

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NEWARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-H-90-20

EARL J. KU,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Earl J. Ku against his former employer, the Newark Board of Education. The charge had alleged that the Board violated subsections 5.4(a)(3), (4), and (5) of the New Jersey Employer-Employee Relations Act when, over the years, one of its supervisors harassed Ku in his work assignments, causing him to be disciplined and eventually discharged. The Commission concludes that Ku's allegation of a breach of contract is outside its jurisdiction and that Ku has not alleged facts suggesting that he was denied representation at an investigatory interview which he reasonably believed could lead to discipline.

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Appearances:

For the Respondent, Marvin L. Comick, General Counsel

For the Charging Party, Earl J. Ku, pro se

DECISION AND ORDER

On August 25, 1989, Earl J. Ku filed an unfair practice charge against the Newark Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(3), (4) and (5),^{1/} when, over the years, one of its supervisors

^{1/} These subsections prohibit public employers, their representatives or agents from: "(3) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

harassed Ku in his work assignments, causing him to be disciplined and eventually discharged.

On June 8, 1990, a Complaint and Notice of Hearing issued. Hearing Examiner Alan R. Howe cancelled scheduled hearing dates when the Board informed him that Ku had filed an appeal contesting his discharge with the Merit System Board and his case was being heard before the Office of Administrative Law. On April 7, 1992, the Hearing Examiner received from the Board a copy of the Administrative Law Judge's initial decision dismissing Ku's appeal. After soliciting comments from the parties, the Hearing Examiner recommended dismissing the Complaint because all of the elements of the Complaint were adjudicated before the Administrative Law Judge. H.E. No. 92-37, 18 NJPER ____ (¶____ 1992).

On June 11, 1992, Ku filed exceptions.^{2/} He claims that the Merit System Board failed to address his claim that the Board violated the collective negotiations agreement and the Act when it charged him with insubordination for failing to attend a March 2, 1989 meeting without a union representative. On June 18, the Board filed a reply urging adoption of the recommended decision. On July 8, upon our request, Ku submitted a copy of the Merit System Board's decision dismissing his appeal.

The preferred procedure in cases where related matters are pending before two agencies is for there to be consolidation, if

^{2/} We deny his request for oral argument. His arguments have been fully briefed.

appropriate, and a predominant interest determination pursuant to N.J.A.C. 1:1-17.1 et seq. That procedure avoids the problem of one agency having to consider an issue after another agency has already done so. See Hackensack v. Winner, 82 N.J. 1 (1980). This case and the case before the Merit System Board should have been consolidated and a predominant interest determination made. Nevertheless, under these particular circumstances, we are able to address Ku's exceptions and his unfair practice allegation without running afoul of Hackensack's admonition that agencies should not issue conflicting opinions.

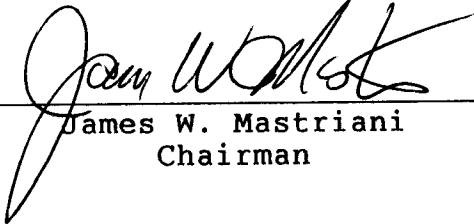
Ku alleges that the Board denied him a contractual right to a union representative at the March 2 meeting. Mere breaches of contract are not unfair practices. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984). Ku also alleges that he was entitled to a representative under our Act. In East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, App. Div. Dkt. No. A-280-79 (6/18/80), we held that an employer violates subsection 5.4(a)(1) when it denies an employee's request for union representation at an investigatory interview which the employee could believe might result in discipline. See also NLRB v. Weingarten, 420 U.S. 251 (1975). Ku's original unfair practice charge does not allege that the March 2 meeting was investigatory. It simply alleges that he was disciplined for failing to attend a meeting. Even if we were to consider Ku's allegations as expressed in his exceptions, those

allegations state that the Board's representatives told Ku that the March 2 meeting was a business meeting. Ku claims that the meeting was a "setup," but there are no facts alleged that suggest that the meeting involved an investigating interview which would lead to discipline. Under these circumstances, Ku's allegations, even if true, would not constitute an unfair practice. We therefore dismiss the Complaint.^{3/}

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Smith, Goetting, Bertolino, Grandrimo and Wenzler voted in favor of this decision. Commissioner Regan abstained from consideration.

DATED: August 20, 1992
Trenton, New Jersey
ISSUED: August 21, 1992

^{3/} The Hearing Examiner found that the remaining allegations were untimely. In the absence of exceptions, we adopt that finding.

H.E. NO. 92-37

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

In the Matter of

NEWARK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-H-90-20

EARL J. KU,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss the Complaint of Earl J. Ku for the reason that an ALJ, acting on behalf of the Department of Personnel, heard the subject matter of the instant Unfair Practice Charge on January 31, 1991, and filed his decision on February 21, 1991, in which he sustained the termination of the Charging Party. The Hearing Examiner is satisfied that, aside from the lapse of time in bringing the ALJ's decision to his attention, all of the elements of the Unfair Practice Charge upon which a violation of our Act might be predicated were adjudicated by the ALJ. Hearing the matter again would violate the mandate of Hackensack v. Winner, 82 N.J. 1 (1980). Additionally, it appeared that the allegations in Ku's Unfair Practice Charge are on their face deficient as to the alleged violations by the Board of Sections 5.4(a)(3), (4) and (5). Thus, dismissal with prejudice is recommended.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 92-37

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Appearances:

For the Respondent, Marvin L. Comick, General Counsel

For the Charging Party, Earl J. Ku, pro se

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

A Charge of Unfair Practices was filed with the Public Employment Relations Commission ("Commission") on August 25, 1989, by Earl J. Ku ("Ku"), alleging that he was terminated by the Newark Board of Education ("Board") On August 17, 1989, in violation of N.J.S.A. 34:13A-5.4(a)(3), (4) and (5) of the Act,^{1/} particularly,

^{1/} These subsections prohibit public employers, their representatives or agents from: "(3) discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

that one Ramanand Durga, a supervisor, harassed Ku in his work assignments over many years, especially between February 4, 1987 and August 24, 1988, all of which resulted in disciplinary actions against Ku between May 1987 and August 1989.

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 on June 8, 1990. Pursuant to the Complaint and Notice of Hearing, a hearing was scheduled for July 30 and July 31, 1990. However, these hearing dates were cancelled by the Hearing Examiner without new dates, based upon advice from the Board that the Ku matter was then being heard before the Office of Administrative Law ("OAL").

The Hearing Examiner heard nothing further until April 7, 1992, when he received from counsel for the Board a copy of the final adjudication of an Administrative Law Judge ("ALJ") of the OAL. The ALJ's decision had been rendered on February 21, 1991,^{2/} and was filed with the Merit System Board and mailed to the parties on February 27th.

The Hearing Examiner then sent a letter to Ku on April 23, 1992, advising him that the decision of the ALJ had recently been brought to his attention and, that he had reviewed it. The Hearing Examiner observed that the ALJ had upheld Ku's termination by the Board on September 15, 1989. The Hearing Examiner next stated that

^{2/} A copy of this decision by ALJ Joseph F. Martone is annexed hereto as Exhibit "A."

he was not inclined to hold a hearing on Ku's Unfair Practice Charge since it was evident that the entire matter had been fully adjudicated by the ALJ, who had conducted a plenary hearing on January 31, 1991. However, the Hearing Examiner decided to request a specific written statement from Ku as to why a hearing should be conducted by the Hearing Examiner on the issue of his termination as an Unfair Practice Charge under our Act.

Ku submitted a detailed response on May 1, 1992, in which he set forth nine paragraphs of reasons for a hearing. The first two paragraphs allege violations of the collective negotiations agreement, which governed Ku's employment relationship with the Board. In the third paragraph Ku claims that the Board made changes in the dates of his fourth disciplinary hearing on three occasions between July 13 and August 17, 1989, causing him distress and frustration. The fourth paragraph alleges that a third disciplinary action of January 11, 1989, was imposed upon Ku in retaliation for his attorney having filed a complaint in the Superior Court on December 1, 1988. In paragraph five Ku claims that because he filed the instant Unfair Practice Charge on or about August 22, 1989, he was terminated by the Board on September 1, 1989.

In paragraphs eight and nine of Ku's response of May 1st, supra, he suggested that he had not received notification from the OAL of the final decision of the ALJ, supra. The Hearing Examiner immediately brought this matter to Ku's attention on May 5, 1992, and requested prompt clarification. On May 8th, Ku advised the

Hearing Examiner that a typographical error in paragraph nine had created the confusion, i.e., Ku had in fact been notified of the decision of the ALJ. He had received a copy on March 3, 1991. Nevertheless, Ku insisted that the ALJ had failed to address the provisions of our Act, as alleged in his Unfair Practice Charge.

The Board provided its statement of position on May 6, 1992, stating that each issue identified by Ku in his letter of May 1st, had been heard and addressed by the ALJ and that Ku was merely restating what had already been litigated. Thus, Ku should not be allowed to relitigate the same subject matter before the Commission.

ANALYSIS

1. A careful reading of the decision of the ALJ discloses that it "tracks" very closely the allegations made by Ku in his Unfair Practice Charge. The ALJ held a plenary hearing on the matter of his termination on January 31, 1991, and the ALJ's decision states that both Ku and the Board were represented by counsel. Ku appeared and testified on his own behalf while Durga and Jan Azumi appeared and testified for the Board.

2. Paragraph nine of Ku's Unfair Practice Charge contains eight separate allegations of discrimination, all of which are time-barred under the six-month limitation in Section 5.4(c) of our Act, the most recent occurrence having been August 24, 1988, a year and a day before Ku filed his Charge on August 25, 1989.

3. The ALJ made extensive factual findings in his decision of February 21, 1991 [see pp. 2-9 attached] and in those findings he dealt with each and every allegation made by Ku in the Unfair Practice Charge, pending before the Hearing Examiner.

4. The allegation in Ku's Unfair Practice Charge that the Board retaliated against him "...after he filed a grievance with Superior Court of New Jersey on November 30, 1988..." was fully litigated before the ALJ. His Factual Discussion at page 7 states that Ku "...testified that on one occasion, he filed a complaint against Dr. Durga in the Superior Court, Dr. Durga filed a disciplinary action against him and immediately thereafter (sic) ..." The Hearing Examiner notes that Ku made a similar statement in the fourth paragraph of his letter of May 1, 1992, to the Hearing Examiner that a third disciplinary action was initiated against him on January 11, 1989. This is consistent with the Factual Discussion of the ALJ, supra, and also appears in paragraph 10(D) of Ku's Unfair Practice Charge.

5. Finally, a reading of paragraphs 2-4 of this decision, supra, leaves no doubt but that the critical allegations contained in Ku's Unfair Practice Charge with respect to lack of union representation, the Board's alleged discrimination against Ku between February 1987 and August 1988, and its alleged retaliation because of Ku's Superior Court grievance filing of November 30, 1988, are either time-barred or were fully litigated in the hearing before the ALJ. Relitigating these matters in a hearing before this Hearing

Examiner would be inconsistent with the mandate of the New Jersey Supreme Court in Hackensack v. Winner, 82 N.J. 1 (1980) where the Court stated that administrative agencies are governed by such doctrines as res judicata, collateral estoppel and the single-controversy doctrine. These doctrines hold that the "...principles of comity and deference to sibling agencies are part of the fundamental responsibility of administrative tribunals..." [82 N.J. at 32]. Thus, a collision between two agencies is to be avoided. [82 N.J. at 33]. If the Hearing Examiner should now undertake the relitigation of Ku's termination by the Board in September 1989 then he would be hearing again the same dispute previously decided by the ALJ and would thereby be acting in derogation of the Court's mandate in Hackensack v. Winner, supra.

6. Further, Ku has failed to show that he engaged in any timely activities protected by the Act or that the Board had any knowledge thereof as required by Section 5.4(a)(3). Finally, even if the foregoing requisites were assumed, Ku has failed to establish that the Board manifested any hostility or anti-union animus toward him as required by Bridgewater Tp. v. Bridgewater Public Wks. Assn., 95 N.J. 235 (1984).

7. Ku's allegation that the Board violated Section 5.4(a)(4) of the Act fails for the same reason as his allegation that the Board violated Section 5.4(a)(3) since the Commission uses the Bridgewater test in adjudicating alleged violations of Section 5.4(a)(4): Downe Tp. Bd. of Ed., P.E.R.C. No. 87-154, 13 NJPER 577 (fn. 3)[¶18211 1987].

8. In disposing of Ku's final allegation that the Board violated Section 5.4(a)(5) of the Act, it is well settled that an individual public employee has no standing to bring such a charge; Camden County Highway Dept., D.U.P. No. 84-32, 10 NJPER 399 (¶15185 1984) and Tp. of Cherry Hill, D.U.P. No. 81-18, 7 NJPER 286 (¶12128 1981).

RECOMMENDED ORDER

For the reasons above stated, it is **RECOMMENDED** that the Commission **ORDER** that the Unfair Practice Charge of Earl J. Ku be dismissed with prejudice.



Alan R. Howe
Hearing Examiner

Dated: June 1, 1992
Trenton, New Jersey



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON STREET
NEWARK, NJ 07102
(201) 640-6000

**A copy of the administrative law
judge's decision is enclosed.**

**This decision was mailed to the
parties on FEB 27 1991**



State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. CSV 8988-90

EARL J. KU,

Appellant,

v.

NEWARK BOARD OF EDUCATION,

Respondent.

Wilbur J. Van Houten, Esq., for appellant

Marvin L. Comick, Acting General Counsel, for respondent

Record Closed: January 31, 1991

Decided: February 21, 1991

BEFORE JOSEPH F. MARTONE, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Appellant appeals his removal from his position as senior research assistant on charges of unsatisfactory performance and insubordination, effective September 15, 1989. The appellant filed an appeal with the Department of Personnel on September 5, 1989, and the matter was originally transmitted to the Office of Administrative Law (OAL) on September 25, 1989, for hearing as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. After settlement negotiations and discussions, the matter was scheduled for conference hearing on June 28, 1990, at the OAL offices in Newark, New Jersey. On that date, respondent's principle witness failed to appear and respondent was unable to proceed. By Initial Decision dated August 1, 1990, the Administrative Law Judge (ALJ) suppressed the claims of respondent and ordered that appellant be reinstated. However, by Order dated September 18, 1990, the New Jersey Department of Personnel

remanded the matter to the OAL for a hearing, concluding that the record indicated that there was good cause for the absence of respondent's witness. It is to be noted that on remand, the ALJ is directed to consider what, if any, remedy is appropriate to compensate appellant for the costs associated with the delay caused by the nonappearance of respondent's witness.

The matter was then scheduled for a conference hearing on January 31, 1991, at the OAL offices, Newark, New Jersey. On that date, the hearing was held and concluded and the record was closed.

FACTUAL DISCUSSION

There is a wide divergence between the testimony of the witnesses for the respective parties regarding the allegations of wrongdoing by appellant. Accordingly, an examination of the testimony of the various witnesses is necessary in order to reach factual conclusions in this matter.

Certain essential facts are not disputed. Appellant was first hired in April 1982 as a research specialist and Dr. Ramanand Durga was his supervisor. At the time he was hired, he advised Dr. Durga that he was looking for a place to stay and Dr. Durga offered to allow him to stay at his home for a rental of \$130 per month for one room. He lived there approximately three months, until his family moved to New Jersey from out of state, at which time they rented a home. Appellant remained under Dr. Durga's supervision until June 1984, when Dorothy Gawenus became his immediate supervisor and was such until June 1986. In June 1986, Dorothy Gawenus retired and appellant was placed back under the supervision of Dr. Durga from that time until June 1990.

Appellant has a Ph.D. from the University of Illinois in educational research, testing, and evaluation. He indicated that he has been involved in this field of research since 1974 when he was a graduate assistant.

On or about July 5, 1989, appellant was served with a Preliminary Notice of Disciplinary Action charging him with unsatisfactory performance and insubordination. A

hearing was held before the appointing authority's designated hearing officer on August 17, 1989, and as a result, the charges were upheld and appellant was removed effective September 15, 1989.(Exhibit R-4).

The first witness to testify on behalf of respondent in connection with the charges in this matter was Dr. Ramanand Durga. Dr. Durga testified that he has been employed by the Newark Board of Education for 10 years. He also indicated that he is familiar with appellant and that he has known appellant from the day appellant was hired. Appellant had been hired in the position of research assistant in the Division of Research, Evaluation, and Testing and worked under Dr. Durga from the date of his initial hiring. He also stated that in addition to their professional working relationship, there was a personal relationship between the two. When Dr. Ku was first hired, there was some hardship caused by the fact that his family was living out of state and Dr. Ku was looking for a place to live. Dr. Durga testified that he volunteered to let appellant stay at his home.

Dr. Durga then testified concerning the circumstances giving rise to the charges resulting in appellant's termination. Dr. Durga originally testified that on either February 28 or March 1, 1989, he met with appellant concerning a research assignment to be given to appellant on March 2, 1989. He later corrected this to state that it was sometime on the morning of March 2, 1989, that he met with appellant concerning the work assignment. This correction was based upon the fact that appellant had been suspended until his return to work on March 2, 1989. Dr. Durga indicated that he prepared a memo assigning the work to appellant. He stated that this was not the form that he usually used to assign work, but he knew appellant was on probation. Therefore, he took great care and caution in preparing a written statement of this assignment. At his initial meeting with appellant, he explained to appellant that the assignment was not personal and that if there were any problems with it to let him know of them. Dr. Durga indicated that only he and appellant were present at this initial meeting and that appellant gave no response other than shaking his head. Dr. Durga testified that he gave appellant the memo of assignment personally on the morning of March 2, 1989 (Exhibit R-5), told appellant to study the memo in the morning and meet with Dr. Durga, Dr. David Preddy, and Dr. Elaine Walker at 1 p.m. on March 2, 1989.

Dr. Durga then testified that Dr. Ku failed to appear at the 1 p.m. meeting on March 2, 1989, even though Dr. Preddy and Dr. Walker were present. Dr. Durga testified that he walked to Dr. Ku's desk at approximately 1 p.m. and asked why he was not present. In response to this, Dr. Ku indicated that he did not want to appear until a union representative was available to attend the meeting. According to Dr. Durga, he explained to appellant that the meeting was only to discuss the written assignment, and Dr. Ku responded that he would not attend the meeting without the presence of the union representative. Dr. Durga indicated that he asked Dr. Ku to reconsider, but Dr. Ku refused. As a result, Dr. Durga issued a memo dated March 2, 1989, charging appellant with insubordination for refusal to attend the meeting (Exhibit R-6).

With regard to the assignment set forth in the memorandum of March 2, 1989 (Exhibit R-5), Dr. Durga testified that its purpose was to analyze the relationship between the Comprehensive Test of Basic Skills (CTBS) and the High School Proficiency Test (HSPT). The timelines or due dates of the various tasks are set forth on page three of the memo. Dr. Durga testified that the March 10, 1989 due date for the first task was not complied with, and that when he asked Dr. Ku about this, Dr. Ku responded that he would get it later. Dr. Durga indicated that he never received the first task.

Dr. Durga also testified that the March 17, 1989 due date for the second task was not complied with and when he asked Dr. Ku, Dr. Ku responded that he was working on it and that he would turn in the entire project at the same time. However, Dr. Durga told Dr. Ku that he wanted to see the various completed tasks in order to determine whether there was any problem with complying with the project. Dr. Durga further testified that none of the other due dates were met by appellant. He indicated that on March 28, 1989, appellant produced a computer printout which meant absolutely nothing to him. Dr. Durga characterized this computer printout as "garbage". However, nothing else was given by Dr. Ku to Dr. Durga.

Dr. Durga was transferred from his position to another division of respondent in June 1989. He accordingly advised his superior, Dr. Gutmore, that Dr. Ku had not complied with the assigned project.

Dr. Durga indicated that he gave appellant two memos, the first dated March 23, 1989, advising him of his failure to comply with the March 10 and March 17, 1989 due dates (Exhibit R-7), and a memo of April 28, 1989, advising appellant that he had failed to meet six deadlines in this matter (Exhibit R-8). Dr. Durga indicated that he never saw the final project because he left the department on July 8, 1989, although he was on vacation for about one week prior to his departure.

Dr. Jan Azumi also testified on behalf of respondent. She indicated that she has been employed by respondent since February 1981, and that she has known appellant since the date of his hiring. She was part of the staff that interviewed Dr. Ku and she was his colleague in the years thereafter. On July 3, 1989, Dr. Azumi became Dr. Ku's supervisor. She explained that she was appointed to replace Dr. Durga as head of the Division of Research, Evaluation, and Testing. She further explained that during the transition between her takeover and Dr. Durga leaving as director of the division, Dr. Gutmore was in charge of the division. She testified as to the charge of dereliction of duty set forth in a memo dated June 30, 1989 (Exhibit R-9). She explained that there was a meeting several days prior to June 30, 1989, at which appellant was directed to analyze the district HSPT scores in order to complete a reporting requirement of the New Jersey State Department of Education. This analysis was due to the county superintendent's office by July 3, 1989. She indicated that the analysis consisted of determining the percentage of ninth, tenth, eleventh, and twelfth grade students who passed the HSPT and providing a written analysis of these figures. Dr. Azumi indicated that Dr. Ku was specifically told what he was required to do at the meeting of approximately one week prior. On June 30, 1989, Dr. Ku gave to Dr. Elaine Walker only a portion of this assignment that had been completed. He then left work and did not inform either Dr. Gutmore or Dr. Azumi that he was leaving. It was then necessary for Dr. Elaine Walker to complete the collection of this material and prepare the necessary written analysis of this data in order to have it to the county superintendent's office by the July 3, 1989 due date.

Dr. Earl Ku testified in response to the foregoing allegations. He indicated that his relationship with Dr. Durga became strained after he had moved into Dr. Durga's home. Dr. Durga, his wife, and his son continuously asked appellant if he wanted to rent an

apartment in their home, because they were in the process of renovating the home to create several apartments for rental. Dr. Ku felt that he was being pressured by Dr. Durga and his family to rent an apartment. He paid five months' rent of \$130 per month for the single room even though he only lived there for three months. He was afraid to ask for a refund, which is why he paid the five months' rent. Appellant indicated that his relationship with Dr. Durga changed for the worse when he left Dr. Durga's home. After the first normal three-month probation, he was given a second three-month probationary period. In fact, Joan Buttram, who was hired at approximately the same time as appellant, became his supervisor. He reported to Dr. Durga either through Joan Buttram or directly to Dr. Durga, other than from June 1984 through June 1986, when he reported to Dorothy Gawenus.

Appellant testified that he was treated differently from the beginning of his employment. He was required to punch in and out of a time clock while others in the office signed in and out. He was required to inform Dr. Durga whenever he left his office, which is a cubical, even to go to the men's room. He did not know why this was required. In fact, Dr. Durga occasionally followed appellant to the men's room. Others on the staff were paid overtime, but appellant was not. Appellant was also accused of snooping around the secretaries' desks. On one occasion, Dr. Durga allegedly threatened appellant with dismissal if he continued to ask questions about his work.

Appellant testified that when Mrs. Gawenus retired, Dr. Durga asked him, "Earl, are you going to take the easy way or hard way to do your job?" Appellant testified that he felt threatened by this question.

Appellant testified that he reported to work at 8:30 a.m. on March 2, 1989, after a period of suspension. Dr. Durga gave him a work assignment (Exhibit R-5) and told him to "report to my office at 1 p.m." Appellant testified that he reviewed the assignment and that he is fully qualified to perform the project assigned to him on March 2, 1989. However, based on his professional judgment, he did not agree with the timelines. He stated that in his professional opinion, the project would take four months. However, he did not express that opinion to Dr. Durga on the morning Dr. Durga assigned the project to him. He testified that he expressed this opinion on the next day in a meeting with Dr.

Durga that was attended by a union representative.

Appellant testified that his relationship with Dr. Durga was not normal. He testified that on one occasion, he filed a complaint against Dr. Durga in the Superior Court, Dr. Durga filed a disciplinary action against him and immediately thereafter.

He explained that the assignment of March 2, 1989, was not a normal assignment. He pointed out that there are 80 objectives in the CTBS and 70 objectives in the HSPT, and that in order to match the contents of the two it is necessary to compare these various objectives. In addition, the task required to be completed by March 24, 1989, involving the finishing of the construction of the computer data base, could not be completed because Dr. Preddy, who was respondent's computer expert, had not completed constructing the computer data base. Appellant testified that he went to Dr. Durga's office three times on March 2, 1989, to advise Dr. Durga that the union representative would be attending the 1 p.m. meeting. He indicated that he went to Dr. Durga at 10:30 a.m., at 11 a.m., and again at 12:55 p.m. to advise him that the union representative would be there. Dr. Durga made no response to this information. Appellant then testified that he went to Dr. Durga's office at 1 p.m. for the meeting and that Dr. Walker and Dr. Preddy were not there. At 1:05 p.m., the union representative appeared and it was at this point that Dr. Durga told appellant that he had cancelled the meeting.

Appellant testified that he completed the project assigned to him on March 2, 1989, and gave it to Dr. Azumi on July 11, 1989. He also testified that he gave every piece of the information in the project to Dr. Durga as it was completed. The March 10 task was given to Dr. Durga on March 27, 1989.

Appellant denies that Dr. Durga ever had a conversation with him concerning the project or concerning the due dates as set forth in the memos of March 23, 1989 (Exhibit R-7) and April 28, 1989 (Exhibit R-8). He testified that the usual procedure for Dr. Durga was simply to place a memo in Dr. Ku's mailbox with no discussion.

With regard to the assignment analyzing the district's HSPT scores due on July 3, 1989, appellant testified that he finished his analysis on June 30, 1989, and handed it to

OAL DKT. NO. CSV 8988-90.

Dr. Walker. He also advised Dr. Walker that he was sick, and because Dr. Gutmore told him to report to Dr. Walker, he felt that simply notifying her that he was sick and would be leaving was sufficient.

On cross-examination, Dr. Ku testified that no other supervisor ever instituted disciplinary action against him and never expressed dissatisfaction with his work performance. Appellant was then questioned concerning a series of memoranda alleging poor performance on his part, but, with one exception, appellant denied ever seeing any of these memos. As a result, none of these memoranda were accepted into evidence with the exception of Exhibit R-12. Appellant admitted having received the memo dated April 26, 1983, with regard to Division of Research, Evaluation, and Testing policies. However, appellant denied that he violated any the policies as set forth in the memorandum.

Appellant further testified that he felt that the purpose of the assignment of March 2, 1989 (Exhibit R-5), was to set him up for a disciplinary action because of the timelines set forth therein. He further testified that he requested a union representative at the hearing based on the union contract (Exhibit A-1) because he felt that the purpose of the project of March 2, 1989, was to lead to a disciplinary action.

Also on cross-examination, appellant admitted that on March 3, 1989, at a meeting attended by him with Dr. Durga and a union representative, the union representative advised appellant to complete the March 2, 1989 assignment as best he could. Dr. Ku further indicated that he did not object in writing to the time deadlines because Dr. Durga would simply have disregard the memorandum.

Appellant testified that on June 30, 1989, he was feeling ill because of stress. He was dizzy, nervous, and could not concentrate. On June 29, 1989, he had received a Preliminary Notice of Disciplinary Action and this caused a physical reaction in him.

Dr. Azumi testified in rebuttal. She indicated that she has her Ph.D. in Sociology, and that while she was not familiar with the March 2, 1989 project at that time, she is familiar with the procedures. She admitted that the completed assignment was turned in to her by Dr. Ku sometime in July 1989. She expressed her opinion that the reports

prepared by Dr. Ku did not fulfill the assignment. She disagreed with appellant's testimony that the computer data base was not constructed. She testified that all that was necessary was to merge the CTBS data base with the HSPT data base and she indicated that respondent's computer system has the capability to merge these two data bases.

Dr. Azumi further testified that she did not consider the June 30, 1989 project to be completed because the computations were not correct and no written analysis was provided by Dr. Ku.

LEGAL DISCUSSION AND ANALYSIS

This matter involves a major disciplinary action brought by the appointing authority against appellant, Earl J. Ku. N.J.S.A. 11A:2-21 and N.J.A.C. 4A:2-1.4 place the burden of proof on the appointing authority in major disciplinary actions and require the appointing authority to prove its case by a fair preponderance of the credible evidence. See, Atkinson v. Parsekian, 37 N.J. 143 (1962); In re Polk, 90 N.J. 550, 561 (1982); Briggs v. N.J. Dept. of Civil Service, 64 N.J. Super. 351 (App. Div. 1960). An appeal to the Merit System Board requires the Office of Administrative Law to conduct a de novo hearing. Matter of Morrison, 216 N.J. Super. 143 (App. Div. 1987), and to determine guilt or innocence as well as the appropriate penalty. Cliff v. Morris Cty. Bd. of Social Services, 197 N.J. Super. 307 (App. Div. 1984).

In this matter, the finder of fact must choose between two widely disparate stories as to what occurred in connection with the two incidents giving rise to the charges in this matter. Stated in its simplest terms, the testimony of Dr. Durga is to the effect that appellant was assigned a project in the clearest possible terms since the requirements of the project were set forth in written form (Exhibit R-5). When Dr. Durga scheduled a meeting with appellant and with two other supervisors in order to discuss the assigned project with appellant, appellant refused to attend unless the meeting was attended by a union representative. According to Dr. Durga, despite his urgings, appellant refused to attend the meeting in the absence of a union representative. At a subsequent meeting attended by Dr. Durga, appellant, and the union representative, the union representative

recommended to appellant that he do the best he could in performing the project.

According to the testimony of Dr. Azumi, there was no cause or reason for delay in appellant providing this project since respondent's computer system had both the hardware and software capability to merge the two data bases so that appellant could complete the project.

With regard to this issue, appellant alleges that the March 2, 1989 assignment was given to him in order to set him up for a disciplinary action. He admitted that this assignment was within his field of expertise, but denies that the computer system had the capability to merge the two data bases in order for him to complete this project on schedule. According to Dr. Ku, it was necessary to merge the two data bases manually in order to complete the project. He alleges that the project was completed by July 11, 1989, and that it was delivered to Dr. Azumi on that date. He further indicated that he did not place his objections to the time schedule in the project in writing because Dr. Durga would simply ignore the written memos.

With regard to the assignment to Dr. Ku of the project to analyze high school proficiency test scores which was due on July 3, 1989, Dr. Azumi testified that this assignment was given to Dr. Ku several days prior to June 30, 1989. The exact date is not known. He was advised of the requirements of the projects and given the due date when the project was due to the county. According to Dr. Azumi, appellant not only failed to complete the project, but left work on June 30, 1989, both without fully completing the project and without informing the appropriate supervisor that he was leaving work.

In response to these allegations, appellant testified that he did complete the project and that he did inform Dr. Walker of his departure because he was ill. He testified that Dr. Gutmore, who was temporarily in charge of the division to which appellant was assigned, told appellant to report to Dr. Walker in connection with the project.

Finally, on the issue of credibility, Dr. Ku testified that none of his supervisors, other than Dr. Durga, ever had any problems with his performanc. Appellant alleges that Dr. Durga has personal reasons for this animosity dating back to the time when appellant

was first appointed and refused to rent living quarters from Dr. Durga. Respondent challenged appellant's credibility by asking appellant to identify ten memoranda from other supervisors allegedly indicating dissatisfaction with appellant's work performance. Of these, appellant identified only one, a memo from Joan L. Buttram, manager of assessment, dated April 26, 1983 (Exhibit R-12). Appellant denied ever having seen or been made aware of the other nine memoranda.

It would have been most helpful to have additional testimony or evidence concerning the existence or absence of other instances of dissatisfaction with appellant's work performance. However, in the absence of this type of testimony regarding credibility, it is the function of the trier of fact to determine credibility based upon the internal consistency or improbability of the testimony of the witnesses, utilizing experience in everyday affairs to give additional guidance. Thus, matters such as eye contact or lack thereof, nervousness of a witness during portions of testimony, as well as external measures of credibility, such as prior testimony shown to have been misstatements by additional testimony or evidence, are factors that can be considered.

After considering all of the testimony and evidence in this matter, I FIND by a preponderance of the credible evidence that the following are the facts in this matter:

1. On March 2, 1989, appellant was given a work assignment requiring him to analyze the relationship between the CTBS scores and the HSPT scores of students within the school district.
2. This project of March 2, 1989, was within appellant's expertise and experience.
3. Appellant was given the opportunity to fully discuss the requirements of the project as well as the scheduled date for completion of the six separate components tasks of the project, but refused to attend the meeting scheduled for 1 p.m. on March 2, 1989, for this purpose.
4. Appellant, without justification, failed to complete the six tasks within the time specified and also failed to complete the entire project in a satisfactory

manner within the time period specified in the written outline of the project.

5. When the project was finally completed and submitted approximately three months late, the project failed to conform to the requirements set forth in the written outline of the project.
6. Appellant's refusal to attend a meeting to discuss the assigned project of March 2, 1989, with his supervisors amounted to insubordination.
7. On an unspecified date several days prior to June 30, 1989, appellant was given a work assignment involving completion of the New Jersey State Department of Education requirement for analysis of the district's HSPT scores.
8. On June 30, 1989, appellant failed to properly complete this work assignment and left it incomplete, necessitating its completion by another employee of the district.
9. On June 30, 1989, after having failed to properly complete the assigned project, appellant left work without receiving proper permission.

Based upon the foregoing, I **CONCLUDE** that appellant is guilty of the charges of unsatisfactory performance and insubordination. I also **CONCLUDE** that even though appellant was not charged with neglect of duty, the facts and circumstances surrounding this case together with the findings set forth above lead me to **CONCLUDE** that appellant is also guilty of neglect of duty.

PENALTY

The final issue to be determined in this matter is the proper and appropriate penalty to be imposed on appellant. In order to determine penalty, the prior disciplinary record of an employee may be considered. West New York v. Bock, 38 N.J. 500 (1962).

By Final Notice of Disciplinary Action dated June 24, 1987 (Exhibit R-1), appellant

was found guilty of neglect of duty and was given a four-month probationary period starting July 13, 1987 and ending November 13, 1987.

By Final Notice of Disciplinary Action dated August 5, 1988 (Exhibit R-2), appellant was found guilty of a charge of inefficient performance. In a fact sheet attached to this Final Notice, a summary of the testimony indicates that appellant was charged with miscalculations of test scores as well as failing to carry out certain assigned duties. As a result, appellant was suspended for two days (August 23 and 24, 1988). By Final Notice of Disciplinary Action dated February 16, 1989 (Exhibit R-3), appellant was found guilty of the charges of insubordination, unbecoming conduct, and inefficiency and was suspended for three days (from February 27, 1989 to March 1, 1989), and was further given a 60-day probationary period beginning March 2, 1989 and ending May 1, 1989.

After considering the prior disciplinary record of appellant, as well as considering the testimony leading to the finding of guilt of appellant in connection with the charges in this matter, it appears abundantly clear that appellant has a great deal of difficulty in taking orders and following directions. Appellant's poor performance in connection with assignments given to him together with past instances of neglect of duty, inefficient performance, insubordination, and unbecoming conduct lead me to the conclusion that the appropriate penalty in this matter is the termination of appellant. In this matter, respondent has imposed progressive discipline on appellant in order to make it clear to him that the conduct in which he engaged was inappropriate and would not be accepted. In addition, the taxpayers of a school district, and most importantly, the children of a school district, are entitled to have employees who efficiently and effectively complete their assigned tasks. I therefore **CONCLUDE** that appellant should be terminated from his position as a senior research assistant for the Newark Board of Education.

REMEDY FOR DELAY

By its Order of Remand issued October 23, 1990, the Merit System Board required the ALJ to consider what, if any, remedy is appropriate to compensate appellant for the costs associated with the delay caused by the nonappearance of Dr. Durga on June 28, 1990. On this issue, Dr. Durga testified that on the night prior to the hearing of June 28,

1990, he had an attack and increased the dosage of the medication he takes for his undisclosed illness. He then saw his physician the next morning, but was unable to contact the attorney for respondent to advise him of his illness. On that morning, he received medical attention from his physician and then proceeded to the OAL offices. He was on his way to the OAL when he met respondent's attorney who advised him of the cancellation of the hearing. Dr. Durga also indicated that this illness occasionally causes him to miss one to three days of work at any given time.

Despite the determination by the Merit System Board that good cause existed for Dr. Durga's absence, I **FIND** that appellant is entitled to compensation for the delay in these proceedings. That compensation should be for the fees and costs paid by appellant to his attorney for the attorney's appearance on June 28, 1990.

DECISION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that the decision of respondent, Newark Board of Education, finding appellant, Earl J. Ku, guilty of unsatisfactory performance and insubordination and imposing upon appellant removal effective September 15, 1989, is hereby **AFFIRMED** and appellant's appeal is hereby **DISMISSED**.

It is further **ORDERED** that respondent shall reimburse appellant for the fees and costs paid by appellant to his attorney for the attorney's appearance on June 28, 1990, payment of which shall be made within 30 days of the date of submission to respondent of appellant's affidavit or certification of payment with a copy of the attorney's billing attached.

I hereby **FILE** my initial decision with the **MERIT SYSTEM BOARD** for consideration.

This recommended decision may be adopted, modified or rejected by the **MERIT SYSTEM BOARD**, which by law is authorized to make a final decision in this matter. If the Merit System Board does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision

APPENDIX

List of Witnesses

For Appellant:

Earl J. Ku

For Respondents:

Ramanand Durga

Jan Azumi

List of Exhibits

A-1 Excerpt of agreement between Newark Board of Education and Service Employees International Union Local 617, pages 36 and 37

R-1 Final Notice of Disciplinary Action, dated June 24, 1987

R-2 Final Notice of Disciplinary Action, dated August 5, 1988

R-3 Final Notice of Disciplinary Action, dated February 16, 1989

R-4 Final Notice of Disciplinary Action, dated September 1, 1989

R-5 Memorandum of March 2, 1989, regarding work assignment

R-6 Memorandum of March 2, 1989, regarding insubordination

R-7 Memorandum of March 23, 1989, regarding assignment due dates

R-8 Memorandum of April 28, 1989, regarding assignment due dates

R-10 Memorandum of June 30, 1989, regarding dereliction of duties

R-12 Memorandum of April 26, 1983, regarding DRET Policies