

P.E.R.C. NO. 90-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

NORTH CALDWELL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-11

NORTH CALDWELL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses an unfair practice charge filed by the North Caldwell Education Association against the North Caldwell Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employees Relations Act when it transferred teacher James Cancialosi from one school to another allegedly in retaliation for his Association activities. The Commission finds that the Association did not prove that the Board was hostile towards Cancialosi's exercise of protected rights.

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Appearances:

For the Respondent, Metzler Associates, Labor Consultants
(James L. Rigassio, consultant)

For the Charging Party, Zazzalli, Zazzalli, Fagella &
Nowak, Esqs. (Paul L. Kleinbaum, of counsel)

DECISION AND ORDER

On July 8, 1988, the North Caldwell Education Association filed an unfair practice charge against the North Caldwell 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),^{1/} when it transferred teacher James Cancialosi from one school to another allegedly in retaliation for his Association activities.

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

On July 29, 1988, a Complaint and Notice of Hearing issued. On August 10, the Board filed an Answer denying that the transfer was illegally motivated.

On November 17, 1988 and February 6 and 9, 1989, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On May 26, 1989, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 89-39, 15 NJPER ____ (¶ ____ 1989). He found that the Association had not proved that the Board was hostile toward Cancialosi's exercise of protected rights.

On June 27, 1989, after an extension of time, the Association filed exceptions. It claims that: the principal's urging Cancialosi not to pursue the stipend issue violated subsection 5.4(a)(1); the Hearing Examiner incorrectly credited the superintendent's testimony that she did not criticize Cancialosi for being too outspoken at Association meetings; the Hearing Examiner erred in concluding that Cancialosi did not respond to a letter from the principal to the superintendent concerning the return of camp files; the superintendent never informed the Board that there were some problems with Cancialosi, and the superintendent and principal tried to create the impression of Cancialosi's lack of cooperation with the new camp directors. It claims that there is ample circumstantial evidence to prove that the transfer was in retaliation for Cancialosi's union activities. It further claims that the alleged justifications for the transfer - philosophical differences and teacher morale - are without foundation.

On July 19, 1989, after an extension of time, the Board filed a reply. It urges adoption of the Hearing Examiner's finding that Cancialosi was not transferred in retaliation for his protected activities. It claims that there is no evidence to support the Association's claim that the Hearing Examiner erred in his findings of fact and no basis to disturb his credibility determinations.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 3-18) are accurate. We incorporate them here.

Cases of alleged retaliation for protected conduct are governed by In re Bridgewater Tp., 95 N.J. 235 (1984). To prevail, a charging party must prove that protected activity was a substantial or motivating factor in the employer's adverse action. It may do so by direct evidence or by circumstantial evidence that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile to the exercise of the protected rights. If the charging party shows that anti-union animus motivated the personnel action, the employer can avoid an unfair practice finding by proving that it would have taken the same adverse action even absent the protected conduct.

We accept the Hearing Examiner's findings that Cancialosi engaged in protected activity and that the Board knew of that activity. We also accept his finding that the Association did not prove that the Board was hostile toward Cancialosi's exercise of protected rights.

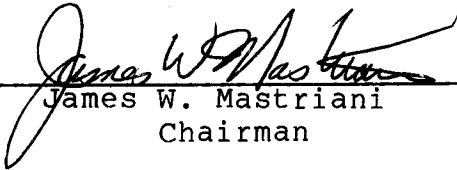
We do not dispute the Association's assertion that Cancialosi was an outstanding teacher. Nor do we dispute that the

philosophical differences that "justified" the transfer stemmed from differences between Cancialosi and his principal over the way the sixth grade program should be structured. Those differences coupled with the principal and superintendent's perception that Cancialosi was not cooperating in returning camp-related files apparently motivated the transfer. We pass no judgment on the wisdom of the Board's decision. Our role in an unfair practice case is to determine only whether the transfer was infected by anti-union animus. Cancialosi's actions regarding the sixth grade program and the camp were not as an Association representative. Likewise, the Board's responses to those actions were not responses to protected conduct. Nor is there any evidence that they were pretextual in nature. Finally, we detect no other evidence of hostility to Cancialosi's role as grievance chairperson. Accordingly, we dismiss the unfair practice allegations.^{2/}

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Wenzler, Johnson and Ruggiero voted in favor of this decision. None opposed. Commissioner Smith was not present. Commissioners Reid and Bertolino abstained.

DATED: Trenton, New Jersey
September 29, 1989
ISSUED: October 2, 1989

^{2/} The principal's urging that Cancialosi not pursue the stipend issue because the principal believed it illegal did not tend to interfere with Cancialosi's protected rights. We therefore find no independent subsection 5.4(a)(1) violation.

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

In the Matter of

NORTH CALDWELL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-89-11

NORTH CALDWELL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it voted unanimously to transfer James Cancialosi from the Gould School to the Grandview School on May 24, 1988. The Charging Party failed to satisfy the third requisite of the first part of the Bridgewater test, namely, that the Board manifested hostility or anti-union animus toward Cancialosi's exercise of protected activities.

Even assuming arguendo that the first part of Bridgewater had been satisfied, the Hearing Examiner concluded that the transfer would have occurred even in the absence of protected activities by Cancialosi. There had been ongoing friction between Cancialosi and his principal during the 1987-88 school year over the administration of a camp program, which prompted the principal to recommend the transfer.

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. 89-39

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

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Nowak, Esqs.
(Paul L. Kleinbaum, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 8, 1988, by the North Caldwell Education Association ("Charging Party" or "Association") alleging that the North Caldwell Board of Education ("Respondent" or "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that on or about May 24, 1988, the Board transferred James Cancialosi from the Gould School where Cancialosi had taught the sixth grade to the Grandview School to teach the third grade, in retaliation for his activities

on behalf of the Association; Cancialosi has been the Association's Grievance Chairman for approximately four years and has been an outspoken advocate on behalf of the Association, handling several grievances in the current year; when Cancialosi was transferred the reasons given to him were "philosophical differences" and "teacher morale"; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.^{1/}

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 July 29, 1988. The Board filed an Answer on August 10, 1988. On September 12, 1988, the Board filed with the Chairman of the Commission a Motion for Summary Judgment, and, following a response from the Association, the Chairman referred the Board's Motion for Summary Judgment to the undersigned on September 20, 1988, pursuant to N.J.A.C. 19:14-4.8. Finally, this Hearing Examiner issued an interlocutory decision, denying the Board's Motion for Summary Judgment, on October 7, 1988 [H.E. No. 89-14, 14 NJPER 678 (¶19285 1988)].

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

Thereafter, pursuant to the Complaint and Notice of Hearing, hearings were held on November 17, 1988 and on February 6 and February 9, 1989, in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by April 5, 1989.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists and, after hearing, and after consideration of the post-hearing briefs of parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

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

FINDINGS OF FACT

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

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

3. James T. Cancialosi has been employed by the Board as a classroom teacher for 15 years and, prior to his transfer on May 24, 1988, he had been a Sixth Grade teacher at the Gould School

where he was tenured.^{2/} After Cancialosi's transfer on May 24, 1988, he was reassigned to teach the third grade at the Grandview School, beginning with the 1988-89 school year. [1 Tr 51, 52].

4. Cancialosi became the Association's Grievance Chairman in 1984, having been appointed by the Association's President at that time, Bruce Gettle. Prior to the 1987-88 school year, Cancialosi had never filed a grievance. Cancialosi did, however, attend about 90% of the Board's meetings. Cancialosi never addressed the Board at any of the meetings he attended as the Association's Grievance Chairman. The fact that Cancialosi appeared at Board meetings in his capacity as the Grievance Chairman was known to John A. Venezia, an Association member until he became Principal of the Gould School on July 1, 1987. Thus, until the beginning of the 1987-88 school year in September, 1987, no one other than Venezia was aware that Cancialosi was the Association's Grievance Chairman. [1 Tr 53-57].^{3/}

5. The Board has for many years conducted an Outdoor Camp Program ("Program") for sixth grade students, in which Cancialosi

^{2/} A series of favorable evaluations of Cancialosi, covering the period March 19, 1973 through June 16, 1988, were introduced into evidence. [CP-1 through CP-12].

^{3/} Cancialosi testified without contradiction that David Winter, the Secretary of the Board, learned that Cancialosi was the Association's Grievance Chairman at a meeting regarding the stipend for sixth grade teachers. This meeting occurred in September 1987 and was followed by a second meeting with sixth grade teachers, Cancialosi and Carol Rosenfeld, an NJEA UniServ Representative, where the stipend issue was satisfactorily resolved. [1 Tr 59-68; CP-15].

has been involved as the Coordinator or Camp Director. However, by September 1987, Cancialosi had decided that he could not continue in the Program. Accordingly, Cancialosi sent a letter dated September 8, 1987, to Sharon I. Clover, the Board's Superintendent since July 1987, advising her of this fact (R-1). This letter followed a telephone conversation between Cancialosi and Clover on August 28th. [1 Tr 59; 2 Tr 43-47].

6. In October 1987, Venezia brought up the matter of stipends, supra, with Cancialosi, in which Venezia urged Cancialosi not to pursue the issue because it was "illegal." The alleged illegality concerned including the stipend within pension calculations, a contention which Winter and his successor rejected and, thus, the stipends were ultimately continued. [1 Tr 59-68, supra]. Cancialosi refused to accede to Venezia's position that the stipends were illegal. [1 Tr 68, 69, 100-102].^{4/}

7. On October 23, 1987, Venezia posted the position of Sixth Grade Camp Director with a stipend of \$1500 (R-4; 2 Tr 112). Venezia appointed two sixth grade teachers to the position, namely, Michelle Nodoro and Cathy Garvey. Cancialosi learned of these appointments about two weeks after the initial posting on October 23rd (3 Tr 14, 15). Cancialosi, having advised Clover on September 8, 1987, that he was not interested in the Camp Director position

^{4/} It is noted that Cancialosi acknowledged on cross-examination that Venezia did not dislike him and did not resent his being Grievance Chairman nor did Venezia object to Cancialosi's involvement in the Association (1 Tr 102).

for the 1987-88 school year (R-1, supra), Cancialosi was not considered (2 Tr 115, 116).^{5/}

8. On November 10, 1987, Cancialosi met with Clover at her request where three matters were discussed: (1) a Board member had spoken to Clover, complaining that Cancialosi had yelled at a parent; (2) Clover stated that Cancialosi was too outspoken at Association meetings; and (3) Clover stated that Cancialosi was uncooperative and disruptive (1 Tr 70, 71). In response, Cancialosi denied that he had ever yelled at a parent in his 15 years with the district and, when he asked Clover to identify the parent, she refused. In connection with his outspokenness at Association meetings, Cancialosi testified that he advised Clover that he was the Grievance Chairman and that that was his job. Finally, his response to his being uncooperative and disruptive was that Clover should call a meeting with the sixth grade teachers (such a meeting never occurred). [1 Tr 71, 72]. These three matters were the only ones discussed by Clover and Cancialosi on November 10th (1 Tr 74). Although Clover did not testify specifically as to what transpired at her meeting with Cancialosi on November 10, 1987, she did testify that she had no recollection of Cancialosi ever having told her that he was the Grievance Chairman for the Association, noting the reason that there had been no grievances throughout the first part of the

^{5/} Subsequent to September 8, 1987, Cancialosi reconsidered his position in a letter to Venezia dated November 9, 1987 (R-5) but it was too late, the appointments of Nodoro and Garvey having previously been made (2 Tr 116-120).

1987-88 school year (2 Tr 57). Given the explicit testimony of Cancialosi that he told Clover that he was Grievance Chairman and the inability of Clover to deny this fact, the Hearing Examiner credits this testimony of Cancialosi. As to Cancialosi's testimony that she stated that he was too outspoken at Association meetings, Clover denied having made such a statement, adding that she would have had no knowledge of Association meetings since she did not attend them (2 Tr 66). The Hearing Examiner finds this testimony of Clover persuasive, based on the unlikelihood that she could have known what had transpired at Association meetings in the absence of additional proof of such knowledge by the Charging Party. Also, it is noted that Clover became Superintendent in July 1987, a short period of time in relationship to the November 10, 1987, meeting, supra.

9. Beginning on November 16, 1987, Venezia commenced sending memoranda to Cancialosi regarding the return of Program files (CP-16 to CP-18). This culminated in a memorandum to Clover on December 23, 1987, wherein Venezia informed Clover of Cancialosi's dereliction in failing to respond to prior requests to return Program files (CP-19). When there was no response by Cancialosi to CP-19, a copy of which he had received, Clover sent a memorandum to Cancialosi on January 7, 1988, in which she stated that his "...unprofessional and uncooperative attitude needs serious attention..." and that she would be waiting to hear that all of the

"...necessary camp-related materials...have been returned to the principal directly..." (CP-20). However, Cancialosi never responded (2 Tr 121-123).

10. Mary J. Blythin, a member of the Board for the previous three years, and now its President, testified that in the winter of 1988, Clover told her that there were some difficulties between Cancialosi and the sixth grade teachers, stating basically that these teachers were "unhappy" because of the Program and disagreements with Cancialosi over it (2 Tr 24-26). Blythin never asked Clover to "...do anything concerning these problems..." and the only thing that Clover ever reported to her was that she had spoken with Cancialosi but that nothing had been resolved and that things were about the same (2 Tr 26-29).

11. Clover arranged to meet with the two Camp Directors, Michelle Nodoro and Cathy Garvey on March 2, 1988. However, since Garvey was ill that day, Clover only met with Nodoro. Nodoro complained that Cancialosi was questioning the actions of the Camp Directors and the timing of what they were doing. Also, Nodoro stated that Cancialosi had embarrassed her in front of the students by his questions and, also, that he had expressed concern about the safety of the children at camp. She said that she had tried to work it out with Venezia and that she had only come to Clover because she wanted to know if it was possible that Cancialosi not attend the Program. Clover stated that she would meet with Cancialosi and Venezia to see if the matter could be resolved. [2 Tr 39-41, 75-77].

12. Beginning in January 1988, Venezia expressed to Clover his frustration regarding his working relationship with Cancialosi. This occurred in the context of Venezia's interest in restructuring the programs in the fourth, fifth and sixth grades at the Gould School and his views about transfers for the next school year. Cancialosi's name was suggested by Venezia as a possible transfer at a meeting with Clover in February 1988. [2 Tr 78-81].

13. On March 4, 1988, a meeting took place between Clover, Venezia and Cancialosi. According to Cancialosi, Clover began the meeting by stating that she had heard his name "too much." Clover then raised with Cancialosi the issue of his being uncooperative and disruptive, which had resulted from her meeting with Nodoro two days earlier. After Clover disclosed to Cancialosi the complaints of Nodoro, supra, she asked him whether he should attend the Program. During the one-half hour meeting Cancialosi asked Clover and Venezia to meet with the other sixth grade teachers but Clover indicated she would not. Apparently nothing was resolved.^{6/} [2 Tr 81-85].

14. Following the March 4th meeting, Cancialosi contacted Rosenfeld and reported on what had transpired in his meeting with Clover and Venezia. Rosenfeld asked Cancialosi to call a meeting with all of the sixth grade teachers, and this meeting took place on March 17, 1988. Present were Rosenfeld, Cancialosi and all of the sixth grade teacher, namely, Michelle Nodoro, Cathy Garvey, Mary Ann

^{6/} Clover insisted that no decision to transfer Cancialosi had been made at the time of this meeting on March 4th.

Dietrich, Joan Marks and Lynn Blasi. Cancialosi opened the meeting by restating the administration's charge that he had been uncooperative and unprofessional, that he had not discussed the Program with the other sixth grade teachers and that they were "unhappy." Rosenfeld then asked Cancialosi to circulate certain documents, which indicated things that he had done to help the sixth grade Program. None of the teachers present indicated that they had had any problem with any of the things that Cancialosi had done. [1 Tr 20-25, 76-80].^{7/}

15. At the request of Rosenfeld and Cancialosi a meeting was arranged with Clover, which took place on April 7, 1988. According to Rosenfeld, the purpose of the meeting was to eliminate the tensions that existed between Clover and Cancialosi and to impress upon Clover that Cancialosi had many years of service in the district and that although he was continuing to make a significant contribution to the school, his contribution was being ignored. According to Clover, the several purposes of the meeting included her statement to Cancialosi that if his behavior did not change, then she would seriously consider barring him from attending the Program. A second purpose was the request that CP-20, supra, be removed from Cancialosi's personnel file. A final purpose was to refute statements made by Clover in correspondence, which indicated

^{7/} The Hearing Examiner sua sponte questioned counsel for the Charging Party as to the relevance of the testimony regarding the March 17th meeting since it in no way involved nor could it have been attributed to the Respondent (1 Tr 79, 80).

that Cancialosi was unprofessional and uncooperative. [1 Tr 26, 80; 2 Tr 55, 56]. The discussion centered on documented contributions by Cancialosi and the question of whether or not he would be attending the Program. Rosenfeld testified that Clover primarily listened. Although Clover said that she would "get back" to Rosenfeld and Cancialosi it was Rosenfeld's impression at the conclusion of the one-half hour meeting that "nothing would change." [1 Tr 28-30, 81; 2 Tr 56, 57].

16. On April 8, 1988, Rosenfeld sent a letter to Clover, expressing hope that the meeting had helped to correct "any misperceptions" that Clover might have had about Cancialosi and looking forward to Clover's response to the request that documents relating to the camp issue be removed from Cancialosi's personnel file (CP-13). Clover's response was set forth in a memorandum to Cancialosi on April 13, 1988, where she stated that Cancialosi could attend the Program and contribute positively to its success. However, she refused to remove any documents from Cancialosi's personnel file (CP-14; 1 Tr 81, 82; 2 Tr 58, 59).

17. On May 24, 1988, Venezia requested a meeting with Cancialosi after school. At this meeting, the principal of the Grandview School, George Rhen, was also present. Venezia stated that he was going to recommend to the Board at its meeting that night that Cancialosi be transferred from the Gould School to the Grandview School (third grade). As a reason, Venezia testified that he and Cancialosi were "...miles apart philosophically..." and that

"...Teacher morale has not been good..." (2 Tr 127). Venezia testified further that he stated to Cancialosi that "...for the benefit of your career and for mine, ultimately also for the children and staff here, you and I can't work together..." (2 Tr 128). Cancialosi's testimony as to what transpired at this meeting was essentially similar, namely, that Venezia stated that the reason was "...because of philosophical reasons and teacher morale..." (1 Tr 83). [1 Tr 82, 83; 2 Tr 124-133].^{8/}

18. The Board met on May 24, 1988, and without discussion unanimously voted to transfer Cancialosi from the Gould School to the Grandview School. Cancialosi addressed the Board. A copy of what he said was introduced in evidence as Exhibit CP-24. The statement was brief and contained no reference to Cancialosi's union activities as a reason for his transfer. Rather, Cancialosi referred to his "involuntary transfer" as having originated with Venezia's stated "philosophical differences."

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate §§5.4(a)(1) And (3) Of The Act Because The Charging Party Failed To Satisfy A Requisite Of Bridgewater, Namely, Proof That The Board Was Hostile Or Had Manifested Anti-Union Animus Toward James Cancialosi's Exercise Of Protected Activities.

^{8/} Both Clover and Venezia testified that the transfer of Cancialosi from the Gould School to the Grandview School was in the best interest of the school district (2 Tr 60, 132).

This case is governed by Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) where the New Jersey Supreme Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980)^{9/} in "dual motive" cases, involving an alleged violation of Section 8(a)(1) or Section 8(a)(3) of the National Labor Relations Act.^{10/} In such cases, Wright Line and Bridgewater articulated the following test in assessing employer motivation: (1) the Charging Party must make a showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242).

The Court in Bridgewater made clear that no violation may be found unless the Charging Party has proved by a preponderance of the evidence on the record as a whole that protected activity was a substantial or a motivating factor in the employer's adverse action. The Charging Party may do so by direct evidence or by circumstantial evidence demonstrating that the employee engaged in protected activity, that the employer knew of this activity, and,

^{9/} The United States Supreme Court approved the NLRB's "Wright Line" analysis in NLRB v. Transportation Mgt. Corp., 562 U.S. 393, 113 LRRM 2857 (1983).

^{10/} These provisions of the NLRA are directly analogous to Section 5.4(a)(1) and (3) of our Act.

finally, that the employer was hostile toward the exercise of the protected activity. [95 N.J. at 246].^{11/}

If, however, the employer has failed to present sufficient evidence to establish the legality of its motive under our Act, or if its explanation has been rejected as pretextual, then there is a sufficient basis for finding a violation of the Act without more. However, where the record demonstrates that a "dual motive" is involved, the employer will be found not to have violated the Act if it has proven by a preponderance of the evidence that its action would have occurred even in the absence of protected conduct [Id. at 242].^{12/}

As to the first part of the Bridgewater test, it is reasonably clear that Cancialosi engaged in protected activities under the Act since he became the Association's Grievance Chairman in 1984. Admittedly, he did not engage in extensive activities in this capacity, no grievances having been filed by him or processed by him during this period. He did, however, appear at several meetings with Winter on the stipends issue in the fall of 1987 and

^{11/} However, the Court in Bridgewater stated further that the "Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action..." (95 N.J. at 242).

^{12/} This affirmative defense need only be considered if the Charging Party has proven on the record as a whole that anti-union animus was a "...motivating force or substantial reason for the employer's action..." [Id.].

he met on several occasions with Venezia and Clover during the winter and spring of 1988.^{13/}

Although the Board sought to prove that neither Clover, Winter or Venezia had knowledge that Cancialosi was the Association's Grievance Chairman in their several meetings during 1987 and 1988, the Hearing Examiner has credited the testimony of Cancialosi that he made his Association status known to them (see Findings of Fact Nos. 4, 6, 8, supra). Thus, the Bridgewater requisite of knowledge by the Board of Cancialosi's protected activities has been established.

Moving on to the third requisite of the first part of the Bridgewater test, namely, hostility or anti-union animus, the Charging Party's case becomes infinitely weaker. The above Findings of Fact by the Hearing Examiner disclose no evidence whatever, either direct or circumstantial, of hostility by the Board per se toward Cancialosi's exercise of protected activities as the Association's Grievance Chairman. Further, there is no proof of anti-union animus on the part of the Board's agents or representatives toward Cancialosi's exercise of protected activities. In so concluding, the Hearing Examiner has carefully examined the record, the pertinent parts of which have been

^{13/} The Commission in Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, 9 (¶17002 1985) stated that "...Under Bridgewater...any level of protected activity could satisfy the first part of the test if that activity motivated the discipline..."

incorporated into his Findings of Fact, supra, and he has found no evidence upon which a finding of hostility or anti-union animus could be based.

Certainly, the dispute over the stipend issue discloses no hostility toward Cancialosi's exercise of protected activities (see Finding of Fact No. 6, supra). Venezia's having urged Cancialosi not to pursue the issue in October 1987 because the stipends were "illegal" does not constitute either an independent violation §5.4(a)(1) or a §5.4(a)(3) violation since Venezia legitimately claimed that the stipends implicated pension calculations.

The Hearing Examiner has credited the testimony of Clover that she would have had no knowledge of Association meetings and that she did not state to Cancialosi on November 10, 1987, that he was too outspoken at Association meetings (see Finding of Fact No. 8, supra). No evidence of animus or hostility was demonstrated by the exchange of correspondence and memoranda between Venezia, Cancialosi and Clover with respect to Cancialosi's having failed to return certain Program files (see Finding of Fact No. 9, supra).

Finally, the Hearing Examiner can draw no inference of hostility or anti-union animus from the meeting between Clover, Venezia and Cancialosi on March 4, 1988, where, according to Cancialosi, Clover stated that she had heard his name "too much" nor from what transpired at the April 7, 1988 meeting between Clover, Rosenfeld and Cancialosi (see Findings of Fact Nos. 13, 15, supra). The Charging Party's case was not strengthened by Exhibit CP-24,

this being the text of Cancialosi's statement to the Board on May 24, 1988, when his transfer was unanimously voted upon. In this brief statement Cancialosi failed to cite his Association activities as Grievance Chairman as a reason for his transfer, electing only to attribute it to Venezia's stated "philosophical differences."

This Hearing Examiner has twice in the last two years had occasion to dismiss a complaint because of the total absence of evidence of hostility or anti-union animus for the exercise of protected activities by a charging party: Lyndhurst Bd. of Ed., H.E. No. 87-56, 13 NJPER 285 (¶18119 1987), adopted P.E.R.C. No. 87-139, 13 NJPER 482 (¶18177 1987) and Southeast Morris County Municipal Utilities Auth., H.E. No. 89-9, 14 NJPER 591, 593 (¶19251 1988).

Even if the Hearing Examiner was to assume arguendo that the instant Charging Party had satisfied the first part of the Bridgewater test, the bottom line would remain the same since the decision of the Respondent Board to transfer Cancialosi from the Gould School to the Grandview School on May 24, 1988, was for reasons unrelated to Cancialosi's exercise of protected activities. The record amply demonstrates the deteriorating relationship between Cancialosi and his principal, John Venezia, during the course of the 1987-88 school year (see Findings of Fact Nos. 6, 9, 12, supra). This resulted in Venezia's recommending to Clover that Cancialosi be transferred. Cancialosi was apprised of this by Venezia at a meeting on May 24, 1988, the date that the Board was to vote upon the recommended transfer (see Finding of Fact No. 17, supra).

There is no dispute but that at their May 24th meeting Venezia stated to Cancialosi that there were significant philosophical differences between the two of them and that staff morale had "not been good." [See Findings of Fact Nos 10, 11, supra]. Significantly, as noted previously, Cancialosi in his address to the Board on May 24th, referred only to "philosophical differences," as being Venezia's reason for the recommended transfer. Cancialosi elected to make no reference to his Association activities as a motivating force or factor in his transfer.

In other words, even if the Hearing Examiner should assume that the first part of the Bridgewater test has been met by the Charging Party, he is satisfied that the Board's May 24th transfer of Cancialosi from the Gould School to the Grandview School would have occurred even in the absence of his protected activities as Grievance Chairman on behalf of the Association. As previously found, the Hearing Examiner rejects the contention of counsel for the Charging Party that when Venezia in October 1987, urged Cancialosi not to pursue the issue of the stipends because it was "illegal" this constituted an independent violation of §5.4(a)(1). [See Charging Party's brief, p. 4]. Venezia provided what this Hearing Examiner considers a legitimate and substantial justification for his position, namely, that the stipend issue implicated pension calculations (see Finding of Fact No. 6, supra). This negates an independent violation of §5.4(a)(1) of the Act: see

Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988) and cases cited by the Hearing Examiner in that case [14 NJPER at 303].

* * * *


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

CONCLUSION OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it unanimously voted to transfer James Cancialosi from the Gould School to the Grandview School on May 24, 1988.

RECOMMENDED ORDER

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



Alan R. Howe
Hearing Examiner

Dated: May 26, 1989
Trenton, New Jersey