P.E.R.C. NO. 83-84

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOARD OF EDUCATION OF THE RANCOCAS
VALLEY REGIONAL HIGH SCHOOL,

Respondent,

-and-

Docket No. CO-82-52-30

RANCOCAS VALLEY REGIONAL HIGH
SCHOOL EDUCATION ASSOCIATION and
ALVAN E. BROCKOW,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge the Rancocas Valley Regional High School Education Association and Alvan E. Brockow had filed against the Board of Education of the Rancocas Valley Regional High School. The charge had alleged that the Board withheld Brockow's increment and longevity and salary adjustment for the 1981-82 school year in retaliation for his activities as the Association's grievance chairperson.

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ALVAN E. BROCKOW,

Charging Party.

Appearances:
For the Respondent, John A. Meagher, Esquire

For the Charging Party, Selikoff & Cohen, Esqs.
(Joel S. Selikoff, of Counsel)

DECISION AND ORDER

On September 10, 1981, the Rancocas Valley Regional High School Education Association ("Association") and Alvan E. Brockow filed an unfair practice charge against the Board of Education of the Rancocas Valley Regional High School ("Board"). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1) and (3),[1/] when on April 29, 1981, it withheld Brockow's increment and longevity and salary adjustment for the 1981-82 school year in retaliation for his protected activity as grievance chairperson, commencing

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; and (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."

December 12, 1980, and his role in processing several grievances, including his own, after that date.

On September 17, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On October 2, 1981, the Board submitted an Answer denying the allegation of retaliation.

On January 28, 1982, the Board filed a Motion for Summary Judgment along with a brief. It claimed that the Commissioner of Education had exclusive jurisdiction of this case and since Brockow did not appeal the Board's decision to the Commissioner of Education as required by N.J.A.C. 6:24-1.2, a charge could not be processed with this agency. On February 5, 1982, the Association and Brockow filed a response.

On February 18, 1982, acting pursuant to N.J.A.C. 19:14-4.8, the Chairman referred this motion to Commission Hearing Examiner Arnold H. Zudick. The Hearing Examiner reserved decision pending the hearing.

On May 19, 1982, the Association and Brockow amended the Complaint to add an allegation that on or about January 19, 1981, Brockow filed additional grievances. On May 28, 1982, the Board amended its Answer to deny that Brockow continued to file or process grievances after January 19, 1981.

On June 1 and 2, 1982, the Hearing Examiner conducted a hearing. The parties examined witnesses, presented evidence and argued orally. They also filed post-hearing briefs.

On October 14, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 83-11, 8 NJPER ___ (¶_____ 1982) (copy attached). He denied the Motion for Summary Judgment

since the matter was filed before this administrative agency only and concerned allegations of retaliation for engaging in activity protected under the Act. On the merits, the Hearing Examiner recommended that the Complaint be dismissed. He found that the Board withheld Brockow's increment because he did not attend parents' night in 1980, refused to comply with guidelines for notifying the Board he would not attend, and had similar problems with parents' night in past years. He found that Brockow's protected activities were not a substantial, i.e., motivating factor in its decision to withhold his increment. He reasoned that the Board's agents had started the process leading to the increment withholding long before Brockow became grievance chairperson. While noting that Brockow had filed a grievance on October 31, 1980 concerning an order from his principal to meet with him to discuss his absence on parents' night, the Hearing Examiner concluded that the Charging Parties had neither pleaded nor proved that this grievance motivated the increment withholding.

On October 28, 1982, the Association and Brockow filed Exceptions. They claim that the Hearing Examiner erred in limiting the issue, as the Complaint essentially alleged, to whether the Board withheld Brockow's increment because of his grievance chairperson activity commencing in December 1980. They argue, citing In re Commercial Township Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), appeal pending, App. Div. Docket No. A-_____, that the Hearing Examiner should have considered Brockow's activity before his appointment as grievance chairperson -- in particular, his filing of grievances on October 31, 1980 and December 4, 1980 -- since the parties

fully and fairly litigated these facts. They ask that the Commission remand for the issuance of a supplemental report analyzing whether the Board withheld Brockow's increment based on his protected activity prior to his becoming grievance chairperson.

We have reviewed the record. Substantial evidence supports the Hearing Examiner's findings of fact. We adopt and incorporate these findings here.

We also adopt and incorporate the Hearing Examiner's analysis of the jurisdictional issue raised by the Board's Motion for Summary Judgment. We may properly assert jurisdiction over a claim that an employer took a certain personnel action because of anti-union animus and thus violated our Act. Once we have resolved that issue, however, we will not consider whether a board of education has acted arbitrarily or capriciously under the education statutes. See In re Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 83-73, 8 NJPER ___ (¶_____ 1982).

We must next determine whether the Board violated the Act when it withheld Brockow's increment and longevity and salary adjustment for the 1981-82 school year. This determination requires an assessment of the employer's motivation. The Charging Party must first establish that his protected activity was a substantial, i.e., a motivating factor in the employer's decision to take that personnel action. If the Charging Party makes this initial showing, then the employer must go forward and establish by a preponderance of the evidence that the personnel action would

have occurred even in the absence of the Charging Party's protected activity. The factfinder must then resolve the conflicting proofs. East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981); In re Black Horse Pike Regional Bd. of Ed., supra. Compare Wright Line, Inc., 251 NLRB No. 159, 105 LRRM 1169 (1980), aff'd as modified, 662 F.2d 899, 108 LRRM 2513 (1st Cir. 1981), cert. den. (March 1, 1982).

Our review of the record persuades us that the Association and Brockow have not proved that Brockow's protected activity was a substantial, i.e., motivating factor in the Board's decision to withhold his increment. We adopt the Hearing Examiner's analysis.[2/] We stress that on the very night -- October 29, 1980 -- that Brockow failed to attend parents' night, the principal decided to recommend administrative action against Brockow

2/ We reject the contention that the Hearing Examiner failed to consider Brockow's protected activity before he became grievance chairperson. In fact, the Hearing Examiner stated: "although the record shows that Brockow filed a grievance as an individual on October 31 concerning his meeting with Huss, the Charging Party did not allege in its charge nor did it prove at hearing that Brockow's increment denial was in any way as a result of that October grievance. The impact of the October 31 grievance is therefore discounted." (Emphasis added) (p. 19) Since the Association and Brockow focused on establishing that Brockow's activity as grievance chairperson precipitated the increment denial (Post-hearing Brief, pp. 15-22) and since they never seriously attempted to establish that Brockow's prior grievances were a motivating factor, we do not believe that the Hearing Examiner was required to explore this aspect of the case in greater detail. In any event, we see no point in remanding the case since the record establishes that Brockow's activity before he became grievance chairperson played no role in the decision or process leading to the increment withholding.

and that the process the principal initiated to withhold Brockow's increment was well under way long before Brockow notified the Board of his appointment as grievance chairperson. Thus, we adopt the conclusion of the Hearing Examiner that the Board decided to withhold Brockow's increment for reasons other than his protected activity. Accordingly, we dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett and Suskin voted in favor of this decision. Commissioner Graves voted against the decision. Commissioner Hipp abstained. Commissioner Newbaker was not present at the time of the vote.

DATED: Trenton, New Jersey
December 15, 1982
ISSUED: December 16, 1982

H. E. No. 83-11

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

In the Matter of

BOARD OF EDUCATION OF THE RANCOCAS
VALLEY REGIONAL HIGH SCHOOL,

Respondent,

-and- Docket No. CO-82-52-30

RANCOCAS VALLEY REGIONAL HIGH
SCHOOL EDUCATION ASSOCIATION
and ALVAN E. BROCKOW,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission denied the Board's Motion for Summary Judgment concerning lack of jurisdiction, but recommended that the Commission find on the merits of the case that the Board did not violate the New Jersey Employer-Employee Relations Act. The Charging Party failed to prove by a preponderance of the evidence that the Board's denial of employee Brockow's increment was based upon his protected activity. The Charging Party did not establish that protected activity was a motivating factor in the Board's action, and the Board established substantial business justification for its actions. The Hearing Examiner found that questions concerning educational matters that are related to but not the issue in the Charge were not within the Commission's jurisdiction and could only be answered by the Commissioner of Education.

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
John A. Meagher, Esq.

For the Charging Party
Selikoff & Cohen, Esqs.
(Joel S. Selikoff, of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION AND DENIAL OF MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on September 10, 1981 and amended on May 19, 1982, by the Rancocas Valley Regional High School Education Association and Alvan E. Brockow (the "Charging Party") alleging in part that the Board of Education of the Rancocas Valley Regional High School (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charging Party has alleged that the Board unlawfully withheld an increment from Mr. Brockow because of the exercise of his union activity as grievance chairperson, all of which was alleged to be in violation

of N.J.S.A. 34:13A-5.4(a)(1) and (3).[1/] The Board denied committing any violation of the Act and alleged that Mr. Brockow's increment was withheld pursuant to valid business considerations.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued by the Director of Unfair Practices on September 17, 1981, pursuant to which hearings were originally scheduled herein for December 1981 and were thereafter rescheduled for February 3 and 5, 1982. However, the Board filed a Motion for Summary Judgment with the Commission including a brief on behalf of the Motion, all of which was received on January 28, 1982, and the Charging Party filed a brief in opposition to the Motion which was received on February 5, 1982. The hearing was delayed pending review of the Motion, and by letter dated February 18, 1982, the Chairman, pursuant to N.J.A.C. 19:14-4.8, referred the Motion to the undersigned Hearing Examiner for consideration. By letter dated March 9, 1982, the undersigned reserved any decision on the Motion and rescheduled the hearing for June 1 and 2, 1982. At the hearing which was conducted on those days both parties had the opportunity to examine and cross-examine witnesses, and to present evidence, and argue orally. Both parties submitted post-hearing briefs, the last of which was received on August 29, 1982. Neither party filed a reply brief.

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; (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."

A Complaint with respect to an Unfair Practice Charge having been issued by the Director, a question concerning alleged violations of the Act 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.

The Motion for Summary Judgment

The Board in its Motion was seeking a determination based upon procedural and jurisdictional arguments, and was not seeking a determination based upon the merits of the case. Normally, a motion for summary judgment may only be granted if there are no genuine facts in dispute (on the merits) and the movant is entitled to a decision as a matter of law. See N.J.A.C. 19:14-4.8(d). In this case the Board, in its Motion, argued that only the Department of Education, i.e., the Commissioner of Education, and not this Commission, has jurisdiction over the withholding of a teacher's salary increment as set forth in N.J.S.A. 18A:6-9 and 18A:29-14. In addition, the Board argued that the Charge on its face lacked merit. Finally, the Board argued that since the Charging Party failed to appeal the Board's denial of an increment to the Commissioner of Education within the time provided in N.J.A.C. 6:24-1.2, that he lost his right to appeal and could not now process a charge before the Commission.

In support of its position the Board relied upon several cases including City of Hackensack v. Winner, 82 N.J. 1 (1980); Hinfey v. Matawan Reg. Bd/Ed, 77 N.J. 514 (1978); and, In re Roxbury

Twp. Bd/Ed, P.E.R.C. No. 80-126, 6 NJPER 207 (¶11100 1980). Both Hackensack, supra, and Hinfey, supra, concerned the jurisdiction of quasi-judicial administrative agencies or authorities such as the Commission and the Department of Education (Commissioner of Education). The Court set forth guidelines to prevent two such agencies from processing and deciding matters concerning the same or very similar facts. The problem could occur where a party commences proceedings before two agencies such as PERC and the Department of Education, each of which could have jurisdiction over legal issues arising from a particular set of facts. To prevent such an occurrence the Court established guidelines whereby one agency would usually defer to the other depending upon the gravamen of the issue.

In Roxbury, supra, the Commission, in application of the Hackensack guidelines, confirmed the Director's refusal to issue a complaint in a charge which predominantly related to proceedings which had already been instituted before the Commissioner of Education.

The Charging Party herein opposed the Motion and argued that Hackensack and Roxbury were distinguishable from the instant matter.

Having reviewed the briefs concerning the Motion the undersigned agrees with the Charging Party that the above cases are distinguishable from the instant matter. The facts show that the Charging Party has filed an action concerning Brockow's increment before only one administrative agency, this Commission, and has alleged a violation within the jurisdiction of the Act. The Charging Party has not filed an action before the Commissioner of Education

nor has it alleged any violations of Title 18A of the New Jersey Statutes in the Charge filed before this Commission. The purpose of Hackensack was to prevent the litigation of a particular set of facts in two or more administrative agencies, it was not intended to prevent litigating a matter appropriately filed in only one agency.

Although the Commissioner of Education is the appropriate forum for challenging increment denials when based upon educational reasons, this Commission is the appropriate forum for challenging an increment denial when the denial is allegedly based upon the exercise of protected union activity. In the instant matter the allegation is that Brockow's increment was denied because of his union activity which falls squarely within the Commission's jurisdiction. It is equally important to note that this Charge does not allege that the increment denial was inappropriate for educational reasons.

Accordingly, based upon the above discussion, and in view of the fact that Hackensack and Hinfey are distinguishable from the instant matter the Board is not entitled to a favorable decision on the Motion as a matter of law. The Motion is therfore denied in its entirety.

Findings of Fact on the Merits

1. The Rancocas Valley Regional High School Board of Education is a public employer within the meaning of the Act and is subject to its provisions and is the employer of the employee involved herein.

2. The Rancocas Valley Regional High School Education Association is a public employee representative within the meaning of the Act and is subject to its provisions and is the majority representative of a unit of employees which includes Alvan E. Brockow.

3. Alvan E. Brockow is a public employee within the meaning of the Act and is a teacher employed by the Board.

4. On April 29, 1981 the Board officially withheld Brockow's increment resulting in the loss to him of approximately $2000. The Board alleged the increment was withheld because of Brockow's failure to attend a parent/teachers night on October 29, 1980, combined with his failure to provide written notice of his inability to attend that function.

The facts concerning the Board's withholding of the increment are as follows. On September 29, 1980, guidelines were created (Exhibit CP-5) relevant to the annual parent/teachers night which was scheduled for October 29, 1980. It was undisputed that said guidelines contained the following provision:

> 6. It is expected that all staff members will participate at this function. Members who cannot be in attendance must submit a written statement to the committee twenty-four hours in advance of the date. A "pre-arranged" absence will in no way become a part of any records.

Approximately three to five days before October 29, Brockow verbally advised Miss Bortnick, who was involved in the preparation for parents night, that he would not attend, and on October 28, 1980, he verbally advised a Ms. Valius, and Mr. Fletcher, the chairman of the parent night committee that he would not attend. 2/ On October 30, 1980, the day after parents night, Mr. Fletcher submitted

2/ Transcript ("T") I, pp. 86-87.

a memorandum to school principal Henry Huss (Exhibit R-8) recounting his encounter with Brockow on October 28. In his memorandum Fletcher indicated that Brockow told him that he was not going to inform the committee in writing of his intended absence from parents night.

Thereafter, on October 31, 1980 Huss met with Brockow to discuss his absence from parents night. Huss prepared a memorandum that same day to Superintendent William Clark (Exhibit CP-6) recounting the meeting he had with Brockow. Huss indicated that Brockow admitted being familiar with item #6 of the guidelines and in response to Huss' question as to why he was absent from parent night Brockow allegedly responded:

> I chose not to be there and I chose not to give the committee anything in writing. 3/

Huss concluded his memo with the following recommendation to Clark:

> It is my recommendation, therefore, that Dr. Brockow's deliberate refusal to attend the Parents/ Teachers' Night Program by not following the prescribed past practice procedures as well as the newly developed guidelines is sufficient grounds for administrative review and disciplinary action.

After discussing the memo with Huss, Clark contacted Board President Lynch and advised him of the situation involving Brockow. Lynch told Clark to arrange a meeting with Board attorney John Meagher, and the meeting was scheduled for November 5, 1980. 4/ In addition to Clark and Meagher, Huss and Fletcher and two Board personnel committee members were present at the November 5 meeting.

As a result of the November 5 meeting with their attorney, Mr. Meagher prepared a letter dated November 20, 1980 to Mr. Lynch

3/ In addition to this comment in Exhibit CP-6, Huss also testified under oath that Brockow made that remark, T. II, pp. 79-80, and the undersigned finds that testimony to be credible.

4/ T. I, pp. 160-161.

(Exhibit R-1) wherein he recommended that Brockow's increment be withheld based upon his actions concerning parents night in 1980, as well as his behavior at previous parents nights. Also dated November 20, 1980 was a memorandum from Clark to the Board (Exhibit R-3) wherein Clark set forth the procedure and law concerning the withholding of Brockow's increment. Both R-1 and R-3 were prepared for the November 20 Board meeting, and the minutes of the closed session Board meeting of November 20 (Exhibit R-2) reflect that Brockow's refusal to attend parents night or give reasons for his absence therefrom were discussed.

As a result of the November 20 Board meeting Clark testified that the Board accepted Meagher's recommendation to withhold Brockow's increment, and thereafter Clark met with Meagher on December 3, 1980 to discuss the procedure to follow to withhold the increment. 5/ But Clark also testified that at the November 20 Board meeting the Board asked him for his recommendation concerning the Brockow incident and Clark recommended withholding the increment. 6/ Clark indicated that that recommendation was based in part on Brockow's actions and insufficiencies in past years including 1976. 7/

In accordance with the December 3, 1980 meeting Meagher submitted a detailed letter to Clark dated December 9, 1980 (Exhibit R-4) outlining the procedure to follow to deny an increment, and that procedure included giving the employee an opportunity to appear before the Board.

5/ T. I, p. 169.

6/ T. I, pp. 183-184.

7/ T. I, pp. 189-190, 208.

Thereafter, by letter dated December 17, 1980 (Exhibit CP-19 exhibit 1 attached thereto) Huss recounted the events of parents night and Brockow's actions therein to Clark, and once again recommended that disciplinary action be taken against Brockow. The following day, December 18, 1980, the Board, at a meeting, approved the procedure for withholding the increment, and required Clark to meet with Brockow to review with him the direction the Board was taking as well as the procedures. 8/ In accordance with the Board's requirement Clark sent Brockow a letter on December 23, 1980 (Exhibit CP-12) requesting a meeting concerning the parents night incident. That meeting took place on January 5, 1981, and in addition to Clark and Brockow, Huss and union representative Creutz were present at the meeting, and Clark informed Brockow of his recommendation to withhold the increment. 9/

Subsequently, the Board, at a meeting on January 22, 1981, met once again to consider witholding Brockow's increment, and reviewed Clark's memorandum of the same date (Exhibit CP-19 attached to letter of 1/30/81) wherein he recounted all of the facts concerning parents night and clearly recommended for the second time the withholding of Brockow's increment. 10/ Following that meeting, the Board, by letter dated January 30, 1981 (Exhibit CP-19) gave Brockow the opportunity to be heard before the Board accompanied by his representatives.

Brockow chose to be heard at a public meeting and the same was held on March 12, 1981. Brockow was represented at the meeting

8/ T. I, p. 171.

9/ T. I, p. 172.

10/ See also T. I, p. 198.

and presented his case to the Board. 11/ Thereafter at a Board meeting on April 29, 1981 the Board voted to withhold Brockow's increment and informed him of the same.

5. The facts concerning Brockow's involvement in protected activity are as follows:

Subsequent to his meeting with Huss on October 31, 1980, Brockow, on that same day, filed a grievance (Exhibit CP-7) over Huss' ordering him to appear for the October 31 meeting which concerned Brockow's failure to attend parents night.

Then, on December 12, 1980 Brockow became chairman of the grievance committee and he so informed Board President Lynch of that fact by letter of the same date (Exhibit CP-8). In that letter Brockow also moved a grievance to step III. On that same date Brockow also formally filed another personal grievance, this one over not having union representation at a meeting he had had with Vice Principal Popler in November 1980 (see Exhibit CP-14). Thereafter, Brockow testified that Huss asked him why he had become so active in the union. 12/

Following these incidents, and beginning on December 15, 1980 and through the end of December 1980, there was a great deal of correspondence between Brockow as grievance chairperson and either Huss or Clark. (See Exhibits CP-9, CP-10, CP-11, CP-14 attachments, CP-15 attachments, CP-16, CP-17, and CP-18). Among that correspondence were several grievances filed by Brockow as grievance chairperson (Exhibits CP-9, CP-10 and CP-11), as well as denials by Huss and Clark of the grievances filed by Brockow on October 31 and

11/ T. I, p. 174.

12/ T. I, p. 98.

December 12 (Exhibits CP-14 attachments, CP-15 attachment, and CP-17). 13/ Once again in January 1981, there was correspondence between Brockow and Board officials regarding grievances (Exhibits CP-13, CP-14 and CP-15). In CP-13, a letter from Clark to Brockow dated January 6, 1981, Clark expressed his concern over the proper procedure to follow in implementing the grievance procedure. 14/ Clark said:

> "I am deeply concerned with attitude and direction taken by you and the Association's Grievance Committee regarding the submission of grievances."

Finally, Brockow was active as grievance chairperson only into January 1981. Don Wisnewski became grievance chairperson around January 19, 1981. 15/

6. The record also contains other relevant facts:

A. Brockow admitted that he knew that his name was on the list for attendance at parents night and that he knew the procedure for not wanting to attend parents night and the procedure included informing Bortnick that he wouldn't be there. 16/ Brockow orally informed Bortnick that he would not attend, but he was aware that the guidelines for parents night (Exhibit CP-5) required written notification of non-attendance, but he believed that he could disregard those guidelines. 17/ When asked why he did not attend parents night Brockow responded that he believed it was a

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13/ Clark denied Brockow's October 31, 1980 grievance (Exhibit CP-7) by letter dated December 9, 1980 (Exhibit CP-19 exhibit 23), and Huss apparently denied that grievance by letter dated November 17, 1980 (Exhibit CP-19 exhibit 23).

14/ T. I, pp. 203-204.

15/ T. I, pp. 68, 75.

16/ T. I, pp. 86, 141.

17/ T. I, pp. 142-143.

voluntary activity. 18/ Finally, Brockow admitted, contrary to the allegation in the amended Charge herein, that he did not file additional grievances on January 19, 1981. 19/

B. Superintendent Clark testified that his recommendation for withholding Brockow's increment was based in part on Brockow's past record particularly his lack of cooperation at previous parents nights. The record shows that Brockow had problems with parents night in 1975 (Exhibit CP-19 attachment 1/22/81 memorandum, attachment exhibit 16 and 18), that the Board almost filed charges against him in 1976 (Exhibit CP-19 exhibits A through S), and, that Brockow failed to attend parents night in 1977. In 1977 Brockow also initially failed to provide written notification of his absence from parents night, but when Huss requested a written explanation the following day, Brockow immediately complied and indicated he had had a doctor's appointment (Exhibit CP-19 attached exhibit 19). 20/

C. Finally, it is important to note that all other teachers absent from the 1980 parents night (approximately ten or eleven people) provided some form of written notification for their absence. 21/

The Issue

The instant Charge alleges that Brockow was discriminated against and his increment withheld because of his activities as

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18/ T. I, p. 85.

19/ T. I, pp. 145-147.

20/ This information is for background and to establish that Brockow did have problems with parents night in the past. This information is not intended to establish the facts for the 1980 parents night.

21/ T. I, pp. 215-216.

grievance chairperson which began on December 12, 1980. The Charging Party did not allege that Brockow's increment was withheld because he filed a grievance as an individual on October 31, 1980. Consequently, the issue presented herein is limited to whether Brockow's increment was withheld because of the protected activities he engaged in as grievance chairperson.

DISCUSSION AND ANALYSIS

Parents Night and Guidelines

Throughout the presentation and argument of its case the Charging Party attempted to prove that attendance at parents night was voluntary, and that the guidelines had not been agreed upon and could in fact be disregarded. However, even if that information were true, it would not establish a violation herein.

The issue in this case is whether Brockow's increment was denied because of his grievance chairperson activities. The questions concerning parents night are educational matters and are within the jurisdiction of the Commissioner of Education, not this Commission. Consequently if Brockow's increment was withheld because of his failure to attend parents night and his failure to provide written notification thereof, rather than because of his grievance chairperson activities, then no violation of the Act would have occurred.

The Substantial Motivating Factor

The Charging Party alleged that Brockow's protected activity was a substantial motivating factor in denying his increment. The undersigned disagrees. Having reviewed the entire record herein

the undersigned is convinced beyond any doubt whatever that Brockow's increment was denied solely because he failed to attend parents night and comply with the guidelines and because of similar problems in the past.

In support of its position the Charging Party cited several cases. In the first case, East,Orange Public Library v. Taliferro, 180 N.J.Super. 155 (App. Div. 1981), the court, in reliance upon Mt. Healthy City Bd/Ed v. Doyle, 429 U.S. 274 (1977), established the substantial motivating factor test which would require the Charging Party herein to establish that protected activity was a substantial or motivating factor in the increment denial. East Orange, supra, was cited for the right purpose, but the undersigned disagrees with the Charging Party's conclusion that it satisfied that test. The Charging Party focused upon Brockow's grievance chairperson activities which began in earnest on December 12, 1980 and lasted approximately one month, and argued that this activity was the substantial motivating factor which resulted in the denial of his increment.

The undisputed facts are, however, that beginning with Huss' memo of October 31 (Exhibit CP-6) the Board, as a result of Brockow's actions regarding parents night, began the process which eventually led to the denial of Brockow's increment. In addition to Exhibit CP-6, there was communication between Board attorney Meagher, Superintendent Clark, Board President Lynch, and Principal Huss as well as various documents exchanged between all of them concerning a denial of Brockow's increment prior to the date Brockow became grievance chairperson.

Within that time frame there were two specific recommendations for withholding Brockow's increment, one by Meagher in his letter of November 20, 1980 (Exhibit R-1), and the other by Clark who credibly testified that he made a verbal recommendation to the Board on November 20, 1980. This evidence clearly established to the undersigned that not only the "substantial" motivating factor, but the only motivating factor for denying Brockow's increment was his failure to comply with the guidelines and attend parents night.

The Charging Party in its post-hearing brief attempted to dilute the effect of the Board's actions prior to December 12 through several arguments. First, the Charging Party argued that no employee had ever been denied an increment for failure to attend parents night and that attendance at parents night was voluntary and that the guidelines could be disregarded. This argument is totally without merit. Even assuming that attendance at parents night was voluntary and the guidelines not enforceable, it is clear from the Board's actions in November 1980 that, right or wrong, it was moving forward to withhold Brockow's increment over the parents night incident. Even if the Board was wrong about parents night that does not negate the fact that the November recommendations to deny the increment were based on the parents night incident and not union activities. Those recommendations could not have been based upon Brockow's grievance chairperson duties because he did not start those duties until December 12, 1980.

Second, the Charging Party argued that Brockow was not given any notice between October 31 and December 12 that the Board

was considering withholding his increment over the parents night incident. This argument is also without merit. There is no requirement in our Act or Rules and Regulations that would have required the Board to notify Brockow of the Board's actions prior to December 12, 1980.

Third, the Charging Party argued that all of the Board's actions prior to December 12 were only "investigatory, preliminary, informal or preparatory in nature," and, in addition, that because no "formal" recommendations for Brockow's increment denial had been made prior to December 12, that all of those actions should be given little weight. This argument is totally unacceptable. Whether one classifies the Board's pre-December 12 actions as preliminary and preparatory, and whether one calls Meagher's and Clark's recommendations formal or informal, the facts are undisputed that the basis for those Board actions and those recommendations was Brockow's behavior with respect to parents night. Brockow's grievance chairperson activities had nothing whatever to do with Huss' October 31 recommendation that Brockow be disciplined, with Meagher's and Clark's recommendations in November to deny Brockow's increment, and they had nothing to do with the Board's instructions in November to Clark and Meagher to prepare the procedures to follow to deny the increment.

The Charging Party seems to suggest that the Board's pre-December 12 actions were meaningless, and that because the Board did not officially act to withhold Brockow's increment prior to December 12 that any attempt to do so after Brockow became an active

grievance chairperson became tainted. Such a suggestion is faulty. The Board's actions to withhold Brockow's increment must be viewed as a whole and should not be dissected. The process began on October 31 with Huss' memo and continued in a timely, reasonable and sensible manner. It was inevitable and unavoidable that the increment denial process would be proceeding at the same time that Brockow was functioning as grievance chairperson. But that coincidence cannot be the basis upon which the increment denial process which began before Brockow was grievance chairperson could be found to be violative of the Act. In addition, there was no evidence by the Charging Party that the Board's pre-December 12 actions were intended to be tentative or temporary in nature. To the contrary, the evidence suggests that Clark, Meagher, and indeed the Board, had formed, prior to December 12, the intention of proceeding to withold Brockow's increment. The Board's actions subsequent to December 12 logically followed the procedures established for the increment denial, and Huss's second recommendation on December 17, Clark's second recommendation on January 22, 1981, and the Board's official denial of the increment on April 29, 1981 merely reinforced, reiterated and finalized what they had each done prior to December 12, 1980.

In addition to East Orange, supra, the Charging Party relied upon the following cases: In re County of Middlesex, P.E.R.C. No. 81-87, 7 NJPER 93 (¶12037 1981); In re Lakewood Bd/Ed, P.E.R.C. No. 79-17, 4 NJPER 459 (¶4208 1978); In re North Brunswick Twp. Bd/Ed, P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978); and, In re Manalapan-

Englishtown Reg. Bd/Ed, P.E.R.C. No. 78-91, 4 NJPER 262 (¶4134 1978), for the proposition that the filing and processing of grievances was protected activity, and that the vigorous expression of a union's position is also protected.

The undersigned agrees that the filing, processing and vigorous representation of grievances (and other actions) are protected activity, however, for the reasons stated hereinabove, Brockow's increment was not denied because of protected activity. The facts of the above cases are distinguishable from the instant matter and cannot form the basis for finding a violation herein. For example, in In re North Brunswick, supra, and In re Lakewood, supra, the employer's actions began after the employee engaged in protected activity. In the instant case, however, the Board's move to withhold the increment began well before Brockow became grievance chairperson.

The Charging Party also attempted to show as a substantial motivating factor remarks by Huss and Clark concerning Brockow's union activity and his attitude regarding grievances. A review of Huss' remark does not indicate any anti-union animus. With respect to Clark's comments to Brockow in Exhibit CP-13, the undersigned believes that Clark's comment was taken out of context. The record shows that both Huss and Clark had informed Brockow as grievance chairperson that he was not - in their estimation - following the grievance procedures properly. In CP-13 Clark was only expressing his concern over Brockow's attitude in not following what he (Clark) considered to be the proper grievance procedure. His remarks were

not intended to prevent the filing of grievances, but only to encourage Brockow to follow the grievance procedure properly.

Finally, although the record shows that Brockow filed a grievance as an individual on October 31 concerning his meeting with Huss, the Charging Party did not allege in its Charge nor did it prove at the hearing that Brockow's increment denial was in any way as a result of that October grievance. The impact of the October 31 grievance is therefore discounted.

The Business Justification

The Charging Party argued that there was no legitimate business justification for the Board's denial of Brockow's increment, and concluded that the Board's reasons for witholding Brockow's increment were pretextual. For the reasons given hereinabove, the undersigned disagrees.

Despite all of the Charging Party's arguments the fact remains that the Board did begin Brockow's increment withholding process because of the parents night incident which was prior to Brockow's grievance chairperson duties. The business justification in question is the right of this Board to discipline Brockow for failure to comply with what it believed to be proper employee procedure and behavior. It is not for this Commission to determine whether those procedures were proper or whether Brockow's behavior actually justified the discipline that was implemented. That issue is within the jurisdiction of the Commissioner of Education. The undersigned is convinced that the Board did not act to withhold Brockow's increment because of his union activity. Thus, the Board's

decision to discipline Brockow over parents night was a legitimate defense and business justification with respect to the Charge herein.

The undersigned does not believe that the Charging Party even established that part of the reason for denying Brockow's increment was his protected activity. However, even assuming that the Board denied the increment in part because of Brockow's union activity there was ample business justification for the Board's action. Under the business justification standards established in Wright Line, A Division of Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980), which were endorsed by the Commission, 22/ the Hearing Examiner must determine if the Board's action (the denial of increment) would have been taken even if there had been no exercise of protected activity. If the answer is in the affirmative, then the action is upheld.

In this case the Board would have taken the same action despite Brockow's union activity. The Board in November 1980 was already moving forward to withhold Brockow's increment over parents night and because he failed to comply with the guidelines. Union activity played no part in that decision and there was no evidence to suggest that this Board action would have been discontinued. In addition, the evidence shows that Brockow had problems with attendance at previous parent nights and the Board considered that information in deciding to withhold the increment. This fact would not

22/ See In re Bd/Ed Vocational Schools in Essex Co., P.E.R.C. No. 82-32, 7 NJPER (¶12263 1981); and, In re Madison Bd/Ed, P.E.R.C. No. 82-46, 7 NJPER 669 (¶12303 1981).

have changed even if Brockow had not become active in the union.

Based upon the above analysis the undersigned is convinced that there is sufficient basis to believe that the Board would have withheld Brockow's increment even if he had not become grievance chairperson.

Accordingly, the undersigned will recommend, for the reasons set forth above, that the complaint be dismissed in its entirety.

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

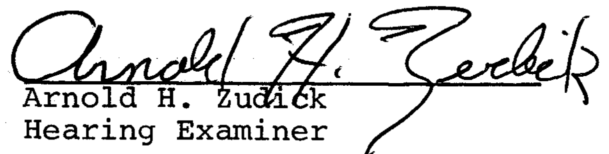
CONCLUSIONS OF LAW

1. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) by withholding Alvan Brockow's increment on April 29, 1981.

2. The Respondent Board did not withold Alvan Brockow's increment because he had engaged in protected union activity. Rather, his increment was withheld based upon legitimate business and educational considerations.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.



Arnold H. Zudick
Hearing Examiner

Dated: October 14, 1982
Trenton, New Jersey