P.E.R.C. NO. 87-3

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OLD BRIDGE TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-85-215-121

OLD BRIDGE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a complaint based on an unfair practice charge filed by the Old Bridge Education Association against the Old Bridge Board of Education. The charge alleged the Board violated the New Jersey Employer-Employee Relations act when it granted a teacher access during school time to circulate an anti-Association petition contrary to its policy prohibiting the conduct of Association business; its principal stated that certain candidates for Association offices should be supported and shared confidential information with a dissident Association member. The Commission finds that the Association did not prove the allegations contained in the charge by a preponderance of the evidence.

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OLD BRIDGE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Wilentz, Goldman and Spitzer, Esqs.
(Steven J. Tripp, Esq., of Counsel)

For the Charging Party, Oxfeld, Cohen & Blunda, Esqs.
(Sanford R. Oxfeld, Esq., of Counsel)

DECISION AND ORDER

On February 19, 1985, the Old Bridge Education Association ("Association") filed an unfair practice charge against the Old Bridge Township Board of Education ("Board"). This charge alleges the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1), (2), (3) and (5),[1/] when it granted a teacher access

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of

Footnote Continued on Next Page

during school time to circulate an anti-Association petition contrary to its own policy prohibiting the conduct of association business on school time and its practice of reprimanding Association members violating that policy.

On April 19, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On April 26, 1985, the Board filed its Answer. It admitted that the petition was circulated, but denied the remaining allegations.

On November 18, 1985, the Association requested leave to file an amended charge. The amendments alleged that the Board violated the Act, specifically subsections 5.4(a)(1),(2),(3) and (5), when: (1) several Board members stated in February and March 1985 there was a need to change the Association leadership; (2) in May 1985, a principal stated that certain candidates for Association offices should be supported and (3) in September 1985, Board members shared confidential information with a dissident Association member. On November 26, 1985, the Board objected to the proposed amendment. On December 11, 1985, Hearing Examiner Alan R. Howe granted leave to amend the Complaint to consider the principal's

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1/ Footnote Continued From Previous Page

employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

statements. However, he found the allegations regarding the Board members' statements to be untimely and therefore only relevant for "background purposes" and that the allegation regarding release of confidential information needed to be "more specific" to be considered.

On December 11 and 13, 1985, the Hearing Examiner conducted hearings. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.[2/]

On April 3, 1986, the Hearing Examiner issued his report and recommended decision. H.E. No. 86-47, 12 NJPER 266 (¶17109 1986). He concluded that the Board violated subsections 5.4(a)(1) and (7) of the Act by its disparate treatment of Association building representative Richard Fornadel. The Board sent Fornadel a written memorandum because he conducted an Association meeting ten minutes before the end of the school day. It orally reprimanded Association member Mary Carrington for circulating a petition during the school day opposing the current Association leadership. As a remedy, the Hearing Examiner recommended that the Board post a notice and "forthwith expunge from the personnel file or personnel records of Richard Fornadel any reference to the written memo

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2/ After the hearing's conclusion, the Association sought to reopen the record to permit testimony of another witness. The Hearing Examiner denied this request and the Chairman denied the Association special permission to appeal that interlocutory decision. The Association has not excepted to this ruling and we agree that it was proper.

received by him...notwithstanding that the said memo was never placed in his personnel file." He further found, however, that the Board did not violate the Act when one ot its principals attended a meeting of one slate of Association candidates and the Association did not prove the remaining allegations in the Complaint.

On May 9, 1986, after receiving an extension of time, the Board filed exceptions. It contends the Hearing Examiner erred in considering the Fornadel incident since it was untimely and not pled in the charge. Further, it contends the Complaint should be dismissed because "the treatment of [Carrington and Fornadel was] not dissimilar...[and] there is no evidence in the record that the Board interfered with internal union matters or discriminated against employees to encourage or discourage protected activities."

On May 12, 1986, the Association filed exceptions. It contends the Hearing Examiner erred in finding that a principal's attendance at a meeting of one slate of union candidates did not violate subsection 5.4(a)(2) because "participation by an employer's supervisor in a union organizing effort is unlawful." On May 19, 1986, the Association filed its response to the Board's exceptions. It urges adoption of the Hearing Examiner's recommendation that the Board committed an unfair practice concerning its disparate treatment of certain employees.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-10) are accurate. We adopt and incorporate them here.

The Association's original charge stated:

> Beginning in January, 1985 and continuing to date, the Old Bridge Board of Education and its administration has allowed a dissident teacher, who is the spouse of a member of the Board of Education, complete access to the schools to circulate an anti-OBEA petition. There exists a Board policy against conducting association business on school time and members of the OBEA have been reprimanded in accordance with this policy.

Thus, the gravaman of this charge is that the Board unlawfully favored one Association faction over another by permitting Carrington, an Association dissident, to have access to schools to engage in anti-Association activity while denying the same rights to the incumbent leadership of the majority representative. There can be no question but that this charge, if proved, would warrant finding a violation of subsections 5.4(a)(1) and (2) of our Act. Passaic County, P.E.R.C. No. 85-109, 11 NJPER 305, 306 (¶16108 1985); Bergen County, P.E.R.C. No. 84-2, 9 NJPER 451 (¶14196 1983). Compare Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976) (exclusive use provisions for incumbent organization during insulated period does not violate the Act). The plain fact, however, is that the Board did not permit Carrington to have access to the schools. To the contrary, the Board's representatives ordered her to stop her activity on the two occasions when she was observed. Furthermore, the Association's reliance on the Board's actions taken in regards to employees engaging in Association activity during work time does not support a finding that Carrington

received favored treatment. The record reveals two instances where employees engaged in Association activity during work time. Both were told not to engage in such conduct in the future. It is of no moment, given all the circumstances of the case, that Fornadel received a memorandum. It was not placed in his file, was not considered part of his permanent record and was not, in the view of the Board, either disciplinary or punitive. In short, the Board did not, in any substantive way, favor Carrington over Association members who had engaged in similar conduct. Accordingly, we dismiss this aspect of the Complaint.

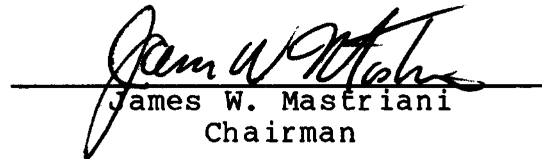
We next consider whether the Board violated the Act when Principal Morrison accepted an invitation and attended a meeting of one candidate group vying for election to Association office. The Association contends that such conduct violates subsection 5.4(a)(2). To establish such a violation, it must be proved that such participation constitutes domination or interference with the formation, existence or administration of the employee organization. See North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (1980). The mere presence of a supervisor at this meeting does not violate the Act. See Local 636, Plumbers v. NLRB, 287 F.2d 354, 47 LRRM 2457 (D.C. Cir. 1961).

Finally, we agree with the Hearing Examiner that the Association did not prove that the Board supplied Carrington with confidential information and that the Association did not prove the remaining allegations contained in its charge.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. Commissioners Hipp and Reid were not present.

DATED: Trenton, New Jersey
July 24, 1986
ISSUED: July 25, 1986

H.E. NO. 86-47

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

In the Matter of

OLD BRIDGE TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and-

Docket No. CO-85-215-121

OLD BRIDGE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board violated §§5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it disparately treated Richard Fornadel, a building representative, on February 3, 1985, by issuing to him a written memorandum of having violated Board policy by conducting an Association meeting ten minutes before the end of the school day on February 1, 1985, while Mary Carrington, who circulated a petition in two schools without permission during the working day was given only an oral reprimand. By way of remedy, the Hearing Examiner recommended that any reference to the Fornadel memo be expunged from his personnel file or personnel records, notwithstanding that the written memo was never placed in his personnel file.

The Hearing Examiner also recommended the dismissal of charges that the Respondent Board violated §§5.4(a)(2) and (5) of the Act by the principal of the Carpenter School having attended a meeting which involved a slate for office in opposition to the incumbent Association slate nor were these subsections violated when Carrington came into possession of a packet of documents involving the Board and the Association.

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. 86-47

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

In the Matter of

OLD BRIDGE TOWNSHIP BOARD
OF EDUCATION,

Respondent,

-and- Docket No. CO-85-215-121

OLD BRIDGE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Wilentz, Goldman & Spitzer, Esqs.
(Steven J. Tripp, Esq.)

For the Charging Party
Oxfeld, Cohen & Blunda, Esqs.
(Sanford R. Oxfeld, Esq.)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on February 19, 1985, and amended on December 11, 1985, by the Old Bridge Education Association (hereinafter the "Charging Party" or the "Association") alleging that the Old Bridge Township Board of Education (hereinafter the "Respondent" or the "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-

Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent permitted a dissident teacher, who is the spouse of a member of the Board, to have complete access to the schools to circulate an anti-Association petition, notwithstanding a Board policy against conducting Association business on school time, which has been enforced by reprimands; and during the months of February and March, 1985, certain members of the Board made public comments indicating that there was a need for a change in the leadership of the Association; and in May, 1985, the Principal of the Carpenter School attended a coffee klatsch where he expressed an opinion that those in attendance should support the candidates for Association office who were in attendance at the coffee klatsch; and the Board in September, 1985, shared confidential information with certain Board members regarding candidates for office in the Association; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act.[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; and (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on April 19, 1985. Pursuant to the Complaint and Notice of Hearing, and at the request of the parties, hearings were not held until December 11 and December 13, 1985, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally.[2/] Oral argument was waived and the parties filed post-hearing briefs by March 13, 1986.[3/]

An Unfair Practice Charge, as amended, 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/ The Respondent objected strenuously to the amendment of the original Unfair Practice Charge, which was allowed by the Hearing Examiner on December 11, 1985 (C-3). The thrust of the Respondent's objection was that two of the three addititonal allegations were out of time under §5.4(c) of the Act and that the final allegation bore no date whatsoever. The Hearing Examiner allowed the amendment on the basis of either background to the original charge or the representations by the Charging Party that the allegations were within the six months permitted by §5.4(c) of the Act.

3/ The delay in the receipt of briefs was occasioned by the request of counsel for the Association to reopen the record for additional testimony. This request was initiated on January 6, 1986 and was denied by the Chairman on February 21, 1986.

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

FINDINGS OF FACT

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

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

3. The pertinent collective negotiations agreement between the parties was effective during the term July 1, 1983 through June 30, 1985 (J-1). Article III, Grievance Procedure, provides in Section F that: "The grievance chairperson shall be relieved of duty one day a week, backed up with a preparation period already in effect, with the understanding that no other teacher shall be taken out of class..." (J-1, p. 8). The pertinent provisions of Article V, Association Rights, are as follows:

> A. The Association and its representatives shall have the right to use school buildings at reasonable hours for Association meetings <u>provided approval has been granted</u> by the Superintendent, which approval shall not be unreasonably withheld.
>
> B. The Association shall have in each school building the <u>exclusive</u> use of a bulletin board in each faculty lounge. Copies of all materials to be posted on such bulletin boards shall be given to the building principal, but no approval shall be required.
>
> * * * *
>
> D. The Association shall have the right to <u>reasonable use</u> of the school mailboxes.

> E. The President of the Association shall be granted time during the school day for Association business...
>
> (J-1, p. 10)(Emphasis supplied)

4. Eugene A. Cimis, a social studies teacher at the Madison Central High School, has been the Association's grievance chairman for five years. On December 23, 1981, Cimis received a telephone call from several teachers regarding a "walkout" during lunch duty, as a result of which he made a telephone call to the Superintendent and defused the situation. Thereafter, during working hours, he investigated whether or not certain teachers had left class, etc., and was warned by the principal not to do so. However, he received no written reprimand for violating Board policy on conducting Association business during working hours.[4/]

5. There was considerable testimony regarding the use of the mailboxes in the schools. As noted above, J-1 provides in Article V, §D that the Association shall have the right to <u>reasonable</u> use of the school mailboxes. The Hearing Examiner credits the testimony of the Respondent's witnesses, Korshalla and

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4/ There was considerable testimony from witnesses for both parties as to Board policy on the conduct of Association business during the school day. Glenn R. Johnson, the President of the Association for the past nine years, testified without essential contradiction that at a Board meeting in January, 1982, the December 23, 1981, incident regarding Cimis was discussed and a motion was made by Board member John D'Amato that no union business be transacted during the school day. This never became a formal Board policy but was merely a directive to administration as testified to by Andrew Korshalla, the Assistant Superintendent for Personnel.

Peter Delaney, the Principal of the Madison Central High School, that, contrary to the testimony of Johnson, the Association does not have exclusive use of the mailboxes since they are also used by teachers in the various schools to communicate with one another, and by parents to teachers and, with the approval of administration, limited use by outside organizations. The relevance of the practice in the use of school mailboxes will be apparent hereinafter.

6. Mary Carrington, a teacher of the gifted and talented, and the spouse of Board member Robert Carrington, was a representative of the Association until her removal in 1984. On October 15, 1984, Johnson wrote to Carrington, objecting to certain comments made by her as an Association representative and questioning whether or not a conflict existed between her serving as an Association representative while her husband was a member of the Board (R-1). Thereafter Carrington was removed by a two-thirds vote of the Association's Representative Council. Additionally, in February, 1985, the Association by a two-thirds vote decided that an inherent conflict of interest would occur if the spouses of Board members or the spouse of the Superintendent were to serve as a representative of the Association. Carrington, in an undated letter to Association members, questioned the legality of the Association's actions in declaring the above conflict of interest and in removing her as a representative (R-2). This memorandum was circulated to Association members by Carrington through the use of the school mailboxes. Johnson objected to Korshalla regarding Carrington's use

of the school mailboxes for the distribution of R-2 on the ground that it was improper.[5/] The Hearing Examiner finds as a fact that Carrington's distribution of R-2 through the school mailboxes was consistent with the practice of teachers using school mailboxes as testified to by Korshalla and Delaney, supra. Plainly, the Association has no exclusive use of such mailboxes either by practice or under the provisions of Article V, §D wherein the Association has only the reasonable use of school mailboxes.

7. On January 28, 1985, Carrington appeared at the Memorial School where, without signing in, she circulated a petition.[6/] The principal, Harry Romeo, called the Superintendent, Patrick Torre, and advised him that a teacher was in the building circulating a petition. Torre told Romeo to "tell that teacher to cease and desist," after which Carrington left (2 Tr. 73). When Johnson learned of the foregoing incident the following day he immediately contacted Korshalla and later met with him the same day. Korshalla indicated that he was aware of the incident and that it "would be taken care of" (1 Tr. 47).

5/ Johnson circulated a counterstatement to Exhibit R-2 on February 7, 1985 (R-3), using the school mailboxes, after which the Association's building representatives distributed R-3 by hand. Thereafter, on February 11, 1985, Carrington distributed another memo to teachers, in which she also used the school mailboxes (R-4).

6/ Carrington's petition dealt with her efforts to prevent Johnson from running again for the office of President of the Association.

8. Several days later Carrington appeared again, this time at the Sandburg Middle School, where she circulated her petition, which caused a seventh grade teacher, Edward Scanlon, to complain about the interruption of his class. Johnson went to the Principal of the Sandburg Middle School, Joseph Wydra, to ascertain if Carrington had had permission to be in the school. Wydra acknowledged that she had been in the building and that she had not signed in. Johnson next went to Korshalla, stating, "she's at it again" (2 Tr. 38). Korshalla told Johnson that Carrington had said she had just stopped in to the school to say hello but, significantly, Korshalla also stated that Carrington did not have permission to be in the school or to distribute material. Johnson also spoke to Superintendent Torre. Torre on or about February 9 or February 10, 1985, saw Carrington in the administration building and, after speaking with her, she said that she would "stop" (2 Tr. 75). However, Johnson testified without contradiction that he later learned that Carrington had circulated the petition in a number of schools, as a result of which the initial Unfair Practice Charge was filed.

9. The Charging Party established that a building representative in the Sandburg Middle School, Richard Fornadel, received a memo from Principal Wydra on February 3, 1985 (J-3) because of Fornadel having conducted a meeting on February 1st at 3:00 p.m., ten minutes before the end of the school day. Wydra also complained that the notice of the meeting (J-2) failed to identify

who was calling the meeting. The Charging Party contends that this memo, which was not placed in Fornadel's personnel file, is indicative of disparate treatment between Fornadel and Carrington since Carrington did not receive a written memo for her two infractions in circulating her petition at the Memorial and Sandburg Schools without authorization but instead was only orally warned once by Korshalla (2 Tr 39). This contention will be considered by the Hearing Examiner hereinafter.

10. The Association's election of officers took place in May, 1985. In the latter part of May, before the election, two meetings took place at the Carpenter School, one of which involved the Johnson slate for office and the other the Judy Warn slate. The Principal of the Carpenter School is Theodore Marcin. The individuals who arranged for the meeting of the Warn slate were permitted to set up for the meeting prior to the end of the school day, notwithstanding that Marcin testified that he only gave permission to use the school library after school, which meant after 3:25 p.m. Marcin acknowledged that he was invited by a Judy Suchicki to attend the meeting of the Warn slate and that he did so. Marcin testified that he was not invited to attend the meeting of the Johnson slate. Marcin testified further that he did not think that his presence at the meeting would influence anyone since teachers are "independent thinkers" (2 Tr. 19). As he left the meeting he said, "have a nice day" (2 Tr. 20). The Association's witness, Cindy Zawadsky, testified that Marcin said, "...it was a

nice job" (2 Tr. 11). The Hearing Examiner finds no significant distinction between the two versions of what Marcin said and refuses to draw any negative inference therefrom.

11. The Charging Party introduced as an exhibit a packet of eight documents, which Carrington, who did not testify, had received from persons unknown sometime during the first half of 1985 (CP-1). The documents bear dates in the month of February, 1985, and pertain to the filing of the Association's Unfair Practice Charge, a memo of Johnson to Torre on the use of school mailboxes, memos from the President of the Board, John F. Shepard, and a memo to all employees from a concerned member, Ray Waters. Johnson testified that he received CP-1 with a cover letter from the New Jersey Education Association in September, 1985, during the course of a proceeding before the NJEA involving Johnson, which was initiated by Carrington. The Hearing Examiner credits the testimony of Torre that he was not involved in providing Carrington with CP-1. Further, the Hearing Examiner finds that the Association has failed to prove by a preponderance of the evidence that the Board, its representatives or agents were in any way responsible for Carrington having received the CP-1 packet.

DISCUSSION AND ANALYSIS

The Board Did Not Violate §5.4(a)(2) Of The Act By The Conduct Of Principal Theodore Marcin In May 1985 Or By Mary Carrington's Having Obtained CP-1.

An examination of the record discloses that the only arguable §5.4(a)(2) conduct by the Board was when Marcin, the

Principal of the Carpenter School, attended a meeting of the Warn slate at the Carpenter School in the latter part of May 1985 or when Carrington obtained the eight documents, constituting CP-1.

In connection with the Warn meeting, Marcin testified that he gave permission to use the school library for the meeting after school, which meant after 3:25 p.m. The Hearing Examiner does not attribute to him the responsibility for the fact that the individuals who arranged for the meeting were permitted to set up for the meeting prior to the end of the school day. Plainly, this could have happened without his direct knowledge or authorization.

Marcin acknowledged that he was invited to attend the Warn slate meeting and did so, adding that he was not invited to attend the meeting of the Johnson slate. Even if it is assumed that Marcin, at the end of the meeting, said, "...it was a nice job," according to Association witness Zawadsky, the Hearing Examiner accepts the testimony of Marcin as credible that he did not think his presence at the meeting would influence anyone since teachers are "independent thinkers."[7/]

As to Carrington's having come into possession of CP-1, the facts set forth in Finding of Fact No. 11 establish that no Board involvement was proven. Torre's denial of involvement has been credited. To base a finding of Board responsibility on this record

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7/ No weight has been given herein to the fact that Marcin's wife filed a lawsuit along with other teachers against Johnson (2 Tr 21).

would require sheer speculation by the Hearing Examiner, which he is not prepared to undertake.

The Commission has laid down a clear-cut rule for determining the type of activity in which a public employer must engage in order to violate §5.4(a)(2) of the Act: North Brunswick Twp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (1980). See also, Twp. of Mendham, P.E.R.C. No. 83-99, 9 NJPER 99 (1983). In North Brunswick, the Commission said:

> With regard to the Board's alleged violation of §(a)(2), the Education Association has not presented any additional facts to support this allegation, other than the Board's refusing to negotiate with its chosen representatives. While the Board's conduct does, in a sense, "interfere" with the Education Association's ability to collectively negotiate, it does not constitute pervasive employer control or manipulation of the employee organization itself, which is the type of activity prohibited by §(a)(2). Duquesne University, 198 NLRB No. 117, 81 LRRM 1091 (1972)...Kurz-Kasch, Inc., 239 NLRB No. 107, 100 LRRM 1118 (1978)...(Emphasis supplied).

See, also, several more recent decisions of the NLRB to the same effect, namely, that it is pervasive employer control or manipulation that is proscribed by §8(a)(2) of the NLRA, after which the §5.4(a)(2) of our Act is patterned: Deepdale General Hospital, 253 NLRB No. 92, 106 LRRM 1039 (1980); Homemaker Shops, Inc., 261 NLRB No. 50, 110 LRRM 1082 (1982); and Farmers Energy Corp., 266 NLRB No. 127, 113 LRRM 1037 (1983).

Plainly, there is no evidence whatever of pervasive control or manipulation of the Association herein by the Board. Thus, based on the foregoing authority, the Hearing Examiner concludes that the

Board did not violate §5.4(a)(2) of the Act by the conduct of Marcin in May 1985 or by the fact that Carrington obtained CP-1.

The Board Violated The Act By Its Conduct Vis-a-vis Fornadel And Carrington[8/]

The gravaman of the Association's charge as to §§5.4(a)(1) and (3) of the Act is that there was disparate treatment in the disciplining of Fornadel and Carrington for violations of Board policy and/or the collective negotiations agreement. For example, there is a policy prohibiting teachers from visiting schools and interrupting classes (2 Tr 29). Further, there is a policy that Association business is not to be conducted during an employee's working time (2 Tr 32, 33).

By way of background only, it will be recalled that Cimis, the Association's grievance chairman, received an oral warning from his principal when, during working hours, he investigated whether or not certain teachers had left classes on December 23, 1981. This incident, involving Cimis, provoked discussion at a Board meeting in January 1982, and a motion was made that no union business be transacted during the school day. Although this never became a formal Board policy it did become a directive to administration. (See Finding of Fact No. 4, supra).

8/ There was no evidence adduced by the Association, which would constitute proof that the Board violated §5.4(a)(5) of the Act and, thus, the Hearing Examiner will recommend dismissal as to this allegation.

Fornadel, a building representative at the Sandburg Middle School, received a memo from his principal on February 3, 1983, for having conducted a meeting on February 1st at 3 p.m., ten minutes prior to the end of the school day. This memo to Fornadel also complained that his notice of the meeting failed to identify who was calling the meeting. The memo was, however, not placed in Fornadel's personnel file. (See Finding of Fact No. 9, supra).

Carrington, an opponent of Johnson and his administration of the Association, engaged in several activities, which are the subject of the instant Unfair Practice Charge. First, after being removed as an Association representative, she circulated certain memoranda to Association members through the use of the school mailboxes. The Hearing Examiner has found as a fact her use of the school mailboxes was consistent with administration policy and the use of the same mailboxes by other teachers, including Johnson (see Finding of Fact No. 6, supra). However, it was Carrington's circulation of a petition opposing Johnson's running for office again that precipitated the filing of the instant Charge, namely, Carrington's having circulated her petition without permission at the Memorial School on January 28, 1985, and then several days later, repeating the same activity without permission at the Sandburg Middle School (see Findings of Facts Nos. 7 & 8, supra). The administration's response to these two infractions by Carrington was to give her an oral warning (see Finding of Fact No. 9, supra). This treatment of Carrington caused Johnson to complain of "unequal treatment" (1 Tr 45).

The Charging Party argues that disparate treatment occurred as between Fornadel and Carrington, Fornadel having received a written warning for the one incident in which he was involved as against Carrington having received only an oral warning for the two incidents in which he was involved (see Charging Party's brief pp. 6-9). The Charging Party makes much of an apparent discrepancy in the time frame of the warning to Carrington, pointing to the conflicting testimony of Korshalla and Torre. The Hearing Examiner is unable to perceive any meaningful distinction in this discrepancy. The record reflects clearly that, following two incidents involving Carrington at the Memorial and Sandburg Schools, she was given only one oral warning.

Leaving the oral warning of Cimis in December 1981 aside, as too remote in time from the instant Unfair Practice Charge, the Hearing Examiner must determine whether or not there was disparate treatment as between Fornadel and Carrington, Fornadel being a building representative for the Association and Carrington being a dissident Association member, who was not a representative of the Association. Plainly, each was engaged in the exercise of protected activity, Fornadel in calling an Association meeting and Carrington in circulating a petition seeking to oust Johnson as President of the Association.

Before reaching the ultimate conclusion on this aspect of the Unfair Practice Charge, the Hearing Examiner preliminarily finds that although Fornadel is not specifically referred to in the

Charge, filed initially on February 19, 1985, and amended on December 11, 1985, the substance of the complaint on behalf of Fornadel was fully and fairly litigated and, thus, may be considered and determined: Commercial Twp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 553 (1982), aff'd App. Div. Docket No. A-1642-82T2 (1983). This decision of the Commission relied on well established decisional precedent of the NLRB.

Research by the Hearing Examiner has disclosed no Commission decision finding disparate treatment based on the exercise of protected activity by employees in a collective negotiations unit. There have, however, been many Commission decisions where disparate treatment has not been found: see, for example, City of Wildwood, P.E.R.C. No. 80-88, 6 NJPER 47 (1979) and Boro of Stone Harbor, P.E.R.C. No. 82-96, 8 NJPER 278 (1982).

However, there are a spate of decisions of the NLRB, involving the disciplining of employees where a violation of §8(a)(1) and/or §8(a)(3) of the National Labor Relations Act has been predicated upon a finding of disparate treatment: see, for example, NLRB v.Shepard Laundries Co., 440 F.2d 856, 76 LRRM 3080 (5th Cir. 1971); NLRB v. Schill Steel Products, Inc., ____ F.2d ____, 83 LRRM 2369 (5th Cir. 1972); Hammermill Paper Co. v. NLRB, 658 F.2d 155, 108 LRRM 2001 (3rd Cir. 1981); Glass Guard Industries, Inc., 212 NLRB No. 47, 86 LRRM 1563 (1974); Pandair Freight, Inc., 253 NLRB No. 134, 106 LRRM 1218 (1980); Restaurant Corp of America, 271 NLRB No. 171, 117 LRRM 1094 (1984); and Diversified Products, 272 NLRB No. 162, 117 LRRM 1458 (1984).

While none of the above decisions of the NLRB or the courts specifically contain the fact pattern herein involved between Fornadel and Carrington, several of the cases offer interesting parallels. For example, in Shepard Laundries, supra, a violation was found where an employer discharged two employees who engaged in union solicitation in alleged breach of a no-solicitation rule where the employer did not impede or discipline a third employee who circulated an anti-union petition during working hours without written permission. In Glass Guard, supra, the discharge was held to be discriminatory in the case of an employee who committed certain work derelictions where another employee committed similar derelictions and was not disciplined. In Restaurant Corp., supra, an employer was held to have unlawfully suspended two employees and then discharged them where they breached the employer's no-solicitation rule by their solicitation on behalf of the union, the rule having been applied disparately. Finally, in Diversified Produces, supra, the NLRB found that an employer unlawfully suspended and then discharged an employee following an incident in which he violated company policy by working overtime without authorization, the disciplined employee having been treated disparately, in that he was not afforded prior counseling, and the disciplinary action was more severe than that imposed on other employees for the same offense.

Based on the foregoing Federal precedent, the Hearing Examiner concludes that the Respondent Board herein violated

§§5.4(a)(1) and (3) of the Act by its disparate treatment of Fornadel, who received a written reprimand for his first and only offense in violation of Board policy, and possibly the agreement, while Carrington received only an oral reprimand for her two infractions of Board policy. An appropriate remedy will be recommended hereinafter.

* * * *

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

CONCLUSIONS OF ALW

1. The Respondent Board violated N.J.S.A. 34:13A-5.4 (a)(1) and (3) when it issued a written reprimand to Richard Fornadel for having violated Board policy, and possibly the collective negotiations agreement, when he conducted an Association meeting on February 1, 1985, ten minutes before the end of the school day, while Mary Carrington received only an oral reprimand for two infractions of Board policy when she entered the Memorial School on January 28, 1985 and the Sandburg Middle School several days later without permission and during working hours for the purpose of circulating a petition.

2. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(2) when Theordore Marcin, the Principal of the Carpenter School, attended a meeting at the school of the Judy Warn slate nor was the same subsection of the Act violated when Mary Carrington obtained the eight documents constituting CP-1.

3. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(5) by its conduct herein.

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 treating employees such as Richard Fornadel disparately from other employees such as Mary Carrington when infractions of Board policy occur.

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 the rights guaranteed to them by the Act, particularly, by treating employees such as Richard Fornadel disparately from other employees such as Mary Carrington when infractions of Board policy occur.

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

1. Forthwith expunge from the personnel file or personnel records of Richard Fornadel any reference to the written memo received by him on February 3, 1985 (J-3), notwithstanding that the said memo was never placed in his personnel file.

2. 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'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.

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

C. That the allegations that the Respondent Board violated N.J.S.A. 34:13A-5.4(a)(2) and (5) be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

Dated: April 3, 1986
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 treating employees such as Richard Fornadel disparately from other employees such as Mary Carrington when infractions of Board policy occur.

WE WILL NOT discriminate 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 the Act, particularly, by treating employees such as Richard Fornadel disparately from other employees such as Mary Carrington when infractions of Board policy occur.

WE WILL forthwith expunge from the personnel file or personnel records of Richard Fornadel any reference to the written memo received by him on February 3, 1985 (J-3), notwithstanding that the said memo was never placed in his personnel file.

Old Bridge 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 James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08618, Telephone (609) 292-9830