P.E.R.C. NO. 85-110

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MATAWAN-ABERDEEN REGIONAL
BOARD OF EDUCATION and
MICHAEL KIDZUS,

Respondents,

-and-

Docket No. CO-84-316-42

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge that the Matawan Regional Teachers Association filed against the Matawan-Aberdeen Regional Board of Education and Michael Kidzus. The charge alleged that the Board and Kidzus violated the Act when Kidzus, a member of the Board of Education, threatened to terminate two employees unless they agreed to waive contractual benefits and attempted to coerce them into withdrawing the unfair practice charge. The Commission holds that Kidzus was not a "public employer" or a "representative or agent" of the Board of Education within the meaning of the New Jersey Employer-Employee Relations Act and that the Board did not authorize or ratify Kidzus' activities.

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MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Charging Party.

Appearances:

For the Respondents, DeMaio & DeMaio, Esqs.
(Vincent C. DeMaio, of Counsel)

For the Charging Party, Oxfeld, Cohen & Blunda, Esqs.
(Mark J. Blunda, of Counsel)

DECISION AND ORDER

On May 18, 1984, and August 9, 1984, the Matawan Regional Teachers Association ("Association") filed an unfair practice charge and amended charge against the Matawan-Aberdeen Regional Board of Education ("Board") and Michael Kidzus ("Kidzus"), a Board member, with the Public Employment Relations Commission. The charge, as amended, alleged that the Respondents violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1),(2),(3),(4),(5) and (7),[1/]

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

when Kidzus circumvented the Association by contacting two non-tenured members of the negotiations unit and threatened their employment unless they agreed to waive contractual salary benefits. The amended charge further alleged that after the initial charge, Kidzus contacted two employees represented by the Association and "attempted to coerce them into influencing the Matawan Regional Teachers Association into withdrawing the pending unfair practice charge against him." The charge alleged that the Board approved Kidzus' actions.

On September 13, 1984, the Administrator of Unfair Practice Proceedings issued a Complaint and Notice of Hearing. On September 24, 1984, the respondents filed their Answer. Kidzus admitted having conversations with staff members, but denied that they were coercive or unlawful. The Board denied that it sanctioned, ratified or approved Kidzus' alleged conduct.

On October 12, 1984, Hearing Examiner Mark A. Rosenbaum conducted a hearing. The parties examined witnesses and argued orally. They also filed post-hearing briefs. Hearing Examiner Rosenbaum subsequently left the employ of the Commission and it designated Hearing Examiner Alan R. Howe to issue a report and recommended decision.

1/ (continued) 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; (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; and (7) Violating any of the rules and regulations established by the commission."

On February 27, 1985, Hearing Examiner Howe issued his report and recommended decision. H.E. No. 85-29, 11 NJPER ___ (Para. _____ 1984) (copy attached). He concluded that Kidzus was not a "public employer" or a "representative or agent" of the Board and the Board did not authorize or ratify Kidzus' activities. Therefore, he recommended dismissal of the Complaint.

On March 13, 1985, after receiving an extension of time, the Association filed exceptions.[2/] It contends that the Hearing Examiner erred in finding that Kidzus was not a "public employer" within the meaning of the Act and was not an "agent or representative of the Board."

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-6) are accurate and we adopt them here.

We agree with the Hearing Examiner that this Complaint should be dismissed. Our Act proscribes unfair practices by "public employers, their representatives or agents." N.J.S.A. 34:13A-5.4. N.J.S.A. 34:13A-3(c) defines "employer" and "public employers" as:

> (c) The term "employer" includes an employer and any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification, but a labor organization, or any officer or agent therof, shall be considered an employer only with respect to individuals employed by such organization. This term shall include "public employers" and shall mean the State of New Jersey, or the several counties and municipalities thereof, or any other political subdivision of the State, or a school district, or any special district, or any authority, commission, or board, or any branch or agency of the public service.

2/ It also requested oral argument. We deny that request.

Plainly, an individual board member is not a public employer within the meaning of the above definition. See Dorrington v. Board of Education of the Township of North Bergen, 1982 S.L.D. ___ (decided March 24, 1983) (an individual Board member cannot bind the Board as an entity to a particular course of action). Nor, under the circumstances of this case, can Kidzus be found to have been "acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification." The Board did not have prior knowledge of Kidzus' actions and certainly did not ratify them. To the contrary, the record establishes that Kidzus was acting adverse to the desires of the Board. Indeed, he described himself as a "minority" Board member.

Nor, for the same reasons just expressed, was Kidzus acting as an agent or representative of the Board with respect to the conduct. "Representative" is defined in N.J.S.A. 34:13A-3(e) as:

> any organization, agency or person authorized or designated by a public employer, public employee, group of public employees, or public employee association to act on its behalf and represent it or them.
> (emphasis added)

Kidzus was not authorized to act on the Board's behalf.

Nor was Kidzus an "agent." In Commercial Township Board of Education, P.E.R.C. No. 83-25, 8 NJPER 550 (Para. 13253 1982) aff'd App. Div. Docket No. A-1642-82T2 (1983), in finding a board of education liable for the actions of its superintendent and president, we said:

> We entertain no doubt that the superintendent and president were representatives and agents of the Board in this case. The superintendent's normal duties include evaluating employees, discussing these evaluations with the Board, making recommendations concerning employees, and participating in the grievance process. The letter in question was issued in connection with the discharge of these functions. Indeed, the superintendent prefaced his threat of dismissal with the statement that Collingwood's poor behavior and attitude had been the subject of much discussion with the Board. Thus, it is clear that the superintendent was performing the duties contemplated by the Board when he issued the letter. Similarly, the president of the Board attended the negotiations meeting at which he threatened Collingwood as a representative of the Board authorized to participate in the negotiations. In sum, the superintendent and the principal both were acting within the scope of the authority delegated to them by the Board and their apparent authority as Board agents, regardless of whether the Board formally ratified or even knew of the threats they made. Compare R. Gorman, Basic Text on Labor Law, pp. 134-137 (1976) (employer responsible for actions of supervisors which are impliedly authorized or within apparent authority of actor; whether specific acts were actually authorized or subsequently ratified is not controlling). [Id. at 552].

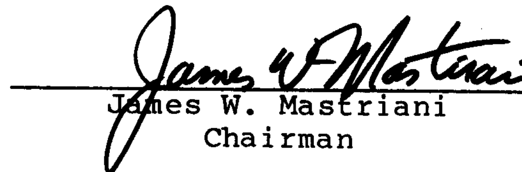
In contrast, here it is quite clear that Kidzus was not acting as an agent of the Board. His meetings and conversations with the employees were not within his normal duties or "apparent authority." Unlike the president in Commercial Township, Kidzus' comments were not made during a negotiations session or any other authorized meeting. Indeed, he was not even a member of the negotiations committee.

In sum, Kidzus acted solely as an individual board member. He was not authorized to so speak by the Board; it did not approve or ratify his actions; and he did not even have "apparent authority."[3/] Under such circumstances, the Complaint must be dismissed. See also Yonkers Board of Education and Yonkers Federation of Teachers, 10 NYPERB 3101 (Para. 3057 1977).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Wenzler and Suskin voted in favor of this decision. Commissioner Hipp dissented from consideration of this decision. Commissioner Graves was not in attendance.

DATED: Trenton, New Jersey
April 25, 1985
ISSUED: April 26, 1985

3/ We do not find that an individual Board member may never violate the Act. We merely hold that, under these facts, Kidzus' behavior (although inappropriate) did not constitute an unfair practice.

H.E. No. 85-29

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

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EDUCATION and

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Respondents

-and-

Docket No. CO-84-316-42

MATAWAN REGIONAL TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the individual Respondent Kidzus and the Respondent Board did not violate Subsections(a)(1), (2) or (5) of the New Jersey Employer-Employee Relations Act under the circumstances of Kidzus, a member of the Board: (1) not having acted in the interest of the Board with its knowledge or ratification; (2) not having acted as a "representative" of the Board since he was not authorized or designated to act on its behalf; and, finally, (3) not having been an "agent" of the Board. Kidzus on his own initiative separately approached two employees in the collective negotiations unit and urged that they take a 5% pay cut, which each employee rejected, one employee having been approached in her office during working hours and the second employee having been approached in the parking lot. The Hearing Examiner concluded that the Board did not by its conduct clothe Kidzus with "apparent authority" to act on its behalf when he engaged the two employees in the pay cut conversations. Further, the Hearing Examiner found that even if Kidzus was clothed with "apparent authority," he exceeded the limits of that authority and thus the Board could not be bound by his conduct.

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.

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(Vincent C. DeMaio, Esq.)

For the Charging Party
Oxfeld, Cohen & Blunda, Esqs.
(Mark J. Blunda, Esq.)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on May 18, 1984, and amended on August 9, 1984, by the Matawan Regional Teachers Association (hereinafter the "Charging Party" or "Association") alleging that the Matawan-Aberdeen Regional Board of Education and Michael Kidzus (hereinafter the "Respondents," the "Board" or "Kidzus" [1/]) have engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Board and the Association are parties to a collective negotiations agreement effective for the 1983-84 and 1984-85 academic years; that on or about

1/ The original Unfair Practice Charge named Kidzus alone as the Respondent, identifying him as a "Member, Agent & Representative of Matawan-Aberdeen Regional Board of Education." The Amended Unfair Practice Charge named both Kidzus and the Board as Respondents.

January 30, 1984 Kidzus suggested to the Association that it agree voluntarily to reduce the negotiated salaries for members of the unit, which the Association refused; that thereafter, between February 1 and February 22, 1984, Kidzus intimidated, interfered with and restrained individual employees and the Association by privately contacting non-tenured members of the unit and threatening their employment unless they agreed to waive contractual salary benefits; that Kidzus directly approached and spoke to Susan Hourihan and Barbara Cholewa, suggesting that each take a 5% reduction in salary in order to save jobs; and that after notice from the Commission that a conference would be held on June 20, 1984, Kidzus spoke to two unit members, John McKenna and Jack Evans, and attempted to coerce them into influencing the Association to withdraw the original Unfair Practice Charge against Kidzus; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5) & (7) of the Act.[2/]

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 13, 1984. Pursuant to the Complaint and Notice of Hearing, a hearing was held before Hearing Examiner Mark A. Rosenbaum on October 12, 1984[3/] in Trenton, New Jersey, at which time the parties were given an

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2/ These Subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act.

"(2) Dominating or interfering with the formation, existence or administration of any employee organization.

"(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

"(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.

"(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.

"(7) Violating any of the rules and regulations established by the commission."

3/ At the hearing the Respondent's oral Motion to Dismiss was granted as to the allegations of a violation of Subsection(a)(3), (4) and (7) of the Act, and, also, as to any violation regarding McKenna and Evans (Tr. 142, 143, 145 & 148).

opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by February 5, 1985.

Hearing Examiner Rosenbaum resigned from the Commission effective February 1, 1985. The instant matter was reassigned to the instant Hearing Examiner on February 11, 1985 for the issuance of a decision. Based on the record made at the hearing on October 12, 1984 and the post-hearing briefs filed by the parties, the undersigned Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Matawan-Aberdeen Regional Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Matawan Regional Teachers Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Michael Kidzus is a member of the Matawan-Aberdeen Regional Board of Education, but his status as an alleged agent and representative of the Board is the major issue to be resolved in the instant Recommended Report and Decision, i.e., whether or not Kidzus is an agent or representative of the Board, who is subject to the provisions of the Act, as amended.

4. Kidzus has been a member of the Board for 12 years and two or three years ago he was Vice President (Tr. 150). During this period Kidzus has never been a member of the Board's Negotiating Committee or its Personnel Committee (Tr. 151). Kidzus has never voted with the majority of the Board, and he characterized himself as a minority Board member (Tr. 44, 45, 76, 160).

5. The Association is the collective negotiations representative for approximately 500 of the Board's employees in four units: the Teachers Unit; the Clerical Unit; the Custodial Unit and the Bus Driver Unit (Tr. 13, 71). The current collective negotiations agreements are effective from July 1, 1983 through June 30, 1986, and contain an 8-1/2% salary increase for each of the three years (Tr. 67, 68, 71, 72).[4/]

6. During January and February 1984 the Board was struggling with a budget

4/ Kidzus voted against ratification of the current agreements (Tr. 73).

problem and since they were at CAP the Board was considering a RIF of 20 teaching positions and six clerical positions (Tr. 20, 28, 37, 43, 70). Among the alternatives considered at that time was the restructuring of the school day, which was negotiated with the Association and an agreement was reached (Tr. 54, 55).

7. Marie Panos has been the President of the Association for 17 consecutive years and headed the Association's Negotiating Committee for the 1983-86 agreement (Tr. 67).

8. At a public meeting of the Board on January 31, 1984, Kidzus, in directing a statement to Panos, proposed that each unit employee agree to a $900.00 salary cut per year in order to ease budgetary problems, which Panos rejected (Tr. 72). Kidzus had made no motion in support of his proposal nor did the Board take any action in response thereto (Tr. 38, 72, 73, 152).

9. On February 1, 1984, during a budget meeting of the Board, Kidzus reiterated his proposal for a salary cut, this time changing his proposal from a reduction of $900.00 per employee per year to a 5% salary reduction per employee per year (Tr. 75). This was flatly rejected by Panos and the Association (Tr. 75, 162). No formal request had been made by the Board to the Association to enter into negotiations to modify the terms set forth in the current agreement (Tr. 76). At this meeting on February 1st, the Board took no formal action on the "Kidzus proposal" (Tr. 75, 76, 152).

10. Shortly after the February 1, 1984 Board meeting, supra, Kidzus approached two individual members of the unit concerning a voluntary reduction in their salaries, a fact which is undisputed.

a. The first individual was Susan Hourihan who, at the time of the hearing, was the Corresponding Secretary of the Association and a regular attendee at Board meetings (Tr. 12). Hourihan had previously been employed by the Board from 1976 to 1980, at which time she resigned; returning to employment with the Board in September 1982 as a Learning Disability Teacher Consultant (Tr. 15, 16). Thus,

in February 1984, she was non-tenured. Kidzus approached Hourihan in her office during the normal school day and asked her about taking a 5% pay decrease, which she stated she would not entertain. Kidzus then asked her if she "...wasn't low person on the totem pole," which she acknowledged (Tr. 25). In the face of Hourihan's rejection of Kidzus' pay decrease proposal, Kidzus stated that she could lose her job if her area was cut, indicating that she would be the first to go and would not find a job elsewhere (Tr. 25, 26). Hourihan testified that she understood that Kidzus was speaking to her as a Board member[5/] and that she was "troubled" and "worried" by his visit to her office (Tr. 27, 28, 29). Hourihan did not report the incident to the Association, explaining that she did not want to rock the boat (Tr. 30, 34).

b. The second individual that Kidzus approached was Barbara Cholewa, who works in the Central Administration Office as an Information Services Specialist (Tr. 57). Cholewa is a 12-year employee who was in her first year as an Information Services Specialist in 1983-84 (Tr. 57). Kidzus encountered Cholewa in the parking lot where Kidzus broached his 5% salary reduction proposal. Cholewa testified that during the conversation she felt "annoyed" and "insulted" because she felt that she deserved the 8.5% salary increase that had been negotiated (Tr. 62). As in the case of Hourihan, Cholewa testified that she felt that Kidzus was speaking to her as a Board member and that her response would go back to the rest of the Board (Tr. 63).

11. Panos learned of the Kidzus conversations with Hourihan and Cholewa shortly after they occurred and at the February 13, 1984 public meeting of the Board she raised the topic with the Board President Robert Fenske, asking if he was aware that Kidzus had spoken with Association members regarding a pay cut (Tr. 77). Fenske indicated that he was not aware, but Kidzus interjected that he had spoken to two staff members and had a right to do so (Tr. 32, 33, 78).

5/ Kidzus testified that he had not engaged in discussions with Hourihan and Cholewa as a Board member, but rather as a private citizen (Tr. 184).

12. The next meeting of the Board, and the last meeting relevant hereto, took place on February 21, 1984. Panos testified that she stood up and stated to the Board that the Association had contacted its attorneys regarding the conduct of Kidzus, and that the Association was firmly convinced that the law had been violated, and that the Association was going to file "more than likely an unfair labor practice charge" (Tr. 51, 79, 80). Panos then asked the Board to disavow the conduct and comments of Kidzus so that the Association could determine if it would file against Kidzus "...who had acted as an individual Board member or against the full Board..." (Tr. 80). At that point the attorney for the Board stated that he did not think it was "appropriate" for the Board to respond to the request of Panos. Notwithstanding the advice of the Board's attorney, two Board members responded, namely, Marilyn Brenner said that she would not support Kidzus and Douglas Scott indicated that he lacked sufficient knowledge either to "condemn or condone" (Tr. 51, 52, 80).

DISCUSSION AND ANALYSIS

Board Member Michael Kidzus Is Not A "Public Employer" Nor Did He Act As A "Representative" Of The Board Or As Its Agent In Connection With His Conduct Herein

In reaching the conclusion that Kidzus is neither a "public employer" nor a "representative" or an "agent" of the Board, in connection with his discussions with Hourihan and Cholewa in February 1984, the Hearing Examiner first distinguishes the only Commission decision on the question: Commercial Township Board of Education, P.E.R.C. No. 83-25, 8 NJPER 550 (1982), aff'd. App. Div. Docket No. A-1642 -82T2 (1983).

The facts in Commercial involved two aspects, namely: (1) the Superintendent's sending of a letter to the Association President, in which he threatened to recommend her dismissal unless her attitude, behavior and acceptance of responsibility substantially improved within 90 days, which the Commission concluded was based upon the Association President's exercise of protected

activities under the Act; and (2) the statement of the Board's President to the same Association President at a negotiations session that she was "...nothing but a liar, a troublemaker and (that) if he had his way (she) would not be employed by the school system, that (she) would have been fired a long time ago."

Counsel for the Board in Commercial argued that the Board should not be held responsible for the actions of its Superintendent and President, relying upon the definition of "employer" in N.J.S.A. 34:13A-3(c), which provides, in part: "The term 'employer' includes an employer and any person acting, directly or indirectly, on behalf of or in the interest of an employer with the employer's knowledge or ratification." (Emphasis supplied). The Board there contended that it did not know of or ratify the actions in question. In rejecting this contention, the Commission noted that N.J.S.A. 34:13A-3(e) defines "representatives," in part, as "...any person authorized or designated by a public employer... to act on its behalf and represent it..." (Emphasis supplied).

Although Section 5.4(a) of the Act begins by prohibiting "public employers, their representatives or agents" from committing specified acts, there is no definition in the Act of the term "agent." Applying the foregoing definitions in the Act, together with agency principles, the Commission held in Commercial that the Board's Superintendent and its President were representatives and agents of the Board in connection with the conduct complained of, supra. The letter from the Superintendent was issued in connection with the discharge of his functions, which included evaluating employees and making recommendations concerning them. Similarly, the President of the Board made his threatening statement to the Association President in the context of a negotiations session where he appeared as a representative of the Board, who was authorized to participate in negotiations. The Commission concluded by stating:

> "In sum, the superintendent and the president both were acting within the scope of the authority delegated to them by the Board and their apparent authority Board agents, regardless of whether the Board formally ratified or even knew of the threats they made..." (8 NJPER at 552).

First, the Hearing Examiner considers the status of Kidzus as an "employer" within the meaning of Section 3(c) of the Act. The applicable portion of Section 3(c) is that dealing with a "person acting, directly or indirectly, ...in the interest of an employer with the employer's knowledge or ratification." It is as plain as a pikestaff that the conduct of Kidzus vis-a-vis Hourihan and Cholewa, supra, was undertaken by him without the knowledge or ratification of the other members of the Board. On February 13, 1984, Board President Fenske stated, in response to a question from Panos, that he was not aware. Admittedly, Kidzus, at this same meeting on February 13th, volunteered that he had spoken to two staff members and had a right to do so. At that point the members of the Board and its President had "knowledge." However, this was after the fact. Thereafter, the Board failed to ratify in any manner the conduct of Kidzus in speaking to Hourihan and Cholewa. Thus, the Hearing Examiner concludes that on the facts herein, Kidzus did not act, directly or indirectly in the interest of the Board with its prior knowledge or its ratification after the event.[6/]

It is noted that the Commission in Commercial, supra, did not address and decide the status of the Superintendent and the Board President as an "employer" under the Act. The Commission predicated its holding on the application of the terms "representatives" and "agents" of the Commercial Township Board.

Moving now to the definition of "representatives" in Section 3(e) of the Act, the Hearing Examiner notes that the term includes any person "authorized or designated" by a public employer to act on its behalf. It strains credulity for one to conclude that Kidzus was in any manner authorized or designated by the Board to approach Hourihan and Cholewa under the circumstances herein, namely, in Hourihan's office in

6/ The Hearing Examiner attaches no legal significance to the failure of the Board to disavow the conduct of Kidzus as requested by Panos on February 21, 1984. Panos prefaced her request by a clear statement that the Association considered the law as having been violated, followed by a threat to file an "unfair labor practice charge." Under these circumstances, the Board acted reasonably in relying upon its attorney's advice that it would not be "appropriate" to respond to Panos' request. The unsolicited responses of two Board members are not probative on the issue of disavowal or ratification.

a school building and in the parking lot in the case of Cholewa. Thus, unlike Commercial, the Hearing Examiner can find no basis for concluding that Kidzus was a "representative" as defined in Section 3(e) of the Act.

However, as noted above, the Act does not define the term "agent," and resort must be had to the law of a agency. Counsel for the Board correctly cites as pertinent the agency principle of "apparent authority" for determining the status of Kidzus since, plainly, "actual authority" is not involved herein. The law of "apparent authority" may be stated as follows: where a principal manifests to a third person that another is his agent, and the third person in good faith relies upon the principal's manifestation and changes his position to his detriment, then the principal is bound by the conduct of the agent. See Restatement, Agency, Sec. 267 and Elger v. Lindsay, 71 N.J. Super. 82, 87 (L.D. 1961).

The Court in Elger stated the rule, thusly:

> "It is ...the general rule that the principal is bound by the acts of the agent within the apparent authority which he knowingly permits the agent to assume or which he holds the agent out to the public as possessing..." (71 N.J. Super. at 88).

In concluding that the Board did not invest Kidzus with "apparent authority" in the matter of his proposing salary decreases to Hourihan and Cholewa, it is first noted that the Board in no way manifested to the Association, Hourihan or Cholewa that Kidzus was acting as its agent or knowingly allowed them to assume that Kidzus had the authority to make pay decrease proposals on its behalf. It is true that Kidzus was a Board member and that Hourihan and Cholewa testified that they assumed that he was speaking to each of them as a member of the Board. However, even if this is true, there is no evidence that they acted in good faith reliance upon what Kidzus said to them and changed their positions to their detriment. Neither Hourihan nor Cholewa could have reasonably believed that Kidzus alone possessed the authority to reduce their salaries unilaterally. The mere fact that Hourihan was "troubled" and "worried" and that Cholewa was "annoyed" and "insulted" does not alter the situation. It is also noted that Hourihan testified that Kidzus stated to her that she could lose her

job and that she would be the first to go. Again, Hourihan could not have reasonably believed that Kidzus had the power, acting alone, to bring about a reduction-in-force such as would eliminate Hourihan's job. Thus Kidzus never possessed apparent authority, the exercise of which could have bound the Board herein.

One additional point on the matter of the authority of Kidzus when he spoke to Hourihan in her office and to Cholewa on the parking lot. There is an agency principle described as "frolic and detour," which applies when a servant or agent so exceeds the limits of his scope of employment or authority that the master or principal is deemed relieved of legal responsibility for the acts of the servant or agent. Thus, even if it is assumed that Kidzus was an "agent" of the Board when he approached Hourihan and Cholewa, supra, he so exceeded the scope of his authority as a Board member that his actions could not bind the Board as a legal entity. In this regard, it is significant that the conduct of Kidzus occurred at places remote from where the Board normally conducts its business and discharges its responsibilities.

* * * *

CAVEAT: The Hearing Examiner wishes to make clear that he considers the facts and conclusions involved in the instant case highly unusual and, thus, sui generis, and not a license for public employers, their representatives and agents to run amok.

* * * *

Accordingly, Kidzus not having been a "public employer" or a "representative" or an "agent" of the Board in connection with his conduct herein, the Unfair Practice Charge, as amended, must be dismissed as to Kidzus and, because the Board did not act in any manner by which the conduct of Kidzus could bind it, the Charge must also be dismissed as to the Board.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

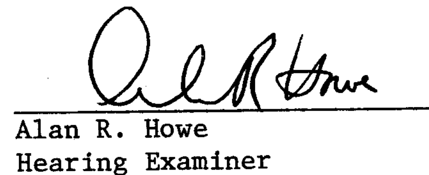
CONCLUSION OF LAW

1. By his conduct herein Michael Kidzus did not act as an "employer" or a "representative" within the meaning of N.J.S.A. 34:13A-3(c) or 3(e) nor did he act as an "agent" of the Matawan-Aberdeen Regional Board of Education.

2. Neither Respondent violated N.J.S.A. 34:13A-5.4(a)(1), (2) or (5) by the conduct of Michael Kidzus herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Alan R. Howe
Hearing Examiner

Dated: February 21, 1985
Trenton, New Jersey