P.E.R.C. NO. 92-16

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WASHINGTON TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-90-29

WASHINGTON TOWNSHIP
EDUCATION ASSOCIATION/NJEA,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Washington Township Education Association/NJEA against the Washington Township Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when its Middle School principal wrote an observation report criticizing an Art teacher for writing a certain letter and leaving it in view of the students. The Commission finds that the principal was motivated not by the Association's involvement, but by the possibility of personal litigation and his Association representative's advice to document the incident.

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WASHINGTON TOWNSHIP
EDUCATION ASSOCIATION/NJEA,

Charging Party.

Appearances:

For the Respondent, Capehart and Scatchard, attorneys
(Alan Schmoll, of counsel)

For the Charging Party,
Eugene Sharp, NJEA Field Representative

DECISION AND ORDER

On July 27, 1989, the Washington Township Education Association/NJEA filed an unfair practice charge against the Washington Township Board of Education. The charge alleges that the Board violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,[1/] when its Middle School principal, Gary Bowen, wrote an observation report criticizing an art teacher, Gail Brooks, for writing a certain letter and leaving it in the view of students. The charge

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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."

specifically alleges that the principal, desiring to punish Brooks for exercising her right to union representation, reversed his earlier determination to return the letter to Brooks in June and not to take any further action.[2/]

On December 8, 1989, a Complaint and Notice of Hearing issued. The Board's Answer denied that the principal had been motivated by anti-union animus and asserted that the principal's "inclusion of the letter in the observation report was proper as it arose out of the observation and evaluation of teaching performance."

On June 25 and 26, 1990, Hearing Examiner Susan A. Weinberg conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by November 13, 1990.

On March 22, 1991, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-34, 17 NJPER ___ (¶____ 1991). She found that the principal's decision to include the letter in the observation report was not influenced by the Association's involvement and was instead a response to his being threatened with personal litigation and being advised to document the incident. She specifically found that on March 30, 1989, Bowen observed Brooks' art class and removed an objectionable letter which

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2/ The Association also grieved the inclusion of the letter in the observation report and demanded binding arbitration. The Board petitioned for a scope of negotiations determination and sought a restraint of arbitration. On May 14, 1990, we determined that the dispute predominantly involved a disciplinary reprimand and could be submitted to binding arbitration. Washington Tp. Bd. of Ed., P.E.R.C. No. 90-109, 16 NJPER 326 (¶21134 1990).

was partially visible on her desk; later that afternoon Bowen told Brooks that he intended to retain the letter until the end of June and then return it if no problems had arisen; on April 3, the Association's grievance chairperson, Kate Britton, told Bowen that Brooks and her husband were considering suing Bowen personally for invading their privacy; immediately afterwards Bowen told the Art Department chairperson, Maria Carpenter, about the conversation; the next day Bowen told the president of the Washington Township Principals' Association, David DeGroodt, about Britton's statement and asked for advice; DeGroodt advised him to document the incident; and Bowen thereupon and therefore issued an observation report including the letter.

On May 31, after receiving an extension of time, the Association filed exceptions. It contests the Hearing Examiner's credibility determinations and findings of fact and her conclusion that including the letter in the observation report was not intended to retaliate against Brooks for the Association's intervention.3/

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-13) with these modifications and observations.

We modify finding no. 3. Bowen was Middle School principal for at least five months (IT101) and probably seven or eight months before April 1989 (2T26-2T27).

3/ The Association also requested oral argument. The parties having fully briefed the issues, we deny that request.

We accept the statement in finding no. 4 that the purpose of the March 30 meeting was to discuss and clarify the observation. Bowen so testified (2T6-2T7). Brooks told King that other things besides the letter were discussed at the meeting, but the record does not indicate what (1T125).

We modify finding no. 6. The Association's building liaison committee, unlike its grievance committee, does not deal with alleged contract violations. It is a troubleshooting body which tries to resolve problems before a grievance is filed. These pre-grievance discussions appear to be different from pre-grievance hearings which are invoked by the Association's grievance committee (1T23).

We accept finding no. 13. The Hearing Examiner found that Britton told Bowen that the Brooks matter would probably not be addressed through the grievance procedure because Brooks and her husband were considering suing Bowen personally for invading their privacy. This finding was based on specific testimony (1T192; 2T14) and express and precise credibility comparisons and determinations. We will not second-guess it. See, e.g., City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980).[4/]

4/ The Association suggests that the Hearing Examiner's reliance on Britton's failure to make eye contact was unwarranted since Britton referred to notes during her testimony. We note that near the end of Britton's direct testimony, the Hearing Examiner directed her to testify from her recollection without referring to her notes (1T36-1T37). In any event, we decline to second-guess the Hearing Examiner's assessment of the witnesses' eye contact. We also note an inconsistency in the

Footnote Continued on Next Page

We accept finding no. 14. The Hearing Examiner found that just after Bowen's conversation with Britton, a visibly upset Bowen (1T153) said to Carpenter: "Can you believe this? Britton told me that Brooks might be getting a lawyer to sue me for invasion of privacy." (1T148-1T149; 1T193). This finding is supported by the record and the Hearing Examiner's credibility determinations based on her assessment of Bowen's demeanor. We also accept the Hearing Examiner's determination not to credit Gail Brooks' testimony. We will not second-guess her firsthand observation that Brooks hesitated significantly before answering a question about her intention to sue.

We accept finding no. 16. The Hearing Examiner found that DeGroodt told Bowen to document the incident in the observation report. Bowen so testified (1T195). DeGroodt's testimony confirms that he told Bowen to document the incident (1T142; 1T144), although it does not specify that Bowen was to use an observation report.

We accept finding no. 21. The Hearing Examiner found that Britton accused Bowen of violating a confidence when, at a grievance meeting before the Superintendent, he disclosed that Britton had

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4/ Footnote Continued From Previous Page

testimony of King and Britton. According to King, she and Bowen discussed the faculty's concern about his "rifling through" a teacher's desk; he responded that he would have to discuss that issue with a lawyer, and she then called Britton (1T83; 1T98). According to Britton, King called her and asked Britton why Bowen would want a lawyer and Britton responded that she couldn't imagine why unless it was a privacy matter (1T18; 1T46).

told him that Brooks and her husband might sue him for invading their privacy. The Hearing Examiner credited the testimony of Bowen (1T202-1T203) and Carpenter (1T149-1T150) affirming that this statement was made and discredited the testimony of Britton (1T37-1T38, 1T44) and King (1T94) denying that it was and asserting instead that Bowen stated that when the Association became involved it felt like a "showdown" and that "they should have known there would be a price to pay." Again, we will not second-guess the Hearing Examiner's credibility determinations, based on her observations of the witnesses.[5/]

Given our findings of fact and the Hearing Examiner's credibility determinations, we agree with the Hearing Examiner's conclusions of law. Under In re Bridgewater Tp., 95 N.J. 235 (1984), a violation of subsections 5.4(a)(1) and (3) will not be found unless the charging party proves that anti-union animus was a motivating force or substantial reason for the employer's action. This burden of proof has not been met since Bowen was motivated not

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5/ The Association notes that Bowen did not deny making the alleged "price-to-pay" statement and disagrees with the Hearing Examiner's opinion that the Bowen-Carpenter account "makes more sense" than the Britton-King account. We cannot ignore the Hearing Examiner's express credibility determinations and we are not persuaded that the Bowen-Carpenter account is implausible. Bowen was understandably reluctant to divulge what he believed to be a confidence. Britton herself believed her April 3 conversation with Bowen was off-the-record (1T33; 1T64). Britton may not have foreseen that the possible lawsuit would be the answer given when she finally persuaded Bowen to explain why he had changed his mind about returning the letter.

by the Association's involvement, but by the possibility of personal litigation and DeGroodt's advice to document the incident.[6/]

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Grandrimo and Wenzler voted in favor of this decision. Commissioner Smith voted against this decision. Commissioners Bertolino and Regan abstained from consideration.

DATED: August 14, 1991
Trenton, New Jersey
ISSUED: August 15, 1991

6/ The Hearing Examiner found that subsection 5.4(a)(1) was not violated when the April 10 conference was recorded by Bowen's secretary and attended by his union representative. This assertion was not pleaded in the unfair practice charge, included in the issue framed by the parties (1T9), or raised in the Association's post-hearing brief. We will therefore not consider it.

H.E. NO. 91-34

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

In the Matter of

WASHINGTON TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-90-29

WASHINGTON TOWNSHIP
EDUCATION ASSOCIATION/NJEA,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that Washington Township Board of Education did not violate the New Jersey Employer-Employee Relations Act when it reprimanded a teacher for a letter she wrote. The Hearing Examiner found that the principal's decision to include a copy of the letter in the teacher's written evaluation was in no way influenced by the teacher's request to have Association representation.

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. 91-34

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

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WASHINGTON TOWNSHIP
EDUCATION ASSOCIATION/NJEA,

Charging Party.

Appearances:
For the Respondent, Capehart and Scatchard
(Alan Schmoll of counsel)

For the Charging Party, Eugene Sharp,
Field Representative, NJEA UniServ

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 27, 1989, the Washington Township Education Association/NJEA ("Association") filed an unfair practice charge against Washington Township Board of Education ("Board"), alleging violations of the New Jersey Employer-Employee Relations Act ("Act"), N.J.S.A. 34:13A-5.4 et seq.; subsections (a)(1) and

(3).[1/] The charge alleges that teacher Gail Brooks was reprimanded in a written evaluation for a letter[2/] she wrote, in retaliation for exercising her right to Association representation. The charge further alleges that this action interfered with, restrained and coerced employees in the exercise of their protected rights.

A Complaint and Notice of Hearing issued on December 8, 1989, naming Joyce M. Klein as Hearing Examiner. On January 9, 1990, the Board filed an Answer denying it violated the Act. On April 9, 1990, the Director of Unfair Practices transferred the case to me. I conducted a hearing on June 25 and June 26, 1990, at which the parties examined and cross-examined witnesses, presented evidence and argued orally. After extensions, both parties filed post-hearing briefs by November 13, 1990.

Upon review of the entire record, I make the following:

FINDINGS OF FACT

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, 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."

2/ In a related scope of negotiations decision, Washington Twp. Bd. of Ed., P.E.R.C. No. 90-109, 16 NJPER 326 (¶ 21134 1990), the Commission found that the portion of the Brooks evaluation which discussed the letter was a predominantly disciplinary reprimand.

1. The Board is a public employer and the Association is a public employee representative within the meaning of the Act.

2. Gail Brooks is a tenured Art Teacher in Washington Township and has held that position for eleven years. During the 1988-1989 school year, she taught Art to eighth and ninth grade students in the Washington Township Middle School (2T55). 3/

3. Gary Bowen is Principal of the Washington Township Middle School and has held that position since April, 1989 (1T172). Bowen is a member of the Washington Township Principals' Association (1T194).

4. On March 30, 1989, Bowen was in Brooks's classroom when she arrived for her sixth period class. Brooks put her books and pocketbook on her desk and began teaching from the front of the classroom. Bowen remained to observe the lesson.

While standing near Brooks's desk, Bowen noticed and read a letter (R-6) 4/ which was partially visible among the

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3/ Transcript citations are as follows: 1T refers to the transcript of proceedings on June 25, 1990 and 2T refers to the transcript of the proceedings on June 26, 1990. The number(s) following the transcript reference is the page designation(s).

4/ The contents of the letter are as follows:

Dear Sub,

What a day! You get to follow a real shitty day! Please feel any of my team members (Teacher A-Not bad!, Teacher B-What a dame!, Teacher C-Forget it!, Teacher D-Try her in the

Footnote Continued on Next Page

belongings which Brooks had just placed on her desk. Bowen confiscated the letter without telling Brooks and left near the end of the class period. Brooks noticed the letter's absence when she looked through her things after class. 5/

Brooks was summoned over the loudspeaker to meet with Bowen at the end of the day (2T4-5). Maria Carpenter, Art Department Chairperson, participated in the meeting (1T147). The purpose of the meeting was to discuss the earlier observation. Bowen confronted Brooks with the letter and expressed his concern over potential problems due to other teachers' names appearing in the letter and the possibility that students had read it. Accordingly,

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4/ Footnote Continued From Previous Page

> smokers lounge!) to help get you through your day. All of my marital problems can be found in the faculty room under my jockey shorts. Almost anybody in the faculty room should be able to direct you to this spot (anxiously). Please take a roll of toilet paper to each class. If there are no seating xharts in the folder, please pass around each student in the room. Please write a short narrative about yourself, including all sexual problems. Thanks!
>
> Love,
>
> Teacher E.

(Actual names have been removed.)

5/ These facts are taken from the Commission's scope of negotiations decision (see footnote 2 supra.) I took administrative notice of this decision during the hearing (1T8) pursuant to N.J.A.C. 19:14-6.6. That decision concerned the same events which are the basis of the present charge. While these facts are not specifically related to subsequent actions which are alleged to be illegal, I recite them here as relevant background information.

Bowen told Brooks that he wished to retain the letter until the end of June, at which time, if no problems had arisen, he would return it to her (1T140; 2T20). Prior to the meeting, Bowen did not inform Brooks that she had a right to representation. He felt the purpose of the meeting was to discuss and clarify the observation (2T6-7).

6. Lynn King is an eighth grade teacher and has been employed by the Board for the past 11 years. In the 1989-90 school year, she was assigned to the Middle School and was Chairperson of the Association's building liaison committee. The liaison committee assists in the smooth running of the school by initiating pre-greivance discussions with administrative personnel (1T71-72).

7. On the morning of March 31, 1990, King learned of the previous day's incident involving Brooks and Bowen from John Brooks, Gail's husband, who also is a teacher in the district (1T17; 1T73). Mr. Brooks told King that his wife was upset about Bowen holding the letter until June and that it was having a detrimental affect on her health [6/] (1T73).

8. In response, King offered to meet with Bowen to see if he would agree to return the letter to Brooks sooner (1T74).

9. King made an appointment to speak with Bowen during sixth period that day. The appointment was made in King's name only, however, after arriving, King told Bowen that Brooks would be joining them (1T78). King arrived before Brooks. At that time,

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6/ Brooks has a diabetic condition (1T79).

King told Bowen that when he called Brooks in the day before, with Carpenter in attendance, it was "of a serious nature" and "she [Brooks] should have been afforded the right to representation" (1T76).

10. When Brooks arrived, King asked Bowen if there was any flexibility in the length of time he would hold the letter. She explained that Brooks was having difficulty teaching and functioning with the letter "being held over her head" and also that it was having a detrimental effect on Brooks's physical condition because of her diabetes (1T77-79). Bowen said he needed to keep the letter in case there were any repercussions from other students or teachers having seen it (1T80). Bowen indicated he would think about it over the weekend, try to come up with an acceptable solution, and get back to Brooks and King on Monday, April 3 (1T80; 2T11).

11. During the meeting with Brooks and King, Bowen also expressed his dismay at seeing them in his office that day (1T77; 2T8). Bowen made this statement because he felt that he and Brooks had reached an understanding on the matter the day before (2T8).

12. Bowen did not get back to Brooks or King on April 3 (1T81; 2T11). That evening, on her way out of the building, King stopped in to speak with Bowen about the Brooks matter (1T81; 2T11). King told Bowen that she was a little taken aback by the tone of their meeting on the 31st. She testified that Bowen seemed more formal and harsh than in previous meetings 1T96-97). King asked Bowen whether he had come up with a solution. Bowen indicated

that he had not. Bowen also stated that he was upset because some of the faculty were discussing the incident (1T81-83). King replied that the faculty was concerned because they felt one of their fellow teachers' desks had been "rifled through" and that that was a "legal issue". Bowen responded that he would have to contact his lawyer (1T83; 1T98).

13. At approximately 7:30 p.m. on April 3, Bowen spoke with another teacher, Kate Britton, about the Brooks incident. Britton was the Association's grievance chairperson. Bowen had been working late in his office and Britton stopped by after her evening school class. Britton told Bowen that the Brooks matter probably would not be addressed through the grievance procedure because the Brookses were considering litigation against Bowen personally for invasion of their privacy (1T192; 2T14; 1T18-19; 2T45-46).[7/]

7/ Britton denies making this statement. She testified that it was Bowen who brought up the subject of contacting an attorney. Britton said she told Bowen that since she was only the grievance chairperson, she would not handle a legal matter. She also stated that she did not feel at that point there was anything to grieve. Britton further testified that neither King nor the Brookses ever indicated that such a legal action was contemplated (1T18-19; 1T45). I do not find Britton's testimony on this subject credible. While on the witness stand Britton appeared unsure, nervous and stilted. During her testimony she consistently looked at the floor and almost never made eye contact with either the questioning attorney or me. Her recitation of the April 3 conversation with Bowen seemed less than forthright. Bowen's testimony, on the other hand, was confident and candid. He recounted the events openly and with ease; making eye contact throughout his testimony.

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14. Shortly after Bowen's conversation with Britton, Carpenter, who was in the building late that evening for a meeting, also stopped by Bowen's office. Responding to Carpenter's inquiry of how he was doing, Bowen said, "Can you believe this? Britton told me that the Brookses might be getting a lawyer to sue me for invasion of privacy" (1T148-149; 1T193).[8/] During the conversation with Carpenter, Bowen was visibly upset and greatly concerned about his personal liability. Carpenter felt that what she was seeing was Bowen's immediate reaction to Britton's statement. (1T153-154).

7/ Footnote Continued From Previous Page

In addition, I find it slightly too coincidental that both King and Britton would independently address the same legal issue of invasion of privacy. I believe it is reasonable to infer that discussions about Bowen's alleged invasion of Brooks's privacy did occur among the parties involved. Thus, the similarity in the subject of the conversation supports the argument that such a comment was in fact made by Britton.

8/ What is important here is what Britton said to Bowen, not what Mr. or Mrs. Brooks actually said. However, since Mrs. Brooks's testimony may be viewed as somewhat contradictory, I will comment.

Mrs. Brooks was called briefly to the stand near the end of the case. She testified that she did not tell anyone that she intended to sue Bowen regarding the letter (2T56). She also stated that she and her husband did not discuss the possibility of exploring their legal rights vis-a-vis Bowen's seizure of the letter (2T60). Mr. Brooks was not called to testify. I specifically do not credit Brooks's testimony. When asked directly about her intention to sue, she hesitated significantly before answering. It appeared to me that she was trying very hard not to say the wrong thing. In all respects, her brief testimony came across as totally unconvincing.

15. On April 4, 1989, Bowen called David DeGroodt (1T193). DeGroodt had been principal in the high school for twenty-three years and was president of the Washington Township's Principal's Association (1T138). Bowen told DeGroodt that he needed advice on how to handle the Brooks situation and that he was concerned about his personal liability due to the Brookses' threat to sue him for invasion of privacy (1T141; 1T193).

16. DeGroodt met with Bowen the next day (1T142; 2T24). DeGroodt told Bowen to advise the Superintendent of the situation, document the incident in Brooks's written observation evaluation, have a secretary take notes of all future meetings concerning the incident and consult the Board's attorney (1T142; 1T194-195; 2T16).

17. Bowen followed DeGroodt's advice. On April 6, 1989, he prepared and signed Brooks's evaluation, including an edited version of R-6 (1T195; 2T17; R-5). Bowen felt that the Association had rejected his offer to hold the letter until June. He did not extend an alternate solution before including the letter in Brooks's written evaluation (1T197-198; 2T19-20).

18. On April 10, 1989, Brooks, Bowen, King (Brooks's representative), DeGroodt (Bowen's representative), Carpenter (in her capacity as Brooks's Department Chairperson) and Gazara (recording secretary) attended a post-observation conference (1T87; 1T143; 1T160; 2T29; 2T33). Bowen and Carpenter informed Brooks of the scheduling of the meeting in writing and also informed her that she should have representation (1T164). It was not a normal

district practice to provide this type of notice or to have a recording secretary and Principal's Association representative present at a post-observation conference (1T87-88; 1T132; 1T165; 2T34-34). During the meeting, Bowen went through Brooks's evaluation point by point, with discussion being held until the end of the meeting. King expressed her concern over the redacted version of the letter being included in the evaluation, which was part of Brooks's permanent record (1T88-89; 1T133). After several requests by Bowen, Brooks signed the evaluation indicating receipt only, not agreement with its contents (1T114-115; R-1).

19. On April 21 and 25, 1989, a pre-grievance hearing[9/] was convened to discuss Brooks's evaluation. Present at this hearing were Bowen, Britton, Brooks, King and Carpenter. The session was recorded by both Bowen and King and transcribed by Bowen's secretary. The hearing was conducted pursuant to an agenda prepared by Britton, which addressed most of the points raised in Brooks's evaluation. Several times during the hearing, Bowen was asked why he decided to put the letter in Brooks's evaluation instead of trying to work out an alternate solution such as holding the letter for a certain period of time. Each time Bowen refused to answer, stating that there were "mitigating circumstances" and that the answer "would not be in the best interest of those involved."

9/ A pre-grievance hearing is an informal meeting where the parties attempt to resolve a dispute before it becomes an actual grievance (1T23).

No resolution of the dispute was reached at the April 21 and 25 hearings. Thereafter, the Association filed a grievance which was denied at the first level by Bowen (1T25-29; 1T89; 1T91-92; 1T167; 1T197; R-2; R-3; and R-4).

20. On May 25 and June 5, 1989, the parties participated in a level two grievance hearing before Superintendent Terrell. Other members of the administration and teaching staff who were part of the district's "Committee of Ten" were also present at the second meeting. The Committee of Ten drafted the teacher evaluation forms used in the district, and participated in the hearing by mutual consent of the parties to identify the evaluation's purpose as it related the Brooks matter (1T28-31; 1T200). After the evaluation's purpose was discussed, the Committee of Ten left the meeting (1T35).

21. Several times during the level two hearings, Britton again asked Bowen why he moved from holding the letter for a certain period of time to putting it in Brooks's written evaluation and if that was his final decision. Britton was so insistent on this point that the Superintendent got annoyed at her repetitiveness. Bowen, after making the determination to finally answer the questions, stated that it was his final decision and that he changed his mind because Britton told him that the Brookses were considering litigation against him personally for invasion of their privacy. In response, Britton reacted by saying, "you just violated my

confidence" (1T34; 1T93; 1T149-150; 1T201-203).[10/] Also during the level two hearings, Bowen stated, and I find, that he felt "intimidated" by the Association because of King's warning regarding Brooks's right to representation and the mention of the legal ramifications of his actions (1T33-35; 1T64; 1T96-98; 1T157).

22. The grievance was denied at the Superintendent's level (TB53). Sometime after the level two hearings, the grievance was heard by the Board of Education. At the Board level, Britton reiterated her version of the level two hearing discussion about the letter, including Bowen's alleged "price to pay" statement. In the

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10/ Both Britton and King tell a different story. They testified that in response to Britton's repeated questions, Bowen said that when the Association became involved it felt like a "showdown" and that they "should have known there would be a price to pay" (1T38; 1T94). Carpenter testified that she did not recall Bowen making these statements (1T158-159). Brooks did not testify on the subject and Terrell was not called to the stand.

I specifically do not credit the testimony of Britton or King and find Bowen's and Carpenter's version of the conversation to be true. As stated earlier, I did not find Britton to be a believable witness (see footnote 7, supra.) While King's testimony in general seemed straightforward, as to this incident, Bowen's and Carpenter's account simply makes more sense. No less than three times during the pre-grievance hearing on April 21 and 25, Bowen avoided answering the same questions by giving vague, non-committal responses. Clearly, he was trying to side-step the issue so as not to reveal the source of the "mitigating circumstances." These facts are not in dispute. Now, at a higher level, with the Superintendent involved, and again faced with repeated questions from the Association, he had no choice but to make it clear why he took the action he did. When he stopped protecting Britton as the source of his knowledge of the Brookses' intention to sue him personally, it is logical that she would react angrily by stating, "you just violated my confidence."

open session before the Board, Bowen did not deny making this statement. Following the Association's presentation of the case, the Board went into executive sesssion and the Association was dismissed. In the executive session, Bowen explained why he chose to put a copy of the letter in Brooks's evaluation. The Board denied the grievance (1T39-40; 1T55; 1T99; 1T151; 1T203-204).

ANALYSIS

The New Jersey Supreme Court has set forth the standard for determining whether an employer's actions violate subsection 5.4(a)(3) of the Act in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). In order to determine whether an employer has illegally discriminated against employees in retaliation for participation in protected activity,

> ...the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. [Citation deleted.] Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. [Bridgewater at 224].

Thus, under Bridgewater, no violation will be found unless the Charging Party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or

motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected activity. Id. at 246.

In this case, there is no direct evidence of anti-union motivation. Consequently, the Charging Party must rely on circumstantial evidence to show that Brooks's protected conduct was a substantial or motivating factor in her discipline. Clearly, Brooks engaged in protected activity by requesting and receiving Association representation and Bowen knew of this activity.

I find that anti-union animus was not the sustantial or motivating factor for Bowen's reprimand of Brooks, nor did his actions interfere with, restrain or coerce employees in the exercise of their protected rights. The pattern of facts in this case shows that Bowen's decision to put a copy of Brooks's letter in her evaluation was not in retaliation for the Association's involvement.

Principal Bowen went into teacher Brooks's classroom to observe her conducting a lesson. While there, he noticed a highly objectionable letter which was in view of her eighth grade students. Realizing that this letter was inappropriate and potentially damaging to the educational environment, he did the only thing he could do: remove it. At the end of the day, Bowen called Brooks down for a meeting in the presence of her Department Chairperson to discuss the letter. He offerred to hold the letter

in his office until the end of the school year (just three months away) and, barring any repercussions, he would then return it to her.

Through liaison committee chairperson King, the Association became involved the next day. King came into the meeting and immediately applied the pressure to Bowen by informing him that she felt Brooks should have had representation at the previous day's meeting. That Bowen's demeanor might have changed after this warning is natural. It was King who raised the level of the dispute into a more formalized and adversarial state by making that statement. Thus, I do not find that Bowen's more stern behavior was in reaction to the Association's involvement per se, but rather to King's adversarial posture in the matter. In addition, I find that Bowen's statement that he was dismayed to see King and Brooks in his office that day was an honest expression of his sorrow that the dispute was not resolved by his offer to hold the letter until June.

Nevertheless, Bowen agreed to examine the issue over the weekend. The following Monday, Bowen received visits in his office from King and Britton. First, King came in and told him that other teachers were upset because Brooks's desk had been "rifled through" and that that was a "legal matter." King admits these statements. Later, Britton came in and informed him that the Brookses were contemplating sueing him personally for invasion of privacy. When Carpenter spoke with Bowen on the same night, just after he saw Britton, she found him upset and concerned. He immediately told her

about Britton's statement. Bowen's visible distress was noticed by Carpenter and she felt that this was his instantaneous reaction to the litigation threat. I agree with Carpenter and believe that such a threat would have caused Bowen to be upset and to think very carefully about what actions should be taken with regard to the Brooks letter.

The very next day Bowen called his union representative. I find this to be the strongest evidence of Bowen's state of mind. He made that call because of his extreme concern over his personal liability. Bowen sought out and received advice from DeGroodt and that advice was clear--document the incident. Immediately following his conference with DeGroodt, Bowen did just that. Accordingly, I find that the sole reason Bowen reprimanded Brooks in her observation evaluation was because of the advice given him by his Association representative and because of the threat of personal litigation against him. I specifically reject the Charging Party's argument that Bowen took this action because Brooks had representation.

Bowen prepared the evaluation on April 6. Prior to that time there had been only <u>one</u> meeting with Brooks involving Association representation on March 31 and that meeting was generally informal. Thereafter, all other meetings, including the post-observation conference and the pre-grievance hearing, were conducted <u>after</u> Bowen had already decided to put the letter in the evaluation. Timing is an important factor in assessing motivation.

City of Margate, H.E. No. 87-46, 13 NJPER 149 (¶18067 1987), adopted P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987). The timing of the events in this case is clear. Bowen decided to document the letter he found in Brooks's possession immediately after he was threatened with personal litigation and after he received advice from his union representative. Simply put, he did exactly what he was told to do and what he felt was in his best interest. I find that his decision to include the letter in the evaluation was in no way influenced by the Association's involvement in the matter. Accordingly, I conclude that the Association has not proved, on the record as a whole, that anti-union animus was a substantial or motivating factor for Bowen's action and thus find no violation of subsection (a)(3) of the Act.

I further conclude that Bowen's actions did not independently or derivatively violate subsection (a)(1) of the Act by interfering with, restraining or coercing employees in the exercise of their protected rights. I have previously found that Bowen did not make the alleged "price to pay" or "showdown" statements. The Association also argues that the Board committed a violation in the manner in which it conducted the April 10 post-observation conference. I disagree. While it was not normal for two union representatives to be present at such a meeting or for the meeting to be recorded by a secretary, I find that under the circumstances, these additional procedures were not so outrageous as to be deemed coercive. Bowen had been threatened with personal

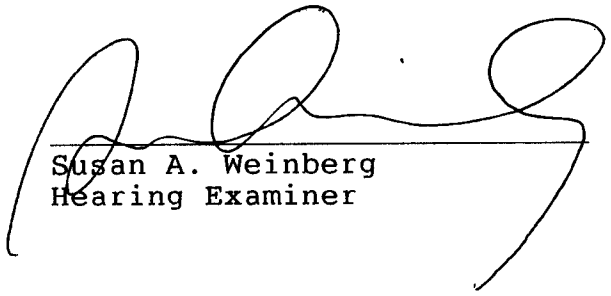
litigation. He wanted his representative there to counsel him and he wanted his secretary there to record what was being said. In taking these actions to protect himself in the event the Brookses sued him, Bowen acted in accordance with a legitimate and substantial business justification.

CONCLUSIONS OF LAW

The Washington Township Board of Education did not violate subsections (a)(1) or (a)(3) when it reprimanded teacher Gail Brooks for a letter she wrote.

RECOMMENDED ORDER

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



Susan A. Weinberg
Hearing Examiner

Dated: March 22, 1991
Trenton, New Jersey