P.E.R.C. NO. 91-55

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-H-90-18

RONN A. BEN AAMAN,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Ronn ben Aaman against the Newark Board of Education. The charge alleged that the Board failed to rehire the charging party as a per diem substitute teacher after he wrote letters and filed a grievance complaining about a payroll problem. The Commission finds that the charging party failed to prove that the Board's actions were motivated by protected activity.

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RONN A. BEN AAMAN,

Charging Party.

Appearances:

For the Respondent, Marvin L. Comick, General Counsel

For the Charging Party, Ronn A. ben Aaman, pro se

DECISION AND ORDER

On August 22, 1989, Ronn A. ben Aaman filed an unfair practice charge against the Newark Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(3),[1/] by failing to rehire him as a per diem substitute teacher after he wrote letters and filed a grievance complaining about a payroll problem.

On January 12, 1990, a Complaint and Notice of Hearing issued. On January 25, the Board filed its Answer claiming that it

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1/ This subsection prohibits public employers, their representatives or agents 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."

discontinued using the charging party as a substitute teacher for sound educational reasons.

On March 27 and April 25, 1990, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses, introduced exhibits, and argued orally. The charging party filed a post-hearing brief on July 11, 1990.

On September 11, 1990, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 91-7, 16 NJPER 528 (¶21233 1990). He found that the charging party failed to prove that the Board's decision not to use him as a substitute teacher was based on his exercise of protected rights.

On November 28, 1990, after an extension of time, the charging party filed exceptions. He asserts that the Hearing Examiner erred in: (1) crediting the testimony of the principal and payroll clerk explaining why he was not rehired; (2) crediting the principal's explanation of the practice of informally evaluating substitute teachers; (3) failing to find hostility to his exercise of protected rights; (4) and failing to grasp the pattern of animus and retaliation proven by the evidence.

On December 6, 1990, the Board filed a reply urging adoption of the recommended decision.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-13) are accurate. We incorporate them here. We find no basis for displacing the Hearing Examiner's credibility determinations.

In order to prove discrimination for protected activity, a charging party must prove that protected activity was a substantial or motivating factor in the adverse action. In re Bridgewater Tp., 95 N.J. 235 (1984). This may be done by direct evidence or circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of protected rights. Id. at 246. Only then does the burden shift to the employer to prove that the adverse action would have taken place absent the protected conduct. Id. at 242.

We agree with the charging party that the timing of the employer's decision not to rehire him is suspicious. It immediately followed his complaints about errors in his paychecks. But given the totality of the evidence, which included the principal and payroll clerk's explanations of why he was not rehired, we cannot conclude that the charging party proved that his protected activity motivated the adverse action.[2/]

2/ We make no judgment about the Board's failure to follow contractual evaluation procedures. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
December 17, 1990
ISSUED: December 18, 1990

H.E. NO. 91-7

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

In the Matter of

NEWARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-H-90-18

RONN A. BEN AAMAN,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Newark Board of Education did not violate the New Jersey Employer-Employee Relations Act when it did not recall Ron ben Aaman as a per diem substitute. The Hearing Examiner concluded that the Charging Party did not prove that the Board's actions were based upon the Charging Party's exercise of protected activity.

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.

H.E. NO. 91-7

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

In the Matter of

NEWARK BOARD OF EDUCATION,

Respondent,

-and- Docket No. CI-H-90-18

RONN A. BEN AAMAN,

Charging Party.

Appearances:

For the Respondent, Marvin L. Comick, Acting General Counsel

For the Charging Party, Ronn A. ben Aaman, pro se

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On August 22, 1989 Ronn A. ben Aaman ("Charging Party") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") against the Newark Board of Education ("Board") alleging the Board violated subsection 5.4(a)(3)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), by failing to rehire him as a per diem substitute

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1/ This subsection prohibits public employers, their representatives or agents 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."

teacher either because he wrote letters complaining about a payroll problem or filed a grievance over not being called to substitute.[2/]

A Complaint and Notice of Hearing (C-1) was issued on January 12, 1990. The Board filed an Answer (C-2) on January 25, 1990 arguing that the Complaint did not state a claim upon which relief might be granted, and that the Board discontinued hiring ben Aaman as a per diem substitute teacher because of educational reasons.

Hearings were conducted on March 27 and April 25, 1990.[3/] All parties had the opportunity to call, examine and cross-examine witnesses, present documents, argue orally, and submit post-hearing briefs. The transcripts were received by May 9, 1990 and the Charging Party filed a brief on July 11, 1990.[4/]

2/ The Charging Party did not actually allege on the face of the Charge that the Board failed to rehire him as a per diem substitute teacher because he wrote letters complaining about a payroll problem or because he filed a grievance. The wording of the Charge was unclear. During the hearing, however, it became apparent that ben Aaman was alleging that the Board failed to rehire him as a substitute because he complained about a payroll problem. The grievance was filed after the Board had already stopped calling the Charging Party, thus the grievance could not have been the basis for the Board's actions.

3/ The transcripts will be referred to as 1T (3/27/90) and 2T (4/25/90) respectively.

4/ The Charging Party presented his own testimony and two witnesses. The Board did not present witnesses. It rested after the Charging Party completed his case.

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Based upon the entire record I make the following:

Findings of Fact

1. The Charging Party was employed by the Board at East Side High School as a per diem substitute teacher, at $90 per day, averaging three days per week from October 24, 1988 through March 1, 1989 (1T17; CP-29; CP-32, Art. 10 Sec. 3A; CP-33, CP-34). He was not employed by the Board after March 1, 1989 (1T17).

On February 10, 1989, ben Aaman received a pay check for the week of January 17-20, 1989. He had worked two days that week but was paid for one. That same day he telephoned Ann Pelose, payroll clerk at East Side High School who also telephones substitutes in the morning, advising her that his check was one day short. Pelose examined the sign-in book and confirmed that he worked two days that week and told him she would prepare a corrected time report and have his pay corrected. The Charging Party confirmed that telephone conversation by letter to Pelose of February 14, 1989 (C-1B)(2T6-2T7, 2T14).[5/]

4/ Footnote Continued From Previous Page

By letter of May 21, 1990 I advised the parties that post-hearing briefs were due by July 6, 1990 and reply briefs by July 13, 1990. The Charging Party's brief was mailed on July 5 and received on July 11, 1990. The Board did not submit a brief at that time. By letter of July 16, received July 19, 1990, the Charging Party objected to any brief the Board might submit as untimely. On July 23, 1990 I received a Board statement in lieu of brief. The Board's statement was untimely and will not be considered as part of the record in this case.

5/ A copy of C-1B was sent to Adele Eutsey, the Board's payroll administrator (1T16).

After receiving C-1B Pelose corrected her error in the time book and sent a corrected time report to payroll clerk Rosalyn Brown, whom Pelose assumed would issue a corrected check (2T14-2T15). Ben Aaman's payroll problem, however, had not yet been resolved. On February 24, 1989 he received his next paycheck which underpaid him by another $90 thus bringing his lost earnings to $180. By letter of February 26, 1989 (C-1C) ben Aaman notified Pelose of this second error, identified the days he worked, asked for his money, and suggested she prepare the time reports more carefully . He sent a copy of C-1C to East Side High Principal, Robert Wujciak, but Wujciak did not speak to Pelose about the letter (2T9-2T10).

Although Pelose did not speak to Wujciak about C-1C, she did bring the corrected time report to him for his signature and explained her error (2T37-2T38). Pelose had no animosity toward ben Aaman as a result of C-1B or C-1C, she admitted her error, she felt he was entitled to the money, and she did everything she could to get him his correct pay as quickly as possible (2T36-2T37).[6/]

6/ I credit Pelose's testimony. On cross-examination she was asked if she had any reason to get back at ben Aaman for anything he did. She responded:

> Please, I'm a God fearing woman, I wouldn't even think of that. I would never do that to another human being, not even an animal (2T36).

Footnote Continued on Next Page

Ben Aaman received his next paycheck on March 3, 1989, and again the check was incorrect. It was short for the period it covered and it did not contain the additional $180. On March 6, 1989 ben Aaman telephoned Linda Hall, the Board's principal payroll clerk, explained the problem, and confirmed the conversation by letter to Hall of the same date (C-1D). In the last paragraph of C-1D ben Aaman said in part:

> ...I am gravely concerned that Mrs. Pelose's errors/omissions will continue and that they may be manifesting themselves as a form of disparate treatment and/or harassment....

A copy of C-1D was sent to Wujciak, Eutsey, Superintendent Eugene Campbell, and others.

2. The Charging Party had last been called to substitute on Wednesday, March 1, 1989. By Tuesday, March 7, he was concerned

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6/ Footnote Continued From Previous Page

When asked her reaction to ben Aaman's payroll problem she said:

> I felt bad because it's pay and the man has to live. They have to eat just like I do. (2T36)

I carefully observed Pelose's demeanor and attitude while making these comments and felt she was testifying in a sensitive, honest and forthright manner. I found her to be devoid of any hostility or bitterness towards ben Aaman.

over not having received any calls to substitute and mentioned that concern to Barbara Kaye-Mortimer, Board Executive Deputy Superintendent (C-1F).[7/] On Thursday, March 9, 1989, ben Aaman spoke to Wujciak (by telephone) about not being called as a substitute and Wujciak said:

> Each and every department head had something bad to say about you (C-1F, 1T18, 1T90).

The Charging Party asked Wujciak for the "particulars" of that "allegation" and Wujciak told him to ask the department heads (1T18, 1T91, C-1F).

On Friday, March 10, 1989, ben Aaman received a check correcting all of his payroll problems (C-1F, 1T86-1T88).

On Monday, March 13, 1989, ben Aaman met with Pietro Petino, a representative of the Newark Teachers Union ("Union"), to discuss his (ben Aaman's) not being recalled as a substitute (1T18-1T19, C-1F). As a per diem substitute, ben Aaman was covered by a collective negotiations agreement, CP-32, between the Board and the Union effective July 1, 1988-June 30, 1991. Pursuant to Article 3, Section 2B, Step 1 of CP-32 (the grievance procedure) a grievance begins with a discussion of the problem with an administrative superior. As a result of his discussions with Petino, ben Aaman initiated a first-step grievance concerning his not being recalled. A meeting on the grievance was held on March 15, 1989 between

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7/ No evidence was produced showing what, if any, reaction Kaye-Mortimer had to ben Aaman's concern.

Wujciak, Petino, and Peter Rubis, a shop steward at the High School (2T65, C-1E).[8/] On March 17, 1989 Wujciak issued the following memo (C-1E) to Pelose:

> Please be advised that [ben Aaman] is to be continued to be hired as a per diem substitute teacher at East Side High School, as the need arises.[9/]

After receiving C-1E, Pelose called ben Aaman more than once to substitute, but he was either not in, or unavailable (2T15-2T16, 2T24-2T25, 2T39).[10/] After approximately three calls to ben Aaman, several department chairpersons told Pelose not to call him to be a substitute in their departments because they were dissatisfied with his performance (2T29-2T30, 2T39-2T41). After those few complaints Pelose did not again call ben Aaman to substitute at East Side High School even though substitutes were

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8/ In his testimony (1T18), and in C-1F, ben Aaman said he "filed" a grievance leading to the March 15 meeting. But since Step 1 of the grievance procedure only required a discussion of the problem at that step, no written grievance was actually filed at that time, only the initiation of the grievance at the first step.

9/ Wujciak recalled the meeting with Petino and Rubis (1T65), but he could not recall the date of the meeting and he could not recall whether the grievance preceded C-1E (1T64). Nevertheless, he testified that C-1E was not in response to the grievance (1T63-1T64). From the chronology of events, and noting Wujciak's inability to recall the timing of events, I find that Wujciak is mistaken on this point, and that C-1E was in response to the first-step grievance meeting of March 15, 1989.

10/ Although Pelose seemed a little confused about whether she called ben Aaman after C-1E (2T23-2T25), I generally found her to be a sincere witness and credit her testimony that she called him after that date (2T16, 2T25, 2T39).

used at the school every day from March 1 through the end of the school year, and Wujciak did not tell her not to call ben Aaman until May or June 1989 (CP-28, CP-34, 2T96).

On April 2, 1989 ben Aaman sent a letter (C-1F) to Superintendent Campbell explaining the problem he (ben Aaman) was having being called to substitute at East Side High School. He explained that he thought he was entitled to a make whole remedy for lost wages and suggested that if he was not recalled he would consider it disparate treatment. By letter of April 10, 1989 (C-1G) Campbell responded and suggested that ben Aaman register with other schools in the District to increase his chances of being called as a substitute. In October 1988 ben Aaman placed his name on the substitute lists at other high schools in the District (1T79, CP-37). After March 1, 1989, ben Aaman contacted those schools telling them he was available to substitute, but apparently he was not called (1T79-1T81).

On April 27, 1989 ben Aaman sent a letter (C-1H) to Board President Charles Bell, enclosing C-1G and C-1H and asking the Board to "act" on the merits of his complaint.

3. The Board has established a personnel policy for the evaluation of substitutes entitled "Unit Member Performance Evaluation and Personnel Files" (CP-31), that contains the identical language as Article 5, Section 6 of CP-32. The pertinent items in that Section provide:

SECTION 6 - UNIT MEMBER PERFORMANCE EVALUATION AND PERSONNEL FILES

A. Unit member performance shall be regularly evaluated by members of the supervisory and administrative staff, authorized and competent to make such evaluation. When such evaluation involves visitation, it shall be done openly and with the knowledge of the employee being observed. Every written evaluation of the performance of any employee shall be signed by the individual who makes the evaluation.

B. Unit members shall be reported Satisfactory or Unsatisfactory. If rated Unsatisfactory it is the obligation of the supervisor to make specific recommendations for improvement and provide assistance to the employee. After a reasonable time, the supervisor shall re-evaluate the employee. In the event of a strong difference of opinion, the employee evaluated Unsatisfatory may request evaluation to be made by another supervisor from within the system.

D. Evaluations shall not be placed in the employee's files unless the employee has had the opportunity to read the material. The employee shall acknowledge that he has read such material by affixing his signature on the copy to filed. Such signature shall merely signify that he has read the material and is not to be construed that he necessarily agrees with its contents. If the employee refuses to sign, that fact shall be noted, dated and witnessed.

E. Employees shall be given a carbon copy of each evaluation.

Other pertinent Articles in CP-32 provide:

ARTICLE II - NON-DISCRIMINATING CLAUSE

Section 1 - The parties agree to follow a policy of not discriminating against any employee or applicant for employment on the basis of race, color, creed, national origin, ancestry, sex or marital status, or membership or participation in or association with the activities of any employee organization.

ARTICLE III

Section 3(E) - No reprisals of any kind shall be taken against any participants in the grievance procedure by reason of such participation.

ARTICLE X

> Section 5 - If an employee claims that he has been receiving an incorrect salary applicable to him and his claim is found to be in fact correct, the salary payments of the employee shall be immediately corrected by the payroll department and retroactive payment shall be made to the employee for the full time during which the employee should have received the corrected rate. Such adjustment shall also be made if such an incorrect placement is discovered by the Payroll Department even if the employee makes no claim.

The Board also maintains a substitute policy (CP-35) which contains the following pertinent language:

> The activities of the substitute are to be closely supervised by the principal or his/her designee in order to lend support, and monitor the efficiency of the substitute and the adequacy of the plan.

According to CP-31 and CP-32 substitute evaluations are to be written (formal)(2T81), but the policy, at least at East Side High School, is for department chairpersons to informally evaluate (unwritten) substitutes on a daily basis and report problems to the principal (2T72-2T73, 2T76-2T77). Ben Aaman was not formally evaluated (2T76-2T77, 2T81, 2T90, 2T94).

4. Although Wujciak has the prime responsibility for hiring and evaluating substitutes, he delegated the day-to-day hiring or calling in of the substitutes to Pelose, and the day-to-day supervision and evaluation of substitutes to department chairpersons (2T58-2T59, 2T97). Pelose calls substitutes from a list of substitutes acceptable to the department chairpersons. The chairpersons review the list relative to their departments and priorities. Substitutes are considered based upon their

credentials, expertise, certification, and substantive classroom performance. If a chairperson does not put a person's name on a list, or strikes a name from the list, that person will not be called for that department. The more chairpersons that reject a substitute will increase the likelihood that the substitute will not be called to work at that school (2T19). Six of the nine chairpersons at the High School told Pelose they were dissatisfied with ben Aaman's performance and they asked her not to call him for their departments (2T28-2T30, 2T39-2T41). If a substitute is rated unsatisfactorily he/she will not be rehired (2T73).
Pelose did not know the basis of the department chairpersons' dissatisfaction (2T20, 2T40).

Ben Aaman was not evaluated in writing, but chairpersons made several complaints to Wujciak regarding his performance (2T87-2T89, 2T90-2T94). The first problem arose in late December 1988 or early January 1989 (2T63, 2T87). Ben Aaman complained to Wujciak about the way Paul Cutrino, Science Department Chairperson, supervised his department and raised questions about ben Aaman's procedure in the classroom (2T63, 2T85, 2T87-2T88). Both Cutrino, and Pat Ramonda, Math Department Chairperson, had problems with ben Aaman's performance over a period of time (2T85-2T90). Both chairpersons complained to Wujciak about ben Aaman's failure to control the class, unwillingness to continue directed lessons and mishandling student discipline (2T85-2T86, 2T89). Subsequently, Cutrino, Ramonda, and Mrs. Stables, the English Department

Chairperson, asked Wujciak not to allow ben Aaman to substitute in their departments (2T88-2T89). Other chairpersons also complained to Wujciak about ben Aaman's performance (2T89).

Wujciak generally gave substitutes two chances to correct their problems and did so with ben Aaman (2T31). He spoke to ben Aaman after the initial problems with Cutrino and ben Aaman criticized Cutrino's performance (2T62-2T63, 2T85-2T87). He spoke to ben Aaman again after Cutrino and Stables rejected ben Aaman for their departments. During that conversation Wujciak recommended that ben Aaman modify his classroom technique and behavior, but ben Aaman refused to accept those recommendations and again criticized Cutrino (2T88-2T89). Wujciak spoke to ben Aaman again after Ramonda rejected him for his department, and ben Aaman accused the chairpersons of conspiring against him and criticized their efficiency (2T89).

After several months, ben Aaman was not rehired to substitute at East Side High School because of the accumulation of verbal and written complaints from chairpersons questioning his classroom efficiency, procedure, ability to control and discipline students and inability to focus on the subject matter (2T83, 2T99-2T100).[11/]

11/ I credit Wujciak's testimony about why ben Aaman was not rehired and what the chairpersons said about him. Wujciak's testimony was produced on ben Aaman's direct case, the

Footnote Continued on Next Page

5. Ben Aaman estimates he lost $2,755.00 plus interest by not being hired as a substitute after March 1 through the remainder of the school year (CP-33).

ANALYSIS

The Board did not violate the Act by refusing to recall ben Aaman to substitute at the High School. Ben Aaman was not recalled because department chairpersons were dissatisfied with his performance.

In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984)(Bridgewater), the New Jersey Supreme Court created a test to be applied in analyzing whether a charging party in a 5.4(a)(3) case has met its burden of proof. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing that the employee engaged in activity protected by the Act, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected activity. Id. at 246.

11/ Footnote Continued From Previous Page

Charging Party did not present evidence to rebut that testimony, and I found Wujciak to be a competent and reliable witness. In addition, Wujciak was sequestered while Pelose testified, yet their testimony was the same regarding chairperson complaints regarding ben Aaman, thus I credit both their testimony on that issue.

If a charging party satisfies those tests, then the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. The burden will not shift to the employer, however, unless the charging party proves that anti-union animus was a motivating or substantial reason for the employer's actions.

By inquiring into his payroll problem ben Aaman was engaged in protected activity and the Board was aware of that activity. But ben Aaman did not prove that the Board was hostile toward the exercise of that activity. Since the Charging Party did not meet his burden of proof, the Board was not required to justify its actions.

In his closing remarks at hearing and in his post-hearing brief, ben Aaman argued that a violation should be found at least in part because: 1) the Board violated the contract and its own policy by not evaluating him in writing and giving him notice of his deficiencies; 2) he never received an unsatisfactory evaluation; 3) no written documentation was offered to prove ben Aaman's alleged deficiencies; and 4) Pelose's and Wujciak's testimony regarding chairperson comments about ben Aaman were hearsay and the Board did not offer chairperson testimony in support thereof. Those arguments lack merit.

First, this case did not concern the Board's failure to follow the union contract or Board policy regarding substitute evaluations or whether ben Aaman was entitled to notice of

performance deficiencies. The Charging Party did not make such allegations in his Charge and even if he had, contract violations are not normally violations of the Act. See State of N.J. (Department. of Human Services), 10 NJPER 419 (¶15191 1984).

Second, whether unsatisfactory evaluations were made of ben Aaman's performance goes to the credibility of Wujciak's testimony. I credited his testimony thus found that chairpersons did negatively evaluate ben Aaman's performance. Whether the evaluations should have been written and served on ben Aaman are procedural matters which were not the subject of the Charge and could have been pursued through the contract grievance procedure.

The third and fourth arguments raise questions regarding the burden and order of proof. Ben Aaman misunderstood that burden. A charging party always has the first burden to prove the elements of the charge by a preponderance of the evidence. In a 5.4(a)(3) allegation such as this, the Bridgewater standards apply, and the elements the charging party must prove are protected activity, knowledge by the employer, and hostility by the employer toward the charging party for the exercise of the protected activity. If the charging party meets its burden, the burden shifts to the employer to prove its defenses. But if the charging party does not meet its burden, the burden does not shift to the employer, and the employer need not present its defenses and the charge will be dismissed. That is the scenario in this case. The Charging Party did not meet his burden thus the Board was neither required to

prove ben Aaman's deficiencies nor present chairperson testimony to support Pelose and Wujciak.

Ben Aaman failed to meet his burden because on his direct case the evidence showed that chairpersons had told both Pelose and Wujciak they did not want him teaching in their departments. Pelose and Wujciak relied on the chairperson complaints, plus Wujciak found ben Aaman uncooperative based upon their own discussions. Ben Aaman tried to make his case by attacking the credibility of his own witnesses regarding chairperson complaints, and then assuming the Board was required to prove such complaints were made. But by my having credited Pelose and Wujciak, the burden was on ben Aaman to prove he had no work deficiencies and/or that chairpersons did not complain about him to Pelose and Wujciak.

Ben Aaman engaged in prehearing discovery, thus, he had the opportunity to ascertain the nature of Pelose's and Wujciak's testimony, and would have had the opportunity to call one or more chairpersons in an attempt to discredit Pelose and Wujciak. But by not calling a chairperson in an attempt to rebut them, ben Aaman risked his case on whether I would discredit his witnesses. But there was insufficient basis to discredit his witnesses. I observed Pelose and Wujciak while they testified, I found them to be sincere and trustworthy, their testimony on the whole was consistent, made sense, corroborated one another despite Wujciak's sequestration and

there was no rebuttal evidence.[12/] Thus, with his witnesses credited, ben Aaman proved on his direct case, even though unintentionally, that he was not recalled to substitute because of department chairperson complaints rather than because of his exercise of protected activity.[13/]

Accordingly, based upon the above facts and analysis I make the following:

12/ In his post-hearing brief ben Aaman argued that Wujciak should not be credited in part because it was not logical for Wujciak to issue C-1E on March 17 after chairpersons had already allegedly told him of their dissatisfaction with ben Aaman. Ben Aaman explained in his brief that if Wujciak really believed his performance unsatisfactory, he would not have issued C-1E, thus inferring that the Board's refusal to recall him had nothing to do with his work performance.

I do not share ben Aaman's analysis of why C-1E was issued. C-1E was issued in response to a grievance. It was written in such general terms that it did not guarantee that ben Aaman would be called, rather it was conditioned on the "need arising." It was not illogical for Wujciak to issue C-1E in resolution of the grievance because it was conceivable that a need could arise at some time for ben Aaman's services. Thus, by issuing C-1E, Wujciak kept his options open to call ben Aaman at least until May or June when he told Pelose not to call ben Aaman.

Finally, even if Wujciak's testimony was discredited, there was even less of a basis to challenge Pelose's testimony, and she, independent of Wujciak, established that chairpersons directed her not to call ben Aaman for their departments because of his performance.

13/ Although some of Wujciak's testimony was based upon hearsay, it was not of a significant level. The hearsay rule is not strictly applied in administrative hearings.

Recommendation

I recommend the Commission ORDER the Complaint dismissed.

Arnold H. Zudick
Hearing Examiner

DATED: September 11, 1990
Trenton, New Jersey