P.E.R.C. NO. 79-59

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

HAMILTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

Docket No. CO-78-243-73

-and-

HAMILTON TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Hamilton Township Education Association filed an unfair practice charge against the Hamilton Township Board of Education which alleges that the Board violated the Act when a memorandum was placed in the file of employee Robert Holden recommending that his outburst against an administrator at a Superintendent level grievance meeting be given consideration in the employee's overall performance rating for the school year because this conduct warranted some disciplinary action.

The Hearing Examiner noted that in the context of grievance proceedings some latitude must be provided for the full exchange of views, even when they are accompanied by profanity and accusations of improper conduct. However, in balancing the right of an employee to present a grievance against the employer's right to maintain order by punishing acts of insubordination, the Hearing Examiner concluded that Holden's conduct exceeded the bounds of protected activity. Accordingly, the Hearing Examiner recommended that the charge be dismissed in its entirety.

Relying upon the same cases cited by the Hearing Examiner, the Commission reverses his recommendation, finding that the activity of the grievant, although inappropriate and uncalled for, nevertheless was not indefensible in the context of the grievance involved. The Commission stated that, at a grievance hearing, the parties are equals. It would violate that important principle if an employer could threaten disciplinary action in such circumstances. Accordingly, the Commission found that the Board violated the Act and ordered the Board to remove the threatened disciplinary action from the employee's file.

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Charging Party.

Appearances
For the Respondent, Pachman, Aron & Till, Esqs.
(Mr. Martin R. Pachman, of Counsel)

For the Charging Party, Greenberg & Mellk, Esqs.
(Mr. Arnold M. Mellk, of Counsel)

DECISION AND ORDER

On April 12, 1978, an Unfair Practice Charge was filed with the Public Employment Relations Commission by the Hamilton Township Education Association (the "Association") which alleges that the Hamilton Township Board of Education (the "Board") engaged in an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Association alleges that the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when a memorandum was placed in the file of employee Robert Holden recording that his outburst against an administrator at a Superintendent level grievance meeting be given consideration in the employee's overall performance rating for the school year because this conduct warranted some disciplinary action.

The charge was processed pursuant to the Commission's Rules, and it appearing to the Director of Unfair Practices that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 23, 1978. In accordance with the Complaint and Notice of Hearing, a hearing was held on July 17, 1978 before Robert T. Snyder, Hearing Examiner of the Commission, at which both parties were represented and were given an opportunity to present evidence, to examine and cross-examine witnesses, and to argue orally. On September 18 and October 11 post-hearing briefs were filed by the Association and the Board, respectively. On October 31, 1978, the Hearing Examiner issued his Recommended Report and Decision,[1/] which included findings of fact, conclusions of law, and a recommended order. The original of the Report was filed with the Commission and copies were served upon all parties. A copy is attached to this Decision and Order and made a part hereof. Pursuant to an approved request for an extension of time, timely exceptions and a brief in support thereof were filed by the Association on January 3, 1979.

The Hearing Examiner noted that in the context of grievance proceedings some latitude must be provided for the free exchange of views, even when this is accompanied by profanity and accusations of improper conduct. However, in balancing the right of an employee to present a grievance against the employer's right to maintain order by punishing acts of insubordination, the

1/ H. E. No. 79-23, 5 NJPER ___ (¶ 1979).

Hearing Examiner concluded that Holden's conduct exceeded the bounds of protected activity. Accordingly, the Hearing Examiner recommended that the charge be dismissed in its entirety.

Initially, the Charging Party excepts to the Hearing Examiner's finding of fact No. 12, footnote 3, wherein he concluded that Holden was not a very trustworthy witness, and that his testimony was contradictory, confused, unclear, and unresponsive in cross examination. The Charging Party argues that these findings were not accompanied by any citation to the transcript of the proceeding.

It suffices to say that questions of credibility are for the trier of fact based upon his opportunity to observe the demeanor, and the like, of the witnesses. The Commission will not substitute its second-hand reading of the transcript for the Hearing Examiner's judgment except in those rare cases where the most persuasive testimony to the contrary is present in the transcript.[2/] Therefore, we reject this exception as being without basis.

After a careful review of the transcript the Commission finds itself in agreement with the Hearing Examiner's evaluation of Holden's testimony. Holden denied that he had become violent,[3/] yet he admitted that he struck the table hard

2/ In re Long Branch Board of Education, P.E.R.C. No. 77-70, 3 NJPER 300 (1977); In re Hudson County Board of Chosen Freeholders, P.E.R.C. No. 78-48, 4 NJPER 87 (¶4041 1978) and In re City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶4011 1977).

3/ T. p. 50 lines 17-22.

with a closed fist; stood up; spoke loudly and walked around the room, though it was quite small and crowded with people and furniture; and was angry and upset because he felt that his, and his wife's, credibility had been questioned, the grievance had not been resolved at a lower level, and he had not been given a second opportunity to present his lesson plan book as, he alleged, other teachers had been.[4/] In addition, Holden could not recall what he said as he walked around the room[5/] and was not sure whether his grievance was denied, and on what basis, by the Superintendent or whether it was withdrawn after the hearing.[6/] Holden was further confused as to what was said, and by whom, to provoke his response. At one point he stated that his wife being called a liar provoked his outburst. Subsequently, he appears to retract this statement and admits that he could not recall the specific provacative statement.[7/] From the whole tenor of his testimony during cross examination it is apparent that often he was not responsive to the specific question.[8/] Thus, it is apparent that the Hearing Examiner's conclusion is amply supported in the record.

The Association next excepts to the Hearing Examiner's crediting the testimony of the Board witness, Lester Aron, concerning Holden's outburst. In response, it is not necessary to comment further on the Hearing Examiner's role in determining questions of credibility. Our comments above are dispositive.

4/ T. p. 45-48 and p. 53 lines 1 to 14.
5/ T. p. 57 line 22-23.
6/ T. p. 58-62.
7/ T. p. 62-65.
8/ Holden's testimony at page 52 through 64 is just one example of his unresponsiveness to cross-examination.

In its third exception the Charging Party appears to be raising the issue that Holden's grievance was not denied on the merits but, rather, because of this allegedly protected activity in speaking out at the hearing. The Commission agrees with the Hearing Examiner's decision that this issue, not having been timely raised and adjudicated at the hearing, should not be considered.

In any event, Holden's conduct having without doubt disrupted the hearing and rendered a meaningful continuation unlikely, we see nothing wrong with the action of the Board representatives in rapidly concluding the hearing and denying the grievance. Holden, not having been responsive, cannot be said to have presented a case warranting upholding of the grievance.

In its next exception the Association asserts that the Hearing Examiner did not properly apply the Commission's decision, In re City of Hackensack, P.E.R.C. No. 78-74, 4 NJPER 215 (¶4107 1978), when he concluded that the Board was not motivated by anti-union animus in its conduct towards Holden. The record supplies no support for a conclusion that the Board was in any way motivated by a desire to discourage protected activity, and we fully agree with the Hearing Examiner that this portion of the Complaint, N.J.S.A. 34:13A-5.4(a)(3), should be dismissed.

In its final exception the Association alleges that the Hearing Examiner did not properly apply the cited decisions in concluding that Holden's conduct at the hearing was not protected

activity. After a careful review of the cases cited and the transcript, the Commission concludes that it disagrees with the Hearing Examiner's application of the principles established in those cases to the facts in the instant matter. As stated in Crown Central Petroleum Corp.,[9/] cited by the Hearing Examiner, "As long as the activities engaged in are lawful and the character of the conflict is not indefensible in the context of the grievance involved, the employees are protected under §7 of the Act" (emphasis in the original decision). Having cited the proper test, however, the Hearing Examiner's application of it to the facts of the instant case was not consistent with its application in the Crown Central decision.

The Commission accepts the principle that wide latitude in terms of offensive speech and conduct, must be allowed in the context of grievance proceedings to insure the efficacy of this process.

In Crown Central, one employee was reprimanded for "abusive and insubordinate language directed at supervisors" during the course of a grievance proceeding, and another employee was reprimanded and got a one-day suspension. The Court's discussion could not be more on point to the instant matter:

> The Company emphasizes the lack of justification for the employees' statements and the coarse nature of their language. We agree with the Board that whether the remarks were by some standard "justified" is not controlling. Here the remarks were pertinent to a discussion of the grievance under consideration at the meeting.
>
> * * *

9/ 74 LRRM 2855, 2860.

> It has been repeatedly observed that passions run high in labor disputes and that epithets and accusations are commonplace. Grievance meetings arising out of disputes between employer and employee are not calculated to create an aura of total peace and tranquility where compliments are lavishly exchanged. Adding our disclaimer to that of the Board, we do not condone the conduct of Harris and Gilliam in the meeting, but we do not feel that the interests of collective bargaining will be served by the external imposition of a rigid standard of proper and civilized behavior.
>
> Of central importance to our view of the case, is the nature of the protected activity involved. Harris and Gilliam were participating in a grievance meeting, which by its very nature requires a free and frank exchange of views, and where bruised sensibilities may be the price exacted for industrial peace. As the Board noted, a grievance proceeding is not an audience, conditionally granted by a master to his servants, but a meeting of equals--advocates of their respective positions. Manly was not assailed with abuse on the floor of the plant where he stood as a symbol of the Company's authority; the characterization of the untruth came while he was appearing as a Company advocate during a closed meeting with Union representatives.
>
> * * *
>
> We seek neither to rank improprieties or epithets, nor to unnecessarily generalize for a class of cases peculiarly tied to their facts. However, within the confines of a grievance meeting, it would require severe conduct indeed to convince us that the interests of fair give and take between equal parties to bargaining could be justifiably submerged. 74 LRRM 2860

Herein, Holden was appearing at the grievance hearing not in a subordinate capacity but rather as an adversary party on an equal footing. Yet the memo placed in Holden's file refers to an "outburst against an administrator." In other words, Holden was expected to defer to a superior even at a grievance hearing.

To allow that precedent to be set would be a severe blow to the concept of grievance presentation as one of the keys to the whole system of public sector labor relations in New Jersey. Cf. Twp. of West Windsor v. PERC, 78 N.J. 98 (1978); Red Bank Reg. Ed. Assn v. Red Bank Reg. H.S. Bd. of Ed., 78 N.J. 122 (1978). We therefore conclude that the Board violated N.J.S.A. 34:13A-5.4(a)(1), and the threat of discipline against Holden must be rescinded.

ORDER

For the foregoing reasons and upon the entire record herein, it is hereby ORDERED that the Hamilton Township Board of Education:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act by refraining from threatening discipline to employees for conduct while engaging in grievance hearings.

B. Take the following affirmative action:

1. Remove from Robert Holden's personnel file the Director of Personnel's memorandum of March 14, 1978, which threatened Holden with disciplinary action.

2. Post at all schools within the Hamilton Township School District and the offices of the Board of Education, in conspicuous places, copies of the attached notice marked as Appendix "A". Copies of such notice, on forms to be provided by the Commission, shall be posted by the Board immediately upon

receipt thereof, after being signed by the Board's representative, and shall be maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places, including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Board to insure that such notices are not altered, defaced or covered by any other material.

3. Notify the Chairman of the Commission, in writing, within twenty (20) days of receipt of this order what steps the Board has taken to comply herewith.

C. It is further ORDERED that the section of the Complaint which alleges a violation of N.J.S.A. 34:13A-5.4(a)(3) be dismissed.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Graves and Hartnett voted for this decision. Commissioner Parcells voted against this decision. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
March 8, 1979
ISSUED: March 9, 1979

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by refraining from threatening discipline to employees for conduct while engaging in grievance hearings.

WE WILL remove from Robert Holden's personnel file the Director of Personnel's memorandum of March 14, 1978, which threatened him with disciplinary action.

HAMILTON TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H.E. No. 79-23

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

In the Matter of

HAMILTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-78-243-73

HAMILTON TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss charges of unfair practice filed by the Association, which alleged that the Board of Education discriminatorily reprimanded a Junior High School Physical and Health Education Teacher for conduct by him which occured during the course of a Superintendent's level grievance meeting held under the terms of the parties' collective negotiations agreement.

The Association charged that the reprimand was motivated by the teacher's role as grievant and, in any event, interfered with his rights under the Act which permits some latitude in behavior in the presentation of a grievance. The Examiner found that the grievant suddenly became angry during the initiation of the factual inquiry then being made at the meeting by the Superintendent of Schools representatives, the Board's Personnel Director and labor relations consultant. The grievant's conduct included pounding on the table, shouting, claiming the Board considered that he and others who could support his grievance were liars, and moving about the room in a threatening manner. The grievant's conduct resulted in an early termination of the meeting before the Superintendent's representatives could complete their factual inquiry. The Personnel Director issued to the grievant and placed in his file a memorandum of reprimand for the outburst. The Examiner concluded that the Association had failed to establish any discriminatory motive for the reprimand, and, further, that by his disruptive, intimidating and abusive conduct, unrelated to the grievance proceeding, the grievant had exceeded the bounds of activity protected by the Act. Accordingly, the Examiner found that the Board of Education could issue the reprimand and give it consideration in completing the grievant's overall performance rating.

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.

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

In the Matter of

HAMILTON TOWNSHIP BOARD OF EDUCATION,

Respondent,

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Docket No. CO-78-243-73

HAMILTON TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Pachman, Aron & Till, Esqs.
(Martin R. Pachman, Esq., Of Counsel)

For the Charging Party
Greenberg & Mellk, Esqs.
(Arnold M. Mellk, Esq., Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On April 12, 1978, the Hamilton Township Education Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that the Hamilton Township Board of Education ("Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), as amended, N.J.S.A. 34:13A-1 et seq. Specifically, the Association claims the Board violated Sec. 5.4(a)(1) and (3) 1/ by placing in the file of employee Robert Holden, a grievant, a memorandum recommending that his conduct at a Superintendent level grievance meeting which warranted disciplinary action be given consideration on evaluation of his year-end overall performance rating.

1/ Section 5.4(a)(1) prohibits employers from "Interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by this Act" and Section 5.4(a)(3) prohibits employers from "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."

It appearing that the allegations of the charge, if true, might constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 23, 1978. An Answer was filed on June 22, 1978, denying the Commission of the unfair practices alleged. Hearing was held on July 17, 1978. Both parties were given an opportunity to examine witnesses, to present evidence and to argue orally. Both parties filed post-hearing briefs, the Charging Party on September 18, 1978 and the Respondent on October 11, 1978.

Upon the entire record in the case and from my observation of the witnesses and their demeanor, I make the following:

FINDINGS OF FACT

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

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

3. At all times material to this proceeding, the Association has been the exclusive representative for collective negotiations concerning the terms and conditions of employment for all certificated full-time classroom teachers under contract, employed by the Board. A current collective negotiations agreement is effective from July 1, 1977 through June 30, 1980. Article 3 of the agreement, entitled "Grievance Procedure" defines a grievance as a claim by a teacher that he/she has suffered a loss or injury as a result of misinterpretation, misapplication, or violation of this agreement, policies, or administrative decisions. It provides a three level grievance process which may be pursued by the employee alone or with the assistance of the Association, commencing with the aggrieved employee's immediate superior, and if not resolved, proceeding next to the grievant's principal or other immediate superior, and if still not resolved culminating in an appeal to the Superintendent of Schools. At the Superintendent level a meeting may be held at the grievant's request at which the Superintendent may appear by representative. The Article further provides for binding arbitration at the request of the Association if dissatisfied with the Superintendent's decision of only those grievance pertaining to a violation of the agreement, with certain additional limitations not here germaine. Article 15, "Teacher Evaluation", provides that all monitoring or observation of the work performance of a teacher shall be conducted openly and with full knowledge of the teacher and,

further, that a teacher has the right to review and comment on all derogatory material prior to its placement in his/her personnel file.

4. At the time of the hearing Robert Holden had been employed by the Board as a Health and Physical Education Teacher of 7th and 8th grade classes at the Nottingham Middle School for the last four years and was tenured under the Education Law.

5. During the period October 31 through November 4, 1977, Holden had been absent from school due to illness. By a writing entitled "Professional Observation Record", dated November 15, 1977 and signed by his Principal, Virginia Gittelman, a copy of which he received on November 16, Holden was given an official reprimand for failing to have a written lesson plan for use in teaching his classes during his absence. His Principal noted, inter alia, that there was no written evidence of available plans for his absence and his planbook was not locatable in the building during that time. Holden was advised that any future lack of plans will result in Gittelman recommending disciplinary action. The written reprimand was placed in Holden's personnel file.

6. Holden filed a timely grievance to the reprimand and held a first level grievance meeting or meetings with Principal Gittelman at which he had apparently [2/] claimed that his wife had brought his lesson plans in to the school while he was out ill in the course of which she had been seen by two custodians employed at Nottingham Middle School, and, further, that he had called in his lesson plans for the entire week to a colleague, Physical Education teacher Peterson who had advised he transferred them to Gittelman. Gittelman denied the grievance. Holden then appealed the Principal's decision to Superintendent of Schools, Dr. Peter A. Hartman.

7. A Superintendent level grievance meeting was held on March 6, 1977 in the library of the Greenwood Elementary School. Appearing for the Association and the grievant, were Holden himself, Paul Humphrey, a middle school science teacher in the District and presently Association faculty representative and grievance chairperson for Nottingham Middle School, Carol Ryan Kmiec, a six grade teacher in the District and presently grievance chairperson and Middle School representative, and Harry Donnelly, field representative for the Association's parent body, New Jersey Education Association ("NJEA"). Appearing for Superin-

2/ No testimony was elicited as to the substance of the grievance process prior to the Superintendent's level. However, the inference is warranted based upon Holden's testimony that he had raised these defenses to the reprimand at the principal's level of the grievance.

tendent Hartman as his representatives were Thomas Fitzpatrick, the Board's Director of Personnel and Lester Aron, a member of the law firm, Pachman, Aron & Till, and labor-management consultant to the Board.

8. The library room in which the grievance meeting was conducted is approximately 15 feet long by 12 feet wide. It contained tables which had been placed together in such a fashion as to form a horseshoe within the room made up of two sides approximately 8 feet in length and a third side approximately 12 feet long. At the long side sat Association representatives Humphrey, Donnelly and Kmiec. Along the side opposite to the Association representative across the open space formed by the horseshoe sat Board labor counsel Aron, and on opposite ends of the third, closed side of the horseshoe, close to a colleague for his respective position, approximately 8 feet apart, sat Holden and Fitzpatrick. Directly behind the Association representatives were library bookcases. There was a very narrow passing space of approximately 2 feet behind Aron on the third side, limited passing space approximately that narrow behind Holden and Fitzpatrick on the second, closed side and probably no passing space behind the Association representatives whose chairs backed up against the bookcases.

9. The Superintendent's level grievance meeting provides an opportunity for the Superintendent or his representatives to learn the facts regarding the grievance and the Association and/or grievant's arguments in support of the grievance so that a report can be made to the Superintendent for his determination. The meeting usually includes a factual inquiry of the grievant and/or Association with respect to the matter in dispute.

10. On this occasion Board attorney Aron made an opening statement informing the Association representatives that this was its opportunity to make a presentation of the facts and that following such presentation the Superintendent's representatives would make their factual inquiry so that they could provide a report of the facts to the Superintendent. NJEA Representative Donnelly then made an opening presentation. At its conclusion Aron asked one or two questions with respect to the grievance. At that point Personnel Director Fitzpatrick asked Holden directly if it was possible for him to verify through individuals other than himself that his lesson plans were present in the school at the time in question during his absence, as he claimed.

11. All witnesses agree that Holden, who up to this point, had been restrained and normal in his conduct, and casual in his responses, suddenly became extremely agitated and angry. He raised his voice and stated loudly that he had

told this story before and that all the people were going to lie this time. That they wouldn't tell the truth. Fitzpatrick then responded to the effect "Bob, if you're going to be emotional..." but before he could complete the sentence Holden struck the table hard with his fist and rose while speaking in a loud tone of voice. None of the Association witnesses recalled more than one striking of the table. I credit the Respondent's witnesses, Aron and Fitzpatrick, who provided a more detailed and graphic description of the events which transpired than any of the Association witnesses, that Holden struck the table as forcefully as he could with a closed, clenched fist at least twice as he rose out of his seat and screamed or shouted that he had listened to all of this that he was going to listen to, that he had heard it all before, that it was all lies and that he did not have to listen to any more. These statements related to Holden's belief that his and his wife's creditability were being challenged with respect to his claim that his plan book had been brought in to the school during his absence.

12. After rising, striking the table and shouting these comments, Holden remained in place for a moment, then moved his seat back and continued to shout out the same or similar statements while he moved to his left behind the closed end of the horseshoe toward Fitzpatrick, pausing momentarily and then passing behind Fitzpatrick, 3/ made a right turn, passed behind Aron and continued behind the third side of the horseshoe to the corner of the room opposite to where he had been seated and stopped next to a filing cabinet.

3/ Holden testified that as he passed behind Fitzpatrick he said, "Please excuse me sir" whereupon Fitzpatrick moved his chair closer to the table to afford Holden room to walk behind him. Holden also denied that he was screaming. Fitzpatrick testified that Holden did not excuse himself and was screaming as loudly as he could. I credit Fitzpatrick's and Aron's testimony and characterization of Holden's conduct at the time. Holden's request to be excused appears incompatible with his otherwise irrational conduct and extremely agitated state of mind. Furthermore, I did not find Holden to be a very trustworthy witness. He denied that he had become violent but admitted that the room was quite small and that he had become loud and angry during the proceeding, having become upset because the Board was treating him differently than other teachers who had a second change to bring in their plan book prior to being disciplined. At one point Holden was nonresponsive to a series of repeated questions on cross examination seeking to elicit what he was saying as he rose from his seat and moved around the room to his left. Holden also did not have a clear recollection of his remarks as he walked to the cabinet or what Fitzpatrick had asked which triggered his sudden outburst. Holden's testimony was also confused at times. He initially characterized the Superintendent's ultimate denial of his grievance as having been based upon his emotional outburst whereas the denial makes no reference to the outburst but only to an

(continued next page.)

13. Holden is a very large man. My observation confirms that Holden appears to weigh over 200 lbs. and is at least 6 feet tall. At the meeting he was wearing a warm-up suit, identifying him with the physical education activities he directed as teacher. According to the unrebutted testimony of Aron, as he moved toward Fitzpatrick and Aron,Holden had his fist clenched, his shoulders were hunched, his eyes were glazed, the veins in his neck were taut and straining and he appeared extraordinarily agitated and angry. Fitzpatrick, in particular, perceived Holden's upset as being directed to him. Both Aron and Fitzpatrick testified that as a consequence of Holden's appearance and conduct they were personally concerned for their physical safety should they commence talking to Holden or responding to his outburst.

14. During Holden's outburst no one in the room spoke. This pause continued for 45 seconds to a minute in length. Among other statements which Holden shouted and yelled out during this period were ones to the effect that he told his story and the plans were delivered and he did not care what we did to him. We could fire him and what he was doing now he believed would also be held against him. After Holden completed his walk around half the room behind the Superintendent's representatives and came to the filing cabinet he continued to appear to be extremely distressed, was breathing heavily and appeared to be unable to contain himself in one position as he continued to pace back and forth at the end of the room next to the filing cabinet.

15. After the lengthy pause and movements around the room, Donnelly commenced a discussion of the issues for a short period of time. Neither Aron or Fitzpatrick engaged in further questioning of Holden although Fitzpatrick had only asked one question which immediately preceded the outburst and he had been prepared to engage in further questioning of the grievant. Both sides made closing remarks and the grievance meeting concluded.

3/ (continued from page 5)

evaluation of the positions of the parties. Finally, Holden's own testimony supports the irrationality of his behavior at the time which can only reflect adversely on the characterizations he placed on his own behavior at the instant hearing. It is clear that Fitzpatrick was seeking corroboration for Holden's defense that others had made his lesson plans available at the school. Yet, instead of detailing the claims he had previously made, or asking for an opportunity to present his wife, custodians or colleague to support his claim - at one point, Holden testified he wanted them there - Holden became unresponsive to the extent of repeating his view that no one believed him or his wife.

16. As the participants were leaving the room or had already emerged from the library, Donnelly, in response to a comment by Fitzpatrick that he did not like Holden's attitude, stated that it had been perfectly legitimate and was part of the therapeutic effect of the grievance procedure, and, in a comment to Holden, advised him that he should have no worries about the consequence of his behavior.

17. Neither the Association nor the grievant requested a further convening of the Superintendent's level grievance procedure and no attempt was made by either party to reconvene. Following the March 6 hearing, the Superintendent's representatives met with the Superintendent and reported on the merits of the grievance and on Holden's conduct during the grievance meeting. By memorandum dated March 13, 1978, Superintendent Hartman informed Holden that, after reviewing and evaluating the positions of the parties with his designee following the Superintendent's level hearing, he found that the observation record on Holden's failure to have lesson plans in his classroom was appropriate and he, therefore, denied the grievance.

18. By a separate memorandum dated March 14, 1978 from Fitzpatrick to Holden regarding the subject of unprofessional conduct, Fitzpatrick initially noted that the memorandum was to be filed for the record and then cited Holden's unprofessional conduct on March 6, 1978 in the Greenwood School Library as being totally unacceptable behavior for a teacher of this school district. The memorandum went on to state, "Your sudden and violent interruption of my effort as the designee of the Superintendent to learn your position in the incident being heard, forced me to refrain from further participation in the hearing under fear that you might become more emotional." The memorandum continued with Fitzpatrick's recommendation that the incident be given consideration when Holden's overall performance rating for the 1978 school year is being completed since some disciplinary action is warranted for this outburst against an administrator.

19. After its denial by the Superintendent, the Association withdrew the grievance and did not submit it to arbitration. NJEA Representative Donnelly explained the reason as having nothing to do with the merits but rather the result of a failure to make application for arbitration within the time limit specified in the agreement.

20. To date, the memorandum of reprimand, although placed in Holden's personnel file, has not been utilized by the Board pending the unfair practice litigation. The Board's normal practice is not to make use of grievance related

conduct in evaluating staff.

ISSUES

1. Whether Respondent's written reprimand of employee Holden constitutes an act of interference with, restraint or coercion of the exercise by Holden of rights guaranteed to him by the Act, in violation of N.J.S.A. 34:13A-5.4(a)(1).

2. Whether the reprimand constitutes an act of discrimination against Holden in regard to his tenure of employment or any term or condition of employment, to discourage employees in the exercise of the rights guaranteed to them by the Act, in violation of N.J.S.A. 34:13A-5.4(a)(3). 4/

In resolving both issues a threshhold issue must of necessity be resolved regarding the nature of the conduct in which Holden engaged during the Superintendent level grievance hearing, to wit:

3. Whether the conduct in which Holden engaged during the course of the grievance meeting was an exercise of the rights guaranteed to employees by the Act.

With respect to the second issue concerning the alleged violation of subd. (a)(3), a separate subsidiary is presented, namely,

4. Whether the letter of reprimand to Holden placed in his file constitutes a change in his tenure, term or condition of employment, which, if discriminatorily made or inherently destructive of Holden's protected rights, would

4/ For the first time, after the close of hearing, in its post-hearing brief, the Association counsel seeks to raise an issue as to whether, in addition to its written reprimand, the Board further punished Holden by denying his grievance, not on the merits, but because of his protected activity, in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3). The Association, in its brief, seeks as a specific remedy for this alleged violation a revocation of the denial of the grievance and a reconvening of the grievance proceeding. This allegation of unfair practice is not alleged in the charge (or complaint). No amendment was sought to include this allegation in the proceeding at any time after issuance of complaint although the Examiner in an opening statement noted he could only consider for purposes of decision, the specific allegations in the charge and complaint but could permit the Charging Party to amend its charge at any time upon such terms as may be deemed just. Neither was the issue addressed by either Association or Board Counsel during the hearing and the Board did not mention or deal with the allegation in its post-hearing brief. Accordingly, as the allegation belatedly raised by the Association was neither contained in the charge nor adjudicated at the hearing, I decline to pass upon it. In the Matter of Town of Bloomfield and Bloomfield Patrolmen's Benevolent Association, Local No. 32, P.E.R.C. No. 76-39.

violate subd. (a)(3).

ANALYSIS

Turning first to a discussion of the allegation of discrimination in regard to Holden's tenure, term or condition of employment, I conclude, as a preliminary matter, that with regard to Issue No. 4, the letter of reprimand was an act by the Board which has affected Holden's tenure of employment and thus, if discriminatorily motivated (or if inherently destructive of Holden's protected rights), 5/ would constitute a violation of subd. (a)(3). While Fitzpatrick testified that the reprimand has not been utilized by the Board in evaluating Holden's work performance or in determining his personnel rating since its placement in his personnel file, and also noted that grievances are not usually used in evaluating staff, the Director of Personnel also noted that the Respondent was holding the reprimand in abeyance pending the outcome of this litigation. Thus, the Board has not abandoned its future use. The letter of reprimand itself cites Holden's unprofessional conduct on March 6, 1978 as being unacceptable behavior and recommends consideration of the incident in Holden's overall performance rating "since some disciplinary action is warranted for this outburst against an administrator." The Board's brief argues that if permitted to be retained in Holden's file, it is hoped the letter will deter further abusive and unprofessional conduct by Holden or other employees in similar situations. Thus, the reprimand is both a citation for improper conduct as well as a threat of future discipline and, as such, is an actionable change in Holden's tenure or condition of employment. See City of Hackensack, P.E.R.C. No. 78-71; Laurel Springs Board of Education, P.E.R.C. No. 78-4.

As to the issue of violation of subd. (a)(3) itself, Issue No. 2, I recommend that this allegation be dismissed by the Commission even without consideration of whether or not Holden's conduct was protected under the Act. Assuming, arguendo, that Holden engaged in protected conduct during his outburst, the record does not contain any evidence that the Board, acting through Fitzpatrick or Aron, was discriminatorily motivated in issuing and placing in his personnel file the memorandum of reprimand. I find fully applicable here the Commission's conclusion appearing at page 9 of its Decision and Order In The Matter of the City of Hackensack, P.E.R.C. No. 78-74:

5/ In re Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977).

> "Our decision is really a conclusion that the Union has failed to meet its burden of proof. The standard developed by this Commission in an alleged a(3) violation necessitates that the charging party establish that the employer's conduct was motivated in whole or in part by a desire to encourage or discourage the exercise of rights under the Act. The Union has not established the employer's motivation. In some limited circumstances, the natural consequence of the employer's action may be sufficient to infer the unlawful intent of the employer. However, here we cannot conclude that the evidence establishes that the City has been selective in its application of Special Order No. 25...." /Citations omitted/.

The record contains no evidence that the Superintendent's representatives at the grievance meeting were acting in any manner other than in good faith. It was only Holden's unexpected and unanticipated outburst which cut short the meeting. None of the statements made by Fitzpatrick or Aron at the meeting evidence any discriminatory attitude toward Holden because of his having grieved or having sought the Superintendent level meeting. The Superintendent designees' full participation in the meeting and concern for obtaining the Association's position and the facts concerning the grievance clearly negate any basis for inferring a discriminatory motive to them. Consequently, regardless of the characterization of Holden's conduct as protected or unprotected, I will recommend dismissal of the subd. a(3) allegation.

The subd. a(1) allegation presents a completely separate question. Here, good faith is no defense. Rather, "it is the tendency of an employer's conduct to interfere with those employee rights protected by (a)(1), rather than his motives, that is controlling." 6/ Accordingly, whether or not Holden's outburst exceeded the bounds of protected conduct, Issue No. 3, becomes central to a determination of the allegation of a(1) violation.

The rights guaranteed by the Act are defined in N.J.S.A. 34:13A-5.3 in the following words:

> "Except as hereinafter provided, public employees shall have, and shall be protected in the exercise of the right, freely and without fear of penalty or reprisal, to form, join and assist any employee organization or to refrain from any such activity;"

6/ In the Matter of the City of Hackensack, P.E.R.C. No. 78-71 at page 9 of its Decision and Order. See Welch Scientific Co. v. NLRB, 340 F.2d 199, 58 LRRM 2837 (C.A. 7, 1975); NLRB v. Illinois Tool Works, 153, F.2d 811 (C.A. 7, 1946).

It is clear that Holden's role as grievant and his presence and participation in the March 6, 1978 grievance meeting was activity protected by the Act. N.J.S.A. 34:13A-5.3 and Township of West Windsor v. Public Employment Relations Commission and P.B.A. Local 130 ___N.J.___, 4 NJPER 359 (para. 4166)(Supt. Ct., 1978). However, "...any employee may not act with impunity even though he is engaged in protected activity. An employee's rights under the Act must be balanced against the employer's right to maintain order in its operations by punishing acts of insubordination. /Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 74 LRRM 2855 (7th Cir. 1965); Boaz Spinning Co. v. NLRB, 395 F.2d 513, 68 LRRM 2393 (5th Cir. 1968)./ In drawing the line between these conflicting rights, each case must be determined on its particular facts." 7/

The Association in its brief cites a number of federal cases in which various instances of employee misconduct in the course of otherwise protected activity did not serve to remove from them the protection of the federal Labor Management Relations Act. (LMRA), 29 U.S.C. Sect. 141 et seq. 8/

My reading of these and other cases, convinces me that in evaluating Holden's conduct, certain factors must be weighed and taken into account. On the one hand, and as pointed out by the Association in its brief, the courts have recognized that the nature of the protected activity involved is of central importance in resolving the issue. Grievance proceedings, in particular, warrant special consideration because of the fundamental role they play in the day-to-day collective negotiations process. 9/ A measure of some latitude must be provided for the free exchange of views, even those which may be accompanied by profanity

7/ In the Matter of the City of Hackensack, P.E.R.C. No. 78-71 at page 7 of its Decision and Order.

8/ The federal decisional law in unfair labor practice cases arising under the LMRA is particularly appropriate as a guide with respect to the interpretation of the unfair practice provisions of N.J.S.A. 34:13A-5.4 Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, ___N.J.___, 4 NJPER 328 (par. 4162). (Sup. Ct., 1978).

9/ See, in particular, Crown Central Petroleum Corp. v. NLRB, 74 LRRM 2855 at 2860. See, also, the importance attached to the grievance process by the New Jersey Supreme Court in Township of West Windsor v. P.E.R.C. and PBA Local 130, ___N.J.___, 4 NJPER 359 (par. 4166).

or even accusations of improper conduct against the employer. [10]

On the other hand, the Courts have also considered significant whether the conduct complained of was related to the employee's protected activity, [11] whether the conduct occured under extreme provocation [12] and whether the conduct was so egregious as to be considered indefensible. [13]

While Holden's conduct took place during a Superintendent's level grievance meeting dealing with his grievance against a prior employer reprimand, I conclude that his conduct was not directly related to the grievance meeting and his comments were not pertinent to the discussion of the grievance then taking place. His outburst was nonresponsive to the Personnel Director's inquiry. Holden's comments, which, at times appeared to be almost incoherent,seemed to assume a position on the part of the Superintendent's representatives which was not borne out by the facts. At the precise point at which the Personnel Director was seeking specific information which could have led to further inquiry, perhaps even independent corroboration for Holden's position that the lesson plans had

10/ See, e.g. the protected utterances of profanity in the context of employee protests to an employer announcement regarding a profit sharing plan in Hugh H. Wilson Corporation v. NLRB, 414 F.2d 1345 (C.A. 3, 1969) and the use of the ephithet "horse's ass" by an employee directed to a Superintendent in the context of a grievance meeting in NLRB v. Thor Power Tool Co., 60 LRRM 2237 (C.A. 7, 1965).

11/ NLRB v. Cement Transport, Inc., 490 F.2d 1024, 85 LRRM 2292 (C.A. 6, 1974), enforcing 200 NLRB 841, 82 LRRM 1255, (1972), cert. den. 4190, U.S. 828, 87 LRRM 2397 (1974) (employee comment he had helped build the company up and "he was going to help tear it down" was in nature of strike threat in context of union organizing drive); Crown Central Petroleum Corp. v. NLRB, cited supra; NLRB v. Thor Power Tool Co., cited supra.

12/ Boaz Spinning Co. v. NLRB 395 F.2d 513, 68 LRRM 2393 (C.A. 5, 1968) (employee called plant manager a "Castro" where there was a complete absence of any prior conduct of company or manager acting in an arbitrary or totalitarian manner toward employees);

13/ NLRB v. Prescott Industrial Products Co., 500 F.2d 6, 86 LRRM 2963 (C.A. 8, 1974)(employee loud and arrogant, pointing finger at plant manager, at times "blatant" and incoherent, all in full view of assembled employees while defying employer by seeking to speak at employer's pre-election meeting); NLRB v. Red Top, Inc., 455 F.2d 721, 79 LRRM 2497 (C.A. 8, 1972)(employee lost temper, pounded his fist on manager's desk and uttered curse words in context of false charges, threats of physical violence and threats of activity detrimental to welfare of business operation).

been delivered to the school in his absence, Holden engaged in a diatribe having no foundation in the concrete dialogue which was then developing. Holden had no right to assume that the Superintendent would not carefully consider his contentions, and the objective reality at the time was that his representatives were taking care to develop all the facts.

Further, Holden's conduct was not provoked by any improper conduct on the part of the Superintendent's representatives. The record establishes that the questions being asked were relevant to the inquiry and they were being phrased in a normal conversational tone. Holden and his colleagues were being treated as equals in a level of the grievance process for which all participants had set aside time to attend. Holden's conduct had the effect of abruptly terminating the meeting. The Board's side never completed its inquiry and the Association and Holden acquiesced in its termination by presenting a short summation and not seeking a reconvening to permit a full questioning of Holden. 14/

Finally, Holden's conduct was intimidating and abusive. 15/ During his outbursts and movements about the room no one spoke on either side. I conclude that the Superintendent's representatives, particularly Personnel Director Fitzpatrick, reasonably believed that by virtue of Holden's behavior, physical bearing and invective, Holden's conduct was directed at them as the visible agents of Board authority responsible for reporting to the Superintendent on Holden's grievance which warranted their reaction that further comment by them could result in an escalation of the disruption personally involving themselves. 16/ Thus, I

14/ Contrary to the Association's contention, it was the obligation of the Association and Holden and not the Board to seek a further meeting if one was desired because of their responsibility in its premature closing.

15/ I find it unnecessary to rule upon the Association's argument at page 13-14 of its brief that Holden's conduct was constitutionally protected. In the context in which Holden's action and speech took place and are before me, I must judge whether they comport with the requirements and standards of the Act and I have no authority to determine their compliance with constitutional provisions. I comment however, that even in those other States which have considered the question in the public sector, protection under labor relations statutes may be lost for otherwise protected activity which becomes unreasonably disruptive or intimidating. See City of Boston, Dept. of Health and Hospitals (MLRC, 1976) Case No. MVP-2135; Wisconsin Council of County and Municipal Employees, State, County & Municipal Employees (WERC 1977) Case No. 17768, MP-345.

16/ In so concluding, I determine it unnecessary and decline to rule on the Respondent's allegation at page 9 of its brief that Holden's conduct would make him civilly liable for assult.

find that Fitzpatrick's comments made in the March 14, 1978 memorandum of reprimand addressed to Holden that "Your sudden and violent interruption of my effort ...to learn your position...forced me to refrain from further participation in the hearing under fear that you might become more emotional" were well founded. Holden's outburst was also made in the presence of two other teachers and challenged the Board's basic and legitimate interest in maintaining proper decorum and discipline in the educational process, particularly that segment of the process related to processing of grievances by its teaching staff.

For all the foregoing reasons I conclude that Holden's conduct commencing when he exploded at the initiation of the Respondent's inquiry of him, exceeded the bounds of activity protected by the Act. Given all the circumstances previously described in the fact section and now commented upon, I cannot recommend to the Commission that it approve, by finding protected, conduct and behavior which has so frustrated the grievance process and undermined the Board's standards for the maintainance of discipline among its employees. 17/ Consequently, the Respondent was free to memorialize a record of Holden's behavior and to utilize the record in consideration of Holden's overall performance rating.

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

CONCLUSIONS OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) by placing in the file of grievant Robert Holden a memorandum of reprimand for improper conduct in which he engaged during a Superintendent's level grievance meeting.

RECOMMENDED ORDER

The Hamilton Township Board of Education not having violated the Act, it is HEREBY ORDERED that the complaint be dismissed in its entirety.

Robert T. Snyder
Hearing Examiner

DATED: Newark, New Jersey
October 31, 1978

17/ For these reasons I find it unnecessary and also decline to rule on the Respondent's further contention, made at pages 5 to 8 of its brief, that Holden's conduct should be judged under a special standard applicable to professional employees more strigent than that permitted in an industrial setting.