

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BLACK HORSE PIKE REGIONAL  
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-80-309-1

BLACK HORSE PIKE EDUCATION  
ASSOCIATION,

Charging Party.

SYNOPSIS

The Commission, in an unfair practice case, finds that the Black Horse Pike Regional Board of Education violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when it placed in the personnel file of a teaching staff member two letters from Board representatives which were critical of the teacher's actions which were undertaken while the teacher was serving as an Association representative in a meeting with a Principal concerning another teacher's resignation from her job. In agreement with its Hearing Examiner, the Commission finds that where an employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment. The Commission finds in the instant case that the teacher, Stanley Horton, was not engaged in activity which was relevant to his performance as an Industrial Arts teacher, when he represented another teacher at a meeting with the Principal. Accordingly, the Commission finds that the Board committed an unfair practice when it placed the letters in Mr. Horton's personnel file rather than the file it maintained on matters pertaining to the Association.

The Board, which during the course of the litigation, removed the letters in question, was ordered to cease and desist from its violations and to post a notice to employees.

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ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Wade & Friedman, P.A.  
(John D. Wade, of Counsel)

For the Charging Party, Selikoff & Cohen, P.A.  
(John E. Collins, of Counsel)

DECISION AND ORDER

An Unfair Practice Charge was filed with the Public Employment Relations Commission by the Black Horse Pike Education Association (the "Association") on April 16, 1980, alleging that the Black Horse Pike Regional Board of Education (the "Board") violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. The Association alleged that the Board violated subsections 5.4(a)(1) and (a)(2)<sup>1/</sup> of the Act when it sent two letters to the vice president of the Association, Stanley Horton, which were critical of his comments made at a meeting where Mr. Horton served as a representative for another teacher. The

<sup>1/</sup> These subsections provide in pertinent part that "Public Employers, their representatives or agents are prohibited from (1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (2) Dominating or interfering with the formation, existence or administration of any employee organization.

Association also maintained that the letters contained a threat to take legal action against Mr. Horton for the actions he had taken in representing the teacher at the above meeting. In addition, the Association alleged that these letters were placed in Mr. Horton's personnel file.

It appearing that the allegations of the Charge, if true, might constitute a violation of the Act, a Complaint and Notice of Hearing was issued on July 3, 1980. A Hearing was held on August 26, 1980 before Commission Hearing Examiner Edmund Gerber, at which all parties were given an opportunity to present evidence, to examine witnesses, and to argue orally, which the parties waived. At the hearing, the Association moved to amend the Complaint to include an allegation of a violation of 5.4(a)(3)<sup>2/</sup> of the Act. The motion was granted and the Complaint was so amended. The parties filed post-hearing briefs by October 27, 1980.

The Hearing Examiner issued his Recommended Report and Decision on April 28, 1981, a copy of which is attached hereto and made a part hereof. The Hearing Examiner concluded that the Board had violated N.J.S.A. 34:13A-5.4(a)(1) and (3) by its conduct, particularly in placing the letters in Horton's personnel file. Timely exceptions and a brief in support thereof were filed

<sup>2/</sup> This subsection provides in pertinent part that "Public Employers, their representatives or agents are prohibited from (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

by the Board on May 18, 1981. In response, the Association, on May 26, 1981, filed a brief which substantially supported the Hearing Examiner's Recommended Report and Decision.

The Commission, after careful consideration of the record in this matter, rejects the exceptions filed by the Board and adopts the Hearing Examiner's findings of fact and conclusions of law substantially for the reasons set forth in his Recommended Report and Decision.

The record reveals that Mr. Horton is a teacher with the Black Horse Pike Regional School District. During the 1979-80 school year Mr. Horton served as vice president of the Association. One of his duties as an Association officer was to act as Association representative on behalf of other teachers in their dealings with the Board. In that capacity, Mr. Horton was invited by Louis Cappelli, the school principal, to attend a meeting on November 13, 1979 called to discuss the resignation of Barbara Cohen, an English teacher at the school. Ms. Cohen had submitted her resignation as a half-time teacher but a question had arisen as to whether she had provided the Board with adequate notice of her resignation.

The meeting began with Mr. Cappelli questioning Ms. Cohen about whether she still intended to provide only the limited notice she had already given. When she indicated that her plans had not changed, Mr. Cappelli questioned her further and expressed his belief that she was not showing a proper regard for the needs of

the students in the district or the continuity of the educational program. He also indicated that, given her position, the Board might file charges against her under the Education Law to have her teaching certificate revoked for failure to provide adequate notice of her resignation. Ms. Cohen became quite upset at that point and Mr. Horton interjected in an attempt to end the meeting by stating "That's all" and continued that Ms. Cohen was not coming back to work and that's where the matter stood. Mr. Cappelli attempted to pursue his point about a teacher's obligation to the students and Mr. Horton responded that he was there at that time representing Ms. Cohen, not the students. He stated that his role and that of the Association was to protect Ms. Cohen.<sup>3/</sup>

On November 14, 1979, Mr. Cappelli sent Horton a letter criticizing him for his comments at the meeting to the effect that the Association exists only for the protection of the teachers.

<sup>3/</sup> A dispute exists in the record as to exactly what other statements were made by Mr. Horton. Mr. Cappelli, in his testimony indicated, that Mr. Horton stated that he had told Ms. Cohen she was not obligated to provide more notice. Mr. Horton denied ever making such a statement. To the contrary, he testified that in a discussion he had with Ms. Cohen prior to the meeting he advised her that the amount of notice she was providing might be inadequate. Mr. Horton further testified that his comments at the meeting were only intended to protect Ms. Cohen after she became upset at Mr. Cappelli's statements to her and that given her firm position that became his only role at that point.

Given our limited view of this case, as discussed infra, we do not believe it is necessary to resolve the conflict in the testimony on exactly what Mr. Horton said at the meeting or to pass upon the accuracy of the advice he may have given to Ms. Cohen, if the Board's version is correct, or even to pass upon the accuracy of his perception of his role at the meeting.

The letter stated that he, Mr. Cappelli, was greatly disturbed by the expression of an attitude by a representative of the Association that the education of the students was not one of its concerns.<sup>4/</sup> On November 19, 1979, Mr. Horton received a second letter, this time from the Superintendent of Schools, which stated that Mr. Cappelli had related the events of the November 13 meeting to him and that based on the facts of Ms. Cohen's resignation he had recommended to the Board that it pursue having Ms. Cohen's teaching certificate revoked. The letter went on to state that based on what Mr. Cappelli had told him, the Superintendent was also disturbed at Mr. Horton's role at the meeting and that the Board had requested its attorney to investigate what steps could be taken against Mr. Horton "as an individual" and against the "BHPEA."

Neither Mr. Horton, nor the Association took any immediate action with respect to these letters. However, on January 9, 1980, Mr. Horton happened to be in the school's office when he overheard a conversation in the corridor between Mr. Cappelli and Walter King, Mr. Horton's supervisor. Horton's attention was aroused when he heard Cappelli mention Ms. Cohen's name. Cappelli said to King, "I want to kill that son-of-a-bitch, that's what I want to do," referring to Horton. Mr. King responded that "Horton is

<sup>4/</sup> Mr. Horton testified that Mr. Cappelli took his statements out of context in that he, Horton, was only speaking of his role at that meeting after Ms. Cohen became emotionally upset.

told what to do and I don't think he will ever be a teacher."<sup>5/</sup>

Following Mr. Horton's overhearing of this conversation, the Association did send the Board a letter dated January 25, 1980 requesting a meeting to discuss the letters sent to Mr. Horton. This meeting occurred on February 13, 1980, and it developed at that meeting that the Board, through the Superintendent's office, had placed the November 14 and November 19 letters in Mr. Horton's personnel file. At the meeting, the Superintendent indicated that he would transfer the letters from Mr. Horton's personnel file to a file maintained for Association matters. The Association requested instead that they be removed from all files, but the Board refused to do so. The Association then filed the instant unfair practice charge.

The Hearing Examiner found that the letters in this case were intended to discourage Mr. Horton in the exercise of his rights as an Association representative and thus violated N.J.S.A. 34:13A-5.4(a)(1) and (3). He specifically found that the initial placement of the letters in Horton's personnel file rather than the Association file indicated that the Board's agents intended that the letters would reflect upon Mr. Horton as a teacher and Board employee, not as an Association representative. Similarly, their placement in his personnel file was evidence that the

<sup>5/</sup> The Board objected to Mr. Horton's testimony concerning this conversation, which objection was overruled, but neither Mr. Cappelli nor any other Board witness ever denied that the conversation took place or that the statements were made.

Board's motivation in sending them was to discourage Mr. Horton's future conduct as an employee representative and to punish him for his conduct, not simply to protest to the Association actions which it believed were inappropriate. The Hearing Examiner found that the Board's agents were confusing Mr. Horton's roles as teacher and as Association official.

The Hearing Examiner further found that this conclusion was supported by the conversation between Mr. Cappelli and Mr. King, Mr. Horton's teaching supervisor. It provided not only evidence that Mr. Cappelli was motivated by anti-union animosity toward Mr. Horton, but was also indicative of the inability of these Board agents to differentiate between Mr. Horton's activities on behalf of the Association and his conduct as a teacher.

The Board's exceptions to the Hearing Examiner's Recommended Report and Decision contend that he erred in admitting into evidence Mr. Horton's testimony concerning the conversation he overheard between Mr. Cappelli and Mr. King. Its grounds are that the Association's charge alleges that the two letters written to Mr. Horton constitute the unfair practice and that therefore admitting evidence of a conversation which occurred two months after the letters were written expanded the scope of the charge and was irrelevant. The Commission disagrees, and adopts the Hearing Examiner's analysis on this point. The conversation is evidence of the motivation behind the Board's actions in writing the letters and of the effect they intended them to have. Mr.



Cappelli's and Mr. King's comments, particularly those concerning Mr. Horton's performance as a teacher arising in a conversation about the meeting concerning Ms. Cohen are relevant to the issues in this case.

It must be noted that the Hearing Examiner did not find that writing the letters were per se violative of the Act, nor do we. A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However, as we have held in the past, and as noted by the Hearing Examiner, the employer must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer. See, In re Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979) and In re City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶14001 1977).

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible criticism may be appropriate and even legal action, as threatened here, may be initiated to halt or remedy

the others actions. However, as in this case, where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment. In the instant case, when Horton represented Ms. Cohen at the November 13 meeting he was not engaged in activity which was relevant to his performance as an industrial arts teacher.

As indicated, the letters themselves do not, on their face, necessarily constitute an unfair practice. However, the subsequent events relied upon by the Hearing Examiner do establish that the Board's conduct with respect to them was violative of the Act.<sup>6/</sup> As indicated earlier, the conversation between Mr. Cappelli and Mr. King is evidence that the Board's agents harbored animosity toward Mr. Horton emanating from his representation of Ms. Cohen. Moreover, the conversation indicates that they permitted that animosity to influence their judgment of his teaching performance.

<sup>6/</sup> The Appellate Division recently stated in affirming the Commission's finding of an (a)(3) violation based on circumstantial evidence in In re Township of Clark, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980) that:

It is well settled that a discriminatory motive may be established through inferences drawn from the evidence as well as direct proof of animus. Nat. Lab. Rel. Bd. v. Nevada Consol. Copper Corp., 316 U.S. 105, 106-107 (1942). Our Supreme Court recognized that direct evidence rarely exists in discrimination cases and that the courts have long allowed inference to prove discrimination. Peper v. Princeton Board of Trustees, 77 N.J. 55 (1978); see also, Jackson v. Concord Company, 54 N.J. 113 (1969); Flanders v. William Paterson College of N.J., 163 N.J. Super. 225 (App. Div. 1976).  
Township of Clark v. Raymond Xifo, App. Div. Docket No. A-3230-79 (1/23/81) (slip opinion pg. 5).

The other event, which is in our opinion determinative, is the fact that the Board placed the two letters in Mr. Horton's personnel file rather than the file it maintained on matters pertaining to the Association. This action indicates that the Board intended these letters to be reviewed when Mr. Horton's performance as a teacher was being evaluated. It also constitutes evidence that the Board considered Mr. Horton's activities on behalf of the Association to be relevant to his conduct as a teacher. As such, their placement in his personnel file is also evidence that the Board was motivated by a desire to discourage Mr. Horton from engaging in protected activity and to possibly use them against him in the future with respect to his tenure of employment.

The Board, in its exceptions, argues that the Hearing Examiner failed to consider testimony by the Assistant Superintendent that he had removed the letters from Mr. Horton's file and placed them in the Association file just prior to the February 13 meeting. The Hearing Examiner did consider the testimony and found that their subsequent removal only affects the potential remedy and does not affect the finding of an unfair practice. The Board, in its exceptions, also argues that they were placed there through clerical error. However, a review of the testimony indicates only that the Assistant Superintendent removed them because he said he believed that they more appropriately belonged in the Association file rather than Mr. Horton's

personnel file. He never testified on how or why they were initially placed in that file. The statement in the exceptions that they were initially placed there through clerical error is not supported by the record.

Additionally, the Assistant Superintendent testified that he did not tell the Superintendent he had removed the letters. He testified that he had discussed the removal of the letters as a possible way to resolve the matter in preparation for the February 13 meeting, but had not told the Superintendent that he had already done it. Similarly, when the Superintendent suggested it to the Association as a possible resolution of their concerns at the February 13 meeting, and the Association said it wanted them removed from all files, the Assistant Superintendent did not indicate that he had already transferred them to the Association file earlier that day. He also testified that the Superintendent believed they were still in Mr. Horton's file and that the Superintendent did not direct their removal from that file following the February 13 meeting and the Association's rejection of his compromise. Additionally, Mr. Horton testified that he believed the letters were still in his file on February 13 and thereafter. Under these circumstances, we believe the Hearing Examiner was correct in finding that the fact that the letters had been removed from Mr. Horton's file did not warrant a dismissal of the unfair practice complaint.

The Board's final exception is that the letters were not used as discipline and that if the Hearing Examiner's decision is permitted to stand it will discourage written communication by the Board to the Association for fear it will be found to be improper discipline. We reject this exception. As previously stated, we do not find the writing of letters and even the writing of these letters to be per se inappropriate. The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity.

When reviewed in the totality of the evidence set forth in the record, we find that the Board's actions herein did constitute unfair practices within the meaning of subsections 5.4 (a) (1) and (3) of the Act.

#### ORDER

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that the Board shall:

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, particularly by filing letters having to do with protected activities in the personnel file of Stanley Horton.

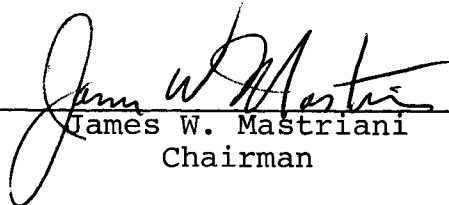
(2) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by placing letters that have to do with protected activities in the personnel file of Stanley Horton.

B. Take the following affirmative action:

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

2. Notify the Chairman of the Commission, in writing, twenty (20) days from receipt what steps the Board has taken to comply therewith.

BY ORDER OF THE COMMISSION

  
\_\_\_\_\_  
James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Suskin, Hartnett, Parcels and Graves voted for this decision. Commissioners Hipp and Newbaker abstained. None opposed.

DATED: August 18, 1981  
Trenton, New Jersey  
ISSUED: August 19, 1981

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 rights guaranteed to them by the Act, particularly by filing letters having to do with employees activities in the personnel file of Stanley Horton.

WE WILL NOT discriminate as to any term or condition of employment to encourage or discourage our employees in the exercise of rights guaranteed to them by the Act, particularly by placing letters that have to do with protected activities in the personnel file of Stanley Horton.

BLACK HORSE PIKE REGIONAL 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,  
429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H. E. No. 81-41

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

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BLACK HORSE PIKE REGIONAL  
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-80-309-1

BLACK HORSE PIKE EDUCATION  
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the Black Horse Pike Regional Board of Education committed an unfair practice when it placed two disciplinary letters in the personnel file of Stanley Horton, a representative of the Black Horse Pike Education Association, for his conduct at a meeting where he served as an employee representative.

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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Appearances:

For the Respondent, Wade & Friedman, P.A.  
(John D. Wade, Esq.)

For the Charging Party, Selikoff & Cohen, P.A.  
(John E. Collins, Esq.)

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

The Black Horse Pike Education Association (the Association), exclusive majority representative of the teachers employed by the Black Horse Pike Regional Board of Education (the Board) filed an Unfair Practice Charge with the Public Employment Relations Commission (the Commission) on April 16, 1980, alleging that the Board had committed an unfair practice within the meaning of the New Jersey Employer-Employee Relations Act (the Act), N.J.S.A. 34:13A-1 et seq. It is specifically alleged that the Board violated § 5.4(a)(1) and (2) <sup>1/</sup> by its action in sending two letters

1/ These subsections provide in pertinent part that public employers, their representatives or agents are prohibited from "(1) interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (2) dominating or interfering with the formation, existence or administration of any employee organization.

to the vice-president of the Association, Stanley Horton, which were critical of his comments made at a meeting where Mr. Horton served as a representative to another teacher. It is alleged that the letters threatened to take legal action against Mr. Horton for the actions he had taken in representing the teacher at the above meeting. It is further alleged that said letters were placed in Mr. Horton's personnel file.

It appearing that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 3, 1980, and a hearing was held before the undersigned on August 26, 1980. At the hearing the Charging Party moved to amend the complaint to include an allegation of a violation of § 5.4(a)(3) of the Act. The motion was granted and the Complaint was so amended.<sup>2/</sup> At the hearing the parties were given an opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by October 27, 1980.

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.

2/ This subsection provides in pertinent part that public employers, their representatives or agents are prohibited from "(3) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

Stanley Horton is a teacher with the Black Horse Pike Regional School District. During the 1979-80 school year Mr. Horton served as vice-president of the Association. One of his duties as an Association officer was to process grievances on behalf of other teachers. Sometime prior to November 13 Louis Cappelli, his school principal, invited Mr. Horton to attend, as Association representative, a meeting called to discuss the resignation of Barbara Cohen, an English teacher at the school. Mr. Horton had previously talked to Cohen about her resignation. The meeting was also attended by Mr. Carroll, the supervisor of the English Department. Cappelli asked Cohen if she was returning to work. She replied that she was not. Cappelli then told Cohen that the Board would file charges to have her teaching certificate revoked. On further questioning by Cappelli, Cohen began to cry. At that point Horton stated to Cappelli, "That's all," and said "as I indicated previously Mrs. Cohen is not coming back and that is where it stands." The conversation at the meeting turned to teachers' obligations to students. Horton stated that he was there as an Association representative. He "was not there representing students" and he "was representing Mrs. Cohen and in this instance anything that is done to improve the welfare of students is incidental." The meeting ended by Cappelli informing Cohen that he would recommend to the superintendent of schools that they should seek to have her teaching certificate revoked for leaving on short notice. On November 14th, the next day, Horton received the following letter from Cappelli:

On Tuesday, November 13, 1979, I met with Mrs. Cohen, yourself as Mrs. Cohen's BHPEA representative, and Mr. Carroll. At that meeting as we discussed Mrs. Cohen's leaving, I expressed the concern I have for the students' learning process being interrupted. I was appalled at your retort of "the association exists only for the protection and benefit of teachers. The NJEA is a union. We are a union. Any improvement that students experience is incidental."

My purpose in writing this memo is related to my concern as to the priority the BHPEA and the NJEA have placed on the purpose of their membership being employed - educating members of a school's society (students). I will be the first to admit the need for such organizations but will be one of the last to admit that education is incidental. Is it any wonder that the general public - parents and, yes, students in particular - are criticizing teachers and the education of our students? With all of NJEA's membership, determination, and strength, has society's attitude lessened resistance to what is happening in schools?

I can't help thinking how much more difficult it would be to fulfill Triton's educational needs if our communities knew that the BHPEA's and NJEA's feeling is that in education "any improvement that students experience is incidental." I wonder if our Board of Education would appeal a defeated budget. It certainly would make the persuading and sometimes arguments, meaningless.

Perhaps there is a strong need for educational associations to re-examine their philosophies and a need for clarification. Educating our youngsters should not be incidental and schools and our positions in them were never created with that intention or goal.

On the 19th Horton then received a letter from the superintendent of schools, Dr. Gerald Killeen. That letter is as follows:

This letter is a follow-up to the recent letter of resignation submitted by Barbara Cohen, an English teacher at Triton High School. Based on information presented to me by Louis Cappelli, principal, it is my understanding that you served as the BHPEA representative in this matter.

Mrs. Cohen submitted a letter of resignation dated October 25, 1979, stating she would be leaving the district November 9, 1979. I wrote to Mrs. Cohen indicating she had a responsibility to provide us with more time in order to seek a replacement. As you are aware, Mrs. Cohen did not respond to my letter nor did she attempt to comply with the spirit and intent of my letter.

It is my understanding that you met with Mrs. Cohen and Mr. Cappelli on Tuesday, November 13th, to discuss this matter. As I understand the situation, you advised Mrs. Cohen that she had no real responsibility to honor the 60-day clause contained in her probationary contract. In view of the fact you have spent many long hours at the negotiating table, I am rather surprised and disappointed that you expressed such a blatant disregard for the contract that Mrs. Cohen had signed.

Based on the facts and circumstances surrounding Mrs. Cohen's resignation, I did recommend to the Board of Education at the November 15th meeting that the Board solicitor be authorized to contact the Commissioner of Education and present the facts to him in order to have Mrs. Cohen's teaching certificate revoked. I recognize this is a serious step; however, I wanted you to be aware that I feel Mrs. Cohen handled this matter in an unprofessional manner and that the advice and counsel you gave her was incorrect.

The members of the Board of Education, at the meeting held on November 15th, also asked our solicitor, John Wade, to look into the legal steps that could be taken against you as an individual and against the BHPEA since you are a vice president and were acting as an officer of the Association.

In closing, I would like to say I was quite disappointed in the role you played and in the poor advice you gave this teacher. If Mrs. Cohen's certificate is revoked, I think you have a heavy burden on your shoulders.

If you would like to discuss this matter with me, please let me know and I will be happy to meet with you.

On January 9, 1980, Horton was in the office at the school when he overheard a conversation in the corridor between Cappelli

and Walter King, Horton's supervisor. Horton's attention was aroused when he heard Cappelli mention Cohen's name. Cappelli said to King, "I want to kill that son-of-a-bitch, that's what I want to do," referring to Horton. Mr. King responded that "Horton is told what to do and I don't think he will ever be a teacher."

By letter of January 25, 1980, the Association requested a meeting to discuss the two letters referred to above. This meeting was held on February 13, 1980. Immediately prior to the meeting Mr. Rex Donnelly, Assistant Superintendent of Schools, removed the two letters from Mr. Horton's personnel file and placed them in an Association file. The Association requested that the letters be removed from all files but the Board refused to do so. The Association brought the instant action alleging that the letters to Horton and their placement in his personnel file constituted threats and retaliation for his exercise of rights protected by the Act. In support of their argument, they rely on Hamilton Twp. Bd/Ed, P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068, 1979). In that case an employee was accused of unprofessional conduct and unacceptable behavior at a grievance meeting. The Commission however recognized that 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. Therefore, an employee, serving as a employee representative at a grievance meeting, must be treated by an employer, not in a subordinate capacity but rather as an adversarial party on equal footing."

The Respondent Board argues this matter is clearly distinguishable from Hamilton, that the letters were addressed to Horton not as an individual but rather as a representative and an equal, and no action was directly threatened against Mr. Horton. As the Board points out, the superintendent's letters only say they will seek advice of counsel as to whether or not action should be taken against Horton as an individual. There is no direct threat of any actions that will be taken.

A reference to legal action does not, by itself, constitute an unlawful threat. See, Middlesex Bd/Ed, H. E. No. 77-19, 3 NJPER 185, where an education association sent mailgrams individually to each member of a board of education and stated that the association will "hold the board of education collectively and individually responsible for any action" which they might take concerning a matter in dispute between the parties. Even though there was an implicit threat of legal action in Middlesex, as there is a threat of legal action in the instant matter, it is not a violation of the Act for a party to state that it intended to exercise whatever legal rights it might have in a given situation. Moreover, here, there is no direct reference to any legal action but merely a reference to a consultation with the Board's attorney.

Similarly the letters, by themselves, do not necessarily constitute disciplinary action taken against Horton. But the Board, through King and Cappelli, confused Horton's roles. The letters were not used to express the concerns and views of one equal to another. They were used in a disciplinary manner against Horton.

They were placed in Horton's personnel file. The fact that the letters were subsequently removed from Horton's file may affect the potential remedy in this case but it does not affect the finding of an unfair practice. It is clear that the letters were meant to discipline. As was discussed in Hamilton and City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶411, 1977), an employer has no right to discipline employees engaged in protected activities (there are limitations to this prohibition but such limitations are not relevant here).

Further, the conversation overheard by Horton between Cappelli and King reveals the state of mind of Cappelli's in writing this letter; accordingly, I am satisfied that these letters were motivated at least in part the intent to discourage the exercise of protected rights. See Haddonfield Borough Bd/Ed, P.E.R.C. No. 77-36, 3 NJPER 71 (1977). Upon the foregoing and upon the entire record in this case the Hearing Examiner makes the following:

Conclusions of Law

Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1) and (3) by its conduct in writing the letters in question and placing them in Horton's personnel file.

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(2). There is no evidence adduced at the hearing demonstrating a violation of this subsection.



Recommended Order

The Hearing Examiner recommends that the Commission ORDER

A. 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 filing letters having to do with Association activities in the personnel file of Stanley Horton.

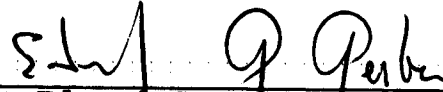
(2) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by placing letters that have to do with protected activities in the personnel file of Stanley Horton.

B. That the Respondent take the following affirmative action:

(1) Cease and Desist from placing any letters having to do with protected activities in the personnel file and record of Stanley Horton.

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

(3) Notify the Chairman of the Commission 20 days from receipt what steps the Respondent has taken to comply therewith.

  
\_\_\_\_\_  
Edmund G. Gerber  
Hearing Examiner

DATED: April 28, 1981  
Trenton, New Jersey

# 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 rights guaranteed to them by the Act, particularly by filing letters having to do with Association activities in the personnel file of Stanley Horton.

WE WILL NOT discriminate as to any term or condition of employment to encourage or discourage our employees in the exercise of rights guaranteed to them by the Act, particularly by placing letters that have to do with protected activities in the personnel file of Stanley Horton.

BLACK HORSE PIKE REGIONAL BD/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 James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State St., Trenton, New Jersey 08608, Telephone (609) 292-9830.