room, 4) she needed a music cart to move her supplies, and she made a few other requests.

Horner noted she was less upset after sending R-2 than before it (2T98).

Shine did not discuss R-2 with Horner prior to the start of the 1992-93 school year (4T29), but she was concerned about the content of the letter, thus, despite Horner's personal note contained therein, Shine showed R-2 to DeGiacomo (3T128-3T129). Horner knew that Shine had shown R-2 to DeGiacomo.

In an effort to address Horner's concerns, the Board obtained a piano for the intermediate school (2T97, 4T12), and Shine sent a memo to the teachers addressing a number of Horner's concerns (4T10). Shine also obtained carts for Horner's use in moving her supplies, and students were assigned to help move the carts (4T11). In fact, most of the concerns or recommendations Horner listed in R-2 were resolved to her satisfaction, and some schedule changes were made (2T97). But Shine could not accomodate all of Horner's schedule change requests because the Board would not agree to bus students to the intermediate school for music (4T12). Horner did not view that result as a positive decision (2T98). Thus, Shine felt that Horner was not satisfied even though her "concerns" were

resolved. Shine believed Horner's main goal was to have students bused to the intermediate school for music (4T12).

10. Prior to August 1992, Shine and Horner had a good friendly relationship (2T78, 4T8). Horner explained that Shine had been very supportive of her throughout the 1991-92 school year (2T89), and the two often discussed music and greeted each other warmly (4T8). But by late August, early September 1992, that relationship began deteriorating (4T8). Shine noticed that after she and DeGiacomo rejected Horner's request for busing and scheduling changes, Horner became more distant and removed toward her (Shine) (4T15). In fact, Shine noted that through the Fall of 1992, Horner was barely speaking to her, and stopped talking to her during the winter (4T8). Shine acknowledged that Horner had some conversations with her (4T34), but emphasized that after the first of the year (winter of 1993), when she (Shine) would greet Horner when she entered the building, Horner would give her a "cold stare", teach her class, then leave the building (4T49-4T50). Shine explained that by that point, Horner was only talking to a few teachers in the building, and, "she did not talk to me" (4T36).

Although Horner testified that she had no knowledge of a deterioration in her relationship with Shine during the 1992-93 school year, and continued to speak to her (2T98-2T99), Horner was not offered to rebutt Shine's testimony. Having carefully observed Shine's demeanor--even during a vigorous cross-examination--I found her to be a strong, yet sympathetic and reliable witness. It was

obvious that Shine felt uncomfortable testifying about Horner, but I found her testimony to be sincere and trustworthy, thus, I credit her testimony regarding Horner's behavior during 1992-93.

Kishler, too, had had a good relationship with Horner through the 1991-92 school year (4T59), but Kishler also opposed busing students to the intermediate school for music (4T61-4T62). After the start of the 1992-93 school year Kishler noted a change in Horner's behavior in comparison to the prior year, she believed that Horner was "constantly in a state of emotional unease, crying frequently" (4T62).

Kishler maintained a good relationship with Horner well into the 1992-93 year (4T76). On February 6, 1993, she even recommended Horner for a music award (CP-57) because of the content of, and her performance in a particular lesson (4T96). But Kishler felt Horner was emotionally upset most of the time she was in the intermediate school (4T64). Kishler concluded that while Horner controlled her emotional reactions while she was in the classroom, when she left the classroom, "she seemed to just fall apart" (4T97). Horner did not rebut Kishler's testimony, nor had she provided any testimony on direct which disputed that testimony. There is no apparent motive for Kishler to have exaggerated Horner's behavior, I find she delivered her testimony in a clear and thoughtful manner, thus, I credit her testimony regarding Horner's behavior.

11. On Friday, September 11, 1992, Horner became ill at the intermediate school from fumes caused by a local farmer spraying his fields with a pesticide (2T58-2T60). She was unable to work that day, but returned to work the following Monday. The Board's insurance carrier determined that Horner did not have a worker's compensation claim, thus, the Board refused to pay Horner's medical bills for that claim, and it charged her with one sick leave day (2T61). Horner decided to speak to her Association representative about filing a grievance over the matter.

On November 13, 1992, Kishler observed Horner and presented her with a very good observation report (CP-52) which was signed on November 19, 1992. Kishler complimented Horner for having an excellent lesson. Kishler's conference meeting with Horner on November 19 concerning CP-52 was very positive (2T64).

On November 23, 1992, Association Grievance Chairperson, Carol Small, filed a grievance with Kishler (CP-26) over the pesticide incident involving Horner, seeking both payment for the physician, and no loss of sick time.

On November 24, 1992, Shine observed Horner's classroom performance.

On December 2, 1992, Small filed the Horner pesticide grievance with DeGiacomo (CP-27), because Kishler had not responded within 5 days.

On December 4, 1992, Shine had a conference with Horner and presented her with a good observation report (CP-53) from the

November 24 observation. The report and conference were both positive, no negative concerns were expressed (2T65).

The evaluation/observation procedure that both Shine and Kishler were accustomed to using for all teachers, and used for Horner, had been developed by DeGiacomo's predecessor, and was in use for ten or eleven years (4T59, 4T68). The principals just observed the classroom performance and only commented upon what they observed during that performance. It was their practice not to make comments about behavior that they did not observe during the actual performance of the lesson (4T23, 4T58-4T59, 4T68). There was no evidence of a contrary procedure.

In keeping with that procedure, since neither Kishler nor Shine observed any problem with Horner's actual teaching performance on November 13 and November 24, respectively, they did not discuss with her at the November 19 and December 4 conferences, the behavioral problems they felt she had already exhibited, nor did they make any negative comments on CP-52 and CP-53, respectively. In fact, during those conferences neither Kishler nor Shine expressed any negatives about Horner's performance, nor did they notify her that her continued behavior might lead to her non-renewal (2T64-2T66).

Shine recognized the fallacy of that procedure and admitted it was a mistake, and that she and Kishler should have broadened their observations of Horner (4T24, 4T47). Shine felt she should have reported what she observed of Horner's overall performance

behavior. She noted she had made a conscious decision not to tell Horner about the concerns she (Shine) had about her (Horner's) behavior, and in so doing, Horner had not been told the truth (4T48).

12. On December 8, 1992 (CP-28), DeGiacomo notified Small that as an act of good faith the Board would pay Horner's doctor bill from the September 11 pesticide event, but her sick day would not be restored. Small was told to have Horner submit her bill to the business office. On December 16, 1992 (CP-29), Small notified DeGiacomo that the grievance committee accepted the Board's offer to pay Horner's doctor bill, but argued she was still entitled to the sick day, thus, informed DeGiacomo that the grievance was being submitted to the Board. On December 22, 1993 (CP-30), the Board denied Small's request to have Horner credited with a sick day.

On January 5, 1993 (CP-31), Small requested DeGiacomo provide her with certain information regarding Horner's grievance. DeGiacomo provided Small with requested information on January 7, 1993 (CP-32).

On February 5, 1993 (CP-33), an Association representative sent DeGiacomo a letter regarding the selection of an arbitrator regarding Horner's grievance. An AAA demand for arbitration was sent on February 10, 1993 (CP-34). Horner's grievance was the only grievance to go beyond the Board level up to that time of DeGiacomo's role as Superintendent (3T81-3T82). On February 16, 1993, Small notified DeGiacomo (CP-35) that Horner's September 11 doctor bill had not been paid.

13. On February 17, 1993, Shine sent a handwritten memo to DeGiacomo (R-5), questioning whether Horner should be retained. R-5 says:

> Diane
>
> Thoughts re Judy D.
>
> Tenure is life security. There are questions about Judy's stability; she's not adjusted to teaching schedule in good spirit. The classroom observations are only one part of evaluation. In good conscience, with children in mind, can we recommend tenure to 2010?
>
> Betty S.

DeGiacomo did not tell Shine to write R-5 (4T42), and Horner was not advised of that note (3T143).

Shine wrote R-5 because (1) she felt Horner had not adjusted to the classroom transfer and new schedule in good spirit, (2) Horner had stopped speaking to her, (3) she felt Horner had problems that could not be overcome in the short term, and (4) she felt Horner had to be prevented from receiving "life security" through tenure (4T20). Shine had conversations with DeGiacomo regarding Horner before DeGiacomo made a recommendation to the Board, and she recommended Horner's non-renewal. She told DeGiacomo that Horner had not adjusted to the new schedule in good spirit, that she had stopped talking to her, that she was often inflexible, and she expressed her concern about the students and the future (3T55, 4T16, 4T19). Shine felt Horner had long term problems with "change and pressure" that would take a long time to resolve (4T21).

Shine was aware of the grievance regarding Horner and the one sick day, but she and DeGiacomo never discussed that grievance as a possible reason for Horner's non-renewal (4T23). I credit her testimony. The grievance was of no particular importance to Shine, and there is no basis for me to infer that she would take action against Horner because of it. I found Shine to be a reliable witness.

Shine discussed her recommendation not to renew Horner with Kishler, and then they spoke to DeGiacomo (4T19, 4T65). Kishler thought Horner was having a hard time adjusting to the classroom transfer and schedule change, and she noted that Horner was distraught most of the time, and asked DeGiacomo if Horner could be placed on a year of probation before she was considered for tenure (4T55, 4T57). Once she learned the answer was no, Kishler supported the decision to non-renew (4T57, 4T67).

Kishler had been aware of the grievance regarding Horner's sick day, but the grievance was never raised in her discussions with DeGiacomo and Shine regarding Horner's non-renewal (4T67). I credit her testimony. As with Shine, the grievance was of no particular importance to Kishler, and there is no basis for me to infer that her non-renewal recommendation was influenced by it.

As a result of conversations with Shine and Kishler, and, in part, based upon her own interaction with Horner, DeGiacomo also concluded that Horner should not be renewed (3T33-3T34). DeGiacomo recognized that Horner had good evaluations, but felt there were

other factors in deciding whether a teacher should be renewed. She concluded that Horner's behavior over the classroom transfer and her behavior toward Shine were both factors that affected her non-renewal. DeGiacomo felt Horner had been too inflexible and distraught over the classroom transfer, she felt that the wording of R-2 showed that Horner had not adjusted to the transfer decision, she did not see an improvement in Horner's reaction thereto even after accommodations were made based on Horner's request, and she concluded that Horner had completely overreacted to the transfer (3T34, 3T44, 3T45). DeGiacomo believed that Horner's reaction to the classroom transfer would eventually permeate the classroom and affect Horner's relationship with the students (3T45, 3T160).

DeGiacomo also could not accept Horner's failure to talk to Shine. She believed it was essential to have good communication between a supervisor and teacher (3T43, 3T46). DeGiacomo, herself, noted that there were occasions during the 1992-93 school year when she greeted Horner, who reacted with an icy stare and a cold response (3T53). Horner did not rebut that testimony.

DeGiacomo's decision to non-renew Horner was not based upon, nor in reaction to, Horner's sick day grievance (3T68). When asked if her non-renewal decision was motivated at all because of the sick day grievance DeGiacomo forcefully responded:

> Absolutely unequivocally, no. It had no bearing on the fact of my not recommending her for tenure. The grievance, to me, was just an everyday part of my job. It had no impact at all on that decision. And, I will say that over and over again, in oath, under oath, out of oath, in any way. No impact at all (3T75).

I was impressed by the manner, seriousness and determination by which that response was delivered. Once again, I found DeGiacomo's testimony to be candid, consistent, and trustworthy. Her demeanor was confident, and even when pressed, she was composed and could forcefully make her point. I found her testimony believable and reliable.

14. On April 19, 1993 (CP-36), an Association representative notified Carol Small that the American Arbitration Association had scheduled Horner's sick day grievance for hearing on June 16, 1993.

In April 1993, the Board changed labor relations consultants (3T149). The new consultant reviewed the grievance involving Horner's sick day and recommended to the Board that it not proceed to arbitration with that grievance. He told DeGiacomo that the arbitration would be time consuming, and he recommended Horner be granted the sick day. DeGiacomo noted that the grievance did not involve a crucial issue, and the Board agreed with the consultant's recommendation (3T61).

On or about April 22, 1993, DeGiacomo went to Horner's classroom at the intermediate school at around 10:30 a.m., and handed her a letter dated April 21, 1993 (CP-60), notifying her that on April 26, 1993, the Board would discuss whether it would renew her contract for 1993-1994 (2T72-2T73, 3T106-3T107, 3T153-3T155). On April 23, 1993 (CP-61), Horner requested that the April 26 Board meeting be held in a public session (2T73-2T74). By letter of April

27, 1993 (CP-62), DeGiacomo notified Horner that the Board had voted not to offer her a contract for 1993-94. That same day Horner requested (CP-63) the specific reason for her non-renewal.

On April 29, 1993, Caputo wrote a letter to the Board (CP-25) criticizing DeGiacomo's recommendation not to renew Horner. During that time period several other letters were written on Horner's behalf (CP-67).

On May 3, 1993, the Board, in accordance with its consultants recommendation, notified Carol Small (CP-37) that it had decided to grant Horner's request to restore her sick leave day from September 11, 1992. The Board had already paid Horner's doctors bill from September 11 (1T116), thus, in CP-37 it asked Small for confirmation that the demand for arbitration would be withdrawn.

On May 10, 1993 (CP-38), DeGiacomo, in response to Horner's request in CP-63, provided Horner with a list of reasons for her non-renewal. That list provides:

1. Superintendent's interaction and personal observation;

2. Inability to adjust to certain administrative changes that are here for the long term;

3. Concerns expressed by parents;

4. General demeanor and approach to administration is not compatible to what is perceived as a Tabernacle employee;

5. Supervising administrators have raised concerns about employee's compatibility with the system;

6. Despite adequate classroom performance evaluations, they do not overweigh the other

> concerns as set forth above and the superintendent's responsibility for well-being of the students and the school system.

DeGiacomo had prepared CP-38 (3T32), and Horner had not been told of those specific reasons prior to her receipt of the document (3T138). DeGiacomo reviewed CP-38. She explained that Item #1 referred to informal observations she made of Horner (3T35). Item #2 specifically referred to the classroom transfer and Horner's reaction thereto (3T36). Item #3 was not a key reason for the non-renewal (3T48). Item #4 concerned Horner's treatment of-and refusal to speak to-Shine (3T50-3T52). Item #5 referred to both Shine and Kishler raising concerns about Horner (3T53-3T55), and Item #6 was a combination of all of the other items (3T56).

Shine and Kishler agreed particularly with Item #2 of CP-38, but also with Items 4, 5, and 6 (4T21, 4T57). Kishler was unaware of any reasons under Item #3 (4T57).

Horner was not given a final evaluation for the 1992-93 school year because the County Superintendent's Office had informed the Board it was unnecessary (3T125).

15. The Board and Association are parties to a collective agreement effective from 1992 through June 1995 (J-1). Article 3 of J-1 is a Grievance Procedure that ends in binding arbitration, Article 4 provides for Teacher Rights, and, Article 9 covers Evaluation. Pertinent sections of Article 9 include:

C. All monitoring or observation of the work performance of a teacher shall be conducted openly and with knowledge of the teacher.

E. Personnel Files
Any complaint regarding a teacher made to any member of the administration which is used in any manner in evaluating a teacher, will be promptly investigated and called to the attention of the teacher. The teacher will be given an opportunity to respond to such complaints.

H. No material derogatory to a teacher's conduct, service, character or personality shall be placed in his/her personnel file unless that teacher has had an opportunity to review the material. The teacher shall acknowledge that he/she has had the opportunity to review such materials by affixing his/her signature to the copy to be filed with the express understanding that such signature in no way indicates agreement with the contents thereof. The teacher shall also have the right to submit a written answer to such materials and his/her answer shall be reviewed by the Superintendent or his/her designee and attached to the file copy.

There was no evidence showing whether R-5 was actually placed in Horner's personnel file.

J. Any item placed in the file, beginning with the implementation of this contract, will bear the date of its receipt at the office of the principal or superintendent.

ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court created a test to be applied in analyzing whether a charging party in a 5.4(a)(3) case has met its burden of proof. Under Bridgewater, no violation will

be found unless the charging party has proved, by a preponderance of the evidence, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing 1) that the employee engaged in activity protected by the Act, 2) that the employer knew of this activity, and 3) that the employer was hostile toward the exercise of the protected activity. Id. at 246.

If a charging party satisfies those tests, then the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. The burden will not shift to the employer, however, unless the charging party proves that anti-union animus was a motivating or substantial reason for the employer's actions.

In this case, as in most (a)(3) cases, the Charging Party succeeded in proving the first two Bridgewater elements, but not the last. The Charging Party proved Horner was involved in protected activity, the sick day grievance, and that the Board was aware of her protected activity. But the Charging Party failed to prove that the Board was hostile to the exercise of that activity or that Horner was selected for non-renewal because she participated in that activity.

In its post hearing brief, the Charging Party argued that I had found that it made a "prima facie" showing regarding the first two Bridgewater standards, and that from the timing of the Board's actions I inferred that Horner's protected activity was a motivating

factor in the Board's decision. The Charging Party then argued that since it demonstrated its prima facie case the burden had shifted to the Board. These arguments are misleading.

The parties in (a)(3) cases are often confused by the Courts use of the term "prima facie" in Bridgewater. Litigants frequently believe that if a hearing examiner denies a respondent's motion to dismiss after the charging party has rested, that the charging party has made a "prima facie" case, which is sometimes thought to mean that the charging party has proved hostility, and that now the burden has shifted to the respondent to prove that it would have taken the action for lawful reasons despite the protected activity. That notion is incorrect.

The Commission's motion to dismiss practice as first used in North Bergen Township, P.E.R.C. No. 78-28, 4 NJPER 15, 16 (¶4008 1977), is guided by the Court's decision in Dolson v. Anastasia, 55 N.J. 2 (1969). In deciding such a motion Dolson requires that the evidence be viewed most favorably to the party opposing the motion, usually the charging party. In that situation the hearing examiner is required to draw any inferences that can be drawn, in favor of the charging party. But those inferences must be drawn that way just to resolve the motion. Once the motion is resolved, the hearing examiner is no longer required to draw inferences for a particular party, which could mean that the charging party has yet to prove hostility.

The decision on whether a charging party has proved hostility in (a)(3) cases is not based only on the evidence produced by the charging party, nor by the mere denial of a motion to dismiss. The Commission in Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987), explained that the decision on whether the charging party has proved hostility will be based upon consideration of all the evidence presented at hearing, as well as the credibility determinations and inferences drawn by the hearing examiner.

Here the Charging Party seems to believe that because I disposed of the motion to dismiss in its favor it had proved its prima facie case. But I made no such finding. In order to meet the prima facie standard a charging party must prove all three of the Bridgewater elements. Prima facie is not determined element by element. Either a charging party has proved all three elements and, therefore, made its prima facie case, or it has not. While I inferred hostility for purposes of the motion, that was to comply with Dolson, not to be confused with a determination of hostility on the whole case.

The issue in this case is limited to deciding why the Board did not renew Horner's employment. This case is not about the propriety of Horner's classroom transfer, or about whether the evaluation procedures in J-1 were violated. If I find that Horner's non-renewal was not based upon protected activity, which in this case is limited to her sick day grievance, then the charge must be dismissed.

This charge was filed on September 15, 1993. In order for this, or any charge to be viable, it must be based upon events that occurred within six months of the filing of the charge. Here the operative event that occurred within the appropriate time period was Horner's notice of non-renewal in April 1993, and the protected activity she was involved in during that time was her sick day grievance. The protected activity Horner was involved in regarding the Xylene, termite spray, and furniture polish incidents were too distant in time to have formed the basis for this charge. The Charging Party did not allege that the Board violated the Act based upon Horner's participation in the Xylene, termite or furniture polish incidents, nor upon statements by DeGiacomo in the January 1992 meeting with Horner, Caputo and McNaughton, or by its transfer of Horner and Caputo which was announced in June 1992 and implemented in September 1992. If the Charging Party had made those allegations they would have been untimely because they concerned events which occurred more than six months prior to the filing of the charge. While the Charging Party was entitled to produce the evidence regarding those events as background information, it was not entitled to a finding on whether the Board violated the Act based upon those events.

Similarly, the Charging Party did not allege a violation of subsection 5.4(a)(5) of the Act,[6/] nor allege that the Board violated the Act by failing to comply with the evaluation procedures in J-1. If it had made such an allegation it would have been dismissed. The Commission does not issue complaints over mere breach of contract allegations or contract interpretation questions. State of New Jersey (Department of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Therefore, whether the Board's use or reliance on Shine's note, R-5, or any other document or information it used in deciding to non-renew Horner violated procedures in J-1, is not an issue before me. If the Charging Party believed the Board's use of R-5 or other information violated J-1, it could have resolved that issue through J-1's grievance procedure.

The Transfer and Earlier Events

Despite the fact that this charge was not filed over DeGiacomo's January 1992 remarks, and Horner's and Caputo's transfers, the Charging Party, nevertheless, argued that DeGiacomo/the Board discouraged Horner and Caputo in the exercise of protected rights, that the decision to transfer Caputo, in

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6/ Subsection 5.4(a)(5) of the Act provides: (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative.

particular, was not based upon an educational purpose, and that Horner and Caputo's selection for transfer was punishment for their having raised safety concerns over the Xylene and other incidents. From those allegations the Charging Party argued that there was a nexus between the Xylene (and other) incident and the transfer, and the Board's decision not to renew Horner.

Although the charge does not cover those issues, I will resolve those issues to avoid confusion. The Charging Party's allegations about DeGiacomo's January 1992 remarks, and the reasons Caputo and Horner were selected for transfer, are not supported by the evidence. In Finding of Fact No. 4, I found that while DeGiacomo told Horner, Caputo and McNaughton that only the Superintendent and Board President were authorized as spokespersons for the Board, there was no evidence that those employees were told they could not discuss their views on the Xylene incident. DeGiacomo even said she had no control over what the employees said. But what was most telling was that none of those employees testified that they were told they could not speak about the Xylene incident, there was no evidence that those employees were aware of the "crisis intervention plan", or that the Board actually implemented such a plan, or that they, or any employee, was affected by it. Neither Caputo nor Horner testified that they felt threatened by anything DeGiacomo said, and McNaughton did not testify at this hearing at all, thus, there was no basis to conclude that she perceived any of DeGiacomo's remarks, including DeGiacomo's

remark about who sprayed the Xylene, to be a threat. On its face, I did not find that remark threatening, it was nothing more than the sharing of information that could prove embarassing to another employee.

In its post hearing brief, the Charging Party cited Jackson Twp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293 (¶19109 1988), to support its argument that DeGiacomo's remarks interfered with the employees free speech rights and supported a finding of an independent 5.4(a)(1) violation of the Act. While the Hearing Examiner's decision in Jackson certainly explains that restrictions on employee speech could interfere with protected rights, 14 NJPER at 304, there is no basis for finding such a violation here. The Charging Party did not allege an independent 5.4(a)(1) free speech violation in its charge. If it had made such an allegation about DeGiacomo's remarks it would have been untimely, and the evidence, nonetheless, does not support a finding that the Board actually restricted Horner's and Caputo's free speech rights.

The Charging Party's arguments and allegations about Horner and Caputo's selection for transfer, similarly, have no merit. As I found in Finding of Fact No. 7, DeGiacomo explained the reason a room transfer was needed, and why Horner and Caputo were selected. There was no evidence disputing DeGiacomo's explanation that a handicapped student would be entering fourth grade in 1992-93, no evidence disputing her explanation that the intermediate school was

not handicapped accessible and that third grade classes were already in that building, no evidence disputing her explanation that music and art classrooms are often moved, and no evidence disputing that Caputo could best handle the transfer.

Both Horner and Caputo testified at this hearing, yet they were not offered to rebut DeGiacomo's testimony about the transfer. A trier of fact is entitled to draw an adverse inference when a party fails to call or question an available witness who is likely to have knowledge on a particular subject. State v. Clawans, 38 N.J. 162, 171 (1962); Wild v. Roman, 91 N.J. Super. 410, 414 (App. Div. 1966); International Automated Machines, 285 NLRB No. 139, 129 LRRM 1265, 1266 (1987). Since Horner and Caputo did not rebut DeGiacomo's testimony about the transfer, and because I found DeGiacomo to be a reliable witness throughout this hearing, I credit her testimony. Therefore, I find that the decision to transfer classrooms was necessary and educationally based, that Horner and Caputo were the most logical teachers for transfer, and that their selection for transfer was not at all based upon their having voiced concerns over the Xylene and other incidents.

Since I have found that DeGiacomo's January remarks, and her decisions regarding the classroom transfer, were not threatening, and not based upon, or in reaction to, the exercise of protected activity, I find there was no nexus between Horner's expressions of concern over the Xylene and other incidents and the transfer, and her subsequent non-renewal. The evidence conclusively

shows that Shine and DeGiacomo were supportive of Horner throughout the incidents of 1991-92. In fact, Horner received good observations/evaluations after those incidents, and she was renewed for 1992-93. Therefore, I find there is no basis to contend that Horner's non-renewal was in reaction to her expressions of concern over those incidents.

The Non-Renewal

Having found no nexus between Horner's exercise of protected activity in 1991-92, and her non-renewal in 1993, the only protected activity she was engaged in at the time of the non-renewal was her sick day grievance. But, the Charging Party did not present evidence proving that the Board was hostile to the processing of the sick day grievance. Rather, it sought to make its case by challenging the usefulness and accuracy of R-2, R-5 and CP-38, by focusing on Horner's evaluations which were devoid of negative comments, and by trying to convince me that DeGiacomo, Shine and Kishler were not credible witnesses, which it hoped would result in a finding that Horner's non-renewal was based upon her sick-day grievance. The Charging Party's arguments, however, were not persuasive.

A witnesses testimony should not be discredited without sufficient basis. The trier of fact must consider, for example, the witnesses demeanor, attitude and cooperation in answering questions, whether there is physical or testimonial evidence to corroborate,

dispute or rebut the witnesses testimony, and, whether the witnesses testimony is logical and believable within the context of the other evidence produced at hearing. I found all three witnesses testified in a cooperative manner, they were neither argumentative nor evasive. DeGiacomo admitted she hoped to restrict what employees could say on behalf of the Board in certain circumstances (though there was no evidence the employees were even aware of her position), and Shine admitted she made a mistake in not noting problems on Horner's observation/evaluation form. Those admissions reinforced their reliability. All three witnesses maintained good eye contact, they were not fidgety, and they did not lose their temper or composure. DeGiacomo and Kishler were clearly less nervous than Shine, but I attribute that to Shine's style and personality. Shine was easily the most soft spoken of the three witnesses, but she was equally effective in communicating the reasons for Horner's non-renewal.

Shine explained that Horner did not talk to her after the first of the year, and both Shine and Kishler explained that outside the classroom, Horner was distraught most of the time and cried often. Horner was available throughout this hearing but was not offered to rebut Shine and Kishler. I find, therefore, that their testimony about Horner's behavior was accurate and credible. State v. Clawans; Wild v. Roman; and International Automated Machines.

In presenting its case the Charging Party relied heavily on the fact that Horner's observations and evaluations contained no

negative remarks, that Horner was never warned that her behavior could affect her renewal, and that the resolution of the grievance occurred just after the non-renewal was announced. From that the Charging Party inferred that the Board's stated behavioral reasons for Horner's non-renewal were pretextual. It cited University of Medicine & Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447 (¶16156 1985), (UMDNJ), to support its argument.

In UMDNJ, the Commission found that the University violated the Act by refusing to renew a professor because of her exercise of protected activity. The professor was vice-president of the union and on the negotiations committee. During the Fall of 1983 and winter of 1984 her protected activity escalated as she prepared, and sought meetings with the University, for negotiations. During that same time period her supervisor had been giving her excellent evaluations. It was during this same time period that the Dean decided not to renew her contract. The Commission concluded that the timing of the non-renewal, so close to the acceleration of her protected activity and her excellent evaluations, warranted a finding of hostility, and that a prima facie case had been made. Then the Commission considered the University's proffered business justification. The Dean had testified that the program the professor was involved with was in trouble and needed new leadership. The Commission concluded the business justification was pretextual.

The Charging Party argues that the facts here are similar to those in UMDNJ and it seeks the same result. Timing is certainly a significant factor to be considered in deciding an employer's motivation for its actions, from which hostility may be inferred. UMDNJ; N.J. Dept Human Services, P.E.R.C. No. 87-88, 13 NJPER 117, 118 (¶18051 1987); Essex Co. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988). There is a timing factor in this case, but it is not the same as in UMDNJ. Here, the Charging Party argues that because the Board settled the grievance so soon after Horner was non-renewed, that the grievance was really the motivating factor for the non-renewal. But the Charging Party did not rebut DeGiacomo's testimony that the grievance was settled based upon the recommendation of the Board's new labor consultant.

While there are some similarities between UMDNJ and this case, there are enough differences that prevent that case from controling here. In addition to the timing difference discussed above, there is a difference between the level of protected activity engaged in, and a difference between the weight given to the observations/evaluations. Although Horner's sick day grievance was being pursued, it was Carol Small, and other Association representatives, who were moving and processing the grievance. While processing of the grievance certainly represented the exercise of protected activity for Horner, there was no evidence that Horner was actually taking action to process the grievance. When contrasted with the accelerated level of activity engaged in by the

professor in UMDNJ, Horner's level of activity was minimal. Since I have already credited Shine, Kishler and DeGiacomo that Horner's sick day grievance was not even considered in reaching their non-renewal recommendations, Horner's level of involvement in protected activity was not a factor in the non-renewal decision.

Similarly, here the November 1992 observations of Horner by Shine and Kishler did not carry the same weight as the evaluations in UMDNJ. Since I credited Shine's and Kishler's testimony about why CP-52 and CP-53 contained no negative comments about Horner's behavior, those observations cannot be relied upon as a basis to infer that Horner did not have behavioral problems.

The Charging Party's argument also fails to address Shine's and Kishler's testimony that their procedure for preparing observations and evaluations was limited to a teachers classroom performance on the day of the observation/evaluation. The Charging Party did not offer testimony or documents to dispute their testimony. In its post-hearing brief, however, the Charging Party, in attempting to discredit Shine's testimony about the evaluation procedure she followed, argued that in CP-51, Horner's June 17, 1992 end of year evaluation, Shine actually evaluated Horner's performance outside the classroom. I don't agree. CP-51 was an end of year evaluation, not a classroom observation of a particular lesson, thus, it obviously encompassed more than a classroom performance. But Shine's language in CP-51 limits her analysis to Horner's performance in the classroom, and her performance in

directing concerts which was clearly part of her teaching duties. I find the language in CP-51 did not contradict Shine's and Kishler's explanation of the evaluation procedure they followed.

Moreover, since CP-51 was prepared in June 1992, which was before Horner exhibited the behavior which led to her non-renewal (and that behavior didn't begin until after R-2 issued in August 1992), there was no basis for any negative comments to appear on CP-51. Shine's admission that she and Kishler made a mistake in not noting Horner's behavioral problems on the observation forms gave credence to her testimony regarding the evaluation procedure. The principals' explanation of that procedure was plausible, and I credit their testimony, Consequently, I will not infer from the absence of negative remarks on CP-52 and CP-53, that the Board's reasons for Horner's non-renewal were pretextual.

In addition to the Charging Party's arguments about Horner's observation/evaluation forms, it also challenged the Board's reliance on R-2 (Horner's August 1992 letter to Shine), R-5 (Shine's February 1993 note to DeGiacomo), and CP-38 (the Board's May 1993 reasons for Horner's non-renewal), in non-renewing Horner. But I found all three documents to be probative of the issue before me.

The Charging Party in its reply brief argued that Horner in R-2 was making "a constructive effort to assure continuing quality instruction to her students", and it argued that the Board quoted the letter out of context. It is not necessary for me to determine

Horner's intent for writing R-2, rather, I am reviewing what inferences may reasonably be drawn from it. Horner did say in R-2 that she was "reeling from" the transfer decision, she was "in turmoil over this room situation", she lost sleep and was getting upset, and she said it was a "miserable situation". Those phrases are certainly taken out of the context of their sentences, but even looking at the context in which those phrases appeared in R-2 as cited in Finding of Fact No. 9, it would be reasonable for readers of that letter to infer that Horner was deeply troubled over the room transfer. Shine and DeGiacomo reached that conclusion, and that was before the September 11 incident that led to the sick day grievance.

The Charging Party attacked the reliability of R-5 in its post-hearing brief. First it unilaterally decided that the two "justifications" Shine raised in R-5 as the basis for her non-renewal recommendation were 1) Horner's instability, and 2) Shine's concern for the well-being of children, then it argued that neither "justification" served as the "official" reason for Horner's non-renewal. I reject that analysis.

The second sentence of R-5 began with the reference to questions about Horner's stability, and the Charging Party obviously overlooked the remainder of that sentence which said: "she's not adjusted to teaching schedule in good spirit". That was the reason for R-5 and Shine's non-renewal recommendation. Shine's notation about Horner's "stability" was referring to her behavior which was a

direct outgrowth of her inability to adjust to the room transfer and schedule change. Shine's notation about children was also directly related to Horner's failure to adjust to the room transfer. Shine was concerned that Horner's instability, i.e., her distraught behavior, might permeate the classroom.

Consequently, I find that the R-5 language consistently related to the main reason for Horner's non-renewal, her inability to adjust to the classroom transfer.

The Charging Party aggressively attacked the reliability of CP-38. It challenged each item in that document separately, but primarily argued that none of it was supported by Horner's observations/evaluations. It compared CP-38 with R-5 and argued that the Board had shifted its reason for non-renewal and, therefore, CP-38 could not be considered genuine. I reject that analysis.

Except for Item 3 of CP-38 (parental concerns), for which there was no evidence, Items 1, 4, 5 and 6 of CP-38 are all directly related to Item 2 in that document, which was the primary reason for Horner's non-renewal, her failure or inability to adjust to the classroom transfer. DeGiacomo and Shine explained that Item 2 referred to the classroom transfer, and a simple reading of that Item supports their testimony.

The Charging Party challenged Item 2, arguing it was not supported by Horner's observations/evaluations. But except for CP-52 and CP-53, the preceeding observations and evaluations are

irrelevant because they pre-date Horner's behavior that led to her non-renewal. Since I have already credited Shine and Kishler's explanation as to why CP-52 and CP-53 did not contain negative comments regarding Horner's behavior, I will not infer that the Board's stated reasons for Horner's non-renewal was pretextual.

The Charging Party's attack of Items 1, 4, 5 and 6 of CP-38 was equally unpersuasive. It argued regarding Item 1, that DeGiacomo had not sufficiently observed Horner and, therefore, she could not make a credible recommendation based on her behavior. But I found that DeGiacomo had read R-2, and that Horner had also given DeGiacomo a "cold stare". Thus, I find DeGiacomo had sufficient basis to draw her own conclusions about Horner's behavior in 1992-93.

The evidence shows that Item 4 concerned Horner's failure to speak with Shine, and, at times DeGiacomo, during and after the winter of 1993, and Item 5 referred to concerns raised primarily by Shine, but also by Kishler, regarding Horner's behavior and whether she should be retained. The Charging Party called those Items the most "illogical" because neither principal had ever criticized Horner in observations/evaluations, and Kishler, even in March 1993, had thanked Horner for an assembly she (Horner) had organized.

I have already found, however, that Horner had stopped talking to Shine in the winter of 1993, and that the observations/evaluations prepared prior to the 1992-93 school year were irrelevant because they pre-dated the behavior that led to Horner's non-renewal. The evidence showed that Horner and Kishler

maintained a good relationship throughout the 1992-93 school year, but that didn't prevent Kishler from observing Horner's distraught attitude and ultimately agreeing with Shine that Horner should not be renewed. I find that the evidence was consistent with the underlying purpose of Items 4 and 5, and that those Items were a direct result of Horner's reaction to the classroom transfer.

Finally, the Charging Party attacked the Board's reliance on Item 6 of CP-38, primiarly by challenging Kishler's testimony regarding the adequacy of Horner's evaluations and performance. I reject the inferences the Charging Party made regarding Kishler's testimony. It is irrelevant here whether Horner's observations/evaluations, particularly the ones prepared before 1992-93, were excellent, or just adequate. CP-38, minus Item 3, was consistent with R-5, and with the Board's decision to non-renew Horner because of her reaction to the classroom transfer.

Since I found that the Board's decision to non-renew Horner was not based on her exercise of protected activity, then that decision could not have interfered with the rights of other employees to participate in protected activity.

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

Conclusion of Law

The Board did not violate the Act by not renewing Judith D. Horner's employment for 1993-1994.

RECOMMENDATION

I recommend the complaint be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: March 13, 1995