

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

EAST BRUNSWICK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-95-72

EAST BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the East Brunswick Education Association against the East Brunswick Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it transferred two teachers out of the high school in retaliation for their actions as representatives of the Association and for their actions on behalf of their co-workers. The Commission finds that the charging party has not proved that protected activity was a substantial or motivating factor in the transfer decisions.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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EAST BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Martin R. Pachman, attorney

For the Charging Party, Balk, Oxfeld, Mandell & Cohen,  
attorneys (Nancy Iris Oxfeld, of counsel)

DECISION AND ORDER

On September 14, 1994, the East Brunswick Education Association filed an unfair practice charge against the East Brunswick 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 subsections 5.4(a)(1) and (3),<sup>1/</sup> by transferring teachers Rosalie Triozzi and Sharon Merli out of the high school in retaliation for their actions as representatives of the East Brunswick Education Association and for their actions on behalf of their co-workers.

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<sup>1/</sup> 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."

On December 6, 1994, a Complaint and Notice of Hearing issued. On December 16, 1994, the Board filed an Answer denying that it committed an unfair practice.

On May 12 and 17, 1995, Hearing Examiner Margaret A. Cotoia conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On February 14, 1996, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 96-14, 22 NJPER 168 (127087 1996). She found that the Association had not proved that hostility to protected activity motivated the transfers.

On March 28, 1996, the charging party filed exceptions. It claims that the Hearing Examiner erred in finding that it had not established a prima facie case that protected conduct was a substantial or motivating factor in the transfers. It urges that the case be remanded to the Hearing Examiner to assess the employer's asserted business justification. On April 2, the Board filed a letter supporting the Hearing Examiner's findings of fact and conclusions of law.

We have reviewed the record. We incorporate the Hearing Examiners findings of fact (H.E. at 2-23). The charging party does not dispute these findings, but excepts to the inferences to be drawn from them.

Under In re Bridgewater Tp., 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected

conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by 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 the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The Hearing Examiner found that there was neither direct nor circumstantial evidence in the record showing employer hostility to protected activity or anti-union animus. Accordingly, she found that the Association had not proved that protected activity was a substantial or motivating factor in the decision to transfer the two teachers.

The Association argues that hostility can be shown by the fact that although the principal and superintendent explained their dissatisfaction with certain aspects of the math program, they did not link Merli or Triozzi with those problems or explain how their transfers alleviated those problems. It further argues that it was a mistake for the Hearing Examiner to weigh the evidence in determining if the Association made out a prima facie case. By prima facie case, the Association is referring to Bridgewater's characterization of the burden a charging party must meet before the the burden shifts to the employer to prove that it would have taken the same action even absent the protected conduct.

The charging party confuses Bridgewater's use of the term prima facie in considering the charging party's burden of proving illegal motivation after the record has closed with the conventional use of that term in evaluating motions to dismiss at the end of the charging party's case. In UMDNJ, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987), we explained the difference between the standards for ruling on motions to dismiss after one party's case and the standards for determining ultimate issues of motivation upon all the evidence.

When a respondent moves for dismissal at the end of the charging party's case, the Hearing Examiner must accept as true all the evidence supporting the charging party's position and must give the charging party the benefit of all reasonable inferences. Bexiga v. Havir Mfg. Co., 60 N.J. 402, 409 (1972); Dolson v. Anastasia, 55 N.J. 2, 5-6 (1969); New Jersey Turnpike Auth.,

P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979).  
The Hearing Examiner must then deny the motion if there is a scintilla of evidence to prove a violation.

The Bridgewater standards are much different. The charging party must prove that an illegal motive contributed to the challenged personnel actions. In determining whether this burden has been met, the trier-of-fact must review the record as a whole, make credibility determinations, resolve conflicts and draw appropriate inferences.

In this case, there was no motion to dismiss at the end of the charging party's case. Both parties presented their evidence and then it was the Hearing Examiner's duty to evaluate all the evidence under the Bridgewater standards. In discharging that duty, the Hearing Examiner was not required to find any facts or draw any inferences in favor of the charging party.

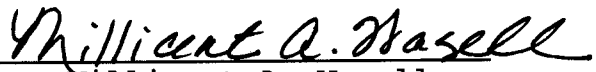
The Hearing Examiner found that Merli and Triozzi engaged in protected activity over a number of years with the Board's knowledge. She found no evidence, either direct or circumstantial, that protected activity motivated the decision to transfer the two teachers. The Association contends that these two teachers were not linked to problems in the math department and the Board did not offer them a statement of reasons for their transfers. But these two facts did not require the Hearing Examiner to infer that the transfers were in retaliation for protected activity. After reviewing all the evidence, the Hearing Examiner declined to draw that inference and we have no basis to disturb that determination.

Accordingly, the charging party has not proved that protected activity was a substantial or motivating factor in the transfer decisions and the Complaint will be dismissed.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
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Millicent A. Wasell  
Acting Chair

Acting Chair Wasell, Commissioners Buchanan, Klagholz, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioners Boose and Finn abstained from consideration.

DATED: September 26, 1996  
Trenton, New Jersey  
ISSUED: September 27, 1996

H.E. NO. 96-14

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

In the Matter of

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Respondent,

-and-

Docket No. CO-H-95-72

EAST BRUNSWICK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the East Brunswick Board of Education did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by transferring math teachers Sharon Merli and Rosalie Triozzi from the high school to the junior high school. The Association was unable to demonstrate that the Board's decision to transfer Merli and Triozzi was at all motivated by their protected activity. The Association proved that both Merli and Triozzi were engaged in protected activity and that the Board was aware of their protected activity. However, the Association failed to demonstrate that the Board showed any hostility towards their protected activity when making the decision to transfer them.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.



H.E. NO. 96-14

STATE OF NEW JERSEY  
BEFORE A HEARING EXAMINER OF THE  
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Appearances:

For the Respondent,  
Martin R. Pachman, attorney

For the Charging Party,  
Balk, Oxfeld, Mandell & Cohen, attorneys  
(Nancy Iris Oxfeld, of counsel)

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On September 14, 1994, the East Brunswick Education Association filed an unfair practice charge with the Public Employment Relations Commission alleging that the East Brunswick Board of Education violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act N.J.S.A. 34:13A-1 et seq.<sup>1/</sup> The Association alleges that the Board transferred

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<sup>1/</sup> 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."

mathematics teachers Rosalie Triozzi and Sharon Merli from the high school to the junior high school in retaliation for their Association activities.

On December 6, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On December 15, 1994, the Board filed an Answer, denying that the transfers were retaliatory and stating that they were based on its reorganization of the high school math department. I conducted hearings on May 12 and 17, 1995 at which the parties examined witnesses and presented exhibits.<sup>2/</sup> The parties filed briefs by September 5, 1995 and the Board filed a reply brief on September 19, 1995. Based upon the entire record in this matter, I make the following:

#### FINDINGS OF FACT

The Association represents the Board's teaching staff (J-1). At the end of the 1993-94 school year, the Board transferred three of the high school math department's 15 members (1T25). Sharon Merli and Rosalie Triozzi were involuntarily transferred from the high school to the junior high school and Joanne Somers received a voluntary transfer from the high school to the junior high school (1T22, 1T25). There is no difference in pay or stipend between the high school and junior high school positions (2T22).

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<sup>2/</sup> "The transcripts of the May 12 and 17, 1995 hearings will be referred to as "1T" and "2T" respectively. Exhibits are designated as follows: Joint exhibits are "J", the Association's exhibits are "CP" and the Board's exhibits are "R".

Merli taught math at Churchill Junior High School for 13 years and was transferred at her request to East Brunswick High School in 1986 (1T22, 1T23). Merli taught at the high school from 1986 until her transfer back to the junior high school in June, 1994 (1T17). While at the high school, Merli served on its faculty council and as a high school representative on the district-wide council (1T18). Both of these instructional councils are provided for in Article XXII, E. of the parties' 1992-94 collective negotiations agreement (J-1).

Faculty councils exist in each school that has a principal. The faculty councils discuss staff concerns in their respective schools with the building principal (J-1, 2T26). There are approximately 70 association members participating on faculty councils (2T27). Superintendent Jon Kopko is not involved in the faculty councils, but perceives them as a positive force, providing a system of checks and balances between the administration and the faculty (2T52).

As one of 15 members of the high school faculty council, Merli attended monthly meetings with high school administrators, including principal Charles King, to discuss issues raised at the faculty council meetings (1T18, 1T19, 1T26, 1T27, 1T83, 1T84, 1T85).<sup>3/</sup> Science teacher Powell Saks served on the high school faculty council with Merli since 1990. Saks characterized the

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<sup>3/</sup> Other math teachers served on the high school faculty council with Merli, including Michael Markot (1T69).

meetings with King as frank, friendly conversations and straightforward discussions in which he and Merli did not hold back topics that would be upsetting to King and that King responded frankly (1T85, 1T86).

The district-wide council consists of seven members and two alternates selected from the faculty councils by the Association President and a maximum of seven administrators chosen by the Superintendent (J-1, 2T24, 2T25). The Superintendent, central office and building level administrators have participated on the council (2T25, 2T26). The district-wide council regularly discusses professional concerns with the Superintendent or his representative and other administrators (1T19, 2T25, J-1). The district-wide council also submits written recommendations to the Superintendent (J-1). Superintendent Kopko listed many positive results from the district-wide council and supports its continued existence (2T50, 2T51).

Merli was a member of the Association's district-wide council for four years, from approximately 1990 through 1994 (1T20). The district-wide council usually met once a month to present Association concerns to the administration (1T21). During Merli's tenure on the district-wide council, administrators who attended the meetings included Superintendent Kopko, Assistant Superintendents Ogden and Witt, high school Principal King, the three high school vice principals and some supervisors and department chairpersons (1T19, 1T20). Merli had no direct contact

with Board members as a member of the faculty and district-wide councils (1T28). Merli was the only member of the district-wide council who was transferred within the last five to six years. (2T26).

Merli's evaluations for the 1991-92, 1992-93 and 1993-94 school years are strong and contain favorable comments about her teaching (CP-4). Merli attached rebuttals to three of her evaluations (CP-4, 1T23). In December 1992, she expressed concern over being observed during the week Christmas break began. In June 1993, Merli's rebuttal expressed frustration over her class assignments, the scarcity and poor quality of instructional materials and the Board's denying her professional days. In December, 1993, Merli again expressed concern over being observed the week that Christmas vacation began, as well as a perceived lack of support from the administration and the lack of textbooks for one of her courses.

Merli did not attribute the alleged anti-union animus behind her transfer to any specific person, but stated that it was "...a Board of Education decision." (1T27). Merli did not receive any threats from any Board member or administration member that could be construed as a manifestation of anti-union animus (1T27). She did have numerous disagreements with different administrators (1T27). However, other members of the faculty and district wide councils have had disagreements with administrators and to Merli's knowledge, none of them filed charges alleging that those disagreements led to negative employment consequences (1T27, 1T28).

Math teacher Rosalie Triozzi was assigned to the high school for 31 years until her transfer to the junior high school in June, 1994 (1T39). Triozzi was vice-president of the Association in the late 1970's and Association president until 1987 (1T40, 1T49). She was a full-time Association President under a release time arrangement with the Board (1T49). After Triozzi ceased serving as Association president, she returned to classroom teaching in the high school (1T50).

Triozzi has also served as a member of the Association's high school representative council (1T40), an internal association committee that represents members, brings their concerns to the Association and dispenses information (1T40, 1T41, 1T50). She was a full-time member of the representative council in the 1991-92 and 1992-93 school years and an alternate member for the 1993-94 school year (1T50). The representative council members only meet with the administration when representing members who have problems with administrators (1T51).

The mornings after representative council meetings, Triozzi met with the staff to update them on what happened at the earlier meeting. She also brought the representative council information on faculty members' concerns (1T51). As a member of the rep council, Triozzi had to obtain permission from the administration to use school facilities for meetings or to put notices in the school bulletin. The administration did not threaten her for making such requests, although they sometimes denied them (1T52, 1T53). If

permission was denied, Triozzi obeyed the order and took alternate routes (1T53).

Triozzi was one of three high school committee members who participated in a work environment survey. Committee members from all of the schools met at the Association office to discuss the work environment at their schools, including working conditions to be discussed with the building principals (1T41, 1T53). Triozzi thought that her activities on the work environment survey were known to unspecified members of the administration because some committee members informed the principal of discussions held at the meetings (1T41, 1T42). However, Triozzi did not meet with the principal as a member of the survey committee (1T42, 1T53, 1T54).

Triozzi has represented herself in grievances (1T42). A few years after she resumed her teaching responsibilities, Triozzi was concerned about an evaluation. Triozzi met with Department Chair Wilker, resolved the matter informally and the evaluation was changed (1T44, 1T55). Wilker continued to evaluate Triozzi after that meeting, and she did not retaliate against her as a result of Triozzi's contesting her evaluation (1T56, 1T57, 1T58).

As a member of the representative council, Triozzi represented high school English teacher Louis Chalupa at post-observation conferences with his supervisors, English Supervisor Marion Hoffman, English Department Chairperson Diana Hill and Assistant Principal Szukics (1T42, 1T43). None of the meeting participants were math department supervisors, and nobody from those

meetings threatened Triozzi or exhibited hostility towards her because she represented Chalupa (1T54, 1T55).

In the 1993-94 school year, Triozzi learned that she was the subject of some parental complaints (1T58). Triozzi first met with Math Department Supervisor Frank Gardella and Wilker about the complaints and later with Gardella, Wilker, King and an Association representative (1T58, 1T59). The first meeting concerned general complaints about Triozzi (1T60, 1T61). The second meeting focused on comments Triozzi allegedly made questioning whether a student had learned certain material in a previous course (1T59, 1T60). The administrators refused to identify the complaintant or the specific nature of the complaints (1T61). After meeting on the matter, Triozzi told Wilker, Gardella, Kopko and King that the administration's failure to provide specific information on the complaints violated her rights (1T44, 1T45).

Triozzi's evaluations and individual improvement plan for the 1993-94 school year are favorable (CP-6). Triozzi attached six pages of comments to her April 1994 evaluation.

Triozzi stated that her transfer was based upon her union activities "Because (she) had no other basis upon which to base it..." (1T64). However, Triozzi was never told by anyone that they were unhappy with her participation as a member of the rep council or the work environment survey group or of her representation of Chalupa (1T63).



Other district math teachers transferred for the 1993-94 school year were Ruth Howard and Karen Rosenfeld from the junior high school to the high school and junior high school math teacher Cerrito to Hammarskjold School.<sup>4/</sup> Department Chairperson Kathleen Wilker was also reassigned to a teaching position in the high school to replace Somers (1T37).

Catherine Schwartz has been the President of the Association for eight years (2T24). The Association struck the Board in 1984 and its relationship with the Board was problematic for some time after the strike. However, from the late 1980's through the present, the Association has made a concerted effort to improve its relationship with the Board and the central administration (2T34). Although the Board and the Association did not always agree on all issues, Schwartz did not characterize the atmosphere surrounding negotiations for the current contract as acrimonious (2T30, 2T31). Schwartz believes that the central administration shares the Association's goal of better relations (2T35). None of the ten people on the Association's last negotiations team experienced any retribution or were involuntary transferred for their participation in negotiations (2T32, 2T33). Superintendent Kopko characterized the relationship between the administration and the Association as forthright, honest and positive. The parties don't always agree over issues but are

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<sup>4/</sup> Merli did not think Cerrito's transfer was voluntary (1T36).

capable of walking away from areas of disagreement without continued acrimony (2T53).

Kopko has been Superintendent of schools since April 1989 (2T35, 2T36). When Kopko first interviewed for the Superintendent's position (2T36), the Board conveyed its concerns over problems with the high school math program. Those problems included delivery of the service to students and a perception that only the "brightest of the bright" should be taking higher level mathematics (2T36).

At some point, the Board also developed a concern that a significant number of students regularly used mathematics tutoring for long periods of time in order to pass courses (2T36, 2T37, 2T38). The Board questioned why students who generally received fairly good grades in other courses would need tutoring in order to maintain their grades in math. The Board was also concerned with grading in the math department (2T38).

During Kopko's first two years as Superintendent, he monitored the situation with the math department and listened to people discuss their perceptions of what was going on there (2T37). He also met with the PTA presidents and discussed the department with the Board, the administration and math supervisor Gardella on a fairly regular basis (2T37, 2T38).

Charles King stated that the Board's concerns with the math department were evident before he became principal in 1988 (2T11). When King became principal he received some phone calls from parents detailing concerns with the math department (2T9). He met

frequently with math department supervisor Gardella to get background as to what the problems were from the 1989-90 school year onward (2T9, 2T10). As the years progressed it became clear to King that the Board was quite concerned about the direction of the math department (2T11, 2T12). Both the Board and King conveyed these concerns to Gardella on several occasions (2T12).

King also received comments from students about the math department (2T10). King believed that the department's problem was adherence to a traditional approach, narrowing down a large group of students to concentrate on "the cream of the crop." King felt that education had changed and that the high school needed to broaden its approach to students and develop a more student-oriented curriculum, rather than a pure curriculum. Both students and parents shared this concern (2T11).

The district evaluates curriculum areas approximately every five years and the mathematics department was reviewed in 1993 (2T39, R-2). The mathematics program evaluation report, prepared in June 1993, (R-2) complimented the skill of the math department staff in many areas and made some suggestions regarding curriculum revision (2T40). However, the report stated that the traditional approach to math instruction was not adequate. It recommended, among other things that the Board integrate technology into the math program and commented that the math instruction focused on mechanisms, rather than on students' abilities to think critically and solve problems. The community section of R-2 discussed the

parental perception that tutoring was necessary as grade level and course difficulty increased. The evaluators could not determine why the need for tutoring was perceived, but felt the perception needed immediate attention (R-2, p.30).

Kopko discussed the tutoring issue with Gardella, among others. Gardella believed that the reason for the amount of tutoring was to make B students A students and not necessarily to get failing students or D students into the C range. Gardella believed that the district's typical students and parents used tutoring to improve student performance for the SAT's and college admissions (2T43). Gardella told Kopko and the Board that the amount of tutoring was due to the overachievement goals of the clientele rather than a perception that it was needed to merely survive in the math program (2T43, 2T44).

However, when concerns about the math department were raised again, the Board and the administration felt the issue needed to be addressed. The Board and Administration wanted to explore what the perceptions of the math department were, because those perceptions were of concern to the community. Kopko believed that the math department had the ability to work cooperatively with the administration, the teaching staff and the parents to turn the perception around (2T44).

Kopko believed that R-2 confirmed that math education at the district's secondary level was delivered in a traditional manner, embodied in a teaching attitude of: "I have the information

and I'm going to dispense the information to the students, I teach, you learn." (2T40). Kopko believed that this attitude had to change to one of: "I'll teach and I'll assist you to learn or help you learn." (2T40, 2T41).

The evening R-2 was presented to the Board, some members of the Math Department were present (2T39, 2T40). The administration directed Gardella to share the entire report with the math department (2T46). The Board then made addressing the report's concerns part of the goals and objectives in Kopko's annual evaluation (2T41).

In November, 1993, Gardella and Wilker prepared R-3, the mathematics development plan. The purpose of the plan was to address delivery of instruction, curriculum development, the incorporation of more technology into the math program, and the encouragement of more parent and student involvement in developing the math program (2T42).

Wilker also regularly analyzed grades with the teachers at math department faculty meetings (2T45). Concerns regarding grading, tutoring and public perception were communicated to members of the math department (2T45).

A report (R-5) analyzed the first marking period grades received by students in high school math courses in the 1993-94 school year. R-5 divided high school math courses into three categories: courses with acceptable achievement, courses with unacceptable achievement and courses with inconsistent achievement

among course sections. The report defined courses with "unacceptable achievement" as those in which 20% or more of the students were failing or not making adequate progress towards learning objectives. (R-5, 2T44, 2T45)

In 1993-94, Merli was the only teacher who taught Calculus AB and Contemporary Math 3 (CP-1, CP-2). Calculus AB was listed under courses with acceptable achievement. Contemporary Math 3 was listed under courses with unacceptable achievement. The percentage of students defined as failing or not making adequate progress in Contemporary Math 3 was 36%, the highest percentage among the five courses in this category.<sup>5/</sup>

The grade analysis report (R-5) contains a breakdown of grading by course and section, and teachers of each section are identified by letters. However, teacher "N" taught the only sections of Calculus AB and Contemporary Math 3, and is therefore Merli (CP-1, CP-2). In the first marking period of 1993-94, Merli's grade distribution for Contemporary Math 3 was: A/B - 36%, C - 5%, D/F - 36%. Her grade distribution for AP Calculus AB was: A/B - 44%, C - 37%, D/F - 8% (R-5).

In the 1993-94 school year, Triozzi was the only teacher to teach sections of both Algebra 2 and Geometry (CP-1, CP-2). The first marking period grade analysis listed Algebra 2, Geometry 1 and

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<sup>5/</sup> The failing percentages for the other courses in this category were Algebra 1 - Part 2, 25%; Contemporary Math 2, 28%; Advanced Algebra/Trigonometry, 29% and Calculus I, 23%.

Remedial Math as courses with inconsistent achievement among course sections. In those courses, grades of D/F ranged from 3% to 42%, depending upon the teacher. The report stated that "One problem appears to be the inconsistency in assessment among teachers. A second area of concern is the apparent failure on the part of a few teachers to match assessment to class instruction." (R-5).

In R-5, only one teacher, teacher "C" taught both Geometry and Algebra 2. Teacher "C" is therefore Triozzi. In the first marking period of 1993-94, Triozzi's grade distribution for Algebra 2 was: A/B - 22%, C - 22%, D/F - 39%. The grade distribution for the other three sections of Algebra 2 as compared to Triozzi's section is reflected in the table below (R-5):

<u>TEACHER</u>	<u>NUMBER</u> (of students)	<u>A/B</u>	<u>C</u>	<u>D/F</u>
K	73	54 (74%)	16 (22%)	2 (3%)
I	70	50 (71%)	14 (20%)	5 (7%)
H	33	23 (70%)	5 (15%)	2 (6%)
C (Triozzi)	49	11 (22%)	11 (22%)	19 (39%)

Triozzi's grade distribution for Geometry was: A/B - 54%, C - 27% and D/F - 16%. The grade distribution for the other two sections of geometry as compared to Triozzi's section is reflected

in the table below (R-5):

<u>TEACHER</u>	<u>NUMBER</u> (of students)	<u>A/B</u>	<u>C</u>	<u>D/F</u>
A	68	55 (81%)	8 (12%)	2 (3%)
B	48	33 (69%)	6 (13%)	5 (10%)
C (Triozzi)	56	30 (54%)	15 (27%)	9 (16%)

In the fall of 1993, the Board and the math department undertook a survey of community attitudes towards mathematics (2T14, 2T42, 2T43). The objective of the survey was to assess whether complaints about the math department had merit and to focus the debate (2T12). The survey asked parents if their children had been tutored in mathematics, and solicited reasons for the tutoring.

The survey results were issued in a "Grade and Tutoring Report" in April, 1994 (R-6). Of the parents using tutoring, 37 respondents identified SAT preparation as the reason, 40 sought tutoring to maintain students' grades, 24 feared "F"s, 24 feared "D"s, 33 sought to raise grades above a "C", and 13 sought to raise grades above "B"s (R-6). The number of students seeking tutoring and the reasons for seeking it are broken down by course and teachers, who were identified by letters. The survey also contained narrative responses, with teachers' names redacted from negative comments. Before the grade and tutoring report issued, there was a general consensus among King, Gardella and Kopko that they needed to focus on the solutions to concerns regarding the math department. The survey crystallized and substantiated some of those opinions (2T14).



In April 1994, Kopko called a meeting with King, Gardella, Ogden, Wilker and the math department teachers to discuss the perceptions in the grade and tutoring report as well as the need to correct them (1T67, 1T68, 1T72, 1T73, 1T74, 2T46). Although there were some favorable responses in the report, King stated that there were many areas of concern and the meeting was held to review those findings (2T13).

High school math teacher Michael Markot<sup>6/</sup> attended the meeting (1T72, 1T73, 1T74). Each administrator (Gardella, Wilker, King, Kopko and Ogden) made a presentation and told the teachers what problems existed in the department. An overhead projector displayed negative statements about the math department from the grade and tutoring report (1T75). Markot did not agree with characterizations that the report stated that the math department was too elitist and catered only to the brightest students or that there were comments about the amount of homework assigned. Markot remembered statements that the department "didn't seem to care" and that its tests were too hard (1T76). He also remembered an administrator stating that parents' and students' perceptions were that the only way to do well in math was to use outside tutoring to

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<sup>6/</sup> Markot has been a math teacher at the High School for 19 years (1T69). He has been a member of the faculty council for 17 years and he was an Association representative for one year (1T69). Markot was an Association witness.

a greater extent than the Board or the administration would like to see (1T76).<sup>7/</sup>

Markot stated that the administrators' complaints were not related to anyone's union activities (1T77). Markot does not remember that staff transfers were mentioned at this meeting, but recalls a statement that some changes had to be made (1T77). Markot felt that the administration blew some comments in the grade and tutoring report out of proportion and he objected to the administration's focus on the negatives of the department, rather than on its strengths (1T80). However, those negatives were not raised for the first time in the April 1994 meeting. The math teachers were told by Gardella at a previous meeting that perception was reality and that the department had to do something about it (1T80).

Markot also stated that in the past two years, the math department met every two to three months with Wilker and Gardella or just Wilker (1T70, 1T71). Merli and Triozzi actively participated in those meetings and were outspoken in objecting to proposed changes in procedures such as assignment of homework and grading

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<sup>7/</sup> Triozzi testified that she remembered this meeting, but resisted the characterization that the meeting focused on parental concerns over the amount of math tutoring students were perceived to need and the attitude of the math department (1T67, 1T68). I do not credit this testimony. I find that Triozzi had more than a general idea of the tenor and subject of the meeting, given the negative aspects of the report and the teachers' reaction to it as embodied in the departmental rebuttal she signed (R-7).

(1T70, 1T71, 1T79). The meetings took place before and after the April 1994 meeting to discuss the grade and tutoring report (1T79).

As a result of the grade and tutoring report, Kopko met several times with Wilker, Gardella, King and Ogden. They looked at the entire scope of the math program including concerns and problems with it. They proposed a set of solutions, one of which was to change the curriculum to a more hands-on, student oriented approach (2T15). Curriculum changes were instituted and several curriculum workshops were held in the summer months (2T16).

Kopko was involved in the decision to achieve a different mix of personnel in the math department (2T48). Kopko met with various administrators to review the math program in grades 6 to 12. As a result of that process, Kopko participated in the final decision of which staff members to reassign between the high school and the junior high school (2T48).

The administration reviewed teacher scheduling to effectively utilize available staff to implement the math department's new focus (2T16). The department chairperson established planning teams, placing teachers who would work well together in groups teaching the same subject area (R-1). The team members were given a common planning period (2T16, 2T17, R-1).

The administration sought to change students' attitudes towards math, the attitude of curriculum presentation and the attitude of those who presented it (2T17). The goal was to produce a successful educational experience for mathematics students and to broaden delivery of math to a wider range of students (2T17, 2T18).

In the course of achieving these goals, the administration decided to reassign staff between the high school and the junior high school mathematics departments. Wilker, Gardella, Ogden, King, Kopko and Assistant Superintendent for Personnel Brenda Witt were involved in deciding to reassign members of the mathematics staff and selecting the staff members who would be reassigned (2T18).

The first part of the selection process for reassigning the math teachers was for the "math people" to look at the curriculum and planning groups. High school principal King was not involved in this process. When that evaluation was completed, King became involved in the next phase, which was to match personnel to curriculum and planning objectives and to determine where teachers might best be utilized to meet the goals the administration was trying to accomplish with the curriculum. The high school and Churchill Junior High School math teachers were evaluated according to their strengths in presentation of material and style. Ninth grade was considered a part of the high school, so both staffs were looked at (2T19, 2T20). Triozzi and Merli were evaluated as part of this process of evaluating the math department staff and deciding how to best utilize their time (2T20).

There was no discussion of the union activities of the teaching staff being reviewed when the math department transfers were discussed. As a former Association president, King would have

been very vocal in his opposition to this type of discussion had it taken place (2T20, 2T21).<sup>8/</sup>

When King was asked why Merli and Triozzi were transferred to the junior high school in exchange for Rosenfeld and Howard, he explained that the transfers were based upon an examination of the entire mathematics program from eighth through twelfth grade. The objective was to combine the curriculum, the staff and the various planning elements to work successfully for the students' benefit. That was the basis of the discussion and the basis of the transfer of four people to accomplish those objectives (2T12, 2T22).

Kopko recommended the transfer of Mr. Cerrito to Hammarskjold School and the transfer of Triozzi and Merli to Churchill Junior High School. Somers was voluntarily transferred to Churchill. Howard and Rosenfeld were transferred to the high school and Wilker was reassigned to a teaching position in the high school (2T49). The teachers at Smith Middle School, Churchill Junior High School and the high school were assigned to mathematics planning teams. The administration felt that the personnel mix on the teams would serve the district and students more effectively (2T49).

The Association or its activities were not discussed by those who determined which math teachers would be transferred

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<sup>8/</sup> Before King became an administrator, he served as President of the Association and on its negotiations committee, and led a strike while president (1T63, 2T7). King is currently a member of the Principals and Supervisors Association. He is a past president of that group and has served on its executive board and negotiations team (2T8).

(2T49). The Board did not make statements reflecting on anyone's union activities and was not provided with a list of the transferred math teachers until it received the personnel agenda one week before its June 9th meeting (2T49, 2T50).

Triozzi received a letter dated May 13, 1994 informing her that it was possible that in conjunction with the completed report on the mathematics program, "specific individuals" may be discussed during closed session of the May 19, 1994 Board meeting (CP-5). On June 6, 1994, King met with high school math teachers Merli, Triozzi and Somers (1T22, CP-5). At the meeting, King told them that they were recommended for transfer, and they were each given a letter stating that their recommended transfers would be discussed at the June 9, 1994 Board meeting (CP-3, CP-5, 1T21, 1T46, 1T62)). Neither Merli nor Triozzi was given a reason for their transfer (1T35). On June 10, 1994, Merli and Triozzi received notices that the Board had directed their transfers to the junior high school at the end of the school year (R-5, 1T46).

On June 23, 1994, the 13 tenured members of the high school mathematics department sent Kopko and the administrators a signed rebuttal letter, criticizing the grade and tutoring report and the administration's interpretation of the report (CP-7, 1T78, 2T46). The teachers believed there was "...an administrative push towards diluting the curriculum and/or inflating grades" and expressed concern that the survey comment section invited negative responses

(CP-7).<sup>9/</sup> The letter concluded "...at a time when our role in the educational process has come under scrutiny, it is imperative that more attention be paid to the students' responsibilities for their own educational experience." Kopko opposed this mindset and felt that the teachers had a responsibility to see that the students learned mathematics (2T47).

#### ANALYSIS

The Association contends that Merli and Triozzi were transferred from the high school to the junior high school in retaliation for their Association activities.

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by 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 the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as

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<sup>9/</sup> Although Merli co-authored the letter and assisted with its circulation, there was nothing on the face of the letter to indicate that Merli had a role in its authorship (1T80, 1T81). Merli's and Triozzi's signatures were a little larger than the others at the bottom of the letter, but both are reasonably proportional in size to the other signatures and neither stands out as unduly bold. The letter was not signed in any particular order (1T80, 1T81).

pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

Merli's Association activities consisted of membership in and participation on the Board's faculty and district-wide councils. Triozzi's Association activities included holding office in the Association, participating in the Association's representative council and a work environment study, filing a grievance and representing another teacher at a post-observation conference. I find that both Merli and Triozzi engaged in protected activity, and that the Board had knowledge of those activities.

Merli's participation in the faculty council was known to High School Principal King and her involvement on the district-wide council was known to King, Superintendent Kopko, Assistant Superintendents Ogden and Witt, the three high school vice principals and some supervisors and department chairpersons. Merli was active on both of these councils until she was transferred in 1994.



The Board also had knowledge of Triozzi's status as a former Association officer and was aware of her involvement on the Association's representative council and with the work environment survey. Triozzi's representation of herself in grievances and in addressing parental complaints was also known to Wilker, Gardella, King and Kopko. Some administrators were also aware of Triozzi's representation of Chalupa.

The decision to transfer math teachers was made by Superintendent Kopko, Assistant Superintendents Ogden and Witt, High School Principal King, Math Supervisor Gardella and Department Chairperson Wilker. There is no direct evidence in this record to establish that the above-listed administrators' decision to transfer Merli and Triozzi was motivated by their Association activities.

The Association urges a finding that the transfers were illegally motivated because there were no other lawful reasons why Merli and Triozzi were specifically selected for transfer. However, the fact that the Board did not give Merli and Triozzi a specific explanation of the reasons for their transfer does not prove that they were transferred because of their Association activities. There is neither direct nor circumstantial evidence in this record to demonstrate the presence of anti-union animus on the part of the Board. The burden was not on the Board to prove the basis for the transfer, the burden was on the Association to prove hostility.

The record does not show that Merli's membership on the faculty and district-wide councils was ever considered by the

administration when determining whom to transfer. No other members of the district-wide council were transferred within the last six years and other members of the high school math department serving on its faculty council were not transferred in the 1994 reorganization. Triozzi's service as an Association officer in the mid-1980's is far removed in time from her 1994 transfer and her representation of Chalupa did not involve any administrators who participated in the decision to transfer math teachers. Although Triozzi's remaining activities were more proximate in time to her transfer, the record does not show that any of them motivated the Board to transfer her. Absent such animus, the Association cannot prove the third part of the Bridgewater standard: that such animus was a "motivating force or a substantial reason for the employer's action." Bridgewater at 242.

The Association also presented the department's rebuttal to the grade and tutoring report (CP-7), Merli's role in authoring it and the prominence of Merli's and Triozzi's signatures on it as evidence of possible animus on the part of the Board. However CP-7 is dated June 23, 1994, which post-dates the June 9, 1994 date the Board transferred Merli and Triozzi. Finally, the Association urges that Merli and Triozzi's outspokenness at math department meetings motivated the Board to transfer them. However, I find that their opposition to proposed changes in grading and homework assignment constituted statements concerning educational policy - not protected activity. There is also no evidence in the record that Merli and

Triozzi's participation in such meetings was linked to their transfer.

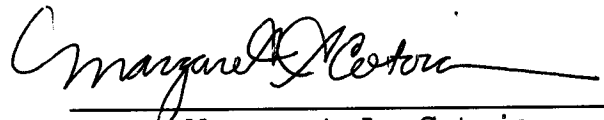
I find that the transfers of Merli and Triozzi were part of the Board's district-wide reorganization of its mathematics program. Absent direct or circumstantial evidence of anti-union animus, there is no need for me to consider the legitimacy of the Board's motive for the transfers of Merli and Triozzi.

CONCLUSION

The East Brunswick Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1) or (3) by transferring Sharon Merli and Rosalie Triozzi from the high school to the junior high school.

RECOMMENDATION

I recommend that the Commission ORDER that the Complaint be dismissed.



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Margaret A. Cotoia  
Hearing Examiner

DATED: February 14, 1996  
Trenton, New Jersey