P.E.R.C. NO. 86-32

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RIDGEFIELD PARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-176-128

RIDGEFIELD PARK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that the Ridgefield Park Education Association had filed against the Ridgefield Park Board of Education. The charge had alleged that the Board transferred a custodian in retaliation for filing an affidavit in tenure proceedings before the Commissioner of Education. The Commission finds that the Association has not proved its allegation by a preponderance of the evidence.

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RIDGEFIELD PARK BOARD OF EDUCATION,

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-and- Docket No. CO-84-176-128

RIDGEFIELD PARK EDUCATION ASSOCIATION,

Charging Party.

Appearances:
For the Respondent, Aron & Salsberg, Esquires (Lester Aron, of Counsel)

For the Charging Party, Vincent E. Giordano, Field Representative, NJEA UniServ Regional Office

DECISION AND ORDER

On January 9, 1984, the Ridgefield Park Education Association ("Association") filed an unfair practice charge against the Ridgefield Park Board of Education ("Board") with the Public Employment Relations Commission. 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), (3), (4) and (7),[1/] when it transferred a high school custodian, Thomas W.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,
(Footnote continued on next page)

Roberts, from a day shift to a night shift. The charge alleges that the Board transferred Roberts because he had filed an affidavit in tenure proceedings before the Commissioner of Education alleging that the assistant superintendent had made racially derogatory comments.

On March 5, 1984, the Association amended its charge. It further alleged that the transfer violated subsections 5.4(a)(2) and (4).

On April 23, 1984, the Administrator of Unfair Practice Proceedings issued a Complaint and Notice of Hearing.2/

On April 30, 1984, the Board filed its Answer. It admitted that Roberts had filed an affidavit with the Commissioner of Education but asserted that fiscal considerations, rather than this filing, motivated his transfer. It further asserted that this filing did not constitute protected activity under our Act.

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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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; and (7) Violating any of the rules and regulations established by the commission."

2/ The Administrator reviewed briefs on whether filing an affidavit in a tenure proceeding should be considered protected activity within the meaning of the New Jersey Employer-Employee Relations Act. The Administrator concluded that such an allegation might constitute protected activity, thus meeting the complaint issuance standards of N.J.C.A. 19:14-2.1, and that the Association should have an opportunity to prove both its factual and legal allegations.

On December 5, 1984, Hearing Examiner Mark Rosenbaum conducted a hearing. The parties examined witnesses, introduced exhibits and argued orally.[3/] They filed post-hearing briefs by April 4, 1985.

After the hearing, Hearing Examiner Rosenbaum left the Commission's employ. Pursuant to N.J.A.C. 19:14-6.4, Hearing Examiner Jonathan Roth was assigned to issue a report.

On June 24, 1985, Hearing Examiner Roth issued a report recommending dismissal of the Complaint. H.E. No. 85-51, ___ NJPER ___ (¶_____ 1985) (copy attached). He concluded that the Association had not made out a prima facie case that Roberts' affidavit had played a substantial or motivating factor in his transfer and that if a prima facie case had existed, the Board would have transferred Roberts anyway. He also concluded that the Board did not violate subsection 5.4(a)(1) when the Superintendent notified Roberts of his transfer the day after he requested a leave of absence.

On July 9, 1985, the Association filed exceptions. It asserts that it made out a prima facie case of illegal motivation; it presented evidence of a causal connection between the filing of the affidavit and the transfer; the Board did not prove that it would have transferred Roberts if he had not filed the affidavit, and Roberts' transfer interfered with the exercise of his rights.

3/ At the hearing, the Association withdrew that portion of its Complaint alleging a violation of subsection 5.4(a)(2).

The Board has filed a response supporting the Hearing Examiner's recommendations. It has also filed cross-exceptions asserting that the Hearing Examiner erred in not accepting the superintendent's reasons for transferring Roberts to the night shift and in considering Roberts' application for personal leave as protected activity since the Association did not make such an allegation.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-10) are generally accurate. We adopt and incorporate them here with the following additions and modifications. Finding of fact No. 12 states that Roberts participated in collective negotiations in early October 1983; the record, however, is silent as to when in October (before or after the October 12 notice of his transfer) Roberts did so. Finding of fact No. 16 states that Juris testified that it was potentially less disruptive for him to transfer Roberts to the night shift than to transfer a custodian from another district school to the high school and transfer Roberts to that other school to fill the vacancy there; the Hearing Examiner characterizes the testimony as "vague" and "smacking of hindsight and mere theoretical justification", but it makes sense to us that the superintendent would prefer to uproot one employee rather than two.[4/] Finally, we add that night shift custodians receive a bonus of $510 each year.

4/ In finding the Superintendent's explanation to be plausible, we are not secondguessing a credibility determination since the Hearing Examiner who issued the report did not conduct the hearing.

In re Twp. of Bridgewater, 95 N.J. 235 (1984) establishes the standards for determining whether an employer has discriminated against an employee in order to discourage protected activity. The Court stated:

> ...Under the test, 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 factor or a substantial reason for the employer's action. [NLBR v. Transportation Management, ___ U.S. at ___, 113 LRRM 2851 (1983)]. 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 in the absence of the protected activity. Id. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense. Id at 244.

Under all the circumstances of this case, we agree with the Hearing Examiner that the Association has not proved by a preponderance of the evidence that the Board violated the Act when it transferred Roberts to the night shift, even assuming that Roberts was engaged in protected activity when he filed the affidavit with the Commissioner of Education.[5/] The evidence is

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5/ We note that the National Labor Relations Board has recently held that an individual employee does not engage in protected activity when he or she files a complaint with OSHA or with a workers' compensation agency. See Certified Service, Inc., 270 NLRB No. 67 (116 LRRM 1098 (1984); Central Georgia Electric

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insufficient to prove that the Board was hostile to Roberts for filing this affidavit or that it retaliated against him. There is no such direct evidence. The Association instead argues that we should find such proof in the alleged insufficiency of the superintendent's reasons for transferring Roberts and the alleged contractual violations in failing to post a notice of the vacancy or consider seniority in filling it. We disagree. The superintendent's reasons for transferring Roberts are plausible to us. The superintendent needed to reduce a deficit and he therefore decided to eliminate the position of assistant to maintenance mechanic Cliff West after determining that one employee could handle the job by himself. Between the time he made the determination and the time West returned to work, a custodian, who had worked the night shift at the high school, retired. Juris decided to transfer Roberts, who was already working in the high school, to this position rather than switch Roberts and another custodian to new positions in different schools. While the superintendent may have violated contractual procedures in effectuating this plan, we do not believe his explanation is implausible enough to warrant by itself an inference that it was a pretext for an underlying discriminatory

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Membership, 269 NLRB No. 123, 115 LRRM 1311 (1984). The Second Circuit Court of Appeals, however, has disagreed. Ewing v. NLRB, __ F.2d __, 119 LRRM 3273 (2nd Cir. 1985). We also note that subsection 5.4(a)(4) does not protect Roberts' filing of his affidavit since that subsection is limited to proceedings under the New Jersey Employer-Employee Relations Act.

motivation. Accordingly, we hold that the Association has not proved that the Board transferred Roberts in retaliation for protected activity.[6/] We dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Suskin and Wenzler voted in favor of this decision. Commissioner Graves was opposed. Commissioner Hipp abstained.

DATED: Trenton, New Jersey
August 27, 1985
ISSUED: August 28, 1985

6/ We also note that the superintendent recommended the transfer of Roberts in September, before Roberts requested a personal leave which the superintendent denied and Roberts represented the Association in negotiations. Accordingly, these activities did not motivate his transfer. We also do not consider whether the Board violated subsection 5.4(a)(1) when the superintendent denied Roberts a paid leave of absence. This allegation was not pleaded or fairly and fully litigated.

H. E. No. 85-51

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

In the Matter of

RIDGEFIELD PARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-176-128

RIDGEFIELD PARK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Ridgefield Park Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act when it reassigned a custodian from the 8:00 a.m.-3:00 p.m.. shift to the 3:00 p.m.-12:00 a.m. shift. The Hearing Examiner recommends that the Commission dismiss the charge in its entirety.

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. 85-51

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

In the Matter of

RIDGEFIELD PARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-84-176-128

RIDGEFIELD PARK EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Aron & Salsberg, Esqs.
(Lester Aron, Esq.)

For the Charging Party, Vincent E. Giordano,
Field Representative, NJEA

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

On January 9, 1984, the Ridgefield Park Education Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission"). The Association alleged that the Ridgefield Park Board of Education ("Board") violated N.J.S.A. 34:13A-5.4(a)(1), (3), (4) and (7)[1/] of

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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

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the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act") when it reassigned Thomas W. Roberts, a custodian employed by the Board at the Ridgefield Park High School, from the 8:00 a.m.-3:00 p.m. shift to the 3:00 p.m.-12:00 a.m. shift. The charge alleged that Roberts was discriminated against because he filed an affidavit with the Commissioner of Education.

On February 15, 1984, the Administrator of Representation ("Administrator") issued a letter to the Association stating that it did not appear to him that the events complained of involved the exercise of rights protected under the Act. He advised the Association that unless it filed an amended statement of position or alleged additional facts which implicated rights protected under the Act within seven days he would not issue a complaint.

On March 5, 1984, after requesting and receiving an extension of time from the Administrator to file a response, the Association filed an amended charge. It alleged that the Board also violated subsections 5.4(a)(2) and (a)(4) of the Act when it reassigned Roberts to the night shift as a result of his filing of an affidavit with the Commissioner of Education.

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in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (7) Violating any of the rules and regulations established by the commission."

On March 19, 1984, the Board filed its response to the Association's amended charge. It asserted that the Association failed to cure the deficiencies of its original charge and did not allege any discrimination based upon protected union activity. The Board accordingly requested that the Administrator decline to issue a complaint.

On March 21, 1984, the Administrator asked the Board for its position on whether the filing of a sworn affidavit with the Commissioner of Education was protected activity under the Act.

On April 2, 1984, the Board filed its response to the Administrator's request. It asserted that Roberts' affidavit was evidentiary support of a tenure charge specifically contemplated under the Education Law, N.J.S.A. 18A:6-1 et seq. It further asserted that the right to file an affidavit in support of tenure charges is not a right guaranteed under the Act. Moreover, it asserted that the affidavit was not filed in support of a "grievance." It again requested that the Administrator decline to issue a complaint.

On April 23, 1984, the Administrator issued a Complaint and Notice of Hearing in this matter.

On December 5, 1984, Hearing Examiner Mark Rosenbaum conducted a hearing in this case, at which time the parties examined witnesses, presented evidence and argued orally.[2/] Prior to the

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2/ Hearing Examiner Rosenbaum left the Commission's employ on February 1, 1985. The Commission Designee transferred this case to me to issue a decision. See N.J.A.C. 19:14-6.4.

presentation of its case at the hearing the Association withdrew that portion of the charge alleging violations of subsection 5.4(a)(2) of the Act. Upon conclusion of the Association's presentation of its case the Board moved to dismiss the entire remaining charge. Hearing Examiner Rosenbaum granted the motion with respect to the allegations that the Board violated subsections 5.3(a)(4) and (a)(7) of the Act and denied the motion with respect to allegations that the Board violated subsections (a)(1) and (3) of the Act. Both parties filed post-hearing briefs by April 4, 1985.

FINDINGS OF FACT

1. The Ridgefield Park Board of Education is a public employer within the meaning of the Act and is subject to its provisions.

2. The Ridgefield Park Education Association is a public employee representative within the meaning of the Act and is subject to its provisions.

3. In 1977, Thomas W. Roberts was hired as a custodian by the Board. Prior to November 1, 1983, he worked from 8:00 a.m.-3:00 p.m. at Ridgefield Park High School. Roberts is included in a negotiations unit of teachers, secretaries, librarians, custodians and others represented in collective negotiations by the Association. The most recent negotiations agreement between the Board and the Association commenced July 1, 1983 and expires on June 30, 1985.

4. Roberts is a member of the Association and frequently attends its meetings. The record does not indicate what office, if any, Roberts holds in the Association. As a representative of the custodians he communicates their concerns to the Association executive board and relays information to them concerning terms and conditions of employment. He does not represent employees at grievance proceedings. Roberts is one of two custodians who wear a cap at work upon which the Association's initials are affixed.

5. On June 7, 1983, Roberts filed a sworn affidavit with the Commissioner of Education concerning an allegedly offensive remark made in his presence to Clifford West, another maintenance employee, by a member of the Board. At the time of the incident West and Roberts were the only two maintenance employees assigned to the day shift at the high school[3/]. On or about July 13, 1983, West took a leave of absence and did not return to work until October 12, 1983.[4/] During West's absence, Roberts adequately tended to all of the high school's maintenance needs. Juris confirmed this observation with the building principal.

3/ Board Superintendent Juris testified that West was a "maintenance mechanic" and paid at a different rate than were custodians.

4/ The record suggests that West was on leave because he was ill (T. p. 121). Juris also apparently advised West that the Board did not intend to pay him for the time he was on leave and not ill (R-4).

6. On September 23, 1983, Board Superintendent Charles Juris sent a memorandum to the Board (R-1) in response to its request of him to project the school district's budget for the 1983-84 term. In the memorandum Juris projected an overall deficit of $19,962. He also proposed to reduce the deficit in part by "[reducing] the maintenance crew by one. If Cliff West returns, put Tom Roberts in a building and save $11,400. Remember that a custodian will have to go." (R-1)

7. On September 30, 1983, Edward Thompson, a custodian who worked from 3:00 p.m.-12:00 a.m. at the high school, submitted a letter of resignation effective November 1, 1983 to the high school principal (R-2). On October 5, 1983, the Board accepted Thompson's resignation (R-3).

8. Juris admitted that a vacancy was created by Thompson's resignation. He did not post[5/] a notice of vacancy for

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5/ Article XIV of the Agreement provides:

> A. All vacancies in existence or newly created positions shall be publicized by the Superintendent or his agent.
>
> B. When school is in session, a notice shall be posted in each school as far in advance as practicable, ordinarily at least thirty (30) school days before the final date when applications must be submitted and in no event less than fifteen (15) school days before such date. A copy of said notice shall be given to the Association at the time of posting. Employees who desire to apply for such vacancies shall submit their applications in writing to the superintendent within the time limit specified in the notice, and the superintendent shall acknowledge promptly in writing the receipt of all such applications.

the night shift position because he intended to reduce in force ("RIF") one custodian position. He also believed that a posting was unnecessary under the terms of the Agreement (J-1). Juris did not immediately reassign Roberts to the night shift because he did not know when West would return to work. The Association did not file a contractual grievance concerning the Board's failure to post a notice of vacancy because it was unaware of the possible contractual violation (T p. 74).

9. Juris admitted that on numerous occasions he sought from Mark Press, President of the Association, the Association's waiver of various contract provisions when the Board wished to implement changes at the workplace (T. p. 132). Juris did not seek the Association's waiver of Article XIV, Paragraph B of the Agreement before he reassigned Roberts. The Association presented no specific evidence of a past practice in which it agreed to waive contract provisions allowing the Board to reassign custodians.

10. The Board employs three less senior custodians than Roberts at other district schools. Juris did not ask them if anyone wanted to fill the vacancy.[6/]

6/ Article IV of the Custodians section of the Agreement provides:
A.1. Custodians shall be considered for vacanct positions
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11. Juris did not seek volunteers among custodians for the vacancy.

12. In early October, 1983, Roberts conferred in a caucus with the Association at collective negotiations sessions between the Board and the Association. However, the Association alleged no particular facts concerning the Board's anti-union animus towards it in general or Roberts in particular while the parties were negotiating.

13. On October 11, 1983, Roberts filed an application for personal leave with Juris. Roberts stated in his application that he wished to be absent with pay on October 17 in order to take a required written examination for postal employees. Juris promptly denied the application. The Association grieved and pursued through arbitration Juris' denial. On November 9, 1984, the designated arbitrator found in favor of the Association (CP-3).

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in order of seniority. Part-time employees shall be listed on the bottom of the seniority list and considered for vacant positions after full-time employees.

2. Paragraph A.1., above, is intended to provide a procedural order of consideration and not a preference. It does not limt the Board's ability to consider all applications.

B. The parties to this Agreement covenant and agree that the responsibility for filling any and all positions is that of the Board and the determination of the Board in connection with the filling of any and all positions shall be conclusive, final and biding o the parties and the actions of the Board shall not be subject to the Grievance Procedure in connection with the filling of any publicized positions or promotions.

14. On October 12, 1983, West returned to work from his three-month leave of absence. On the same date Juris issued a memorandum to the Board stating that West reported to work and that "...we [the Board] are faced with the transfer of Tom Roberts to a custodian building assignment which will be effective November 1, 1983, since it will be at that time that we have an opening" (R-4). Juris had no advance notice of West's return to work at the high school.7/

15. On the same date, Juris issued a memorandum to Roberts stating that effective November 1, 1983, he would be assigned to the night shift at the high school. It also stated that he was being reassigned because the Board "...will be reducing one of the maintenance staff effective by the end of this month..." (C-1). Roberts was informally notified of the notice of reassignment on October 11, 1983. Juris sent a copy of the memorandum (C-1) to the Association.

16. Juris testified that it was less potentially disruptive to the workplace for him to reassign Roberts to the night

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7/ The record indicates that West was senior to Roberts. However, no one at the hearing testified as to the precise reasons why Roberts was reassigned to the night shift instead of West, especially in light of Roberts' adequate handling of maintenance duties on the day shift. Moreover, the Association did not allege that Robert' reassignment in relation to West's return to the day shift on October 12, 1983, connotes employer anti-union animus. Accordingly I draw

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shift than to transfer a custodian from another district school to the high school and transfer Roberts to that other school to fill the vacancy there (T. p. 135). Juris did not know if the potential disruption caused by such a transfer was "serious." Juris' testimony is vague and smacks of hindsight and mere theoretical justification. I do not credit this portion of his testimony.

17. On October 14, 1983, Roberts again applied for personal leave with Juris in order to take the upcoming postal examination. He applied for the leave without pay. Juris promptly granted the request.

ANALYSIS

In In re Twp. of Bridgewater and Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court articulated the following legal standards for analyzing allegations that an employer has discriminated against an employee in order to discourage protected activity:

> ...Under the test, 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 factor or a substantial reason for the

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no factual inferences and make no legal conclusion with respect to Juris' decision to reassign Roberts instead of West to the night shift.

> employer's action. [NLRB v. Transportation Management, ___ U.S. at ____, 113 LRRM 2851 (1983)]. 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 in the absence of the protected activity. Id. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense.

Applying the Bridgewater standards in the instant case and based upon my review of the record, I find that the Board did not violate subsections 5.4(a)(1) and (3) of the Act when it reassigned Thomas W. Roberts from 8:00 a.m.-3:00 p.m. shift to 3:00 p.m. to 12:00 a.m. at the high school.

I first consider whether the Association has made a prima facie showing that Roberts' protected activity was a substantial or motivating factor in the decision to reassign him. I hold that it has not.

The Association asserts that Roberts' protected activity included his filing of the affidavit with the Commissioner of Education, representing custodians before the Association's executive board, participating in collective negotiations with the Board and filing applications for personal leave under the terms of the Agreement. I assume without deciding that all of Roberts' above-referred activities are protected under the Act and that the Board knew of them.

The Association has presented no direct evidence of anti-union motivation and only some indirect evidence of such

motivation since Roberts was engaged in protected activity. It alleges that Roberts' reassignment, following his filing of the affidavit concerning a member of the Board, is an indication of anti-union animus. It also points out that the Board did not post a notice of vacancy (as was its duty under the Agreement) for the available custodian position on the night shift at the high school after Thompson submitted his resignation; nor did the Board consider filling the vacancy with any less senior custodians than Roberts, as was its duty under Article IV of the Custodian section of the Agreement.

The record does not suport the Association's core charge that Roberts was discriminated against because he filed an affidavit with the Commissioner of Education. The Association presented no evidence of a causal connection or nexus between the filing of the June 7, 1983 affidavit and Juris' September 23 memorandum to the Board contigently recommending Roberts' reassignment. The three and one-half months which lapsed (without one alleged incident of anti-union animus) between the filing of the affidavit and the issuance of the memorandum (R-1) connotes no hostility in the Board's decision to reassign. See Civic Center Sports, 206 NLRB 428, 84 LRRM 1637 (1973).

The Association has presented scant evidence of a nexus between the filing of the affidavit and Juris' October 12th notice of assignment to Roberts. With respect to the Board's failure to post a notice of vacancy for the night shift position following

Thompson's resignation on September 30, 1983, I find that the Association has alleged little more than a possible contractual violation. It alleged no facts indicating that Juris' decision not to post a notice was based upon Robert's union activities. Notwithstanding Roberts' participation in collective negotiations in early October, 1983, the Association neither alleged nor presented facts suggesting that Juris continued to refuse to post the vacancy because of Roberts' union activities.

The Board transferred Roberts shortly after he participated in collective negotiations. The close timing of these events could suggest the presence of employer anti-union animus. However, the Association failed to allege facts concerning the Board's anti-union animus towards it in general or Roberts in particular while the parties were in negotiations. Moreover, it alleges that Roberts' participation in negotiations is an indication of his union activity and the Board's knowledge of such activity. It does not allege that his participation was a basis for the reassignment. Accordingly, I find no causal connection between Roberts' participation in negotiations and either the Board's continuing refusal to post a notice of vacancy or its decision to reassign Roberts.

With respect to the allegation that the Board did not consider less senior custodians than Roberts for the vacancy, I find that the Association presented no evidence of a specific past practice in which the Board assigned custodians to locations or shifts based upon their seniority. Furthermore, Association

President Press admitted on cross-examination that the Agreement does not require that assignments be made on the basis of seniority (T. p. 77). Moreover, even if Article IV of the Custodians section of the Agreement required that assignments be made on the basis of seniority, the Association alleged no additional facts indicating that the Board violated the Agreement because it desired to retaliate against Roberts for his participation in union activities.

The Association's charge that the Board discriminated against Roberts on October 12, 1983 (when it notified him of the transfer) because he filed a request for paid leave on October 11 is meritless. The Association presented no facts suggesting that Juris' denial of the request was illegal under the Act or that there was a causal connection between the denial and the notice of assignment. On September 23, 1983, Juris proposed in writing to the Board that if West returned he would reassign Roberts. The Association failed to rebut Juris' testimony that West returned to work without previously notifying the Board of his decision on October 12. That Roberts applied for leave on October 11 and Juris was first able to effect his original plan one day later is a matter of relative coincidence and not of discrimination.

Finally, the Association alleged that the Board violated the Act because it did not solicit custodians to voluntarily transfer to the night shift. The Association presented no facts suggesting that it and the Board have a past practice of soliciting volunteers for available custodian positions. Even if the

Association proved that the Board violated such an established past practice, it would not have proved (without more) that the Board violated subsection 5.4(a)(3) of the Act. Accordingly, I conclude that the Association has failed to make a prima facie showing that Roberts' protected activity was a substantial or motivating factor in the decision to reassign him.

Assuming that the Association made a prima facie showing that Roberts' protected activity was a motivating or substantial factor in the decision to reassign him, I next consider whether the Board has proved by a preponderance of evidence that it would have reassigned him even in the absence of protected activity. I conclude, for the reasons set forth below, that the Board has met this burden.

Juris observed during West's absence that Roberts adequately performed all necessary maintenance duties for the high school on the day shift. During this period Juris was also required to submit a proposed budget to the Board for the upcoming school term. He issued the proposed budget including a bottom line deficit and suggestions to reduce the deficit in a memorandum to the Board on September 23, 1983 (R-1). It stated that one way to reduce the deficit would be to RIF one custodian position. It also stated that if West returned, Roberts should be reassigned to a building. This written recommendation corroborates Juris' testimony that only one custodian was needed for the day shift at the high school. It also strongly suggests that Juris' decision to reassign Roberts essentially depended upon West's return to the high school and

rebuts the allegation that his motive was to retaliate against him for his union activities. As previously stated I find that the Association's failure to allege any incidents of anti-union animus between June 7 and September 23 connotes no hostility in the employer's decision to reassign. Moreover, the Association presented no evidence rebutting the validity of the memorandum (R-1) or demonstrating that it was pretextual (i.e., that the real reason Juris issued it was to reassign Roberts in violation of the Act). The Association also did not rebut the Board's contention that Roberts successfully performed all maintenance duties at the high school.

The position on the night shift became available when Thompson submitted his resignation on September 30, 1983. Juris was no longer faced with having to RIF a custodian. Rather, he facilitated his September 23 proposal by awaiting West's return and reassigning Roberts to the night shift. On October 12 West returned to work and Juris issued another memorandum to the Board expressing his intent to transfer Roberts to a "custodian building assignment" on November 1, 1983, the date Thompson's resignation was to take effect. Juris also notified the Association of his decision.

I do not credit Juris' testimony concerning his reasons for not reassigning less senior custodians from other schools to the high school. However, the Board has demonstrated (often by documentary evidence) that its decision to reassign Roberts was based on fiscal concerns, Juris' observation that only one custodian

was needed on the day shift at the high school and Thompson's resignation. Accordingly, the Board has proved that its decision to reassign would have occurred in the absence of protected activity.

Finally, I address the issue of whether the Board violated N.J.S.A. 5.4(a)(1) of the Act when Juris notified Roberts of the reassignment one day after he requested a paid leave of absence. The standard for the violation was expressed in N.J. Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (para. 10285 1979) where the Commission held:

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

Notwithstanding Roberts' testimony to the contrary (T. p. 55), I find that the Board's reassignment did not tend to interfere with, restrain or coerce Roberts in the exercise of his rights under the Act. Two days after learning of his reassignment, Roberts submitted a second request for leave. Furthermore, Roberts did not resign from his position as a representative of the custodians or cease wearing a cap at work upon which the Association's initials are affixed. Roberts did not cite any specific union activity he no longer performs or performs under fear of reprisal since Juris denied his October 11 request for leave. Accordingly, the Association has not proved that the Board violated 5.4(a)(1) of the Act.

RECOMMENDATION

Based upon my analysis of the facts and issues in this case I recommend dismissal of the entire charge.

Jonathan Roth
Hearing Examiner

Dated: June 24, 1985
Trenton, New Jersey