

P.E.R.C. NO. 97-67

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MAPLE SHADE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-95-41

MAPLE SHADE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Maple Shade Board of Education violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it gave a building representative of the Maple Shade Education Association unfavorable performance evaluations in retaliation for her Association activities. The allegation that the Board violated subsection 5.4(a)(4) of the Act is dismissed.

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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In the Matter of

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Docket No. CO-H-95-41

MAPLE SHADE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Cassetta, Taylor and Whalen
(Garry M. Whalen, consultant)

For the Charging Party, Selikoff and Cohen, attorneys
(Steven R. Cohen, of counsel)

DECISION AND ORDER

On August 11 and October 5, 1994, the Maple Shade Education Association filed an unfair practice charge and an amended charge against the Maple Shade Board of Education. The charge, as amended, alleges that the Board violated subsections 5.4(a)(1), (3) and (4) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} The Association

^{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. (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."

alleges that one of its building representatives, Betty Procopio, was given an unfavorable annual performance evaluation by her principal, Richard DiDio, in retaliation for her Association activities. The amended charge alleges that DiDio retaliated against Procopio for filing the initial charge by giving her a second unfavorable rating in a follow-up observation and by issuing a written reprimand.

On November 10, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Board filed an Answer denying any illegal motivation in issuing the annual evaluation, observation report, and reprimand.

On February 14, 15 and 17, 1995, Hearing Examiner Illse E. Goldfarb conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On February 28, 1996, the Hearing Examiner issued her report and recommended decision. H.E. No. 96-17, 22 NJPER 122 (¶27062 1996). She found that the principal was hostile toward Procopio's activity as building representative and toward the filing of the charge, and that this hostility motivated the unfavorable comments in the annual evaluation, observation report, and reprimand. The Hearing Examiner therefore concluded that the Board had violated subsections 5.4(a)(1), (3) and (4) of the Act.

On March 12, 1996, the Board filed exceptions to which the Association responded. Our analysis will address the issues raised by the exceptions.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-22) with modifications noted in this factual summary.

For over 20 years, Procopio taught at the Wilkins School. Didio was her principal for the entire period. From the start, Didio and Procopio did not relate well to each other, but this dislike did not prevent them from performing their professional duties.^{2/}

During the 1986-1987 school year, Procopio successfully grieved a letter of reprimand which had been placed in her personnel file.^{3/} Near the end of that school year, DiDio unsuccessfully tried to get the superintendent to transfer Procopio to another building. Procopio was not aware of this request. In 1987, Procopio became the Association's building representative for the Wilkins School. While Procopio was the building representative, no grievances were filed until the 1993-1994 school year.

That year started with construction which caused crowding and rearranging of gym classes and other activities. The faculty

^{2/} In finding no. 1, the Hearing Examiner notes that Procopio was named by her "colleagues" as teacher of the year for the 1991-1992 school year. We clarify this finding to note that the committee was composed of faculty members, parents and administrators (1T68-1T69).

^{3/} We correct finding no. 2 to state that Procopio's grievance over a letter of reprimand was filed during the 1986-1987 school year and was settled in 1987, not 1988 (1T136).

complained about these problems, including the discomfort caused by fumes and odors. Procopio brought many of these complaints to DiDio. Many of the faculty members who brought complaints to Procopio had first approached DiDio, but they felt that DiDio was indifferent and they testified that he would usually shrug off their problems and walk away.

One teacher, Gale Blinsinger, had received a memorandum from DiDio about where she had placed her lesson plans for a substitute teacher. She wanted to meet with DiDio about the memorandum and also wanted to tell him about physical problems she had been having because of construction work in the kitchen adjacent to her teaching area. She scheduled a meeting with DiDio and asked Procopio to come with her to the meeting. She did not tell DiDio that she intended to bring an Association representative or that she wanted to discuss problems related to construction as well as the lesson plan memorandum. When the meeting started, Blinsinger first referred to the lesson plan memorandum. DiDio responded that there was no need for Association representation on that issue and abruptly ended the meeting and walked out. Blinsinger rescheduled the meeting and met with DiDio alone, while Procopio waited outside. The second

meeting lasted 15 minutes and ended with Blinsinger satisfied that her concerns would be considered.^{4/}

The Association held meetings about the construction and other problems early in the school year. Procopio advised DiDio that she planned to hold another meeting on November 2, 1993. She did not know when she scheduled that meeting that DiDio would be away that day. The Association's leadership felt that the faculty's complaints were serious enough to warrant the superintendent's attention and he was asked by two Association officers, not Procopio, to attend the meeting. The faculty members, including Procopio, were opposed to having the superintendent attend the meeting because DiDio was away. They felt it was unfair to DiDio that complaints would be made about him to his superior behind his back and they also feared that he would retaliate against the teachers when he returned. The superintendent also expressed reservations about meeting under those circumstances, but agreed because the Association officers told him a meeting was urgent.^{5/}

^{4/} We clarify finding no. 5 to state that there was no notice to DiDio that the first meeting with Blinsinger would address subjects other than his memorandum to her about the placement of her lesson plans. (1T140-1T143; 3T77).

^{5/} We clarify finding no. 6 to state that when Procopio notified DiDio that the teachers wished to have a meeting on November 2, Procopio did not know that the Association leadership would invite the superintendent, Dr. James Kerfoot, to attend the meeting or that DiDio would not be in school that day (1T82-1T84).

Before the meeting started, Procopio directed non-tenured faculty to sit in a separate room because she feared that there would be retaliation if they participated in a gripe session. She testified that her fear of retaliation was based upon her having worked with DiDio for 20 years.

During the session, faculty members expressed nearly unanimous opinions that (1) there were major problems in the school; (2) DiDio had been unresponsive to their complaints; and (3) DiDio would be upset the meeting had taken place in his absence and would retaliate. The superintendent tried to allay these fears, encouraged teachers to voice their complaints, and assured them no one would face any reprisals. He said that he would speak to DiDio before his next work day.

DiDio was hurt by the complaints the superintendent relayed to him. As directed by the superintendent, he scheduled an emergency faculty meeting. Before the meeting, DiDio spoke with Helen Iapalucci, a teacher with whom he had a good working relationship. Iapalucci told DiDio that every teacher, herself included, had complained about him at the meeting with the superintendent. DiDio suggested to Iapalucci that complaints could be resolved before they got to the Association level and suggested that Iapalucci serve as a liaison between the faculty and the principal and bring the teacher's concerns to him. Iapalucci declined to do so because teachers attending the emergency meeting objected since Procopio was the elected Association representative.

In February 1994, DiDio observed a class taught by Procopio. His observation report found fault with Procopio's teaching performance in several areas. Procopio disagreed with DiDio's report and wrote a long rebuttal concluding with a rhetorical question wondering whether the negative observation report was written in retaliation for the Association's meeting with the superintendent. When DiDio and Procopio met to discuss the report, each was "armed" with a tape recorder and both recorded the meeting.^{6/}

On March 16, 1994, Procopio asked DiDio for permission to hold an Association meeting. Contrary to the informal practice of an oral response to an oral request, DiDio required Procopio to put the request in writing. She did and he approved it.

After Procopio grieved the observation report, DiDio did not observe her performance again before issuing an annual evaluation which was markedly more critical than previous annual evaluations. Although DiDio indicated that he would set up additional observations before the year ended, he told Procopio that he did not revisit her classroom before issuing an end of year evaluation because she had filed a grievance against him. The annual evaluation contained a Professional Improvement Plan

^{6/} We correct finding no. 13 to state that on March 4, 1994, the superintendent met with Procopio, not DiDio. The superintendent and DiDio had phone conversations in which the possibility of transferring Procopio was discussed (1T133).

("PIP") drafted by DiDio which gave Procopio from May 1994 to September 1994 to achieve its goals. This timetable was markedly different from the normal timetable for implementing PIP goals, that is from October through May of the next school year. All prior PIPs had been drafted by Procopio and approved without change by DiDio. Procopio told other faculty members about the negative evaluations she received from DiDio.

The Association filed its unfair practice charge during the summer before the 1994-1995 school year. At the start of the school year, Procopio received a memorandum from DiDio reminding her she had to implement the PIP. In September, DiDio observed Procopio's class and issued a report which noted some progress, but still criticized her performance. DiDio also taught a model math lesson as requested by Procopio.^{7/}

On September 22, 1994, DiDio issued a letter reprimanding Procopio for emptying a student's desk onto the floor in order to find a spelling book. The memorandum instructed Procopio to "find a better way" to locate missing items and noted that this was the third parental complaint in a calendar year. On the other

^{7/} We correct finding no. 16 to state that DiDio did not tell Procopio, before the 1994-1995 school year, that he would observe her performance in early September to assess compliance with her PIP and issue a formal observation report (1T171-1T172; 3T102-3T103). The transcript citations accompanying this finding do not establish that the "PIP Observation Report" was placed in Procopio's personnel file without her knowledge or without her having first received a copy.

occasions, DiDio had Procopio speak with the complaining parents before taking any action.

In the 1994-1995 school year, Procopio gave up the building representative position. The position was filled by two teachers, one of whom was Helen Iapalucci.

Applying the standards set forth in In re Bridgewater Tp., 95 N.J. 235 (1984), for adjudicating alleged violations of N.J.S.A. 34:13A-5.4(a) (1) and (3), we now deal with the Hearing Examiner's recommendations and the Board's exceptions. The Board disputes the Hearing Examiner's conclusions that hostility towards Procopio's protected activity as building representative was shown by: (a) DiDio's reaction to Procopio's attempt to represent Blinsinger at a meeting with the principal; (b) DiDio's reaction to the November 2, 1993 meeting which resulted in the superintendent's telling him that the faculty considered DiDio to be a poor leader and that he must communicate better with the faculty; (c) DiDio's attempt to have Iapalucci, rather than Procopio, bring him faculty complaints; and (d) the negative evaluation of Procopio. The Board also excepts to the Hearing Examiner's conclusion that the PIP observation report and the letter of reprimand issued to Procopio in September 1994 were issued in retaliation for the unfair practice charge.

We accept the Hearing Examiner's finding that DiDio's abrupt termination of the first meeting with Blinsinger was evidence of hostility to Procopio's activity as a building

representative. If DiDio were not hostile and he thought Procopio's presence was not required, he would likely have expressed his opinion in a less antagonistic manner.

We reject the Board's exception regarding the November 2, 1993 meeting. The Hearing Examiner may have exaggerated when she stated that as a result of that meeting, "DiDio's career was threatened." But the meeting certainly placed DiDio's leadership in a bad light and led to criticism and a directive from the superintendent that DiDio immediately meet with his faculty to improve communications. Given those circumstances and DiDio's subsequent conduct, it was reasonable for the Hearing Examiner to infer that DiDio resented the Association for arranging the meeting and urging that the superintendent attend.

We reject the Board's exception regarding DiDio's attempt to bypass Procopio and use Iapalucci to help him improve communications with the staff. DiDio suggested to Iapalucci that faculty problems did not need to be taken to the Association and that teachers should come to him either alone or with Iapalucci. Then, when the faculty rejected his proposal at the November 8 meeting, saying that role was for the Association only, DiDio started treating Procopio differently from the other faculty. This disparate treatment sent a signal to the faculty that using the Association to bring complaints to his attention was not prudent.

Beginning with the February 1994 observation of Procopio and continuing into the early part of the next school year, DiDio used the process of evaluating the Association's building representative as a means of retaliating against the Association for having conducted the November 2, 1993 meeting with the superintendent behind his back and for having rejected his attempts to establish an alternate line of communication through Iapalucci. We agree with the Hearing Examiner that the abrupt changes in the content of the evaluation received by Procopio and in the procedures followed are reliable circumstantial evidence of the principal's hostility to the Association's protected activity. Cf. Bridgewater, 95 N.J. at 247 (departure from established procedure in taking a personnel action is evidence of anti-union animus)

As the superintendent acknowledged, the February 1994 observation report and the annual evaluation were markedly different from any other evaluations DiDio had made of Procopio's teaching performance. There are many facts connected with the evaluation documents which show that DiDio evaluated Procopio more harshly because of his problems with her and the Association.

DiDio's failure to reobserve Procopio before the end of the school year after issuing the report of his February classroom observation is also significant. If a teacher's mid-year performance is unsatisfactory and there are still over three months remaining in the school year, common sense dictates that

the teacher's supervisor would revisit her classroom to see if the suggestions made in the evaluation report had been implemented and to determine if the teacher's performance was continuing to decline, especially where the administrator was obligated to issue an annual evaluation. The pendency of a grievance over the evaluation does not prevent an administrator from fulfilling his obligation to collect sufficient information to evaluate the performance of his staff, particularly in the case of a teacher where alleged deficiencies were identified mid-year.

Also significant is the unprecedented change in the timetable for implementing Procopio's PIP. In annual observations before the one for 1993-1994, the timetable for implementing went from October to May of the following year. The 1993-1994 annual report mandates that all aspects of the PIP be implemented over the summer prior to the next school year. This departure from prior practice is reliable evidence of hostility.

Without second-guessing the educational judgments in the evaluation documents, we find it odd to note in a observation report of a second grade classroom that students were distracted and not working on the required task without also noting that a snowstorm was going on outside and that one of the two adults in the classroom (DiDio) had gotten up more than once to walk over to the window and look at the storm. This activity certainly could have drawn the attention of the six and seven-year old students away from the teacher and over to the principal standing at the

window watching the snowstorm. DiDio did not explain why these events were omitted from his observation report.

The fact that other teachers spoke out at the faculty meeting but were not adversely evaluated does not show that DiDio was free from anti-union animus. The other teachers were not Association officials. The only teacher who was adversely evaluated, for the first time in her 20-plus year career at the school, was the Association building representative, and the person with whom DiDio had to communicate in resolving staff concerns over working conditions.

We therefore adopt the Hearing Examiner's conclusion that the negative evaluation documents were motivated in part by DiDio's resentment of the Association.

For many of the same reasons, we also adopt the Hearing Examiner's conclusion that the Board did not meet its burden of establishing that it would have adversely evaluated Procopio absent her protected activity. While we will not substitute our educational judgment for the Board's, we note that the substance of DiDio's February observation report was disputed by Procopio in a detailed point-by-point response. The report criticizes Procopio for failing to keep her second grade students interested in a math lesson and for inadequate classroom management. Yet it omits any reference to a snowstorm which distracted the students' and the principal's attention. DiDio got up to walk over to the window and watch the snow more than once during the class. The

report also fails to mention that Procopio took a toy away from one student and a crayon from another. Moreover, Didio's assertion that Procopio's performance needed improvement before the end of the year and required additional "observations" is undercut by his failure to have her observed again before issuing an annual evaluation. We find his excuse (that he didn't reobserve Procopio because she grieved the report) to be inadequate.^{8/} In sum, the Board has not proved by a preponderance of the evidence that Procopio would have received the same evaluations absent her protected activity.

Turning to the allegation that the Board violated subsection (a)(4) by retaliating against Procopio for the Association's having filed an unfair practice charge on her behalf, we reject the Hearing Examiner's recommendation. We do not find a nexus between the filing of the charge and DiDio's observation of Procopio in early September to determine whether she had achieved the goals of her PIP. DiDio's actions in September were consistent with the PIP he established for her before the unfair practice charge was filed. While the evidence does not support a finding of a violation of subsection 5.4(a)(4), the amended charge alleged that the events of September 1994 were a continuation of the retaliation for Procopio and the

^{8/} The Board asserted that its administrators received training on improving their evaluation methods, but there was no testimony as to how these changes were manifested in Procopio's evaluation.

Association's protected activity the prior year. As the September 1994 PIP observation report was a continuation of the tainted evaluation process which commenced the previous school year, we find that it was done in retaliation for the exercise of protected rights.

However, we do not find that the memorandum issued as a result of the student disciplinary incident was an unfair practice. DiDio issued similar memoranda to other teachers (e.g., Blinsinger). In situations involving parent complaints, DiDio often took the parents' side without hearing from the teachers. See finding no. 7., H.E. at 10. Whether or not the memorandum constituted discipline without just cause, this record does not support a finding that it was prompted by the Association's filing of the charge or by the protected activity engaged in the prior year.

For these reasons, we conclude that the employer violated N.J.S.A. 34:13A-5.4(a) (1) and (3) when DiDio issued adverse evaluations of Procopio's teaching performance in March and May 1993 and in September 1994. We dismiss the allegations concerning the September 1994 reprimand.

We regret that the relationship between a principal and a building representative deteriorated to the point where litigation rather than communication became the mechanism for resolving workplace issues. But we have a statutory duty to decide unfair practice cases on the record before us. See In re Hunterdon Cty., 116 N.J. 322, 337-339 (1989).

ORDER

The Maple Shade Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing teachers and other unit personnel in the exercise of rights guaranteed them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by giving Betty Procopio an unsatisfactory Observation Report and Annual Evaluation Report for the 1993-1994 school year and a negative PIP Evaluation Report in September 1994 in retaliation for her activity on behalf of the Maple Shade Education Association.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by giving Betty Procopio an unsatisfactory Observation Report and Annual Evaluation Report for the 1993-94 school year and a negative PIP Evaluation Report in September 1994 in retaliation for her activity on behalf of the Maple Shade Education Association.

B. Take this action:

1. Remove the Observation Report and the Annual Evaluation Report for the 1993-94 school year and the September 1994 PIP Observation Report from Betty Procopio's personnel file.

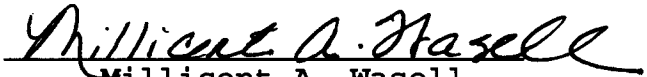
2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as

Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

The remaining allegations of the Complaint are dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Acting Chair

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

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



NOTICE TO EMPLOYEES



**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing teachers and other unit personnel in the exercise of the rights guaranteed to them by the Act, particularly by giving Betty Procopio an unsatisfactory Observation Report and Annual Evaluation Report for the 1993-1994 school year and a negative PIP Evaluation Report in September 1994 in retaliation for her activity on behalf of the Maple Shade Education Association.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act particularly by giving Betty Procopio an unsatisfactory Observation Report and Annual Evaluation Report for the 1993-1994 school year and a negative PIP Evaluation Report in September 1994 in retaliation for her activity on behalf of the Maple Shade Education Association.

WE WILL remove the Observation Report and the Annual Evaluation Report for the 1993-1994 school year and the September 1994 PIP Observation Report from Betty Procopio's personnel file.

Docket No. CO-H-95-41

MAPLE SHADE BOARD OF EDUCATION
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 96-17

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

In the Matter of

MAPLE SHADE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-95-41

MAPLE SHADE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Maple Shade Board of Education violated subsections 5.4(a)(3) and (a)(1) of the Act by refusing an Association building representative the right to represent other Association members and by rating her 1993-94 observation and annual evaluation unsatisfactory for filing a grievance and engaging in other protected activity.

The Hearing Examiner also found that the Board violated 5.4(a)(4) by giving the Association building representative an additional unsatisfactory observation and a reprimand shortly after the Association filed an unfair practice charge in her behalf.

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. 96-17

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

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Appearances:

For the Respondent
Cassetta, Taylor and Whalen
(Garry M. Whalen, Consultant)

For the Charging Party
Selikoff and Cohen, attorneys
(Steven R. Cohen, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On August 11 and October 5, 1994, the Maple Shade Education Association filed an unfair practice charge and an amended charge against the Maple Shade Board of Education. The charge, as amended, alleges that the Board violated subsections 5.4(a)(1), (3) and (4) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1

et seq.^{1/} The Association alleges that one of its building representatives, Betty Procopio, was given an unfavorable annual performance evaluation by her principal, Richard DiDido, in retaliation for activities on behalf of the Association. The amended charge also alleges that, after filing this charge, DiDido further retaliated against Procopio by giving her a second unfavorable rating in a follow-up observation and by issuing a written reprimand against her.

On November 10, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing on the charge and the amended charge (C-1). On November 22, 1994, the Board filed an Answer (C-2), denying that it violated the Act. It asserted that there was a legitimate business justification for Didio's actions toward Procopio.

I conducted a hearing on February 14, 15 and 17, 1995. The parties examined witnesses and presented documents. At the conclusion of the Association's case (2T5) and in its brief, the Board made a motion to dismiss. My decision is set forth within

^{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. (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."

this recommended report. At the conclusion of the hearing, the parties waived oral argument and filed post-hearing briefs, that last of which I received on May 15, 1995.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Betty Procopio has been employed for 25 years as a teacher by the Maple Shade Board of Education, a public employer (1T11-1T12; 1T53). Since the 1973-1974 school year, Procopio has taught second grade at the Maude Wilkins Elementary School (3T65) and been a member of the Maple Shade Education Association, a public employee representative within the meaning of the Act (1T12; 1T52; 1T53). In 1992, her colleagues voted her the Wilkins teacher of the year (CP-3; 1T68). From 1987 to 1994, Procopio served as the Association's building representative in the Wilkins school (1T53).

2. Richard DiDio has been employed by the Maple Shade Board of Education for 25 years as the principal of the Maude Wilkins Elementary School (3T12; 3T64). He has been Procopio's supervisor from the time she was transferred into the Wilkins school in 1973 (3T65).

DiDio knew of that Procopio had been the Association's building representative for a period of years (3T67). She routinely requested DiDio's permission to hold Association meetings in the building (1T76; 3T72-3T73). Procopio is the only Wilkins school employee to have filed a grievance. In 1988, she successfully

grieved a letter of reprimand from DiDio concerning a student he alleged was improperly disciplined (1T55; 1T57; 3T97).^{2/}

3. Board policy and the parties' negotiated agreement require that supervisors observe and evaluate annually all tenured teachers (J-1, Art. 8; J-2). The classroom observation is completed first, usually by January or February (1T53). The supervisor then writes up an observation report and reviews it with the teacher.

After the observation report is completed, the supervisor and the teacher cooperatively develop a professional improvement plan (PIP) which identifies instructional areas that need improvement in the coming school year (J-1, Art. 8; J-2; 1T55; 1T61; 1T163). However, the supervisor should promptly address any significant weaknesses in a teacher's performance and not wait until the PIP is issued (J-2, Section D). The PIP becomes part of the teacher's annual evaluation report which is written by the supervisor. The evaluation report covers the teacher's strengths and areas in need of improvement and a summary of pupil progress (J-1, Art. 8; J-2).@

Usually by May, the teacher receives a copy of the annual evaluation report and meets with the supervisor to review it (1T54; J-2). The teacher may add additional information to the report, including her own evaluation (J-1, Art.8). The supervisor and the

^{2/} Procopio testified that, in spite of a directive from the Board that the reprimand be removed, the letter was still in her file as of July 1994 (1T57).

teacher sign the annual evaluation report and send it to the superintendent's office for filing in the teacher's personnel file (J-2). A teacher must be notified before any derogatory material is placed in her personnel file. The teacher may submit a written response which the superintendent will review and attach to the evaluation report (J-1, Art. 8).

In June of 1993, at the request of the the district's new superintendent, Dr. James Kerfoot, all supervisors attended a workshop on conducting effective, accurate teacher evaluations (3T59).

4. The 1993-1994 school year at the Wilkins school did not begin well. Renovations begun in early 1993 to convert the school's all-purpose room to a cafeteria were still not completed in September. Lunch and health and physical education classes were being held in the classrooms, thereby affecting the teachers' preparation time. Teachers complained daily to Procopio that the construction was interfering with their schedules and that they could not discuss their concerns with DiDio. He was just "shrugging his shoulders" when they attempted to talk to him. In addition, paper supplies were low and the new copying machine was not working properly. A negative tone pervaded the building (1T16; 1T32; 1T73-1T75). Procopio held more building meetings that fall than in previous years (1T81). She also spoke to DiDio about the teachers' complaints (1T17).

5. The parties' negotiated agreement provides for a four-step grievance procedure ending in binding arbitration. The first step is an informal discussion between an employee and the principal.^{3/} The Association has a right to be present at all steps of the grievance process whether or not the grievant has designated the Association as her representative (J-1, Art.7).

In the third week of October, Gail Blinsinger, a health and physical education teacher, asked Procopio to represent her at a meeting she had scheduled with DiDio (1T77). Blinsinger wanted to address DiDio's complaint that she had not placed her lesson plans where a substitute teacher could find them (1T35; 1T48). In addition, she wanted to discuss health problems she was having (1T31; 1T35; 1T76). DiDio had been unresponsive to her earlier complaints about the poor air quality in her office, which was located next to the recently constructed kitchen (1T33-1T34; 1T47; 1T36).

The meeting with DiDio was very brief. Blinsinger had not notified DiDio that Procopio would be attending the meeting (1T140; 3T77). When DiDio saw that Blinsinger had brought Procopio as her union representative, he abruptly ended the meeting and left the room (1T77; 3T76).

^{3/} The second step is a written grievance filed by the employee with the principal; the third step is to the superintendent and the fourth step is to the Board. The fourth step is an appeal by the Association to binding arbitration (J-1, Art. 7).

The testimony from the three participants in this meeting is similiar. Blinsinger testified that DiDio said, "The memo wasn't something that needed an Association representative" (1T35). Procopio testified that DiDio stated, "You didn't tell me you were bringing the building representative. This is the end of the meeting" (1T77). DiDio testified that he abruptly ending the meeting because "the union representative was there without (his) prior knowledge" (3T76; 3T77). It is clear that DiDio was reacting to Procopio's presence as the union representative.

Blinsinger wanted to pursue a resolution to her health complaints and to explain to DiDio about her lesson plans; therefore, she and Procopio scheduled a second meeting with DiDio for the following week (1T36; 1T48; 1T77). Blinsinger asked Procopio to remain outside while she met with DiDio in his office (1T36; 1T79-1T80). The meeting lasted 15 minutes or more (1T37; 1T80), after which Blinsinger told Procopio that matters had been resolved (1T81) and that DiDio was willing to look into her health related complaints (1T36).

6. In the following week, Association President Richard Keegan and Vice-President Andy Seffron met with the Wilkins school staff to discuss their myrid complaints, many of which were caused by the contruction (1T17; 1T75; 2T47; 3T123; CP-9). It was decided that a second meeting was needed (1T18). Keegan and Seffron then talked with the superintendent, Dr. Kerfoot, and asked him to meet with the Wilkins school staff at a previously scheduled building

meeting to be held in the school library. They told Dr. Kerfoot that he must attend because the staff was "near mutiny" (2T19-2T20; CP-2). DiDio would not be attending because he was on vacation (3T81-3T82). Although Dr. Kerfoot initially thought it would be unfair to hold a meeting while DiDio was away, he agreed to attend because of the sense of urgency portrayed by Keegan and Seffron (2T21).

The building meeting had been previously scheduled by Procopio for November 2, 1993 (1T80; 1T82). Procopio testified that she followed her usual practice of asking DiDio's permission to hold it (1T81; 3T117). DiDio denied that she had made the request (3T80; 3T81), or that she "made the arrangements" for the meeting (3T84). I credit Procopio's testimony which was detailed and direct. I found DiDio's testimony on this point to be less reliable than Procopio's. DiDio's responses were elicited by an insistent cross examination. In his recollection, he had to differentiate between two important meeting dates: the November 2 staff meeting and a November 8 meeting he had with the superintendent (see Findings of Fact #8, below). I noted DiDio's discomfort and hesitancy when he answered questions.

Before the building meeting began on November 2, 1994, Keegan called Procopio and told her that he and Seffron were going to attend the meeting with Dr. Kerfoot (1T83). Procopio, like Dr. Kerfoot, did not think it was a good idea to hold the meeting without DiDio (1T83; 1T131).

7. All of the staff attended the hour-long meeting (1T87; 2T21; CP-9). The tenured teachers were seated in the main meeting room. Procopio had instructed the non-tenured teachers to sit in a side room and say nothing (1T19; 1T84-1T85; 1T145). She was afraid that the non-tenured teachers would be retaliated against if they participated in the meeting. Her fear proved unfounded. Dr. Kerfoot was the only administrator present. There is no evidence that attendance was taken. Dr. Kerfoot stated that he did not know which teachers were tenured, as this was just his second year as superintendent (2T22). As his notes show, he made no attempt to identify those teachers who spoke (1T20; CP-1).

Initially, the staff was reluctant to speak (1T20). Dr. Kerfoot told the assembled teachers that he was aware of the negative tone in the building (1T19; 2T31). He asked them speak freely about their concerns and he would take notes without revealing names (1T20; 1T21; 1T83; 2T23; 2T31; CP-1).

One teacher observed that it looked like they were conducting a "witchhunt." Another teacher asserted that it was disloyal to hold a meeting without DiDio and he would be angry (1T20; 1T37; 1T49; 1T50). After Dr. Kerfoot reassured the staff that they would not be retaliated against, the tenured teachers aired their feelings (1T23; 1T37-1T38). Dr. Kerfoot wrote down their complaints (2T25; CP-1).

The faculty stated that the school year had started badly (2T47). DiDio appeared to be overwhelmed by the construction

(2T45), which exacerbated existing problems that the teachers had with him (2T48). They complained that DiDio was vindictive and overly critical and that he needed to improve his interpersonal skills. They stated that he responded to situations in an erratic and emotional manner; either he over-reacted or shrugged off suggestions (1T86-1T87; 2T13; 2T33; CP-1). Blinsinger told Dr. Kerfoot about DiDio's abrupt termination of the recent meeting he had had with her and Procopio (1T87; 2T27, CP-1). Teachers complained that DiDio had not made scheduling changes or planned for student groupings necessitated by the construction (2T27; CP-1). There were comments that DiDio intimidated not only teachers, but students and parents alike (2T45; CP-1); that he reprimanded teachers in public; and, if a parent had a complaint, he would side with the parent without talking to the teacher (2T23; CP-1). Teachers felt that DiDio's performance evaluations were generally negative, especially of non-tenured teachers. DiDio's evaluation comments were not helpful because he relied too much on references to the Rosenshine method of instruction without providing other suggestions (2T28; CP-1).

At the conclusion of the meeting, Dr. Kerfoot told that faculty that he intended to meet with DiDio at the first opportunity on the following Monday, November 8, 1993. This was the day DiDio would return from vacation. Dr. Kerfoot asked that the faculty not speak to DiDio before he had a chance to meet with him (1T21; 1T40; 1T87). Dr. Kerfoot left the meeting, "concerned" and "upset" that the entire staff distrusted DiDio's leadership (2T34-2T35; 2T36).

8. On November 8, 1993, at approximately 8:00 a.m., Dr. Kerfoot met with DiDio (1T41; 1T92; 2T34). Dr. Kerfoot told DiDio that Association officers, Keegan and Seffren, had asked him to attend a meeting with the Wilkins staff the week before (CP-9; 2T19). I note here that DiDio testified that he did not hold Procopio accountable for the November 2 staff meeting (3T84). I infer that DiDio based his conclusion on this information from Dr. Kerfoot.

Dr. Kerfoot, using a handwritten outline of comments he had noted at the November 2 meeting, related the staff's complaints (CP-9). He concluded that the staff thought of DiDio as a poor leader (2T33; 2T34). DiDio hung his head and told Dr. Kerfoot that he was "hurt" by the teachers' complaints (2T37; 2T38).

Dr. Kerfoot told DiDio that he must attempt to be more open and communicative with his staff, to listen to them and to try to make them feel comfortable when he talked with them (2T37-2T38; 3T111; CP-9). Dr. Kerfoot ended the meeting by directing DiDio to meet with the faculty that same day and to inform them of this discussion (2T37).

9. After Dr. Kerfoot left the building, DiDio sought out Helen Iapalucci, a teacher at the Wilkins school with whom DiDio had a rapport (1T15; 1T23; 3T111). Iapalucci routinely discussed problems with DiDio (1T24). DiDio told Iapalucci about his meeting with Dr. Kerfoot. Iapalucci confirmed Dr. Kerfoot's statement that all the teachers at the November 2 meeting, including her, had a

complaint about the conditions in the building (1T23). DiDio told Iapalucci that their problems did not need to be taken to the "Association level," but that the teachers should come to him and discuss their problems. DiDio explained that he had a plan to improve communications between him and the staff (1T24). DiDio considered Iapalucci to be a good communicator and other faculty members respected her (3T111). Therefore, DiDio proposed that Iapalucci be an intermediary: Iapalucci could talk to a teacher who was uncomfortable talking to DiDio alone or she could "go in" with a teacher to see DiDio (1T24-1T25). Iapalucci agreed to help DiDio (1T27; 3T87).

Shortly after meeting with Iapalucci, DiDio announced over the school's public address system that he was convening an emergency faculty meeting at the end of the day (1T25; 1T92). At the meeting, DiDio told the assembled staff that he and the superintendent had met earlier that morning. DiDio stated that he was hurt to discover that there were problems in the school (3T85), but he had a plan to open lines of communication with the staff (1T26; 1T42; 1T95; 3T91). The staff should bring their problems to him so that an informal solution could be worked out without (the staff) having to go to the union (1T27; 1T94; 1T151; 3T91). But, if they felt more comfortable talking to someone else, DiDio suggested that they bring their problems to him through Iapalucci (1T27; 3T114).

Procopio asserted that throughout the meeting, and particularly after announcing that he was "hurt," DiDio looked directly at her (1T93; 1T150; 1T169). I do not credit her testimony. DiDio admitted that he looked at Procopio - she was sitting just seven feet from him (1T92) - but he denied that he stared at her (3T62). There is no support for Procopio's allegation in the testimony of Blinsinger and Iapalucci, who also attended the meeting. In fact, Iapalucci did not remember where Procopio sat in relation to DiDio (1T126). Blinsinger noted that the meeting was "low key" (1T42).

The staff did not respond favorably to DiDio's plan. A teacher pointed out that DiDio's plan circumvented the Association's representative (1T28; 1T44; 3T88). DiDio was disappointed by the reaction (1T28). Iapalucci changed her mind (1T27) about participating in DiDio's plan (3T87). Based upon these facts, I conclude that DiDio's plan was never implemented.

10. On February 23, 1994, DiDio observed Procopio teaching a math lesson (1T95; R-3). DiDio prepared a four page narrative-style observation report, in which he concluded that the "lesson was unsatisfactory" and that he was "concerned about the total math program being taught in (her) room" (CP-4). DiDio listed 10 specific suggestions pertaining to "all areas of instruction and content areas." DiDio concluded that he "would expect to see instruction greatly improved before the end of this school term." He stated that he would be scheduling additional observations of math lessons (CP-4; 1T98-1T100).

The 1993-94 observation report was the most detailed and the most critical report received by Procopio from DiDio in the past five years. In observation reports from the school years 1988-89 through 1992-93, Procopio received overall satisfactory ratings (R6a-R6e; 1T100). These reports were typed on a two-page form, subdivided into six comment sections (R6a-R6e).^{4/}

Procopio received a copy of the report on February 25, 1994 (1T97). She prepared an eight page response and attached it to the observation report (CP-5). She noted that DiDio had been distracted by a snowstorm that was taking place during the lesson. As a consequence, she felt that the accuracy of DiDio's observations were compromised (CP-5; 1T97). She requested that he teach a model math lesson to demonstrate the Rosenshine model of instruction before he observe her again, but she wanted another person present during this lesson. She concluded by suggesting, "Is it possible that this observation was written in realiation for an MSEA Building Meeting?" (CP-5, p.7).

11. Shortly after Procopio got her copy of the observation report, she met briefly with Dr. Kerfoot. She complained that DiDio had given her an unwarrented negative observation report, as demonstrated by her students' performance on standarized achievement tests (1T111-1T112; 1T132). She told Dr. Kerfoot that she thought

^{4/} Although the "summary" section of the 1991-92 observation report was attached as a seperate page, the length of the comment would have fit within the space provided on the form (R-6d).

DiDio had rated her unsatisfactorily in retaliation for the November 2 meeting. She declared, "Dick DiDio and I have not gotten along from the day I walked into the building" (1T133; 2T14; 2T42). I credit this statement as the most accurate of Procopio's testimony describing her relationship with DiDio. Dr. Kerfoot remembered the statement vividly (2T14). Procopio readily admitted that she made this declaration. Her other responses were less candid. On direct, she characterized her relationship with DiDio as "cordial" (1T53). But later, on cross-examination, she admitted that it was "not a warm, cordial relationship" (1T132), but "professional" (1T168). Dr. Kerfoot was the first superintendent to know how Procopio and DiDio felt about each other (2T14-2T15). The meeting was interrupted and had to be rescheduled to March 4, 1994 (1T111; 1T163).

12. DiDio typically involved Procopio when a parent of one of her students called him with a complaint (1T122; 1T123). On March 2, 1994, Procopio received a memo from DiDio, asking her to attend a meeting in his office on March 7 with one of her student's parents. The parents alleged that Procopio, for the second time, had physical contact with their child - she had "slammed" the student's hands on top of his desk (R-1). DiDio asked Procopio to meet with him first to discuss her side of the story before they met with the parents (1T123; R-1). When a parent of another of Procopio's students called on March 28, 1994, complaining that Procopio had refused to let his son go to the nurse after being hit

in the stomach by another student, DiDio met with Procopio (R-2a) and let her talk with the parent(s) in order to resolve the matter (1T123; 1T172; R-2b).

On cross-examination DiDio denied that he had an "ordinary practice" of allowing the teacher to meet with the complaining parent. Depending on how serious the parental complaint was, he might meet with the teacher immediately (3T103-3T104). This does not contradict Procopio's testimony. As the documents R-2a and R-2b indicate, DiDio met with Procopio first and then included her in the process of resolving the matter with the parent(s).

On or about March 2 (1T162), DiDio and Procopio were scheduled to meet and discuss his observation report and her response (3T29). DiDio was prepared to tape the meeting (3T92). When Procopio arrived, she announced that she had been advised to put their discussion on tape (3T30). DiDio and Procopio each taped the meeting on their respective tape recorders (3T29; 3T91-3T92).

13. On March 4, 1994 (1T162), Dr. Kerfoot talked with DiDio. He had reviewed DiDio's previous evaluations of Procopio and noted that the current year's rating was "markedly different" (2T42-2T43). Later that day, Dr. Kerfoot met with Procopio for a second time. He told Procopio that the best way to resolve the conflict between her and DiDio was to transfer her to another school in September (1T113; 1T133-1T134; 2T15). In 1987, DiDio had asked that the former superintendent, Dr. John Sherry, transfer Procopio to another school where she could be evaluated by another

adminstrator. He felt that his efforts to improve her teaching performance were losing their effectiveness (R-8).^{5/} Procopio never learned of DiDio's request (3T67-3T68), which was denied (3T58; 3T68).

14. On March 16, 1994, Procopio asked DiDio for permission to hold an Association meeting, the first since November 2, 1993. The meeting was scheduled for March 22nd (3T118; 3T123). In a departure from their informal practice of a verbal response to a verbal request, DiDio told Procopio that he wanted the request in writing ((3T12; 3T119-3T120; 3T122). Procopio gave him a handwritten memo, which DiDio initialed shortly thereafter (CP-10; 3T121).

Before 1994, DiDio had always approved Procopio's requests to be reimbursed for professional courses she took. In March 1994, DiDio denied Procopio's request to attend a seminar (1T102; 1T103). Dr. Kerfoot had directed principals not to approve workshops or siminars unless they would benefit their school's educational programs (2T15; 2T39). Procopio's request came at the end of the school year when funding would have to be approved from special program accounts (2T15-2T16).^{6/} After being denied, Procopio

^{5/} DiDio testified that his efforts consisted of "stroking" Procopio and giving her positive reinforcement (3T58).

^{6/} Procopio testified that DiDio had approved requests from kindergarten teachers, but that they had applied before she did (1T105; 1T153), and they were attending workshops in subjects Dr. Kerfoot identified as supportive of the district's programs (1T153; 2T15).

resubmitted a request to use a personal day to attend the workshop at her own expense (1T104). DiDio, unsure if there were funding implications to Procopio's second request, called Dr. Kerfoot (2T41). Dr. Kerfoot told DiDio to send it to him for his review. He approved Procopio's request (2T16).

In its cross-examination of Dr. Kerfoot, the Association characterized the decision of whether to approve Procopio's offer to take the seminar at her own expense and on her own time a "no-brainer" (2T41), implying that Dr. Kerfoot's explanation was merely a cover for DiDio's uncooperative behavior. I found Dr. Kerfoot's testimony to be credible. He answered in a forthright and believable manner.

Sometime in March 1994, Procopio filed a grievance over the February 23rd observation report (1T157-1T158).^{7/}

15. On May 23, 1994, DiDio and Procopio met to discuss the Narrative Summary (Section I) and the Professional Improvement Plan (PIP), Section II, that made up her annual evaluation report for the school year 1994-1995 (CP-2f). Section I, the Narrative Summary, is divided into three parts: "strengths," "continued growth" and "recommendations." DiDio identified three areas under "strength."

DiDio considers the category "continued growth" as the place to identify unsatisfactory or deficient performance (3T71).

^{7/} The negotiated agreement between the parties specifies that a grievance must be initiated within 30 days of a grievable incident (J-1; Article VII).

In 1993-94 report, he identified three areas for continued growth: lesson planning, teacher methodology and classroom management/educational environment. In 1988-89, DiDio had listed only classroom management/education environment (CP-2a). No areas were identified as deficient in the Narrative Summaries for 1989-90 through 1992-93 (CP2b-CP2e).

Finally, under "recommendations," DiDio listed eight specific items (CP-2f, Section I). These recommendations were more extensive than any made in the past five years (CP-2a through CP-2e). For the school year 1988-89, DiDio had listed just two items: Procopio was to "strive" to be part of a student assistant committee and to read about assertive discipline and "determine the most effective approach" (CP2a). The only recommendation stated for the school years 1989-90 through 1992-93 was that Procopio "maintain present levels of competency" (CP2b-CP2f).

The Narrative Summary is attached to Section II, the PIP. In the past, Procopio had written her PIP and DiDio had adopted them without any changes (1T55; 1T61; 1T63; 1T65; 1T66). This year, the PIP was prepared by DiDio (1T106-1T107). Like the PIP's developed in the past by Procopio, DiDio's PIP listed goals to be achieved: DiDio specified that Procopio achieve appropriate discipline and improve planning and methodology (CP-2a through CP-2e; CP-2f).

In previous PIP's, goals were to be fulfilled by the end of the following school year (1T61; 1T63; 1T65; 1T67; 1T71; 1T72; CP-2b through CP-2e). DiDio's PIP, however, prescribed the months between

May and September 1994 as the time in which Procopio was to prepare a disciplinary plan and "share" it with him (CP-2f). DiDio wanted the plan to be ready for the next school year (3T36). Similarly, Procopio was to achieve the second goal, improving planning and methodology, by teaching a lesson based upon the Rosenshine methodology in the first week of the 1994-95 school year. DiDio would observe and "critique" the lesson (CP-2f; 3T36).

Procopio prepared a brief response to be attached to the evaluation report. It states: "How would one know if Mr. DiDio's recommendations were or were not followed since DiDio did not revisit my classroom after 2-23-94? I asked Mr. DiDio this question during our conference. Mr. DiDio's response was 'You filed a grievance against me.'" (CP-2g; 3T97). DiDio explained to Procopio that he did not have to go back into her classroom; but because she filed a grievance, he could not observe her again (3T97). On June 2, 1994, the evaluation report with Procopio's response attached was signed by DiDio and Procopio for filing with Dr. Kerfoot's office (CP-2f; J-1, Article VIII).

Sometime after she saw her evaluation, Procopio told Blinsinger that DiDio had retaliated against her by giving her an unfavorable evaluation that made her look bad (1T45). Other teachers in the school told Iapalucci that Procopio's evaluation was the "the worst ever" (1T28; 1T45). Both Blinsinger and Iapalucci received good evaluations from DiDio (1T29; 1T51).

16. On August 9, 1994, the Board received a copy of the unfair practice charge file by the Association in this matter (1T114; Cm-1).

In late August, Procopio returned to work to begin preparations for the new school year beginning September 6, 1994 (1T114; 1T116). On September 2, 1994, she found a memo from DiDio in her mailbox, dated August 25, 1994, reminding her that her PIP responsibilities were due in "September and the beginning of the school" (1T114-1T115; 3T37; CP-6).

In accordance with the PIP (CP-2f), DiDio notified Procopio that he would observe a math lesson on September 16, 1994, four days after classes began (1T117; 1T159; 1T160; 3T37; CP-7). After the observation, he wrote up a two page report. Although DiDio thought that Procopio's overall performance was slightly better (3T41), he identified five areas of instruction that were deficient and needed improvement; and four areas of strength (CP-7). Without telling Procopio (1T170; 1T171; 3T102-3T103), DiDio placed the "PIP observation report" in Procopio's personnel file (1T120-1T121). At Procopio's request, DiDio returned to her classroom to teach a demonstration math class on September 29, 1994 (3T41; R-4; R-5).

17. On September 22, 1994, DiDio issued a written reprimand to Procopio concerning complaints from a parent who alleged that her son did not want to come to school because of the way Procopio was treating him. DiDio labeled one of the complaints "most serious." Procopio had located the student's missing spelling

book by emptying the contents of the student's desk onto the floor. DiDio directed Procopio to "find a better way" to locate missing items (CP-8). A second complaint, that Procopio had not let the student see the nurse, was still being investigated. However, DiDio told Procopio to be "sensitive to these kinds of requests from students" (CP-8).^{8/} DiDio noted that this was the third parental complaint in a calendar year (3T48). The reprimand was placed in Procopio's personnel file (1T122; 1T172; 3T47; CP-8).^{9/}

18. Procopio resigned as the Association representative for the Wilkins school. Members of the staff "didn't take their problems to Betty (because) they didn't feel Betty . . . could do a good job for them." (1T46; 1T130). Because no one teacher wanted to be the building representative, two representatives, one of whom is Iapalucci (1T29; 1T46; 1T125) are serving the Wilkins school. Procopio is currently the Association's corresponding secretary (1T52-1T53).

ANALYSIS

In In re Bridgewater Tp., 95 N.J. 235 (1984), the New Jersey Supreme Court established a test to be applied in analyzing whether a charging party in a 5.4(a)(3) case has met its burden of

^{8/} Didio stated that Procopio had given him a enough information to resolve a complaint about homework.

^{9/} Procopio testified without supporting evidence that this was the first parental complaint ever put in a teacher's file at the Wilkin's school (1T125).

proof. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing that the employee engaged in activity protected by the Act, that the employer knew of this activity and that the employer was hostile toward the exercise of the protected activity. 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 has proven, 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 proven, 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 Board does not contest that Procopio engaged in protected activity when she was fulfilling her responsibilities as the building representative (Board's brief, p. 2). Early in the

1993-94 school year, her protected activities increased. Procopio held many union meetings and had talked with DiDio in an attempt to improve working conditions of the teachers affected by the ongoing construction in the building. She sought to represent Blinsinger at an informal discussion with DiDio. Her participation in the Association meeting on November 2, 1994, where the entire staff of the Wilkins school met with the superintendent to object about conditions at the Wilkins school.^{10/} DiDio clearly knew of these activities.

I find direct evidence that DiDio was hostile toward Procopio because of these activities. In October 1993, Blinsinger set up a meeting with DiDio to discuss a written complaint she had received from him. She was also seeking a remedy for the poor ventilation in her office, a concern that DiDio had refused to address in previous weeks. These were potential grievance issues that Blinsinger wanted to settle informally with DiDio. Therefore, she brought Procopio, her union representative, with her to the meeting.^{11/} But DiDio pointedly refused to go on with the meeting

^{10/} Protected activity is found whenever an employee complains, argues, objects, writes letters or engages in other activities related to enforcing a negotiated agreement or existing working conditions. North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (14205 1978), App. Div. Dkt. No. A-698-78 (4/11/79).

^{11/} The Commission has held that issues dealing directly with employee safety and health are mandatorily negotiable. Union

with Procopio present. In order to resolve matters with DiDio, Blinsinger understood that she would have to forgo her union representation. When she met with DiDio a second time, she asked Procopio to wait outside his office. Only then was she able to successfully discuss her concerns with DiDio.

DiDio's anti-union animus manifested itself again shortly after his meeting with Blinsinger. On November 8, 1993, DiDio learned that his entire staff had attended a "grip" session and vented their complaints about him to the superintendent, Dr. Kerfoot. He knew that the meeting had been organized by the union. As a direct result of the union's involvement in matters at his school, DiDio's career was threatened.

Didio devised his open communications plan that same day. He clearly stated his goal to Iapalucci, who was a key player in his plan to open his door to faculty seeking an audience with him. He wanted to keep the Association out of the picture.

He stated this goal a second time when he presented his plan to the whole faculty. He hoped that, between him and/or Iapalucci, staff members' problems could be resolved without the

11/ Footnote Continued From Previous Page

County, P.E.R.C. No. 84-23, 9 NJPER 588 (¶14248 1983); Tp. of Franklin, P.E.R.C. No. 85-97, 11 NJPER 224 (¶16087 1985); Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987). An employee may present her views on health matters that affect her, even if those matters are not negotiable. Burlington Cty. Vo-Tech Bd. of Ed., P.E.R.C. No. 88-55, 13 NJPER 810 (¶18310 1987).

union. That is, he could deal with the staff in the same way that he dealt with Blinsinger. But he was thwarted once again by the union, in the form of objections from the staff that he was depriving Association members of union representation. DiDio never put his plan into operation. In short, any complaints would have to be brought to DiDio through Procopio.

The Board points out that when DiDio proposed his plan to Iapalucci and thereafter to the staff, he never referred to Procopio by name. He only talked about "the union" or "the Association." The Board concludes that DiDio was referring to the Association president and vice-president, not Procopio. I disagree. As the Blinsinger incident illustrates, DiDio knew that Procopio had and would be a participant, as the building representative, in resolving complaints in his building. But, even assuming the validity of the Board's argument, it is not less repugnant under the Act if hostility towards protected activity is generally expressed rather than expressed towards an individual.

I also find circumstantial evidence of DiDio's hostility toward Procopio's exercise of protected activity in the timing of events after November 1993. Timing of an adverse action is an important factor in assessing motivation.^{12/} The observation

^{12/} See City of Margate, H.E. No. 87-46, 13 NJPER 147 (¶18067 1987), adopted P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987); Essex Cty. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185 (¶19071 1988), recon. den. P.E.R.C. No. 88-112, 14 NJPER 345 (¶19132 1988); Downe Tp. Board of Education, P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985).

report is an important component of a teacher's annual evaluation process; it forms the basis for the final annual evaluation report. Within approximately three months of the November 2 and 8, 1993 staff meetings, DiDio gave Procopio an unsatisfactory observation report. For the previous five years, Procopio had received generally satisfactory observation reports from DiDio.

The Board asserts that DiDio had a legitimate reason for giving Procopio an unsatisfactory report. It asserts that Procopio was a mediocore teacher and that her performance had deteriorated during the 1993-94 school year. The record does not support the Board's argument. Procopio's observation reports and annual evaluation reports for that past five years indicate that she was performing satisfactorily.^{13/} There is no evidence in the record to explain the supposedly precipitous decline of a teacher with 20 years experience could decline so.

The dramatic difference between the highly critical observation report of 1993-94 and reports from the last five years was commented on by Dr. Kerfoot. He noted there was a "marked difference." The Board argues that the difference can be explained by the fact that DiDio had just been trained in conducting effective evaluations and the 1993-94 observation report reflects this. The workshop was mandated by Dr. Kerfoot for all evaluators in the

^{13/} I do not consider the validity of each point of the observation reports or the annual evaluation reports in the record.

school district. Yet, Dr. Kerfoot did not testify that the report was an example of the type of effective and accurate observation he was looking for.

I find other evidence that the unsatisfactory observation was pretextual. The Board's policy unscors the purpose of the PIP as assisting a teacher in reaching her full potential. Therefore, deteriorating performance must not be ignored until the PIP is developed. DiDio did not mince words in his observation. Not only was the math lesson unsatisfactory, but he was expressed fears about the adequacy of the "total math program" and other content areas being taught. Yet DiDio did not attempt to provide professional assistance to Procopio, either in the way of instructional support or follow-up observations before the end of the school year. I infer that DiDio did not provide assistance to Procopio because there was no need for it and that the observation report was a pretext.

In addition, by not providing Procopio with any professional assistant, DiDio effectively deprived her of an opportunity to improve her final annual evaluation. By his own admission to Procopio, DiDio admitted that the reason he would not

come back into her classroom was that she had subsequently filed a grievance contesting the observation report.^{14/} Therefore, he was punishing her further for engaging in protected activity.

I find that DiDio set up a PIP observation schedule for the first week of the new school year for the same reason. The Board's policy for annual evaluations states that the PIP should identify instructional areas that need improvement in the coming school year. DiDio's PIP set May through September 1994, as the time frame within which Procopio was to achieve her instruction goals. This was a major departure from Procopio's previous PIPs which specified the next school year as the schedule. DiDio foreshortened the PIP schedule to keep the pressure on Procopio.

Further, the first days of a school year for elementary school children are as important for "settling in" a class to the routine of school as they are for instruction. DiDio would be more sure to observe some weaknesses in Procopio's lesson at this time than later in the school year.

Based on the foregoing, I find that the Board has not demonstrated by a preponderance of the evidence that DiDio would not

^{14/} The Commission has held that the filing of grievances is a protected activity: see Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986); and Trenton Bd. of Ed., P.E.R.C. No. 88-135, 14 NJPER 452 (¶19187 1988).

have given Procopio a negative evaluation absent her protected conduct.

An employer may not retaliate against an employee for filing a complaint with the Commission. See Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986) and Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552-553 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83). If the employer's actions tend to interfere with an employee's exercise of protected rights and the employer has not demonstrated that it has a legitimate and substantial business justification its actions than it has violated subsection (a)(4).

Before Procopio returned to work for the new 1994-95 school year, she filed this unfair practice. DiDio observed a math lesson four days after classes began. By DiDio's own estimation, Procopio's performance was "slightly better." However, the "critique" prescribed in the PIP became a two page PIP observation report and treated as a formal part of Procopio's annual evaluation. The transformation of the "critique" to a more formal PIP report after Procopio filed the unfair practice charge suggests retaliation. The fact that DiDio filed the PIP report in her personnel file without her giving her the opportunity to respond also suggests that DiDio had an ulterior reason for the adverse

action. See University of Medicine and Dentistry of N.J., P.E.R.C. No. 86-5, 11 NJPER 447 (¶16156 1985).

Shortly after DiDio observed the math class, he issued a written reprimand to Procopio. The Board rationalized the reprimand as progressive discipline. DiDio claimed that this was the third time that Procopio was the subject of a parental complaint, thereby necessitating a reprimand. However, one of earlier parental complaints was resolved between Procopio and the parent and therefore was of no import. The second earlier complaint was more serious. It concerned an allegation that Procopio had slammed a student's hands on his desk. Yet, it too was resolved by DiDio with Procopio and the parent. DiDio's reaction, then, to the September 22 complaint appears disproportionately harsh when compared with this earlier complaint and therefore, suspect.

Finally, I do not credit DiDio's assertion that this was an act of progressive discipline. The other two complaints were resolved and were no longer at issue.

Based on the above, I conclude that DiDio issued the PIP report and the written reprimand in retaliation for Procopio's filing an unfair practice charge.

RECOMMENDED ORDER

I recommend that the Maple Shade Board of Education:

A. Cease and desist from:

1. Interfering with, restraining or coercing teachers and other unit personnel in the exercise of rights guaranteed them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by interfering with MSEA representative Betty Procopio's right to represent MSEA member Gail Blinsinger in October 1993 concerning terms and conditions of employment to Principal Richard DiDio during the school year 1993-94; by Principal Richard DiDio attempting to appoint someone other than MSEA representative Betty Procopio at the November 8, 1993 staff meeting to represent MSEA members concerning terms and conditions of employment during the school year 1993-94 and by admonishing her for filing a grievance contesting her unsatisfactory Observation Report for the school year 1993-94.


2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by Principal Richard DiDio giving Betty Procopio an unsatisfactory Observation Report and Annual Evaluation Report for the school year 1993-94.

3. 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,

particularly, by Principal Richard DiDio giving Betty Procopio a negative PIP Evaluation Report for the school year 1994-95 and by reprimanding her on September 22, 1994 because the MSEA filed an Unfair Practice Charge.

B. Take the following affirmative action:

1. Remove the Observation Report and the Annual Evaluation Report for the school year 1993-94 from Betty Procopio's personnel file.
2. Remove the PIP Observation Report for the school year 1994-95 and the September 22, 1994 written reprimand from Procopio's personnel file.
3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.
4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.


Illse E. Goldfarb
Hearing Examiner

DATED: February 28, 1996
Trenton, New Jersey



NOTICE TO EMPLOYEES



PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION AND IN ORDER TO EFFECTUATE THE POLICIES OF THE NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT, AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by interfering with MSEA representative Betty Procopio's right to represent MSEA member Gail Blinsinger in October 1993 concerning terms and conditions of employment to Principal Richard DiDio during the school year 1993-94; by Principal Richard DiDio attempting to appoint someone other than MSEA representative Betty Procopio at the November 8, 1993 staff meeting to represent MSEA members concerning terms and conditions of employment during the school year 1993-94 and by admonishing her for filing a grievance contesting her unsatisfactory Observation Report for the school year 1993-94.

WE WILL NOT discriminate in regard to hire and tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by Principal Richard DiDio giving Betty Procopio an unsatisfactory Observation Report and Annual Evaluation Report for the school year 1993-94.

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WE WILL remove from the personnel file of Betty Procopio the Observation Report and the Annual Evaluation Report for the school year 1993-94.

WE WILL remove from the personnel file of Betty Procopio the PIP Observation Report for the school year 1994-95 and the written reprimand dated September 22, 1994.

Docket No. CO-H-95-41

MAPLE SHADE BOARD OF EDUCATION

(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372



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