P.E.R.C. NO. 90-40

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MT. OLIVE TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-12

EDUCATION ASSOCIATION
OF MT. OLIVE, INC.,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands to the Hearing Examiner an unfair practice charge filed by the Education Association of Mt. Olive, Inc. against the Mt. Olive Board of Education. Certain testimony relied on by the Hearing Examiner was rebutted and the rebuttals were not considered.

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EDUCATION ASSOCIATION
OF MT. OLIVE, INC.,

Charging Party.

Appearances:

For the Respondent, Ribis, Graham, Verdon & Curtin, Esqs. (Thomas R. Curtin, of counsel; Kathleen M. Noonan, on the brief)

For the Charging Party, Klausner, Hunter & Oxfeld, Esqs. (Stephen B. Hunter, of counsel)

DECISION AND ORDER

In P.E.R.C. No. 89-106, 15 NJPER 278 (¶20115 1989), we remanded this case to the Hearing Examiner to consider allegations in an amendment to the unfair practice charge. The Hearing Examiner has issued a supplemental report. H.E. No. 90-5, 15 NJPER ___ (¶_____ 1989). In its exceptions to that report, the Board notes that certain testimony relied on by the Hearing Examiner was rebutted and that the rebuttals were not considered. We therefore ask the Hearing Examiner to reexamine his finding regarding Stephens' alleged "told to watch you" statement, in light of Stephens' explicit denial that he made such a statement (11T160, 11T161). We also ask the Hearing Examiner to reexamine his finding

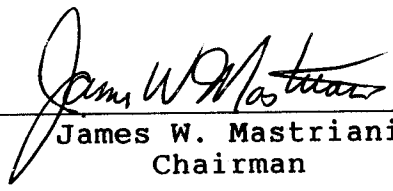
that Stephens told Ryan that two Board members had been wrong to make certain statements to support staff members, in light of Stephen's denial, Licitra's conflicting testimony, and Ryan's testimony regarding staff members' reports of the alleged statements.

We ask that the Hearing Examiner issue a supplemental decision within ten days.

ORDER

This case is remanded for a supplemental decision consistent with this opinion.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Wenzler and Smith voted in favor of this decision. None opposed. Commissioners Reid and Bertolino abstained. Commissioner Ruggiero was not present.

DATED: Trenton, New Jersey
October 27, 1989
ISSUED: October 30, 1989

H.E. NO. 90-5

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

In the Matter of

MT. OLIVE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-12

EDUCATION ASSOCIATION OF MT. OLIVE,

Charging Party.

SYNOPSIS

A Hearing Examiner, upon remand of H.E. No. 89-18 (P.E.R.C. No. 89-106), makes Supplemental Findings of Fact with respect to the Amendment to the Unfair Practice Charge, alleging independent violations by the Respondent of §5.4(a)(1) of the Act, and concludes that the Respondent did violate the Act independently with respect to certain actions by members of the Board and its Superintendent. Accordingly, the posting of a notice is recommended.

However, the Hearing Examiner, notwithstanding his consideration of the exceptions by the Charging Party, refuses to alter his initial recommendation in H.E. No. 89-18 that the Complaint be dismissed as to a Bridgewater contention that the transfer of the Association's President on May 18, 1987, was in retaliation for his exercise of protected activities.

A Hearing Examiner's Recommended Supplemental Report and Decision on Remand is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Supplemental Report and Decision on Remand, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 90-5

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

In the Matter of

MT. OLIVE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-12

EDUCATION ASSOCIATION OF MT. OLIVE,

Charging Party.

Appearances:

For the Respondent, Ribis, Graham, Verdon & Curtin, Esqs. (Thomas R. Curtin, of counsel; Kathleen M. Noonan, on the brief)

For the Charging Party, Klausner, Hunter & Oxfeld, Esqs. (Stephen B. Hunter, of counsel)

HEARING EXAMINER'S RECOMMENDED SUPPLEMENTAL REPORT AND DECISION ON REMAND

This Hearing Examiner issued his Recommended Report and Decision on December 1, 1988, in which he recommended that the Commission dismiss the Complaint of the Charging Party in its entirety (H.E. No. 89-18, 15 NJPER 38 (¶20016 1988).

Thereafter on January 23, 1989, the Charging Party filed exceptions to the Hearing Examiner's Recommended Report and Decision, supra, and on February 14, 1989, the Respondent filed a response, urging affirmance of the Hearing Examiner's recommendation that the Complaint be dismissed in its entirety.

On April 28, 1989, the Commission in a unanimous decision ordered that the case be remanded to the Hearing Examiner for proceedings consistent with its opinion (P.E.R.C. No. 89-106, 15 NJPER 268 (¶20115 1989). The Commission observed that the Hearing Examiner did not consider the allegations in the Charging Party's amended Unfair Practice Charge of September 23, 1987. This amendment alleged three additional independent violations of Section 5.4(a)(1) of the Act when: (1) two Board members allegedly told support staff members that the Association had sold them out; (2) Michael J. Ryan was transferred within weeks of his letter criticizing these Board members; and (3) the Superintendent allegedly told Ryan that the Board had to scrutinize him and everything he did because of his union activities.[1/]

The Commission, in its remand to the Hearing Examiner, stated that this was done so that he might "...make findings and recommendations on these issues..." and that he "...should also make any supplemental findings of fact necessary to resolve factual disputes identified in the post-hearing briefs and reiterated in the exceptions..."[2/]

1/ The Hearing Examiner confesses error in having omitted to consider the allegations in the September 23, 1987 amended Unfair Practice Charge inasmuch as he personally received this amendment and allowed it.

2/ Following the Commission's remand the Hearing Examiner on May 11, 1989, confirmed that counsel for the parties agreed that the record should not be reopened and that they would not submit further briefs.

Based upon the pleadings, including the Charging Party's Amended Unfair Practice Charge of September 23, 1987, the record made during the 15 days of hearing in this matter, the post-hearing briefs of the parties, the Exceptions of the Charging Party, the Respondent's Cross-exceptions, which together constitute the entire record in this proceeding, the Hearing Examiner makes the following:

SUPPLEMENTAL FINDINGS OF FACT[3/]

26. Responding to Charging Party's Exception No. One, prior Finding of Fact No. 7m is supplemented as follows: Board member Maurice J. Geiger stated to Support Staff member, Betty Nagle, sometime prior to March 17, 1987, that "Your Union sold you out..." (1 Tr 81, 82).[4/]

27. Responding further to Charging Party's Exception No. One, prior Finding of Fact No. 7n is supplemented as follows: At a workshop in March 1987, Ryan encountered Stephens during a "break" and brought up the issue of Board members allegedly having made certain statements to Support Staff members (1 Tr 97, 98). When Ryan asked Stephens if he thought it was wrong for this to have been

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3/ Necessarily, the original Findings of Fact set forth in H.E. No. 89-18, supra, are incorporated by reference. For convenient reference, the Paragraph Nos. in these "Supplemental Findings" shall follow numerically the Paragraph Nos. in the original Findings of Fact.

4/ This evidence was adduced through Michael J. Ryan, whose uncontradicted testimony was that he spoke to Nagle on March 17 and March 25, 1987, where Nagle twice made the "sold out" statement and on March 25th Nagle specifically identified Geiger as the author in a conversation that took place at Geiger's house (1 Tr 82).

done, Stephens said "Yes, I know, that was wrong for them to do that. I don't know why they would have done that...," indicating to Ryan that he (Stephens) was referring to Licitra and Geiger (1 Tr 98, 99).[5/]

28. Responding to Charging Party's Exception No. Three,[6/] the Hearing Examiner makes the following Supplemental Finding of Fact: On May 20, 1987, Ryan confronted Stephens in the main office of the High School with a document, which verified that Ryan had handed in only two incomplete grades, not the "large number of incompletes" that Stephens had represented to the Board on May 18, 1987. Stephens at that point responded, "I have been told to watch you by the Board of Education. I have to watch you." [3 Tr 59]. St. Ledger corroborated this testimony of Ryan, specifically testifying that she overheard Stephens say to Ryan "...it is different. I have been told to watch you." (4 Tr 111; 109, 110). Stephens did not dispute Ryan's testimony that they met on May 20th regarding incomplete grades. In response to a question as to whether Stephens had told Ryan on May 20, 1987, that the Board had told him to "watch" Ryan, Stephens testified that the Board of Education "would never say watch anyone" (emphasis supplied) [11 Tr

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5/ The record does not reflect that Stephens contradicted this testimony by Ryan.

6/ This Exception refers to Count Two ¶4 of the Amended Unfair Practice Charge, which alleges that because of Ryan's union activities Stephens stated to Ryan in May 1987 that the Board of Education "...had had to scrutinize him in everything he had done..."

160, 161]. The Hearing Examiner finds that Stephens' testimony failed to rebut the explicit testimony of Ryan and St. Ledger that Stephens made the "told to watch you" statement. Thus, does the Hearing Examiner credit the testimony of Ryan and St. Ledger on this factual issue.

29. Responding to ¶11 of Charging Party's Exception No. Five, the Hearing Examiner makes the following Supplemental Finding of Fact: In 1985, Louis J. Palazzi, Jr., was serving as Head Football Coach and in August of that year he learned that one of his assistant coaches, Michael Cieri, was not going to be retained. This resulted in a letter from the football staff to the Board, requesting a meeting. Immediately following this letter, Stephens met with Palazzi and expressed his dissatisfaction with the letter having been written, adding that he thought that the reason that the letter had been written was the fact that Jeffrey Swanson had been "leading" Palazzi. It was in this context that Stephens said to Palazzi, referring to Swanson, "That big mouth...is always trying to get people on their hind legs and get them upset and cause more problems by doing that than simply by letting things alone..." [14 Tr 10-13].[7/] Although Stephens denied referring to Swanson as a "big mouth" in the presence of Palazzi, the Hearing Examiner credits Palazzi's testimony, based upon (1) the respective demeanors of the witnesses and (2) the apparent lack of bias on the

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7/ See, also, original Finding of Fact No. 7o.

part of Pallazzi since, at the time of the hearing in May 1988, he had been employed elsewhere for at least six months (14 Tr 9, 14, 15).[8/]

30. Responding further to ¶11 of Charging Party's Exception No. 5, the Hearing Examiner makes the following Supplemental Finding of Fact: Stephens denied stating to Swanson that the Board thought he had a "big mouth" and was "too outspoken" (11 Tr 175, 176).[9/] Stephens also denied referring to Swanson as "The loud mouth" in the presence of Palazzi (13 Tr 95). Significantly, Swanson contradicted Stephens, testifying that in January 1987 Stephens said that "...there were a lot of people on the Board who thought that I had a big mouth and I was too outspoken for the Union..." (5 Tr 9). The Hearing Examiner credits Swanson as to what Stephens said to him in January 1987, supra, based upon Swanson's candor and forthrightness as a witness. The crediting of Swanson is consistent with the previous crediting of Pallazzi on the same issue of fact.

31. Responding to ¶13 of Charging Party's Exception No. Five, the Hearing Examiner makes the following Supplemental Finding of Fact: Ryan testified that at the May 18, 1987 meeting where his transfer was voted upon, Board member John McLaren stated, "...that

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8/ The Hearing Examiner attaches no weight to Palazzi's having had a dispute with Stephens regarding his status as a football coach in August 1985, it being too remote in time.

9/ Stephens did, however, equivocate in this testimony by stating that Swanson "did have a big mouth" (11 Tr 175).

if Ryan weren't the President of the Education Association, then there wouldn't be such a problem with this transfer" (2 Tr 79).[10/] McLaren testified on cross-examination that he was satisfied with Stephens' reasons for recommending Ryan's transfer. Further, McLaren recalled stating at the meeting that "...we wouldn't have a problem if Michael Ryan was not the head of the Union, and I would like to clarify that statement...[A]pparently what I meant was that because Mr. Ryan was an officer in the Union he might have thought it to be something else, but I just -- that is the reason I stated that. If he was just a regular teacher, there would be problem at all..." [8 Tr 50, 51]. Considering Ryan's testimony that he was only "...characterizing Mr. McLaren's comments..." in relation to the testimony of McLaren that "...we wouldn't have a problem if Michael Ryan was not the head of the Union...," the Hearing Examiner credits the testimony of McLaren, including his clarification that he was merely making a distinction between Ryan as President of EAMO and Ryan as "...just a regular teacher..." Thus, the Hearing Examiner finds as a fact that McLaren, as an agent of the Respondent, made no statement or statements at the May 18, 1987 Board meeting, which could be construed as manifesting hostility or animus toward Ryan in the context of McLaren's vote to approve Ryan's transfer from the High School to the Upper L (8 Tr 46, 47).

10/ Ryan acknowledged that he was "...characterizing Mr. McLaren's comments..." (2 Tr 79).

32. Responding to ¶1 of Charging Party's Exception No. Five, the Hearing Examiner makes the following Supplemental Finding of Fact: The relevant evidence with regard to the "Rat Poison" (R-2) incident has been fully analyzed and discussed in prior Finding of Fact No. 17, supra. Any suggestion to the contrary by the Charging Party is rejected. It was found that although Stephens testified that he did not believe that Ryan was the author of the document, he did believe that it was typed on the Social Studies Department typewriter. Stephens also added that although he did not believe that EAMO was responsible for the authorship of "Rat Poison," he did believe that members of EAMO aided in its publication. The bottom line in this Finding was as set forth in footnote 11, namely, that no definitive testimony ever pinpointed that Ryan or EAMO was responsible for the authorship and issuance of "Rat Poison," notwithstanding that the Social Studies Department typewriter may have been the instrument upon which it was written. Thus, has the Hearing Examiner concluded that the "Rat Poison" incident played no role in the decision of the Respondent to transfer Ryan on May 18, 1987.

33. Responding to ¶14 of Charging Party's Exception No. Five, the Hearing Examiner makes the following Supplemental Finding of Fact: James E. O'Brien, who held the positions of Building Representative, Chairman of the Grievance Committee, a member and Chairman of the Negotiations Committee and President of EAMO in the years prior to 1980, testified regarding his relationship with

Stephens during those years, dating back to 1974, when Stephens was as now the Superintendent. Although the Hearing Examiner does not discredit the testimony of O'Brien as to the events, which transpired between him on behalf of EAMO and Stephens, the probative value of O'Brien's testimony in resolving Ryan's alleged discriminatory transfer in May of 1987 is rejected as too remote in time. [14 Tr 31-47].

* * * *

34. The Hearing Examiner refuses to make additional Supplemental Findings of Fact in response to the following Exceptions of the Charging Party for the reason that his original Findings of Fact Nos. 1 through 25 supra, are sufficient, except as specifically supplemented above in ¶'s 26 through 33: See Exceptions - Two, Four, Five (¶'s 2-10, 12, 15, 16).[11/]

SUPPLEMENTAL DISCUSSION AND ANALYSIS

I.

The Respondent Did Not Violate §5.4(a)(3) Of The Act Upon The Record On Remand.

Nothing in the above Supplemental Findings of Fact has changed this Hearing Examiner's conclusion that the Respondent did not violate §5.4(a)(3) of the Act under the Bridgewater analysis when the Board voted 8-0 on May 18, 1987, to transfer Ryan from the High School to the Upper L. For example:

11/ Exceptions Six and Seven are argumentative and do not assert deficiencies in the Hearing Examiner's original Findings of Fact.

1. Supplemental Finding of Fact No. 26, supra, involving Geiger, arguably taints only his vote to transfer Ryan at the Board's meeting on May 18, 1987. However, any bias of Geiger toward EAMO, as manifested by his statement to Nagle sometime prior to March 17, 1987, cannot be imputed to other members of the Board on this record.12/ Since, absent consideration of Geiger's vote, there were seven untainted votes for the transfer of Ryan on May 18th, the ultimate result does not constitute a violation of the Act.13/

2. In Supplemental Finding of Fact No. 31, supra, involving McLaren, the Hearing Examiner has found as a fact that McLaren made no statement or statements at the May 18th Board meeting, which could be construed as having manifested hostility or animus toward Ryan. The circumstances surrounding McLaren's vote to approve Ryan's transfer indicate merely that he was attempting to distinguish between the inherent difficulty in voting to transfer a teacher who was, as Ryan, "the head of the Union" and that of a teacher who was "just a regular teacher." This appears to the Hearing Examiner to have been a perfectly logical and neutral distinction.

12/ However, the conduct of Geiger does not insulate the Board from a finding that it independently violated §5.4(a)(1) of the Act, infra.

13/ The bottom line remains unchanged even when the testimony of Stephens is considered, he having implicated Licitra along with Geiger as having made a statement to a Support Staff member in the same vein as that of Geiger (see Supplemental Finding of Fact No. 27, supra).

3. The credited "watch you" statement of Stephens occurred on May 20, 1987,[14/] two days after the Board's vote to transfer Ryan. Thus, this statement of Stephens cannot fairly be attributed to the Board's action of May 18, 1987, since neither Ryan nor St. Ledger pinpointed the Stephens' statement as having been made in the context of the Board's decisional process to transfer Ryan on May 18th.

4. Once again in Supplemental Finding of Fact No. 32, supra, the Hearing Examiner has reexamined the "Rat Poison" issue, which confirms his conclusion that "no definitive testimony ever pinpointed that Ryan or EAMO was responsible for its authorship and issuance." (H.E. No. 89-18, fn. 11). Thus, the 'Rat Poison" incident played no role in the Board's decision to transfer Ryan.

II.

The Respondent Independently Violated §5.4(a)(1) Of The Act Upon The Record On Remand.

A public employer independently violates §5.4(a) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification: Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988); UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526

14/ See Supplemental Finding of Fact No. 28, supra.

(¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). Also, the Charging Party need not prove an illegal motive in order to establish this independent violation of §5.4(a)(1) of the Act: Morris, The Developing Labor Law, at 75-78 (2d ed. 1983).

It is clear to the Hearing Examiner upon remand and, particularly, upon considering the proofs adduced by the Charging Party with respect to the Amended Unfair Practice Charge, that the Respondent has independently violated Subsection (a)(1) of the Act by the conduct of its agents in several instances. Thus, for example, the Hearing Examiner finds and concludes that the statement by Geiger to Support Staff member Nagle in a conversation that took place between Nagle and Geiger at his house constitutes conduct proscribed by our Act since it tended to interfere with Nagle's statutory rights and was utterly lacking in a legitimate business justification. [See Supplemental Finding of Fact No. 26, supra].

Additionally, the acknowledgment by Stephens to Ryan at a workshop in March 1987, that Licitra and Geiger were "wrong" in having made statements to Support Staff directly imputes illegal conduct to Licitra and Geiger as Board members under the same theory as Geiger's statement to Nagle, supra. [See Supplemental Finding of Fact No. 27, supra]. Further, the Hearing Examiner finds and concludes that the Respondent independently violated §5.4(a)(1) of the Act when Stephens stated to Ryan on May 20, 1987, that he had

been told by the Board to "watch you." The findings of fact in this regard are fully set forth in Supplemental Finding of Fact No. 28, supra, and need not be repeated herein.

Supplemental Findings of Fact Nos. 29 and 30, supra, together demonstrate clearly, and the Hearing Examiner so finds and concludes, that Stephens violated the Act as an agent of the Respondent by his statements to Palazzi and to Swanson that Swanson had a "big mouth" and was "too outspoken." Stephens specifically attributed these characterizations of Swanson to "...a lot of people on the Board..." The Hearing Examiner in so concluding makes no distinction between Palazzi's conversation with Stephens having occurred in 1985 and Swanson's conversation with Stephens having occurred in January 1987. If anything, the span of several years between the conversations strengthens the conclusion that Stephens was given to expressing himself in this regard with consistency.

Finally, however, the Hearing Examiner cannot conclude that any violation of the Act was proven by the Charging Party as a result of the testimony of O'Brien, primarily because of remoteness in time. O'Brien testified only about his relationship with Stephens during the years 1974 through 1980 or 1982. [See Supplemental Finding of Fact No. 33, supra].

* * * *

Based upon the entire record on remand in this proceeding, and the Supplemental Findings of Fact above made, the Hearing Examiner now makes the following:

SUPPLEMENTAL CONCLUSIONS OF LAW

1. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(3), nor derivatively, N.J.S.A. 34:13A-5.4(a)(1), when it involuntarily transferred Michael J. Ryan from the High School to the Upper Elementary School on May 18, 1987, notwithstanding that Ryan, as the Association President, had engaged in extensive protected activities and had a confrontational relationship with the Superintendent Chester Stephens.

2. The Respondent did, however, independently violate N.J.S.A. 34:13A-5.4(a)(1) by the conduct of its agents and representatives in the several instances found above.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refraining from making statements to Support Staff members to the effect that "Your Union sold you out"; and further by directing that the Superintendent refrain from stating to Michael J. Ryan that he had been told to "watch" him on and after May 20, 1987; and, further, by directing that the Superintendent refrain from making statements to Louis J. Palazzi, Jr., and Jeffrey Swanson to the effect that Swanson had a "big mouth" and was "too outspoken for the Union..."

B. That the Respondent Board take the following affirmative action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent Board's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent Board has taken to comply herewith.

Alan R. Howe
Hearing Examiner

Dated: August 7, 1989
Trenton, New Jersey

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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refraining from making statements to Support Staff members to the effect that "Your Union sold you out"; and further by directing that the Superintendent refrain from stating to Michael J. Ryan that he had been told to "watch" him on and after May 20, 1987; and, further, by directing that the Superintendent refrain from making statements to Louis J. Palazzi, Jr., and Jeffrey Swanson to the effect that Swanson had a "big mouth" and was "too outspoken for the Union..."

Docket No. CO-H-88-12 MT. OLIVE 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 the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.