

P.E.R.C. NO. 89-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAMDEN BOARD OF EDUCATION

Respondent,

-and-

Docket No. CO-H-88-75

CAMDEN EDUCATION ASSOCIATION and
WILLIAM STOKLEY

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge filed by the Camden Education Association and William Stokley against the Camden Board of Education. The charge alleges that the Board violated the Act by withholding Stokley's increment without explanation in retaliation for his having filed a grievance. The Commission finds, based on all the evidence, that Stokley's increment would have been withheld even if he had not filed a grievance.

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Appearances:

For the Respondent, Murray & Murray, Esqs.
(Karen A. Murray, of counsel)

For the Charging Parties, Selikoff & Cohen, Esqs.
(Steven R. Cohen, Esq.)

DECISION AND ORDER

On September 8, 1987, the Camden Education Association and William Stokley ("charging parties") filed an unfair practice charge against the Camden Board of Education ("Board"). 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), and (5),^{1/} by withholding Stokley's increment without explanation and in retaliation for his having filed a grievance.

^{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

On November 20, 1987, a Complaint and Notice of Hearing issued. On December 11, the Board filed its Answer denying it retaliated against Stokley and asserting that allegations of violation of the parties' collective negotiations agreement must be deferred to the contractual grievance/arbitration procedure.

On March 2, 3, 4, and 7 and April 20, 1988, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On July 27, 1988, the Hearing Examiner recommended the Complaint's dismissal. H.E. No. 89-2, 14 NJPER 537 (¶19229 1988). He found that although Stokley's protected activity motivated principal Mutter K. Bowman's recommendation that Stokley's increment be withheld, the Board proved that it would have withheld the increment even absent the protected activity because of a series of "derelictions" in Stokley's teaching and non-teaching duties. Therefore, he concluded, the Board had not violated the Act. He also found no evidence of improper processing of grievances and recommended that the subsection 5.4(a)(5) allegation be dismissed.

1/ Footnote Continued From Previous Page

condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by 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."

On September 6, 1988, after an extension of time, the charging parties excepted to certain findings of fact and claimed that Bowman's action was motivated by her hostility to Stokley's filing a grievance against her.^{2/}

On September 28, 1988, after an extension of time, the Board filed a reply disputing the charging parties' exceptions and claiming that Stokley's work deficiencies motivated the increment withholding.^{3/}

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-22) are generally accurate. We incorporate them with these modifications. We modify finding no. 9 to show that an administrative assistant informed Bowman that, according to the homeroom teacher that Stokley was replacing, Stokley told the class to meet him in the cafeteria for homeroom. Bowman informed the

2/ The charging parties contend that: (1) Stokley did not relocate his homeroom to the cafeteria; (2) Stokley was disciplined for leaving faculty meetings at the contractually allowed time; (3) Stokley did not meet with his supervisor Hilton about help, and (4) Bowman did not meet with Director of Vocational Education Janik or Assistant Superintendent Frazier about withholding Stokley's increment and a negative inference should be drawn from the Board's failure to call Janik and Frazier as witnesses.

3/ The Board contends that: (1) Bowman credibly testified that Stokley told his class to meet him in the cafeteria for homeroom; (2) Bowman's request that Stokley give her five more minutes as he was leaving a faculty meeting was not discipline; (3) Hilton and Stokley did meet, and (4) Bowman's testimony that she met with Janik and Frazier was uncontradicted and corroborated by the superintendent's testimony that the district's procedure for withholding increments requires the principal to make a recommendation to the director and then to the assistant superintendent.

assistant that the move was not authorized and Bowman thought Stokley moved the assignment back. Stokley denied ever holding homeroom in the cafeteria. We modify finding no. 11 to show that Bowman admonished Stokley for leaving faculty meetings before their completion but never instituted formal disciplinary proceedings before the increment withholding. We specifically adopt the Hearing Examiner's findings that Bowman met with Janik and Frazier about withholding Stokley's increment. Those findings are supported by the superintendent's testimony about regular district procedures. While Janik and Frazier's testimony might have bolstered Bowman's, we do not draw any negative inference from the Board's failure to corroborate uncontradicted testimony.

The standards in In re Tp. of Bridgewater, 95 N.J. 235 (1984) govern this case. The charging parties must prove that protected activity was a substantial or motivating factor in the increment withholding. In the absence of direct evidence of illegal motivation, the charging parties can prove illegal motivation by showing that Stokley engaged in protected activity, that the Board knew about that activity, and that the Board was hostile to that activity. Id. at 246. If the charging parties meet this burden, the Board violated the Act unless it can prove that it would have withheld the increment even absent the protected activity.

Grievance filing is protected activity. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 87-88, 13 NJPER 117 (¶18051 1987); Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER

685 (¶17259 1986); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434 (¶17161 1985); Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984). There is no dispute that Stokley engaged in protected activity when he filed a grievance against Bowman.

There is a dispute over when Bowman found out that Stokley filed the grievance. On February 19, 1987, Bowman wrote Stokley requesting explanations for certain alleged activities. On February 20, Stokley responded. On February 24, Bowman responded and indicated it would be her final memo on the subject. On February 26, in accordance with the grievance procedure, Stokley requested a meeting with Bowman and Stokley's building representative. Bowman, probably unaware that the request was the initiation of a formal grievance, responded that "[i]f it concerns the last Memo, I'm finished at this level." A written grievance was not filed until March 25. Thus, Bowman's March 12 meeting with Janik to discuss Stokley's increment could not have been motivated by the filing of a written grievance. Because the written grievance had not yet been filed, at most the recommendation to Janik could have been motivated by Stokley's request for the informal meeting. Even that suggestion is tenuous because Bowman probably did not know that the request was anything more than a continuation of the memo exchange. Thus, the timing does not support a finding that Bowman initiated her recommendation because of Stokley's grievance.

However, a number of the charging parties' witnesses testified that Bowman made a hostile statement at a faculty meeting

in late February about Stokley's filing a grievance, before a class action grievance was filed. The class action grievance was filed on March 26, the day after Stokley's grievance was sent to the superintendent. The record is not crystal clear as to what Bowman could have known about a grievance in late February. However, at some point during the Board's proceedings to withhold Stokley's increment, Bowman became aware of his grievance and expressed hostility at a faculty meeting. We find that the grievance filing heightened Bowman's antipathy toward Stokley. Because the grievance was filed in the midst of the increment withholding proceedings, we find that Stokley's grievance contributed to Bowman's decision to pursue an increment withholding.

The analysis does not stop here. We must now determine if the Board would have withheld Stokley's increment even absent the grievance. We find that it would have. Bowman and Stokley were at odds from the beginning of their tenure together at Hatch Middle School. Bowman believed that Stokley committed a series of "infractions" and showed no signs of changing his ways. There were disputes over: not signing out, signing out while signing in, and signing others in and out; being in the classroom of Joanne Buchan, a home economics teacher whom Stokley rode with; relocating his homeroom to the cafeteria adjoining Buchan's room; team teaching with Buchan without permission; talking during faculty meetings; improper conduct during hall monitoring; having a key to Buchan's room; inadequate lesson plans; not attending a voluntary in-service

meeting, and leaving the building early.^{4/} Bowman and Stokley were on a collision course. All signals support a finding that the entire year's conduct motivated Bowman's desire to withhold Stokley's increment and to transfer him from Hatch. We need not determine if every reason presented by Bowman has merit. But based on all the evidence, we find that Bowman would have recommended that Stokley's increment be withheld even if he had not filed a grievance. Accordingly, we dismiss the subsection 5.4(a)(1) and (3) allegations.

We also dismiss the subsection 5.4(a)(5) allegation. There was no proof that the Board repudiated the parties' grievance procedure.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



 James W. Mastriani
 Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey

January 9, 1989

ISSUED: January 10, 1989

^{4/} Unlike the Commissioner of Education, we are not charged with determining whether the increment withholding was "patently arbitrary, without rational basis or induced by illegal motives." Kopera v. W. Orange Bd. of Ed., 60 N.J. Super. 288, 294 (App. Div. 1960). We applied this standard in Bergen Cty. Voc. Schools, P.E.R.C. No. 86-94, 12 NJPER 200 (¶17077 1986) where, because of a predominant interest determination, we were deciding the education law issue. The record does not indicate that Stokley filed an appeal with the Commissioner. Instead we must determine if the Board would have taken the same action absent the protected activity.

H.E. NO. 89-2

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

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-and-

Docket No. CO-H-88-75

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Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Subsections 5.4(a)(1), (3) or (5) of the New Jersey Employer-Employee Relations Act when it decided to withhold the 1987-88 increment of Stokley "because of unsatisfactory teaching performance..." based upon Stokley's derelictions in the performance of his teaching and non-teaching duties during the 1986-87 school year. Included among the derelictions were improper signing in and signing out, improper conduct at faculty meetings, lack of commitment to students and professionalism and inadequate homeroom coverage. The protected activity upon which the unfair practice charge was based was Stokley's having filed a grievance. The Hearing Examiner found that although there was a prima facie case under Bridgewater, the Board had established a legitimate business justification for its action independent of retaliation for Stokley's having filed a grievance. There was no evidence of improper processing of grievances under the grievance procedure and, thus, there was no violation of Subsection 5.4(a)(5) of the Act.

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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HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on September 8, 1987 by the Camden Education Association (hereinafter the "CEA") and William Stokley (hereinafter "Stokley") alleging that the Camden Board of Education (hereinafter the "Respondent" or the "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A.

1/ As amended at the hearing.

2/ As amended at the hearing.

34:13A-1 et seq. ("Act"), in that Stokley, in early March 1987, complained by note to his building principal, Mutter K. Bowman ("Bowman"), in which Stokley sought an appointment to discuss his complaint that Bowman had continuously harassed him throughout the school year; that Bowman never responded to the request, as a result of which Stokley filed a written grievance in mid-March 1987; that on March 25, 1987, the CEA initiated a grievance on behalf of Stokley, alleging a violation of a series of articles in the collective negotiations agreement between the Board and the CEA; that on April 9, 1987, the Superintendent of Schools, Arnold W. Webster ("Webster"), notified the CEA that Stokley's grievance was denied; that on April 10, 1987, Webster sent a letter to Stokley, notifying him that Bowman had filed a recommendation that Stokley's 1987-88 increment be withheld; that on June 29, 1987, the Board voted to withhold Stokley's increment for the 1987-88 school year; and that by letter dated July 10, 1987, counsel for the CEA demanded that the Board provide Stokley with the specific areas of his teaching performance which were relied upon to justify the withholding of his increment; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act.^{3/}

^{3/} 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

It appearing that the allegations in the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on November 20, 1987. Pursuant to the Complaint and Notice of Hearing, and after several agreed upon adjournments, hearings were held on March 2, 3, 4, 7 and April 20, 1988, in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by July 11, 1988.

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

Upon the entire record, the Hearing Examiner makes the following:

3/ Footnote Continued From Previous Page

condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by 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."

FINDINGS OF FACT

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

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

3. William Stokley is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

4. The relevant collective negotiations agreement between the Board and the CEA was effective during the term July 1, 1985 through June 30, 1987 (J-1).

5. As of the date of the hearing, Stokley had been employed by the Board as an industrial arts teacher for 15 years. He taught at the Morgan Village Middle School ("Morgan") until he was reassigned to the Hatch Middle School ("Hatch"), beginning with the 1985-86 school year and continuing through the 1986-87 school year when he was again reassigned. Stokley's last principal at Morgan was Arthur Brown and his first principal at Hatch during the 1985-86 school year was Charles Jones. From the beginning of his employment with the Board through the 1985-86 school year Stokley had never been disciplined nor had he ever had an increment withheld.^{4/}

^{4/} Stokley has been a member of the CEA during most of his years with the Board but he has never held office nor has he ever been a building representative.

6. Bowman has been employed by the Board for 28 years. Prior to becoming the principal of Hatch in September 1986, she had served as principal at the Lanning Square School for 12 years, including the 1985-86 school year. Bowman was transferred to Hatch for the 1986-87 school year because it had been "targeted as a problem school, and was lacking in good leadership (2 Tr 160-162). During the 1986-87 school year Bowman supervised 63 teachers, of which Stokley was one.

7. Bowman and Stokley first encountered each other during early September of the 1986-87 school year when a minor problem arose regarding the whereabouts of Stokley's shop keys.^{5/} However, Stokley did commit several infractions during the month of September, which came to the attention of Bowman, namely, signing out at the same time that he signed in^{6/} and spending non-teaching time in the classroom of Joanne Buchan, a home economics teacher, during which time Stokley and Buchan ate breakfast and lunch together. This resulted in Bowman's having to speak to Stokley about "not reporting to his duties." [3 Tr 16, 17]. Because of Stokley's conduct, Bowman sent a memorandum to him on September 24,

^{5/} Although there was considerable testimony elicited by the parties with respect to this incident, originating with a September 2, 1986 memorandum from Bowman to Stokley (R-3), Bowman testified unequivocally that the shop key situation had nothing to do with her later recommendation that Stokley's increment be withheld (4 Tr 7, 8).

^{6/} The factual findings dealing with the alleged signing in and signing out infraction appear in Paragraph No. 17, infra.

1986, directing him to report to the Superintendent, Arnold W. Webster, the next day (3 Tr 17; 4 Tr 92).^{7/}

8. When Webster met with Stokley on September 25th he explained to Stokley the concerns that had been shared with him by Bowman "...and potentially what could be the result if it continued...", namely the withholding of his increment, reassignment or letters of discipline in his folder (4 Tr 110). Stokley stated his concern about the degree of harassment that he had been receiving from Bowman, to which Webster responded that he should not put himself in the position of having to be spoken to, that this would not be the case if he performed his "...basic duties and responsibilities as an instructor..." (4 Tr 111, 112).

9. At the beginning of the 1986-87 school year Stokley did not have a homeroom assignment. On or about October 8, 1986, Bowman sent a note to the Administrative Assistant, Dorothy Capers, in which she requested that Capers assign Stokley to Room 211 as his homeroom (R-4; 3 Tr 18-21). Instead Stokley relocated his homeroom from Room 211 to the cafeteria but returned to Room 211 when requested (3 Tr 21-23).

10. In November 1986, Bowman observed that Stokley had moved his entire class to Buchan's home economics room. When she confronted Stokley he told her that "...they were team teaching..."

^{7/} Webster testified that his meeting with Stokley originated with a telephone call from Bowman, who complained about a "number of incidents" that she had had with Stokley (4 Tr 109, 130, 131).

(3 Tr 44). Since team teaching was not a part of either Stokley's or Buchan's lesson plan, Bowman contacted their respective supervisors, Arthur Hilton and Lucy Branch, and was told by them that there had been no such "practice" (4 Tr 45). Bowman spoke only to Stokley since Buchan's class was in the proper room. When Bowman asked Stokley to discontinue the practice he did so (3 Tr 48). Bowman considered this a disciplinary situation as to Stokley (4 Tr 28).

11. The agreement provides that teachers may be required to attend up to five staff meetings per month after students are dismissed, provided that teachers may not be required to remain more than 45 minutes after student dismissal (J-1, Art. XXVIII, §C, p. 61). Bowman's practice was to hold faculty meetings at least two or three times per month, starting at either 3:05 p.m. or 3:15 p.m. (3 Tr 27, 28). Bowman testified credibly that because Stokley continuously carried "on a running conversation" with Buchan at faculty meetings, often turning away from Bowman "in total...disrespect," she sent a letter to Stokley on November 21, 1986. Bowman requested that Stokley refrain from this type of behavior. [R-5; 3 Tr 29-32]. A copy of this letter was sent to Webster. Prior to sending R-5 to Stokley, Bowman had spoken to him on many occasions about the matter (3 Tr 29, 30).^{8/} Stokley

^{8/} Bowman also testified that another major complaint with respect to Stokley was that he walked out of faculty meetings before the meetings had concluded although Bowman never disciplined him or any other teachers who left early (4 Tr 24-28).

responded to R-5 on December 2, 1986, complaining that Bowman was "unreasonable and arbitrary" because other staff members had also engaged in conversations during the staff meetings and that he was "...merely exercising my First Amendment right of freedom of speech..." (R-6). Stokley also sent a copy of his letter to Webster.

12. In January 1987, Bowman requested that Hilton, Stokley's supervisor, provide Stokley with "help" in three areas: professionalism, commitment and signing in and out at 8:30 a.m. (R-7; 3 Tr 53, 54). As to "professionalism," Bowman testified that Stokley talked in faculty meetings and she also complained about his conduct on hall duty, i.e., he frequently covered his face with a newspaper and, thus, could not control the hall traffic.^{9/} Regarding "commitment," Bowman pointed to his lack of control and interest in the students. Finally, Bowman testified again as to Stokley's "signing in and out" at the same time as he had in the past. [3 Tr 55-61]. Hilton later told Bowman that he had spoken to Stokley regarding R-7 (3 Tr 64, 65).

13. In December 1986 or January 1987, a problem arose between Stokley and Bowman, regarding Stokley's having a key to Buchan's room, and his having entered her room on a day that she was absent (3 Tr 126-128). Bowman testified that Stokley was not

^{9/} Neither Stokley nor Buchan denied Bowman's testimony that Stokley covered his face with a newspaper while on hall duty. Each testified only that other teachers read newspapers, book or magazines while on hall duty without indicating the effect, if any, on their ability to observe the actions of students (2 Tr 147; 5 Tr 19, 20).

supposed to have a key to any room except his own (3 Tr 127). However, Buchan testified credibly that on any occasion that she anticipated being absent from school she gave her key to Stokley and, further, that prior to his having been assigned to Hatch, Buchan gave her key to someone in administration (5 Tr 10, 11). Buchan also testified without contradiction that following the above key incident, which Bowman knew about, she was never advised by administration that the giving of her key to Stokley was unauthorized (5 Tr 11).

14. Bowman testified that every teacher is required to prepare and maintain lesson plans and that Stokley had had a problem because, in her opinion, his lesson plans indicated that he was teaching the same skill, in the same manner, to each of the three classes he taught (3 Tr 118-122). Specifically, on January 24, 1987, Bowman placed a notation on Stokley's lesson plan for the week of January 26, 1987 (R-9), stating that she was still questioning the fact that he is using the same methods and procedures for every class and that she had asked him for an explanation in writing on January 9th [4 Tr 80-85]. However, on cross-examination, Bowman acknowledged that she had no background in industrial arts education and that she had never reviewed Stokley's lesson plans with his supervisor, Hilton (4 Tr 68).^{10/}

^{10/} Hilton evaluated Stokley on February 23, 1987, and made no entry regarding "Preparation and Use of Plans" in the Evaluation Form, stating only his suggestion that Stokley "write objective of lessons on chalkboard." [CP-9].

15. On February 19, 1987, Bowman sent Stokley a memorandum, requesting that he submit in writing his reason for not having attended a departmental "in-service meeting" and requesting further that he explain why he left the building at 3:05 p.m. on February 18th without permission (CP-2). Stokley responded on February 20th, pointing out that attendance at the "in-service meeting" was voluntary and that if Bowman contacted Hilton he would substantiate this fact (CP-3).^{11/} Finally, Stokley offered an explanation regarding his having left the building early on February 18, 1987. He stated that after completing his outside duties with the students he had retrieved "an item of importance" from his car, returned to the building and remained there until 3:35 p.m.^{12/} Stokley attached to his February 20th memorandum signed statements from three teachers, attesting to the fact that he had not signed out until 3:30 p.m. and was in the building until 3:35 p.m. (CP-3). The Hearing Examiner finds as a fact that the evidence is insufficient to establish that Stokley left the building at 3:05 p.m. without permission on February 18, 1987 since his temporary absence occurred while he was performing outside duties. Further,

^{11/} Bowman acknowledged that Stokley's attendance at the "in-service meeting" although not mandatory was preferable and that he was the only person from Hatch who did not attend (3 Tr 67, 74).

^{12/} Stokley did not dispute Bowman's testimony that she had observed him going to his car at about 3:05 p.m. on February 18th, adding that the "item of importance" was a pair of sunglasses and chewing gum (2 Tr 11, 69; 3 Tr 68, 69, 72, 73).

the time involved in his traveling to and from his car was minimal. Finally, Stokley did not sign out of the building for the day until about 3:35 p.m., this fact having been attested to by three fellow teachers (CP-3).

16. On February 24, 1987, Bowman sent a memorandum to Stokley, in which she responded to his memorandum of February 20, 1987 and set forth her version of what had transpired on February 18th when Stokley went to his car at about 3:05 p.m. (CP-4). Bowman cautioned him about "signing out" when he "signs in" and also about his having an unauthorized key to let himself into the building. Bowman concluded by stating that: "I consider this matter closed unless/until you desire to continue your charade." Bowman testified that this statement meant that the letter-writing between Stokley and herself had come to an end (3 Tr 88).

17. Bowman's having cautioned Stokley on February 24th about "signing out" when he "signs in" relates back to the beginning of the 1986-87 school year when Bowman learned that Stokley was not signing out in the afternoon when he was leaving the building (3 Tr 57, 58). This was followed by Stokley's signing in and signing out at the same time upon entering the building, which came to Bowman's attention in January 1987 (3 Tr 58-62). Stokley admitted that he had signed in and out at the same time in September 1986, but insisted that he had not done so thereafter, following Bowman's having spoken to him at that time (2 Tr 12, 13). Specifically, Stokley testified that he had not signed in and out at the same time

between September 1986 and February 24, 1987, the date of Bowman's memorandum (2 Tr 12; CP-4). However, Stokley freely admitted that he had "always" signed out both Buchan and himself at the end of the school day and that he had done so since September 1986 (2 Tr 25, 26). The Hearing Examiner cannot credit Stokley's testimony that he discontinued his practice of signing himself in and out in September 1986, after Bowman spoke to him, because of his subsequent admission that he had signed Buchan and himself out at the end of the school day and had "always" done so since September 1986 (2 Tr 26).

18. Stokley testified that following the receipt of Bowman's February 24th memorandum (CP-4, supra), which he viewed as "defamatory", he decided to file a grievance because he had "had enough" (2 Tr 15). Stokley and Buchan promptly went to the CEA office and spoke to Carol J. Washington, a CEA representative, who told Stokley how to initiate a grievance under the agreement (1 Tr 68, 69; 2 Tr 16).^{13/}

19. With the assistance of Washington, Stokley wrote an undated "Grievance Report" (CP-1)^{14/} and then Washington directed Stokley to send a written note to Bowman asking for a meeting (1 Tr

^{13/} Washington's explanation of the procedure was consistent with J-1, Art. III, Secs. B(2) & B(3), which require a grievant to discuss the complaint "first with the Principal" and, if it is not resolved to the satisfaction of the grievant, then within five school days a written grievance must be served upon the Principal, who shall have five school days to render a "decision to the grievant" (J-1, p. 4, 5).

^{14/} Bowman testified credibly that she never saw CP-1 until the hearing (3 Tr 89).

68, 69; 2 Tr 16). In a handwritten note dated February 26, 1987, Stokley requested a meeting with Bowman and his building representative, Deborah Moore (2 Tr 17; CP-5). Bowman responded in an undated note written under Stokley's signature on CP-5, which she placed in Stokley's school mailbox (R-8; 3 Tr 95, 96).^{15/} Bowman's undated note above stated that "If it concerns the last Memo. I'm finished at that level" (R-8).

20. On March 25, 1987, Washington reduced Stokley's grievance to writing in a letter addressed to Superintendent Webster (J-2).^{16/} In this grievance Washington incorporated Stokley's complaints against Bowman, making reference to the various incidents previously set forth. On April 9, 1987, Webster sent a memorandum to Washington denying Stokley's grievance, stating in part, that Stokley had been brought to Webster's attention "...on several occasions this school year..." and that it appears that Stokley "...is not willing to conform to basic rules and regulations of our schools..." (CP-7). The parties stipulated that Stokley's grievance has been processed through the grievance procedure to final and binding arbitration, that an arbitrator has been selected and a hearing has been scheduled for sometime in April 1988 (1 Tr 124-127).

^{15/} Stokley's testimony that he never received a response from Bowman is not credited since the Hearing Examiner accepts the inherent probability of Bowman's testimony that she placed her response in Stokley's mailbox.

^{16/} Bowman testified credibly that she did not see Stokley's formal written grievance (J-2) until the end of March or in April 1987 (4 Tr 58).

21. On March 26, 1987, Washington sent a "class action" grievance to Webster, in which she complained about Bowman's "...repeated attempts to discipline, harass and accuse the employees in Hatch Middle School..." (CP-6). Specifically, Washington addressed the threat of discipline to employees who failed to "volunteer properly," i.e., staying beyond the required work time. Webster also denied this grievance on April 9, 1987, in the same memorandum to Washington in which he denied Stokley's grievance (CP-7). Webster based his denial on the lack of specificity in the grievance since it did not identify any "individual or situation." The parties stipulated that the "class action" grievance was denied at the Board level and was not processed to arbitration (2 Tr 29, 30).

22. The parties adduced considerable evidence as to what transpired at faculty meetings subsequent to Stokley having initiated his grievance in February 1987. Claudia Cream, a building representative at Hatch through June 1987, testified credibly^{17/} that: [1] faculty meetings are held three to four times a month and are attended by 80-90 teachers (1 Tr 39, 49); [2] the meetings begin at approximately 3:10 p.m. and conclude around 4 p.m. (1 Tr 40); [3] the several meetings that Cream testified to spanned the months of

^{17/} The Hearing Examiner was impressed by Cream's demeanor and candor as a witness. Further, notwithstanding that she was a CEA building representative at Hatch through June 1987, Cream did not appear to harbor any bias toward Bowman or others in administration, which, if otherwise, might have impaired her credibility.

March and April 1987 (1 Tr 17, 41, 51); [4] at one particular faculty meeting, which was held when only Stokley's grievance was pending, Bowman stated that a grievance had been filed and that "it is within your rights to file a grievance," adding in a hostile tone, "...but make sure that if you do this you have your back covered, because I will have my back covered..." (1 Tr 15, 16, 41, 56); [5] prior to another faculty meeting, which occurred two weeks later, Cream brought to Washington the facts for a "class action" grievance for harassment of teachers (CP-6; 1 Tr 19, 45, 46); [6] Bowman brought this grievance to the attention of the faculty at a meeting where she stated that she "wanted to know who filed the grievance..." (1 Tr 20, 44); [7] after Stokley's grievance was filed, Bowman singled him out and chastised him (a) for talking at a faculty meeting at the end of March where others were talking and (b) for leaving a faculty meeting early in April, notwithstanding that Cream and three others departed at the same time because it was 45 minutes after the time of dismissal (1 Tr 16-19, 51, 52); and [8] specifically, Bowman directed several remarks to Stokley such as "Can't you give me five more minutes" as he was leaving the April meeting and, in another instance, "You need to hear this" [the exact context of which was not testified to] (1 Tr 18, 49-52).^{18/}

^{18/} The testimony of Buchan although not as detailed as that of Cream corroborated Cream's testimony, supra, (1 Tr 74, 76, 77).

23. Bowman's testimony contradicted in part that of Stokley, Buchan and Cream as to what transpired at the various faculty meetings in March and April 1987, supra. She admitted that she made a statement that "If you are going to file a grievance, make sure that your back is covered because I am going to cover my back" but was adamant that this statement was not made in connection with Stokley's grievance (3 Tr 145-148). Bowman also admitted that she had mentioned at a faculty meeting that a grievance had been filed against her but insisted that she had no way of knowing who had filed the grievance (3 Tr 136-138). However, Bowman did testify that she had mentioned the "class action" grievance^{19/} at a faculty meeting, adding that she cautioned the teachers "...to use the proper procedures..." and that "...if you are going to grieve it, before you can grieve it, you have to do it so make sure you done it before you grieve it, or you don't have a grievance..." (3 Tr 139-141). Bowman also testified that she had stated on more than one occasion that teachers were free to file grievances (3 Tr 146-148). Finally, Bowman admitted that some of her faculty meetings had exceeded the contractually set ending time and that she considered Stokley's having left a meeting early on one occasion rude and unprofessional, adding that she did not speak to any other teachers about leaving early because she did not observe them (4 Tr 24-28). Given the several admissions by Bowman as to what

^{19/} Bowman denied asking who was responsible for the filing of this grievance (3 Tr 143).

transpired at the various faculty meetings in March and April, 1987, and the credited testimony of Cream, corroborated by Buchan, the Hearing Examiner finds that: [1] Bowman was referring to Stokley's grievance when she made the "back covered" statement; [2] Bowman did state that she "wanted to know who filed" the "class action" grievance; and [3] Bowman did chastise Stokley for talking at one faculty meeting and leaving another faculty meeting early.

24. Bowman testified that she met twice with Lou Janik, the Director of Vocational Education, in the early part of 1987, the second meeting being on March 12th (3 Tr 96-99). The stated reason for each meeting with Janik was Stokley, and at the second meeting on March 12th, Bowman testified that she discussed with Janik "...the total overall picture that I was seeing with Mr. Stokley..." (3 Tr 97). Bowman first requested that Janik move Stokley from Hatch to another building. She then stated that she was going to recommend the withholding of his increment. [3 Tr 97-99]. Janik agreed to transfer Stokley from Hatch to another school and he also concurred in Bowman's decision to recommend the withholding of Stokley's increment. By way of explanation as to why it was necessary to speak to Janik regarding her recommendation to withhold Stokley's increment, Bowman testified credibly that she was required to confer with Stokley's "Director" (Janik) in order to make her ultimate recommendation that Stokley's increment be withheld (3 Tr 96-98). The Hearing Examiner credits Bowman's testimony regarding her March 12, 1987 meeting with Janik, notwithstanding that this

finding would have been strengthened by the corroborating testimony of Janik who was not called as a witness by the Board. Also, prior to her written recommendation to withhold Stokley's increment on April 7, 1987, infra, Bowman testified that she spoke with the Assistant Superintendent, Mary Arnold Frazier, who asked Bowman for her reasons and if she had "...backup for the reasons..." and if she had conferred with "...the Director..." (3 Tr 103). Frazier stated that "by all means" Bowman should make the recommendation to withhold Stokley's increment (3 Tr 103). Again, the Hearing Examiner notes that the Board did not call Frazier as a witness to corroborate Bowman's testimony. The Hearing Examiner has credited Bowman's testimony as to her meeting with Janik on March 12th and her meeting at some point prior to April 7, 1987, with Frazier because it appears logical that Bowman would have consulted higher levels of administration before proceeding to make a recommendation that an increment be withheld.^{20/}

25. On April 7, 1987, Bowman sent Frazier a letter, in which she formally recommended that Stokley's increment be withheld (R-2). Bowman testified that this recommendation was unrelated to

^{20/} Webster confirmed that the procedure for recommending the withholding of an increment is that the principal makes a recommendation to the Director at the elementary school level and then to the Assistant Superintendent, who forwards the recommendation to the Superintendent with the necessary documentation (4 Tr 113, 114). Webster also explained that a recommendation to withhold an increment occurs within a timetable whereby any such recommendation is presented to the Board at its meeting on the last Monday in April of each year (4 Tr 115, 116).

Stokley's having filed a grievance. Further, even if Stokley had never filed a grievance Bowman stated that she would still have recommended the withholding of his increment, recalling that she had so recommended to Janik on March 12, 1987. [3 Tr 164]. Bowman testified that she had not given Stokley prior notice of her recommendation since there is no procedure requiring such notice nor has she ever done so in the past when recommending the withholding of increments (4 Tr 86, 87).

26. On April 10, 1987, Webster sent Stokley a letter, notifying him that a recommendation had been made by Bowman to withhold his 1987-88 increment and that this was "regarding your work performance" (CP-8). In this letter to Stokley, Webster also requested him to report to a conference on April 16, 1987, adding that he had a right to have a representative present. The same form of letter is sent to all individuals whose increments have been recommended for withholding, it being "part of the usual procedure" (4 Tr 116).

27. Bowman testified that after sending R-2 to Frazier on April 7, 1987, she thereafter sent Stokley's personnel file to Frazier prior to the conference on April 16th (2 Tr 174, 175). This transmittal included Stokley's lesson plan book, sign in/sign out

sheets and the following exhibits in evidence: R-1, CP-2 through CP-6 and CP-9 (2 Tr 175-183).^{21/}

28. Stokley did not receive any written set of specifications as to why his increment was being recommended for withholding prior to the April 16th conference but Webster testified that he was certain that Bowman had had several meetings with Stokley prior to the conference although Bowman did not so testify (4 Tr 136-138).

29. The scheduled conference on April 16th lasted approximately 45 minutes to one hour and the following persons were present: Stokley and his representatives, Sarah Davis, the President of the CEA, and James Geiger of the NJEA; for the administration - Webster, Frazier, Janik, Bowman and Ramsey Koumjian, the Director of Personnel (3 Tr 106, 107). Bowman testified in considerable detail as to what transpired, outlining the reasons for her recommendation, which were: signing in and out;^{22/} lack of preparation;^{23/} lack of commitment to

^{21/} There are actually two copies of an employee's personnel file, one maintained officially at City Hall and the other in the principal's office, the latter being the more comprehensive, which, in Stokley's case, was the one that Bowman sent to Frazier (2 Tr 175, 179).

^{22/} See Findings of Fact Nos. 12 & 17, supra.

^{23/} Bowman failed to adduce any evidence as to "lack of preparation" as an alleged reason for recommending the withholding of Stokley's increment.

students;^{24/} lack of professionalism;^{25/} improperly entering Buchan's room;^{26/} unprofessional behavior at faculty meetings;^{27/} homeroom coverage;^{28/} and leaving faculty meetings early.^{29/} Bowman also testified that an additional reason for her recommendation was Stokley's problems in lesson planning.^{30/}

30. After Bowman completed her presentation Stokley responded to each of Bowman's reasons (3 Tr 131). Davis addressed the lesson plan problem and Geiger "...had some things to say..." (2 Tr 126; 3 Tr 132, 133). The subject of Stokley's grievance or the "class action" grievance did not arise at the conference (2 Tr 134; 3 Tr 134). The April 16th conference concluded with Webster stating that he would review the matter and determine whether or not he would follow Bowman's recommendation to withhold Stokley's increment (2 Tr 137; 3 Tr 134).

^{24/} See Finding of Fact No. 12, supra, and Bowman's testimony that Stokley failed to perform hall duty, cafeteria duty and the proctoring of tests properly (3 Tr 123, 124).

^{25/} See Finding of Fact No. 12, supra, and Bowman's testimony regarding Stokley's lack of professional growth and his behavior at faculty meetings (3 Tr 125).

^{26/} See Finding of Fact No. 13, supra.

^{27/} See Findings of Fact Nos. 11, 22 & 23, supra.

^{28/} See Finding of Fact No. 9, supra.

^{29/} See Findings of Fact Nos. 11, 22 & 23, supra.

^{30/} See Finding of Fact No. 14, supra.

31. On April 16, 1987, the date of the conference, Webster sent a letter to Stokley, in which he advised that the Board would be considering the withholding of his increment, along with those of other employees, at its April 27, 1987 Board meeting (CP-12).^{31/}

32. The Board did not act upon the withholding of increments until its June 29, 1987 meeting for administrative reasons (4 Tr 122, 123). Stokley did not appear at the June meeting, notwithstanding that he had been advised that he could do so in Webster's letter of April 16th (CP-12; 4 Tr 124). The Board, after considering Webster's presentation with supporting materials, voted unanimously to withhold Stokley's increment for the 1987-88 school year (4 Tr 123, 125).^{32/} Stokley was notified of this action of the Board in a letter from Webster dated July 2, 1987, in which Webster stated that the withholding of his increment was "...because of unsatisfactory teaching performance..." (CP-10).^{33/}

^{31/} Webster testified that he did not actually recommend the withholding of Stokley's increment until several days after April 16th since he had to review the supporting materials and those of the several other individuals involved (4 Tr 140).

^{32/} Webster explained at the hearing that the Board does not automatically follow his recommendations to withhold increments and it has refused to follow his recommendations in some instances where the documentation submitted has been considered inadequate (4 Tr 125).

^{33/} Bowman testified that she had not based her recommendation to withhold Stokley's increment on his teaching ability or his teaching performance because "...If that had been the case, I would have gone for his contract..." (4 Tr 43).

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate §§5.4(a)(1), (3) And/Or (5) Of The Act Because It Established A Legitimate Business Justification For The Withholding Of Stokley's Increment For The 1987-88 School Year.^{34/}

This case is governed by Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) where the New Jersey Supreme Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980)^{35/} in "dual motive" cases, involving an alleged violation of Section 8(a)(1) or Section 8(a)(3) of the National Labor Relations Act.^{36/} In such cases, Wright Line and Bridgewater articulated the following test in assessing employer motivation: (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in

^{34/} The following analysis deals solely with the allegations of the Charging Party that the Respondent violated §§5.4(a)(1) and (3) of the Act since the Hearing Examiner is convinced that no evidence was adduced, which would support a finding that the Respondent violated §5.4(a)(5) of the Act. The contrary argument of the Charging Party in its Reply Brief (p. 7) is rejected since no conduct of the Respondent's representatives or agents abrogated the contractual grievance procedure, particularly, since Stokley's grievance and the "class action" grievance were processed to the full extent of the grievance procedure (1 Tr 124-127; 2 Tr 29, 30).

^{35/} The United States Supreme Court approved the NLRB's "Wright Line" analysis in NLRB v. Transportation Mgt. Corp., 562 U.S. 393, 113 LRRM 2857 (1983).

^{36/} These provisions of NLRA are directly analogous to Sections 5.4(a)(1) and (3) of our Act.

the employer's decision, in this case the Board's withholding of Stokley's increment; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242), i.e., the employer must establish a legitimate business justification for its action.

The Court in Bridgewater further refined the above test by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity (see 95 N.J. at 246).^{37/} Finally, as in any case involving alleged discrimination, the Charging Party must establish a causal connection or nexus between the exercise of the protected activity and the employer's conduct in response thereto: see Lodi Bd. of Ed., P.E.R.C. No. 84-40, 9 NJPER 653, 654 (¶14282 1983) and University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447 (¶16156 1985).

As to the first part of the Bridgewater test, it is clear that Stokley was engaged in protected activity under the Act when he initiated a grievance under the contractual grievance procedure (see Findings of Fact Nos. 18 & 19, supra). The Commission has held on

^{37/} The Court in Bridgewater stated further that the "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" (95 N.J. at 242).

many occasions that the filing of a grievance is protected activity: Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); and Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986).

Next, as to the Board's knowledge of Stokley's protected activity in having initiated a grievance in the latter part of February 1987, the Hearing Examiner does not accept the argument of the Respondent that Bowman was unaware of Stokley's having initiated a grievance until she saw CP-1 at the hearing (see Respondent's Main Brief, p. 26). The record indicates that Stokley, with the assistance of Washington, wrote the undated "Grievance Report" (CP-1), which Bowman admittedly never saw until the date of the hearing. Washington then directed Stokley to send Bowman a written note, asking for a meeting (see Finding of Fact No. 19, supra). Bowman thereafter responded to a handwritten note by Stokley dated February 26, 1987, in which he had requested a meeting with Bowman and his building representative. Bowman placed her note in Stokley's school mailbox. In Bowman's response she stated that "If it concerns the last Memo. I'm finished at that level" (emphasis supplied). [R-8].

The Hearing Examiner cannot conclude other than when Bowman used the word "level" she was necessarily responding to Stokley under the grievance procedure. To give "level" any other meaning in

this context would be to render it nugatory. Thus, Bowman, as an agent of the Board, had knowledge of Stokley's having triggered the grievance procedure, notwithstanding that she did not see CP-1 until the hearing and that she did not see his formal grievance (J-2) until the end of March or in April 1987 (4 Tr 58).

The next area of inquiry is whether or not there is prima facie evidence that the Respondent Board manifested hostility or anti-union animus towards Stokley, which is sufficient to satisfy the Bridgewater caveat, supra, that the "Mere presence of anti-union animus is not enough..." The Charging Party must also establish that "...anti-union animus was a motivating force or a substantial reason..." for the Board's decision to withhold Stokley's increment. It appears to the Hearing Examiner that the Bridgewater caveat requires that the Charging Party establish a causal nexus between Stokley's initiation of a grievance and the manifestation of hostility or animus by the Board in response, i.e., the Board's withholding of Stokley's increment in June 1987.

The Charging Party's argument that it has satisfied the hostility or anti-union animus requisite of Bridgewater is found in its Main Brief (pp. 6-12), which centers upon statements made by Bowman at faculty meetings and the timing of Bowman's written recommendation to withhold Stokley's increment on April 7, 1987. The Hearing Examiner's findings of fact as to faculty meetings appear in Findings of Fact Nos. 11, 22 and 23, supra. Stokley's faculty meeting problems with Bowman originated in November 1986

Fact No. 11). Stokley's faculty meeting problem next surfaced during the months of March and April 1987. For example, at one faculty meeting while his grievance was pending, Bowman stated that a grievance had been filed, adding, at one point, in a hostile tone "...but make sure that if you do this you have your back covered, because I will have my back covered..." This statement was made at a faculty meeting where 80 to 90 teachers were present. Bowman's statement appears to the Hearing Examiner to have been prima facie coercive since Bowman had no legitimate reason to admonish or to caution the faculty as to the pre-requisites for filing a grievance. To compound the matter, after the "class action" grievance was filed, Bowman stated at another faculty meeting that she wanted to know who had filed the grievance. Again, what legitimate concern did Bowman have as to who had filed a grievance since she would ultimately learn the identity of the grievant during the course of the grievance procedure. [Finding of Fact No. 23].

The scenario proceeds with Bowman having singled out and chastised Stokley for (1) talking at a faculty meeting in March where others were also talking and (2) leaving a faculty meeting early in April even though Cream and three others departed at the same time. Further, Bowman's several specific remarks to Stokley at faculty meetings in April 1987 provide additional examples of the manner in which she directed the faculty's attention to him in a hectoring manner. [Findings of Fact Nos. 22 & 23].

Although it may be argued that the above conduct of Bowman at faculty meetings in the months of March and April 1987, does not conclusively establish prima facie evidence of hostility or animus, it did occur [1] after Stokley had initiated his grievance in the latter part of February and [2] immediately prior to Bowman's recommendation to withhold Stokley's grievance on April 7, 1987. This leads ineluctably to the Charging Party's argument that "timing" is an important factor in determining whether hostility or anti-union animus may be inferred: University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447, 448, 449 (¶16156 1985); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, 8 (¶17002 1985); and Essex Cty. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988).

Even though the Hearing Examiner has credited Bowman's testimony that she met with Janik on March 12, 1987, where she sought his approval of her anticipated recommendation to withhold Stokley's increment, this does not negate the conclusion that Bowman was at that time illegally motivated. It is only necessary to recall that by March 12th Bowman had actual knowledge of Stokley's having initiated a grievance (CP-5 & R-8), the Hearing Examiner having previously rejected the contention of the Respondent that Bowman, in using the phrase "I'm finished at that level..." in R-8, was not responding to Stokley within the framework of the contractual grievance procedure.

The Hearing Examiner is convinced that when the above statements of Bowman at faculty meetings in March and April 1987 are coupled with the suspect "timing" of her written recommendation on April 7th that Stokley's increment be withheld, the conclusion is inescapable that the Charging Party has satisfied the final prima facie requisite of Bridgewater. Having done so, the Charging Party has met the first part of the Bridgewater test, namely, that its proofs support an inference that Stokley's protected activity in initiating a grievance was a "substantial" or a "motivating" factor in Bowman's decision to recommend the withholding of his increment on April 7th, which the Board adopted in June.

It now remains to determine whether the Respondent has demonstrated by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity (95 N.J. at 242). In other words, has the Respondent proven that Stokley's increment would have been withheld for the 1986-87 school year even in the absence of his exercise of the protected activity of initiating a grievance. It is the conclusion of the Hearing Examiner that the Respondent Board has met this burden and that a legitimate business justification has been established for the Board's action.

Stokley had had a lengthy history of problems with Bowman and the administration when Bowman met with Janik on March 12, 1987. At this meeting Bowman sought and attained Janik's concurrence in her pending decision to recommend the withholding of

Stokley's increment. As of March 12th, Stokley's failure to have adhered to school policy regarding signing in and signing out had been a continuing infraction, having occurred in one form or another^{38/} from September 1986 through March or April 1987 (see Findings of Fact Nos. 7, 12 & 17). At the April 16th meeting where Bowman gave Webster her reasons for recommending the withholding of Stokley's increment, she mentioned first the continuing problem of Stokley's signing in and signing out. This conduct by Stokley represented a serious dereliction in the non-teaching aspects of his overall performance.

While the subject of faculty meetings has been considered previously in resolving the issue of whether or not Bowman manifested hostility or anti-union animus towards Stokley, this does not preclude further consideration of the Respondent's evidence regarding Stokley's conduct at faculty meetings, which was presented to Webster by Bowman on April 16th. The findings of fact on this issue (Nos. 11, 22 & 23, supra) disclose that Stokley continuously carried on running conversations with Buchan and often turned away from Bowman "in total...disrespect," which caused Bowman to request that he refrain from this behavior in a letter of November 21, 1986 (R-5). Bowman also complained that Stokley walked out of faculty

^{38/} The pattern of Stokley's conduct in this regard ranged from failing to sign in and sign out when leaving the building, signing in and signing out at the same time when entering the building and, most seriously, signing Buchan and himself out at the end of the school day (see Finding of Fact No. 17).

meetings early, which she considered rude and unprofessional.^{39/} Thus, the Hearing Examiner perceives no impediment to Bowman's having presented the faculty meetings problem as an additional reason for her recommendation at the April 16th meeting.

Although the Hearing Examiner might be inclined to attach little weight to Stokley's alleged deficiencies in lesson planning (Finding of Fact No. 14) or Bowman's complaint regarding Stokley's lack of commitment to students (Finding of Fact No. 12; 3 Tr 123, 124), these aspects of Stokley's overall performance were presented by Bowman to Webster on April 16th for whatever weight he might assign to them in formulating his recommendation to the Board. Likewise, Stokley's alleged lack of professionalism, (Finding of Fact No. 12) coupled with Bowman's claim that he improperly entered Buchan's room (Finding of Fact No. 13) and the homeroom situation (Finding of Fact No. 9) constituted additional factors which Bowman relied upon in assessing Stokley's overall performance during the 1986-87 school year.

After Bowman had presented all of the reasons for withholding Stokley's increment to Webster on April 16th, Stokley made his response. Webster thereafter made his own recommendation to the Board and the Board at its meeting on June 29, 1987, voted

^{39/} Stokley's conduct in this regard is not excused by the fact that other teachers left faculty meetings early since it is Stokley's conduct that is under scrutiny in this proceeding.

unanimously to withhold Stokley's 1987-88 increment.^{40/} On July 2nd Webster sent a letter to Stokley in which he advised him of the Board's action and that his increment was being withheld "...because of unsatisfactory teaching performance..." (CP-10).^{41/}

The Respondent has cited Bergen Cty. Vocational Schools, P.E.R.C. No. 86-94, 12 NJPER 200 (¶17077 1986), aff'd. App. Div. Dkt. No. A-3608-85T8 (1987) where the Commission relied upon the education law in deciding that the employer's withholding of the increment of a union activist (Cummings) for tardiness and absenteeism would have occurred even in the absence of his protected activities.^{42/} Cummings was the president of the union and had participated in negotiations and filed numerous grievances. The

^{40/} N.J.S.A. 18A:29-14 provides, in part, as follows with respect to the withholding of increments: "Any board of education may withhold, for inefficiency or other good cause, the employment increment of...any member in any year by a recorded roll call majority vote of the full membership of the board of education. It shall be the duty of the board of education, within 10 days, to give written notice of such action, together with the reasons therefor, to the member concerned..."

^{41/} Although Bowman testified that she had not based her recommendation to withhold Stokley's increment on his teaching ability or his teaching performance (4 Tr 43), the Hearing Examiner finds nothing inconsistent between Bowman's testimony and the reason given to Stokley by the Board on July 2nd since Bowman's presentation at the April 16th meeting with Webster clearly dealt with Stokley's overall teaching performance both in and out of the classroom.

^{42/} Cummings had also filed a petition with the Commissioner of Education and, as a result of a predominant interest determination, the Commission adjudicated both the unfair practice and the education law issues (12 NJPER at 201).

Commission had no difficulty in concluding initially that the union had satisfied the first part of the Bridgewater test, supra. In deciding the second part of the Bridgewater test, the Commission cited and applied Kopera v. Bd. of Ed. of the Town of W. Orange, 60 N.J. Super. 288 (App. Div. 1960) where a teacher's increment was withheld because of an "unsatisfactory" evaluation by her department head and her principal. No illegal motivation was alleged. The Court restated a well-established rule that:

...action of the local board which lies within the area of its discretionary powers may not be upset unless patently arbitrary, without rational basis or induced by illegal motives... (60 N.J. Super. at 294).

In concluding that the employer in Bergen had satisfied the second part of the Bridgewater test, the Commission noted that under the education law persistent tardiness or absenteeism is a reasonable basis for withholding an increment, citing Burns v. School Dist. of Newark, State Bd. of Ed., No. 33-84 (1984). It then applied the Kopera standard and the education case law to the record before it and concluded that the Commissioner of Education would have sustained the withholding of the increment. The Commission then dismissed the unfair practice complaint and the petition to the Commissioner of Education and this decision was affirmed by the Appellate Division, supra.

Even though Stokley did not file a petition with the Commissioner of Education (2 Tr 48-52) appealing the withholding of his increment, it would nonetheless appear that this case is in the same legal posture as Bergen. Applying Bergen to this record, the

Hearing Examiner, following the same analysis, concludes that the Board has not violated the Kopera standard, supra, in that its action in withholding Stokley's increment "because of his unsatisfactory teaching performance" fell within the area of its discretionary powers and is not to be upset as patently arbitrary, without a rational basis or having been induced by improper motives.^{43/} Just as the Commission concluded in Bergen, the Hearing Examiner is convinced that the Commissioner of Education would sustain the conclusion that Stokley's increment for the 1987-88 school year was properly withheld.

* * * *

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


CONCLUSIONS OF LAW

1. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) or (3) when on June 29, 1987, it decided to withhold the 1987-88 increment of William Stokley "...because of his unsatisfactory teaching performance..."
2. The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) or (5) by its conduct in the processing of grievances under the grievance procedure.

^{43/} In assessing the Board's motivation, the Hearing Examiner finds that the reasons, which originated with Bowman, were not pretextual within the meaning of Wright Line or Bridgewater (95 N.J. at 241) nor were the reasons lacking in objective substance, particularly, the signing in and out infraction and Stokley's conduct at faculty meetings.

RECOMMENDED ORDER

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



Alan R. Howe
Hearing Examiner

Dated: July 27, 1988
Trenton, New Jersey