H.E. No. 2009-9

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

In the Matter of

WEST PATERSON BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2007-255

WEST PATERSON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Board violated 5.4a(3) and derivatively (1) of the Act when Superintendent Rixford refused to grant discretionary time off to custodians and secretaries in retaliation for the Association's filing of grievances and the rejection of his proposals to alter terms and conditions of employment. She also recommends that the Board independently violated 5.4a(1) when Rixford threatened to lay off custodians if they did not work with him. The Hearing Examiner, however, dismisses the allegation that Rixford's statements to the Association co-presidents that they should not seek advice from Uniserv Representative Loccke because he prevented the parties from resolving issues independently violated 5.4a(1). Those statements were made between equals.

Next, the Hearing Examiner recommends that the Commission find that the Board violated 5.4a(4) of the Act when Rixford transferred Custodian Massimo Amato for the 2008-2009 school year to another school with different, less desirable work hours shortly after he testified at the first day of hearing in this matter. She rejected the Board's rationale as pretextual. However, she recommends dismissing the allegation that the Board reassigned Secretary Sharon Lovas in violation of 5.4a(4) finding that Rixford planned the reassignment well before the testimony and would have reassigned her whether or not she testified at the hearing. Finally, the Hearing Examiner recommends that the 5.4a(5) and (1) allegations regarding direct dealing be dismissed. She determined that Rixford's polling of custodians regarding his proposal that they work certain in-service days in exchange for discretionary time off at Christmas was permissible conduct.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Schenck, Price, Smith and King, attorneys
(Joanne Butler, of counsel)

For the Charging Party,
Zazzali, Fagella, Nowak, Kleinbaum and Friedman, attorneys
(Richard A. Friedman, of counsel)

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On March 5, 2007, the West Paterson Education Association (Charging Party or Association) filed an unfair practice charge against the West Paterson Board of Education (Respondent or Board) alleging that the Board violated 5.4a(1), (2), (3) and (5)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A.

1/ These provisions 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard (continued...)

34:13A-1 et seq. (Act). The Association contends that in response to protected activities - the filing of numerous grievances, objections to the superintendent's alleged direct dealing with custodians, the filing of a unit clarification petition regarding secretaries and the raising of various other concerns, Superintendent Scott Rixford engaged in a pattern of behavior evidencing anti-union animus. It is asserted that Rixford generally threatened to exercise his discretion in unfavorable ways towards individuals who did not cooperate with him and towards the Association for filing grievances. It is also alleged that Rixford threatened to: (1) subcontract maintenance work, (2)reduce the number of floating holidays for custodians, (3) reassign work from confidential to non-confidential secretaries, and (4) require secretaries to work a half-day longer before the Thanksgiving and Christmas holidays in contravention of past practice. Finally, the Association alleges that Rixford dealt directly with custodians over their working schedules. Rixford's actions, the Association contends,

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1/ (...continued)
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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

independently chilled or interfered with the exercise of protected activities.

On November 16, 2007, a Complaint and Notice of Hearing issued (C-1).[2/] On May 22, 2007 and February 13, 2008, the Board filed its Answer (C-2) generally denying that its superintendent retaliated against unit members for the exercise of protected activities, that he threatened or interfered with the Association, or that he dealt directly with custodians.

On May 27, 2008, I granted the Association's motion to amend the Complaint to add allegations that Superintendent Rixford transferred Sharon Lovas and Massimo Amato in retaliation for their April 30, 2008 testimony at the first day of hearing in this matter in violation of 5.4a(1), (3) and (4) of the Act (C-3, C-5).[3/]

On May 23, 2008, Respondent filed its amended Answer (C-4) generally denying that Rixford transferred Lovas and Amato for retaliatory reasons.

2/ "C" refers to Commission exhibits received into evidence at the hearing. "CP" and "R" refer to Charging Party's and Respondent's exhibits respectively.

3/ This provision prohibits public employers, their representatives or agents from: "(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." See footnote 1 for 5.4a(1) and (3) violations.

A hearing was held on April 30, September 23 and 25, and October 2, 2008 at which the parties examined witnesses and presented documentary evidence.[4/] At Charging Party's request, the period for filing briefs was twice extended. Briefs were filed by January 30 and replies by February 13, 2009. Based on the record, I make the following:

FINDINGS OF FACT

1. The West Paterson Board of Education is a public employer and the West Paterson Education Association is a public employee representative within the meaning of the Act (1T10-1T11).

2. The Association and Board are parties to a collective negotiations agreement effective from July 1, 2004 through June 30, 2008 (CP-9). The following provisions of the collective agreement are pertinent to this hearing.

Article I, entitled "Recognition", states that the Association is the exclusive representative of a broad-based unit consisting of various titles including, among others, teachers, librarians, secretaries and custodians. Unless indicated otherwise, the term "teachers" when used in the agreement refers to all employees represented by the Association (CP-9).

4/ Transcript references to hearing dates are "1T" through "4T" respectively.

Article II, entitled "Negotiation Procedure", contains a maintenance of benefits provision and states in paragraph E.:

> Except as this Agreement shall hereinafter otherwise provide, all terms and conditions of employment applicable on the effective date of this Agreement to employees covered by this Agreement as established by the rules, regulations and/or policies of the Board in force on said date, shall continue to be so applicable during the term of this Agreement, **nothing contained herein shall be interpreted and/or applied so as to eliminate, reduce nor otherwise detract from any teacher benefit existing prior to its effective date.** [emphasis added]

Article VI, entitled "In-School Work Year", states in pertinent part:

> B. On the last day before Thanksgiving, Christmas and Easter, dismissal for teachers will be 1:15 PM (Memorial's teachers 1:00 PM).

Article XI, entitled "Voluntary Transfers, Reassignments and Procedures", states at paragraph D that:

> Any transfer or reassignment shall be made only after a meeting between the teacher and the Principal, at which time the teacher shall be notified of the reasons therefore. In the event the teacher objects to the transfer or reassignment at this meeting, he may request another meeting with the Principal together with an Association representative. [CP-9]

Article XXI, entitled "Non-Certified Personnel Salaries and Hours of Work", states at paragraph A(1) that the secretaries' hours of work shall be **8:30 AM to 4:00 PM** during the school year; lunch hours will be from 12:00 PM to 1:00 PM. Article XXI

C(1)through (3) sets out the daytime custodian's hours of work as 7:30 a.m. to 4:30 p.m. while nighttime hours are 1:00 p.m. to 10:00 p.m. with one hour for lunch. It also provides for discretionary summer hours of 7:00 a.m. to 3:00 p.m. This paragraph also provides for no more than three "swingtime" custodians whose hours are 9:00 a.m. to 4:30 p.m. or 3:00 p.m. to 12:00 a.m. In Article XXI specific holidays are listed separately for secretaries and custodians and under paragraph E it states that "**[t]he Saturday [sic] holidays, which are lost to twelve-month employees, are not to be lost but taken at a later date at the request of the individual**" (CP-9) [emphasis added].

Appended to the collective agreement (C-9) is a list of annual stipends for various activities, including, among others, $800.00 for mail runs.

3. On July 1, 2006, Scott Rixford succeeded Fredrick Lijoi as West Paterson superintendent (3T6). Rixford came to West Paterson from the Paterson State Operated School District where he worked three years as a teacher, two years as a supervisor of staff development, four years as a principal and, finally, for one year as an assistant superintendent (3T6). I infer that when he was hired by the West Paterson Board, it was his first assignment as a superintendent.

4. Lijoi and former Association President Sue Patterson enjoyed a friendly relationship. Lijoi grew up in West Paterson

and taught there before becoming superintendent. Patterson, who worked for over 30 years in the district, taught Lijoi when he was a student (4T92, 4T94).

5. During Lijoi's tenure, the relationship between the Board and the Association was also good. According to Board Attorney Peter Tucci, since he was hired in 2004, no unfair practice charges were filed (4T39, 4T68). Only one grievance was filed toward the end of Lijoi's tenure regarding whether teacher's aides were required to attend in-service days with teachers. That grievance was arbitrated in July 2006, a few weeks after Rixford became superintendent (CP-11; 4T69).

Although the in-service-day grievance arose under Lijoi, Rixford testified at the arbitration hearing that the aides should be required to attend in-service days with teachers. Moreover, although Patterson then was no longer Association president when the in-service grievance was arbitrated (she was succeeded in the 2006-2007 school year by co-presidents Cassandra Lazzara and Venous Tashayodi), she also testified at the arbitration hearing. Despite the contract's silence on the issue, the Association maintained that, by past practice, the aides were not required to attend when students were not present (CP-11; 3T12-3T13, 4T108-4T109). The grievance was eventually sustained. [See Fact Nos. 39 through 41]

The Meet-And-Greet Dinner in August 2006

6. As a result of concerns raised by Rixford's testimony at the in-service arbitration and in order to improve relations, Lazzara and Tashayodi invited Rixford to an informal meet-and-greet dinner with Passaic County Education Association President Joe Cheff, West Paterson Mayor Pat Lepore and the NJEA UniServ representative assigned to West Paterson, Richard Loccke (3T20, 4T106). According to Rixford, the conversation between him and Loccke during dinner was combative and heated, although he did not recall the details of the conversation or what was specifically discussed (3T21-3T22, 3T116). Tucci, who was at the restaurant with a friend, heard what he described as unhappy voices coming from their table but did not hear the substance of the conversations nor did he join the group (4T76).

7. Loccke, however, recalled in detail the conversation at dinner. He remembered that the subject of the parties' collective negotiations agreement and past practices came up repeatedly, because the dinner was planned, at least in part, to address concerns raised by Rixford's testimony at the arbitration hearing (4T106-4T108).

Loccke recalled Rixford initially raised the issue of past practice (4T107). Rixford expressed that there were a lot of areas in the parties' agreement that, he felt, were unclear, but he did not believe in looking to past practice (4T108-4T109). He

also questioned why Lazzara and Tashayodi consulted with Patterson regarding the parties' past practices. In particular, Rixford mentioned the Association's reliance on past practice in presenting its in-service day grievance. Rixford explained that he intended to rely only on the letter of the collective agreement (4T109).

Loccke and Rixford then debated contract interpretation. Loccke pointed out to Rixford that Patterson was very knowledgeable about West Paterson past practices because she was a long-time Board employee. Rixford, however, responded that Patterson was no longer Association president. In response, Loccke explained that the Association could seek advice from or consult with anyone they chose and told Rixford he hoped there would not be an outright challenge to the parties' collective agreement (4T109-4T110).

According to Loccke, the Mayor then suggested to Rixford that perhaps he could give his new position some time before making too many changes. Despite the heated exchange between Rixford and Loccke, nobody stormed off, and the parties finished dinner (4T111-4T112).

8. I credit Loccke's description of the dinner conversation. Rixford's memory was vague. It is unlikely that Rixford would recall no details of a dinner conversation that he himself described as very heated and combative. Also, Rixford

was a new Board employee and a first-time superintendent. The dinner was an important opportunity for Rixford to assess the tenor of labor relations. It is not credible that he would recall nothing that was said that evening. Finally, Loccke's accounting of the dinner conversation was unrebutted.

The Tucci-Loccke August 2006 Conversation

9. Sometime in August after the meet-and-greet dinner, an issue arose regarding the attendance of teachers' aides at orientation day before the beginning of the 2006-2007 school year (4T42). Rixford had sent a letter to all staff members, including aides, requiring attendance at the September 5 orientation day (CP-12; 4T103).

In the past, aides had not been required to attend orientation day which, like in-service days, is a day when staff, not students, are present. This issue, therefore, was related to the in-service-day grievance, in that both addressed whether aides were required to attend school on days when students were not present.

10. After sending the letter (CP-12), and since no award had yet issued regarding the in-service-day grievance, Rixford decided aides' attendance for the orientation day would be voluntary. He instructed his staff to inform any aide who called about it, that their attendance was voluntary (3T23-3T24).

11. Despite these instructions, Loccke complained to Tucci that he did not feel it was appropriate to invite the aides on a voluntary basis, because they would feel obligated to attend (4T43). During the course of this conversation, Loccke expressed frustration with how Rixford was dealing with the Association (4T82). In his opinion, Rixford did not understand how labor relations worked and was ignoring past practices. In essence, Loccke told Tucci, Rixford was disrupting what had been good relations with the Association (4T87-4T88).

12. Tucci considered Loccke's comments up to this point to be run-of-the-mill labor relations banter. Tucci was used to dealing with Loccke in negotiations. He first negotiated with him in 2004 for the current collective agreement (4T67).

Loccke's next comments, however, were not ordinary in Tucci's opinion. Loccke indicated he would do his best to make sure that the Board did not renew Rixford's employment contract and added that he would enjoy tearing Rixford apart. Tucci considered these statements a threat to Rixford's employment and indicated to Loccke that he would communicate these comments to Rixford and the Board (4T45, 4T48, 4T51, 4T89, 4T96-4T97).

13. At the end of August, Tucci spoke to Rixford, repeating what he considered to be Loccke's threats to Rixford's employment. Tucci did not relate any other part of the Loccke conversation, namely what Tucci considered to be run-of-the-mill

banter regarding Rixford's alleged mishandling of labor relations with the Association (4T48, 4T51, 4T89, 4T96-4T97).

14. After hearing Tucci's account of the Loccke conversation, Rixford was "pretty much blown away and shocked" by what he viewed as a direct threat by Loccke. At Rixford's request, Tucci sent him a letter (R-11) on September 13 paraphrasing Loccke's "threats". Rixford, however, never confronted Loccke about the alleged statements (R-11; 3T78, 3T122-3T123).

Tucci admits that, as far as he knows, neither Loccke nor the Association ever approached the Board about non-renewing Rixford's contract. Indeed, except for this one conversation in late August 2006, Tucci never heard Loccke repeat these so-called "threats" (4T70-4T72, 4T84-4T85).

15. Upon learning what Tucci had done in telling Rixford what he said, Loccke was displeased that Tucci communicated the substance of their conversation to Rixford. He felt Tucci's actions were improper and told him so (4T53-4T54).

16. In any event, after learning what Loccke said to Tucci and receiving Tucci's letter recounting the conversation (R-11), Rixford was more guarded in his dealings with Loccke. In Rixford's view, any attempt to work with the Association was made virtually impossible with Loccke involved. Rixford felt he could

have resolved many issues if he was just working with Tashayodi and Lazzara (3T81-3T82).

Rixford denies, however, that his subsequent decisions and actions - e.g. denials of Association grievances - were tainted by his relationship with Loccke or were an attempt to assert himself as the new guy. According to Rixford, before he responded to these grievances, he consulted with Tucci for guidance and to get his understanding of the parties' practices (3T83-3T84).

17. Nevertheless, Tashayodi testified that Rixford told her and Lazzara early in the 2006-2007 school year that they should not go to Loccke for any advice and that it would be better for them to seek advice from Carol Pierce, a NJEA UniServ representative assigned to the State Operated Paterson School District, whom Rixford knew well and got along with from his prior employment (2T69-2T70). Tashayodi remembers this conversation because she had just become Association co-president. When Rixford told her not to talk to Loccke, she "got so nervous [she] ran, got in the car and called Rich Loccke right away" (2T70).

Rixford admits that he mentioned Pierce many times to the co-presidents because he had a very positive and productive relationship with her in the seven years he worked in Paterson. He recalls only one grievance being filed during this time period. Rixford considered Pierce to be a good resource for information

and told Lazzara and Tashayodi that he did not feel Loccke was helpful or remediated issues (3T72-3T73).

Rixford, however, denies telling Tashayodi and Lazzara not to talk to Loccke (3T71), but when asked specifically whether he ever told the Association presidents that they should speak to Pierce rather than Loccke, he responded:

> I don't believe I ever said you should speak to Ms. Pierce. Again, I certainly tried to explain how the dynamic was very, very different in remediating disagreements and controversies in my previous work with Ms. Pierce. [3T73]

18. Based on the testimony of the witnesses, I credit Tashayodi that Rixford told her and Lazzara not to go to Loccke for any advice and that it would be better if they spoke to Pierce. Rixford's response to questions regarding what he told Tashayodi and Lazzara was evasive and vague. He never directly denied telling Tashayodi and Lazzara that they should speak to Pierce not Loccke. By contrast, Tashayodi's recollection was specific, describing her reaction of running to her car to call Loccke.

Additionally, from the initial meet-and-greet dinner, Rixford and Loccke had a contentious relationship. Rixford disagreed with Loccke's views on labor relations, particularly as to the binding effect of past practice. Also, during that dinner, Rixford questioned Loccke about why Tashayodi and Lazzara consulted with former Association President Patterson. Clearly, Rixford had an

opinion regarding who the Association should rely on for information and advice and was not reticent about expressing it.

Finally, after learning from Tucci about Loccke's "threat" to his employment, Rixford concluded that Loccke made it impossible to resolve issues with the Association leadership and was guarded in dealing with Loccke. It would follow that Rixford communicated his reservations about Loccke to Lazzara and Tashayodi and encouraged them to reach out, not to Loccke, but to Pierce as someone with whom he had a good rapport and who resolved labor disputes amicably.

The Maintenance Issue

19. Besides the July in-service-day grievance, Rixford inherited another issue from Lijoi's tenure. In May 2006, the Board was dealing with staff assignments for the 2006-2007 school year when an issue regarding district-wide custodial assignments arose (3T8-3T9, 3T129). In particular, even though there is no formal maintenance position or separate job description for maintenance worker, the Board was concerned about the assignment of two custodians - Sal Navarre and Massimo Amato - to maintenance-only work, especially since some custodians questioned the fairness of these assignments (R-2; 3T10-3T11, 3T15-3T16). The issue was tabled in May 2006, but was one of the first things that the Board President asked Rixford to deal with in July 2006 (3T8-3T9).

20. As a result, Rixford met with Supervisor of Buildings and Grounds Jack Wittig about the custodial/maintenance assignments. He asked Wittig what custodial services he needed to cover the three district buildings - Memorial School, Beatrice Gilmore School and Charles Olbon School (Memorial and Olbon are the two largest school buildings).[5/] Based on Wittig's input, new assignments were issued for the nine full-time custodians (3T10). The maintenance-only assignments were eliminated. The two custodians who had previously been assigned maintenance-only duties - Navarre and Amato - were reassigned as custodians to one of the school buildings (3T15).

21. As a result, Navarre and Amato approached Lazzara with concerns about, what they viewed as, the dissolution of the maintenance department. Lazzara arranged a meeting to discuss these concerns with Rixford (1T27-1T28, 1T30, 1T37, 3T15).

22. On August 21, 2006, Lazzara, Navarre and Amato met with Rixford and Wittig. According to Lazzara, Rixford told them that he was dissolving the maintenance department and that, if his decision was questioned, he would let two custodians go and privatize the maintenance services. No one from the district had previously mentioned sub-contracting. In Lazzara's opinion,

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5/ West Paterson has no high school but sends its students to Passaic Valley Regional High School.

Rixford mentioned it to control the custodians, so that they would not fight his decision (1T27-1T28, 1T30-1T31, 1T66, 1T78).

23. Amato testified that Rixford told them that he did not need a formal maintenance department in a district the size of West Paterson, and that he did not want what amounted to 20% of his custodial staff waiting around for something to break and need maintenance. Amato also confirmed that, for the first time, Rixford mentioned that some custodians might be laid off and/or that some of the maintenance work would be privatized (1T96-1T97, 1T102-1T103).

24. In describing the meeting, Rixford testified that he shared the Board's concern that other custodians felt the custodial work was not being fairly apportioned and that the Board did not want Navarre and Amato waiting around for something to break (3T15-3T16). This jibes with Amato's testimony.

According to Rixford, Navarre and Amato then presented him with hypothetical maintenance problems. Even though the Board had never mentioned sub-contracting or privatizing maintenance work to him, Rixford echoed what he believed was the Board's position, namely that outside vendors would have to perform high-level maintenance such as fixing a leaking roof (3T17, 3T131-3T133).

Rixford admitted that during the meeting he probably said something like "[i]f you don't work with me, I won't work with you", although not these exact words (3T71). However, Rixford

also told them that he was not looking to cause trouble but to work collegially with them. He recognized that Navarre and Amato were two of the best custodians employed by the Board (3T18). Wittig did not testify.

25. The witness testimony supports that Rixford explained that the maintenance-only assignments were eliminated because of Board concerns with the distribution of custodial work. It also confirms that Rixford mentioned outside vendors in response to Navarre's and Amato's posed hypothetical situations.

As to Lazzara's testimony that Rixford told them that if his decision to eliminate the maintenance-only assignments was questioned he would let two custodians go, Amato testified that Rixford might have mentioned laying off some custodians or he might have mentioned privatizing the work. Amato seemed vague on this point. However, Rixford never rebutted her testimony. Also, I draw a negative inference from the Board's failure to call Wittig, a witness who was within its power to produce and who presumably could have supported Rixford's testimony that Rixford discussed the transfer with him, thereby rebutting Amato's testimony. State v. Clawans, 38 N.J. 162, 170 (1962) (a party's failure to produce a witness who would elucidate the facts at issue raises a natural inference that the party fears that witness' testimony as to those facts would be unfavorable to him).

I credit Lazzara[6/] and Amato that Rixford mentioned laying off custodians.

Additionally, Lazzara could have subjectively reached this conclusion from Rixford's statement that if the custodians did not work with him on these changes, he would not work with them and from his mentioning privatizing certain work, a concept that had not previously been mentioned. In any event, despite Rixford's mention of privatizing and possible layoffs (something Lazzara perceived as a threat), the Association did not file a grievance on behalf of Navarre and Amato after this meeting and apparently did not challenge Rixford's decision thereafter.

Parent-Teacher-Conference Issue

26. Regardless of the apparently rocky beginning to Rixford's tenure in August 2006, there was one issue that the

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6/ The Board argues that, generally, I should not credit Lazzara's testimony, because her testimony was inconsistent regarding the outcome of numerous Association grievances. For instance, when questioned on direct examination about an orientation-day grievance, she stated it was "won" by the Association. The Board maintains this characterization was inaccurate. However, the fact that Lazzara viewed the Board's settling of that grievance as a "win" for the Association is understandable, although technically not correct - e.g. there was no arbitration award issued. As a result of the award in the Association's favor on a related in-service-day grievance, the Board settled the orientation-day grievance by making any aides whole who had voluntarily attended. The settlement was in Lazzara's opinion a "win". I do not find, therefore, that her testimony in this regard was so inconsistent as to be not credible. Since the Association won the grievances that went to arbitration, her testimony was generally accurate.

Association and Rixford amicably resolved that month. Specifically, Rixford wanted to add a third parent-teacher conference to coincide with the number of marking periods. He spoke to Tashayodi and Lazzara who agreed to the addition of the third conference (3T14).

Secretary-Lunch-Hour Issue

27. Another issue that was resolved, but only after a grievance was filed, involved Rixford's decision to have Secretary Sharon Lovas and the other secretaries at Memorial cover for the secretary assigned to Beatrice Gilmore when she went to lunch. The grievance was resolved when the lunch hours were restored (1T124).

Custodians-Working-Staff-Development-Days Issue

28. During either September or October 2006, Rixford met with Lazzara and Tashayodi to discuss another issue he had identified regarding the custodians (3T66). Rixford was concerned that teachers would be present when the boilers were operating, and no custodian with a black seal license would be on duty (3T67). Specifically, Article XXI D(2) of the parties' collective agreement gives custodians certain days off - Columbus Day, Veteran's Day and Martin Luther King Day - when teachers, not students, are present for staff development days, but custodians work the week between Christmas and New Years when the rest of the staff is off (C-9; 3T66).

29. Rixford asked Wittig to inquire informally among the custodians if they would be interested in working the staff development days in exchange for time off at Christmas (3T68, 3T140). Rixford testified that he then approached Lazzara and Tashayodi with his proposal (3T141).

30. Thereafter, Tashayodi and Lazzara met a couple of times with Rixford about his proposal, but after discussing it, they eventually rejected his idea and told him at one of the meetings that they would enforce the parties' collective agreement (2T71). Lazzara and Tashayodi decided not to speak to the custodians about Rixford's suggestion, because they rejected it (2T74).

After being told that the Association would not accept his proposal, Rixford told Lazzara and Tashayodi that the custodians would have to work the Christmas break since time off at Christmas is left to the discretion of the superintendent. Custodians had not worked this break in years (1T38). Lazzara concluded that Rixford's decision in this regard was in retaliation for the custodians not agreeing to work the three holidays, especially since in the earlier conversation about maintenance-only work, Rixford told her and the custodians that he could not possibly work with the custodians if they didn't work with him (1T38-1T39).[7/]

7/ Amato testified on cross examination that custodians were not required to work Christmas break 2007 (1T109). I infer (continued...)

31. A couple of days after the Rixford meeting, Tashyodi was approached by some of the custodians who told her they knew about the request to switch days (2T71). Tashayodi and Lazzara subsequently learned that Wittig had spoken to the custodians about Rixford's suggestion. According to Tashayodi, Wittig spoke to the custodians after the conversation she and Lazzara had with Rixford (2T74).

32. Amato confirmed that he was approached by Wittig on behalf of Rixford about exchanging days off (1T99). Amato then spoke to Tashayodi about his conversation with Wittig and asked her to look into it (1T100, 1T107).

33. Wittig did not testify. I cannot determine from the record the precise timing of these conversations. Rixford's testimony, that he asked Wittig to speak to the custodians before he (Rixford) approached the Association co-presidents, is not inconsistent with Tashoyodi's testimony that Wittig approached the custodians to poll them after the conversation with Rixford.

It is plausible that Wittig was asked by Rixford to poll the custodians before he met with Lazzara and Tashayodi, but Wittig did not get around to it until after Rixford's meeting with the co-presidents. It could have left Lazzara and Tashayodi with the impression that Rixford asked Wittig to approach the custodians

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7/ (...continued)
that for some reason Rixford changed his mind, although the record is not clear on this point.

through Wittig after they informed Rixford of their decision not to accept his proposal.

Grievances

Despite amicably resolving a couple of issues, numerous grievances were filed by the Association during the first half of the 2006-2007 school year. All of the following grievances were arbitrated. With the exception of the Orientation-Day grievance which was settled after the issuance of the related In-Service Day grievance award in November 2006, all of the other grievances were arbitrated, and awards were issued between September 2007 and September 2008 sustaining them. I have summarized the grievances, including the orientation-day grievance, below.

A. Secretary-Early-Friday-Release-Time Grievance

34. On Friday of the first week of school in September 2006, Rixford telephoned each school at the end of the day, but no one answered the phones. When he spoke to principals the following week, he learned that secretaries leave by 3:30 p.m. on Fridays, not the 4:00 p.m. time specified as the end of the secretarial work day in Article XXI of the parties' collective agreement (CP-9; 3T28).

35. Rixford did not want secretaries leaving early any day of the week, because he felt problems often arise at the end of the day, such as a bus incident or a child not making it home (3T28, 3T30). During the second week of September, therefore, he

notified the secretaries that they had to work until 4:00 p.m. on Fridays (1T113-1T114).

36. On October 17, 2006, the Association filed a grievance over this issue. Rixford responded the next day denying the grievance under Article XXI A(1) which sets the secretaries' standard hours of work as 8:30 a.m. to 4:00 p.m. He explained that any deviation from these hours were at the sole discretion of the superintendent and rejected the Association's past practice argument (R-3).

37. The grievance was arbitrated on June 12, 2007 (CP-6). Sharon Lovas, a secretary in the district for 29 years, testified about the 28-year practice of early-Friday release time (1T113). Former Association President Patterson also testified as to the practice.

38. On January 16, 2008, an arbitrator sustained the grievance, rejecting the Board's arguments. He determined that the 28-year practice was binding, mutually established, and superceded a literal application Article XXI A(1) which gives the superintendent discretion to modify certain secretarial work hours (CP-6).[8/]

8/ There is conflicting testimony as to whether the Board moved to vacate the award (3T56). The Association has denied receiving notice of the Board's action (R-4, R-5; 4T104). The Board provided no credible evidence that the Association was properly served. The Association, however, has moved to confirm the award (4T104-4T105). I need not resolve these

(continued...)

B. Orientation-Day Grievance:

39. On September 21, 2006, after Rixford's decision to allow the aides to attend orientation day on a voluntary basis and in keeping with Loccke's objection to voluntary participation,, the Association filed a grievance seeking compensation for those who voluntarily attended the September 5 orientation day. Rixford responded the next day denying the grievance (CP-1). He explained in pertinent part:

> This invitational approach to attendance was offered to [the aides] so as to ensure that they were not "singled-out" for non-participation in this day when my comments as the newly-appointed superintendent were to be delivered, and so that they might receive important information being provided to other Association members in the areas of Sexual Harassment in the Workplace, DYFS reporting instructions and updates, Student Bullying and Harassment, and other topics of direct interest to these employees. [CP-1]

40. On November 14, 2006, an award was issued in the related in-service-day grievance at which Rixford and Patterson testified in July 2006. The arbitrator sustained the grievance. He determined that the parties' practice demonstrated that aides were dismissed at the same time as students on in-service days, thus limiting their work hours to the hours when children were present.

8/ (...continued)
inconsistencies. Whether the Board moved to vacate, whether the Association was aware of the Board's actions, and whether the Association moved to confirm the award is not material to this decision.

This past practice was "consistent, unequivocal, clearly defined, long-standing and mutually accepted" and, therefore, enforceable under the maintenance of benefits provision - Article II(E) - of the collective agreement (CP-11).

41. After the issuance of this award, the Board and Association settled the orientation-day grievance. Each aide who voluntarily attended orientation day received compensatory time to be used before the end of the school year (3T27, 3T135-3T136).

C. Floating-Holiday Grievance:

42. On October 4, 2006, Rixford sent a memorandum to secretaries and custodians as well as the business administrator and confidential secretaries that revised the number of floating holidays allotted for the 2006-2007 school year (CP-2). Article XXI E of the parties' collective agreement allows certain holidays falling on a Saturday to be taken at a later time. Relying on the literal language of this article, Rixford informed them that, since Christmas Eve and New Years Eve Day both fell on a Sunday for the 2006-2007 school year, they would not be included in the floating holiday allotment for that year (CP-2; CP-9; 1T41).

43. On October 6, 2006, the Association filed a grievance. It was denied by Rixford on October 12, 2006 for the reasons stated in his memorandum (CP-2), namely the explicit language of Article XXI E (R-7). The grievance was arbitrated and an award, sustaining the grievance, was issued on November 10, 2007.

The Arbitrator wrote in part:

> The history in the district has clearly been to ensure that the employees receive the stated number of days off provided in Article XXI.
>
> * * * *
>
> I do not agree with the district that the intent was to forfeit Sunday holidays because of the use of the word Saturday [in Article XXI]. As noted Section E [of Article XXI] came about after the same negotiations in 1998/99 that added holidays for the secretaries as a trade-off for their working an additional daily half hour. The past practice language of Article II, Section E pre-dates this change and while it contains a provision to exclude contractual exceptions, Article XXI, Section E makes no specific reference to Sunday holidays as an exception. It is only the interpretation chosen by the Board that makes this exception.
>
> * * * *
>
> The last point of significance is that in the first opportunity to interpret Section E as an agreement to change the past practice, with the recent negotiations fresh in everyone's mind, the Board did not do so. In 2000 immediately following the 1998/99 negotiation the District maintained the past practice of ensuring that employees received the number of days off listed in the CBA by granting two Floating Holidays for listed holidays that fell on Sundays as noted earlier. This was repeated in 2005, the next opportunity to interpret the parties' intent in this area and the employees were given the time off. Indeed, even in the year in dispute, the Board initially included the two Floating Holidays in its June 2006 memorandum.
>
> While the Board made an interesting argument on this issue, given the facts in the record I cannot agree that the intent of the parties

> was for the employees affected to forfeit the time off provided in Article XXI, Sections B.2 and D.2. [CP-10]

D. Mail-Stipend Grievance:

44. Sometime in September or October 2006, Rixford merged the responsibility of mail delivery throughout the district with custodial responsibilities, but did not pay the $800 mail-run stipend stipulated in the parties' collective agreement (CP-9). Rixford was aware that the stipend had been paid in the past, but suggested to the Association co-presidents that the stipend could be put to better use, such as tuition reimbursement for teachers.

Lazzara and Tashayodi disagreed and insisted on enforcing the terms of collective agreement (1T44-1T45). The Association filed a grievance.

45. On October 18, 2006, in denying the grievance, Rixford wrote in pertinent part:

> . . . the district has determined that no stipend should be awarded for delivery of the mail as:
>
> (1) it does not occur external to the regular workday and work year; and
> (2) it does not require extraordinary experience or certification/licensure.
> The delivery of mail falls within the guidelines of the job description for custodians during their regular work day and work year.
>
> * * * *
>
> In conclusion, should the district not wish to conduct any particular activity noted within the Agreement, or should it wish to redefine

> the task as part of the regular workday/work year, it is not forced to provide an unnecessary stipend merely because such is listed in the Agreement. [R-6]

46. At some point after the filing of the mail-stipend grievance, Tashayodi approached Rixford and asked him if he could notify the custodians in November about any jobs they could do throughout the school buildings that would allow them to get some discretionary days off during the Christmas vacation (CP-9; 2T75). In the past, the Superintendent had exercised his discretion under the collective agreement to give the custodians this time off (3T65, 3T69). Rixford responded that if the custodians started working with him then he would consider it, but that since there were so many complaints, his hands were tied (2T76).

47. Since the mail-stipend grievance had recently been filed (October 13, 2006), Tashayodi explained to Rixford that the mail-stipend grievance came from the Association, not from any individual custodian (2T76). Rixford repeated that his hands were tied and he had to follow the letter of the parties collective agreement since that, apparently, is what the Association was asking him to do. He further explained that he was too nervous to do anything else such as giving the custodians discretionary days off during the Christmas vacation (2T76-2T77).

48. On September 14, 2007, an award was issued sustaining the grievance (CP-7). The arbitrator wrote in pertinent part:

> . . . while the Superintendent is ostensibly free to allocate Mail Run duties among bargaining unit titles, no matter how the work is sliced, the contractual stipend plainly must be honored. Accordingly, because I find the contract language negotiated between the parties to be clear and unequivocal in favor of the Association's position, I will sustain the grievance.
>
> Lastly, in passing, I reject the notion that the broadly worded provisions of the Custodian Job Description . . . somehow provided an escape valve to avoid the Board's contractual obligations to the Association under the Collective Bargaining Agreement with respect to the payment of the Mail Run stipend. [CP-7]

E. Thanksgiving/Christmas-Early-Dismissal-Time-Grievance

49. On November 8, 2006, Rixford issued a memorandum to district staff concerning dismissal time the day before Thanksgiving recess (R-9). He informed the staff that students and most staff would be dismissed at 1:00 or 1:15 p.m., but that secretaries would be dismissed, depending on the school they were assigned to, at either 1:30 or 1:45 p.m., while custodians would work their regular shifts.

The memo also informed custodians that they would work only one shift that day - 8:00 a.m. to 3:00 p.m. - and be dismissed at 3:00 p.m. After issuance of this memo, the Board gave Rixford some flak in regard to the custodians because, unbeknownst to him, the Board permitted athletic groups to use the school after 3:00 p.m., and due to Rixford's dismissal decision, no custodians would be present (3T54-3T55).

50. The Association filed a grievance on December 11, 2006 concerning only the secretaries' dismissal time (1T59, 3T56). It maintained that for 20 years, secretaries had been dismissed at the same time as teachers and students on the day before Thanksgiving (1T59).

51. Rixford responded to the grievance that same day, denying the Associations grievance and relying on what he considered to be clear contract language contained in Articles VI B controlling teachers hours of work and Article XXI controlling secretaries hours of work (CP-4).

Rixford explained that the Association appeared to have taken diametrically opposing positions in different grievances. In the in-service and orientation-day grievances, the Association relied on past practice and submitted that the instructional aides were not covered by the term "teachers" in the collective agreement. Therefore, the Association argued in those grievances that the aides should be treated differently than teachers and not required to attend school when students were not present. Here, it appeared to Rixford, that the Association was arguing that the secretaries were covered by the term "teachers" as used in the collective agreement. Thus, the Association seemed to be claiming that secretaries should be treated the same as teachers as to release time.

Rixford was upset that the Association grieved this issue and wrote in pertinent part:

> I am sorry that my goodwill gesture, in the spirit of the holiday so noted in that communication [R-9], has caused the Association the need to expend the necessary effort towards this grievance. I can assure you that I shall not cause the Association issue with future potential early release times, days or dates. [CP-4]

In writing the above-quoted paragraph, Rixford thought that he "can't win for losing" and "no good deed goes unpunished" (3T60, 3T124). Rixford hoped to communicate to the Association "how frustrating it was to try to do something right and even to have that come into question" (3T60-3T61, 3T64-3T65). In essence, Rixford was writing to tell the Association that he had no intention of giving them any more breaks in regards to early-release time because there would likely be a complaint or a grievance filed (3T125).

52. The issue arose again on the day before the Christmas break. Rixford insisted that the secretaries work until 4:00 p.m. (CP-8; R-10). Nevertheless, at the last minute, Rixford released the secretaries at 2:30 p.m., not 4:00 p.m. on the date in question (CP-5). The Association filed a grievance on January 18, 2007, and Rixford responded the next day denying it for the same reasons stated in CP-4 (CP-5).

53. On September 29, 2008, an award was issued sustaining the grievances (CP-13).[9/] The award covered early release time before Thanksgiving 2006, Christmas 2006 and Easter 2007 as well as these same holidays in the 2007-2008 school year. After noting that this was not the first time that these parties had gone to arbitration respecting compensation for not working full days and that, in those instances, the grievances were sustained, the arbitrator wrote in pertinent part:

> While Article XXI(A)1 sets forth the work schedule of secretaries, it appears that over all of the years (before the existence of the contract) the practice which the Association urges is correct here has been in place. As it was pointed out by one of the Arbitrators in citing Article II(E) (the Past Practice article) ". . . this provision establishes the parties' intent that an established past practice shall be enforceable under the contract." This is precisely the situation in this case. Put another way, these secretaries should have been released at 1:00 PM/1:15PM on the days before Thanksgiving and Christmas in the years in question. In that regard, the Arbitrator is relying upon the past practice between these parties (a cannon of interpretation in what he would characterize as ambiguous or uncertain contractual language here). How the parties have operated under this language over many years does indeed furnish a reliable guide as to what the parties intended. . . .[CP-13]

9/ The award was received by Charging Party after the hearing, but, on motion of Charging Party and over the objection of Respondent, I admitted the award into evidence, finding no prejudice to Respondent.

Discretionary-Work-Periods Memorandum

54. On October 13, 2006, the day after Rixford responded denying the Association's floating-holiday grievance (R-7) and the day that the mail-stipend grievance was filed, Rixford began composing a memorandum to bargaining unit custodians and secretaries regarding discretionary work periods for the 2006-2007 school year (CP-3; R-8; 3T139, 4T9). The memorandum was completed on October 30, 2006 but not sent until sometime thereafter. The record is unclear as to when it was sent. However, the memorandum (CP-3) was not received by the secretaries and custodians in interoffice mail until Monday, November 13, 2006 (1T53, 1T117-1T118, 1T122, 3T139). The memorandum stated in pertinent part:

> I have been asked by the WPEA leadership to communicate with you my intentions as such relates to certain work days, work periods, and work times for association member custodians and secretaries during days, times and periods which are either regular workdays or "days off" as determined by the sole discretion of the Superintendent of Schools. [CP-3]

Basically, the memorandum notified the custodians and secretaries that Rixford would not be granting any discretionary time "both now and for the foreseeable future" (CP-3). Specifically, as to the secretaries that meant working during the spring recess and no reduction in hours during the summer months (CP-3). As to the custodians, Rixford informed them that they

would be working regular hours over the Christmas vacation and spring break and no abbreviation of summer work hours (CP-3).

55. Rixford was aware that in the past there had been abbreviated summer hours, at least as to the custodians, but he did not believe in giving abbreviated summer hours (3T154).

56. On Thursday, November 9, 2006, four days before this memorandum regarding discretionary days (CP-3) was received by the secretaries and custodians, the Association filed a clarification of unit petition under Docket No. CU-2007-013. The petition challenged the Board's determination that six out of 11 secretaries were confidential employees, thus, excluded from its bargaining unit (1T49-1T50, 1T119-1T120).[10/] The parties eventually settled this matter. On June 23, 2008, the Director of Representation approved the Association's request to withdraw its petition.

Increased Secretarial Workload

57. Shortly after the clarification of unit petition was filed, secretaries assigned to the three schools were notified by their principals that they would be responsible for handling banking in their individual schools - a function previously handled by confidential secretaries (1T123). The principals explained that it would be easier to handle the banking in

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10/ Before Rixford was hired there were five confidential secretaries, but Rixford hired a confidential secretary for himself (1T132).

separate accounts in each school for functions such as field trips (1T124).

Sharon Lovas Reassignment

58. All staff receive contracts at the end of the school year for the succeeding year after the April or May Board meeting approving staff assignments. These assignments are prepared by the school business administrator at the direction of the superintendent (2T24).

59. For 30 years, Lovas was a secretary at Memorial School assigned to the main office (2T12). There are a total of two and a half secretarial positions assigned to Memorial (2T39).

On May 16, 2008, approximately two weeks after testifying in the hearing in this matter, Lovas received her contract for the 2008-2009 school year indicating that she was again assigned to Memorial School but not in the main office and her responsibilities were changed (2T12-2T13).

60. Lovas' new assignment was to work under the supervisor of curriculum and instruction, a newly-created district-wide position (2T13, 2T24-2T25). No one had previously discussed this assignment with her nor had she requested this change (2T17). Article XI of the collective agreement requires that any transfer or reassignment be made only after a meeting between the staff member and the principal at which time the staff member is notified of the reasons for the transfer or reassignment (CP-9).

61. Lovas e-mailed Rixford sometime after May 16 when she learned of the new assignment but before May 20 when the charge in this matter was amended (C-3) to add allegations regarding retaliation for Lovas and Amato having testified in this hearing. Lovas wanted to discuss her reassignment. No meeting took place in response to Lovas' e-mail request to meet, but at the request of Lazzara, Rixford eventually met with Lovas in September 2008 to discuss her new office and what she would need in the office (2T27, 2T29, 2T39-2T40, 3T118-3T19, 3T162-3T163). According to Rixford, he explained to Lovas that she was reassigned because of the quality of her work (3T118-3T119, 3T162-3T163).

62. According to Rixford, he began discussions and formulating plans for an office of curriculum development in the Fall of 2007 (3T94-3T95). During the planning process, Rixford discussed with Memorial Principal Charles Silverstein Lovas' role in the new department as the support person assigned to the supervisor of curriculum and instruction (R-1; 3T98, 3T145). He also informally mentioned to Lovas, at a social event, that he had great plans for her in the next school year (3T145). I infer that Rixford did not tell Lovas specifically that the "great plans" included her new assignment with the supervisor of curriculum and instruction.

63. Rixford felt that Lovas was one of his best secretaries. He observed that she had the ability to take on new projects,

master them and teach them to others. Also, she had excellent technology skills (3T92). In this regard, Rixford wrote a letter in support of Lovas being named Passaic County secretary of the year (1T133, 1T135). This letter was written after the charge in this matter was filed (1T135). However, before this charge was filed, he wrote a letter dated December 18, 2006 to Lovas commending her for her assistance in implementing the NJSmart technology program (R-12).

Thus, in October or November 2007, when School Business Administrator Thomas DiFluri gave Rixford the staff spreadsheet to mark up with any staff assignment changes in preparation for the 2008-2009 budget, Rixford returned the spreadsheet indicating, among other changes, that Lovas was to be reassigned. He took her out of her assignment as secretary to the principal and reassigned Lovas to work under the newly created position of supervisor of curriculum and instruction (R-13; 4T24, 4T26-4T27).

DiFluri took the changes indicated by Rixford in R-1 and created the final version of the 2008-2009 budget on February 6, 2008 (4T27, 4T29). The Board eventually acted on approving the staff assignments in April or May 2008 (4T32).

64. As a result of Lovas' reassignment, Rixford transferred Ms. Letterie who had been working in the Board's central office full-time. She was reassigned to work part-time in the central

office and part-time in the main office at Memorial School (3T142).

65. Lovas did not actually begin her new assignment until September 2008 because as of the previous May there was still a question as to where the new department would be located (2T15, 3T101). Rixford wanted to construct new space at Memorial but was not able to do so (3T101). During the summer of 2008, therefore, Lovas was assigned to spearhead the district's effort installing a software program call Real-time (3T101). She was training other employees in this program and another program called New Jersey Smart (2T26).

Massimo Amato Transfer

66. Amato is currently Association negotiations chair and, as such, under the collective agreement gets a 43 minute preparation period every two weeks.

In 2007-2008, Amato was a custodian assigned to Memorial School where he had worked for the past 13 years (1T90, 2T43-2T45, 3T104). Amato was notified in May 2008 of his assignment for the 2008-2009 school year when he received his new contract (2T46). He learned that he was transferred to the Charles Olbon School and would have new work hours, namely 7:30 a.m. to 4:30 p.m. (2T46). Amato had been working from 9:00 a.m. to 6:00 p.m. which was preferable to Amato because of child care issues (2T46).

67. Like Lovas, Amato never requested the new assignment nor had anyone spoken to him before the notification of the transfer (2T47). Specifically, Memorial Principal Silverstein never spoke to him about the possibility of being transferred (2T48).

Amato was sitting with his supervisor Jack Wittig when he received his assignment for 2008-2009 (2T47). He asked Wittig if he knew anything about it, but Wittig denied any knowledge of the transfer (2T48). According to Rixford, he did discuss the transfer with Wittig (3T146). Wittig did not testify. I credit Amato's testimony in this regard. I draw a negative inference from the Board's failure to call Wittig [see Fact No. 25].

68. According to Rixford, he transferred Amato for a variety of reasons (2T52-2T53; 3T104-3T105; 3T146): (1) A custodian, Dennis Pacelli, was moved from Beatrice Gilmore School where he had worked for several years, because Rixford felt he would be better at Memorial, a larger school. That left an additional custodian at Memorial, so Amato was transferred.; (2) Memorial and Olbon are the two largest schools and, after speaking with Wittig, Rixford felt that Navarre and Amato were his two strongest custodians. Therefore, he wanted one at each school. I infer from Rixford's testimony that both Navarre and Amato were working at Memorial before the transfer of Amato to Olbon, otherwise Rixford's testimony is illogical.; (3) Since the complexion of the Board had changed, there were discussions of potentially returning

to a maintenance-only coverage; and (4) The quality of Amato's work also factored into the transfer decision, although Rixford never told Amato this nor did he meet with him because of the filing of the amended charge (C-3).

69. A few weeks after receiving his contract for 2008-2009, Amato requested a meeting with Rixford, but was told by Wittig that since the hearing in this matter was still on-going, Rixford could not meet with him (2T50).

70. In late July or August 2008, Amato approached Rixford about changing his hours of work. According to Rixford, he recommended that another custodian be given the earlier shift but the Board did not support his recommendation. Amato's request, therefore, could not be accommodated (3T106).

ANALYSIS

The 5.4a(3) and derivative (1) allegations

Charging Party asserts that the Board violated 5.4a(3) and (1) of the Act when Superintendent Rixford exercised his discretion adversely to unit members in retaliation for the Association not going along with his proposals and/or for the filing numerous grievances. The Board responds that the Association retaliated against Rixford for enforcing the clear language of the parties' collective agreement and filed numerous grievances and this unfair practice charge to get him removed as superintendent. Based on the evidence, I find that

Superintendent Rixford retaliated against the Association for filing grievances and rejecting his proposals to alter contractual terms and conditions of employment.

In re Bridgewater Tp., 95 N.J. 235 (1994) articulates the standards for determining whether personnel actions were motivated by discrimination for the exercise of protected activities under 5.4a(3) and derivatively (1). A charging party must prove, by a preponderance of evidence on the entire record, that protected conduct was a substantial and motivating factor in the adverse personnel action. This may be done by direct or circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise of protected rights. Id. at 246.

If the employer presents no evidence of a non-discriminatory or legal motive for its action(s), 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 unlawful motives under the Act and other motives contributed to a personnel action. In these dual motive cases, the employer has not violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense is not

considered unless the charging party first proves, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action.

The Association has demonstrated that it was engaged in protected activity - e.g. filing grievances and meeting with Rixford to discuss proposals related to terms and conditions of employment. The Board through Superintendent Rixford was aware of these activities. The question remains whether Rixford was hostile to the Association's exercise of these activities.

There is ample evidence from the start Rixford and Uniserv Representative Richard Locke had a contentious professional relationship. The two butted heads at an initial meet-and-greet dinner arguing vociferously over their differing views regarding labor relations. Rixford maintained that he would enforce what he viewed as the clear terms of the parties' collective agreement and rejected the notion of past practice as something he did not "believe in". Loccke countered that past practice was an enforceable legal principal.

During the ensuing months, Rixford acted in most instances consistently with his initial statements to Loccke, enforcing what he viewed as clear contract language and either ignoring the parties' longstanding practices or rejecting them. These actions resulted in the filing of numerous grievances during the first few months of Rixford's tenure.

Eventually, the Association's grievances were sustained by various arbitrators on the basis that the maintenance of benefits clause of the parties' collective agreement preserved past practices that the arbitrators found to be longstanding, unequivocal, consistent, clearly defined and mutually accepted in each instance. In one instance - a mail-stipend grievance - Rixford's actions in refusing to pay the contractual stipend seemingly repudiated clear contract language, but his reasoning for not paying this stipend to custodians was rejected by an arbitrator.

Despite these losses, I do not find that the actions underlying the grievances themselves - e.g. eliminating early-Friday release time for secretaries, insisting on aides attending orientation day, taking away two floating holidays that fell on Sunday that year, and changing secretarial dismissal time before Thanksgiving - were taken by Rixford in retaliation for the exercise of protected activity. In each instance, Rixford articulated different rationales for his actions that, although later rejected by arbitrators, were consistent with his belief that "clear" contract language superceded the parties' past practices.

For instance, Rixford wanted secretaries to work a full day on Friday to cover situations where bus incidents might occur or students did not arrive home. Thus, he countermanded a long

standing practice of releasing secretaries early on Fridays and ordered them to work until 4:00 p.m., the time set in Article XXI as the end of their work day.

Rixford also felt aides should attend orientation day because, under the collective agreement, teachers were required to attend. He reasoned that under Article I of the parties' agreement, the definition of teacher encompassed aides. The Association had made this argument in an earlier and related grievance regarding aides' attendance at in-service days. In both instances, Rixford argued against considering or abiding by longstanding past practices.

Finally, Rixford interpreted the collective agreement to set different holidays and work hours for secretaries than teachers, so he justified giving secretaries different dismissal times before holidays.[11/] This decision led to the early-release times grievance.

Rixford's decisions were not sustained in arbitration. Nevertheless, being mistaken in this context or acting out of ignorance of labor law principles is not the same as acting out of hostility and does not in and of itself support a violation of

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11/ Rixford testified that in every case he sought the advice of the Board's attorney before taking the actions that led to various grievances. Whether he sought such advice, was given advice, or followed the advice is immaterial.

our Act.[12/] In Mendham Boro. Bd. of Ed., H.E. 97-4, 22 NJPER 301 (¶27160 1996), aff'd P.E.R.C. No. 97-126, 23 NJPER 300 (¶28138 1997), a hearing examiner rejected an Association argument that the Board violated the Act when it refused to renew a non-tenured teachers contract based on faulty information and complaints. Although the information relied on was mistaken, the hearing examiner determined that the Act does not protect employees against employers making what might arguably be considered wrong decisions based on misinformation. Only if the employer takes adverse personnel action against the employee for exercising a protected right is a violation found under our Act. See Boro. of Chester, I.R. No. 2002-8, 28 NJPER 162 (¶33058 2002) (Commission Designee restrained implementation of proposed police work schedule change rejecting Borough's managerial prerogative defense where chief's memorandum threatened to change schedule if officer's grievance was not withdrawn).

Rixford's growing frustration, however, with the filing of grievances and stances taken by the Association resulted in adverse personnel actions tied directly to union animus. For instance, when Rixford decided, in what he viewed as a "goodwill

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12/ Respondent cites several cases for the proposition that clear contract language defeats a past practice argument. Those cases are immaterial to this decision. I am not going to second guess the arbitrators and reverse their decisions. Appeals of these awards are appropriately not before me. The Board had an avenue of appeal that, apparently, it chose not to exercise.

gesture", to release the secretaries early the day before Thanksgiving, but not as early as teacher/student release time, he was frustrated when the Association filed a grievance asserting that his action was inconsistent with the past practice of releasing secretaries at the same time as teachers and students. He described his feelings as "he can't win for losing" and "no good deed goes unpunished."

In his step 2 grievance response, Rixford assured the Association "that I shall not cause the association issue with future potential early release times, days or dates" (CP-4; 3T60, 3T124), implying that he would not repeat what he viewed as his "good will gesture" of early release, albeit not as early as the Association argued they were entitled to be released. Although Rixford's initial decision to release the secretaries at 2:30 p.m. the day before Thanksgiving does not support a violation, his decision to not grant early release time before subsequent holidays was in retaliation for the Thanksgiving-day early-release-time grievance. See generally, Hunterdon Cty. and CWA, 116 N.J. 322 (1989) (Court affirmed Commission's determination that anti-union animus motivated the County's decision to unilaterally implement and later terminate a safety incentive bonus program in order to punish CWA for filing charge that County unilaterally implemented the program without first negotiating).

Rixford's response was intended to alert the Association that he would give them no more breaks in regard to early release time and was a threat. Indeed, when the issue arose again before the Christmas vacation, Rixford informed the secretaries that they would work until 4:00 p.m., but changed his mind at the last minute and released them at 2:30 p.m. The only apparent reason for Rixford's decision regarding early-release time was his displeasure with the Association's grievance filing. These actions violated 5.4a(3) and (1) of the Act.

Also, Rixford issued a "Discretionary Work Periods" memorandum (CP-3) to custodians and secretaries that was received by the Association on November 13, 2006. The memo informed them that, although the collective agreement gives the superintendent discretion to grant time off during the year - e.g. time off at Christmas for custodians and early summer hours for both, Rixford would not be granting any discretionary time "both now and for the foreseeable future."

The Association contends that this memorandum was issued in retaliation for their filing of a unit clarification petition on November 9 challenging the Board's designation of 6 out of 11 secretaries as confidential. The timing of events, however, mitigates against such a finding. The evidence established that Rixford began preparing the "Discretionary Work Periods"

memorandum on October 13 and finalized it on October 30 a week before the unit clarification petition was filed.

It appears, however, that the memorandum was prepared and issued in retaliation for other protected activities. It was started the day after Rixford responded to the Association's grievance challenging his decision to eliminate two floating holidays that fell on Sunday and on the day that the Association filed its grievance challenging Rixford's determination not to pay custodians a stipend for the mail runs as required by the collective agreement.

As to the latter, the Association had previously rejected his suggestion that the mail-run stipend money be spent better elsewhere. After the filing of the mail-run grievance, Rixford rejected Tashayodi's request that he find tasks for the custodians to do in November so that they could get time off at Christmas, time that had been given to them in the past at the discretion of the previous superintendent. He explained that he would consider it if the custodians started working with him, but since there were so many complaints, he couldn't grant her request. Tashayodi correctly explained to Rixford that the mail-stipend grievance was filed, not by the custodians, but by the Association, a differentiation Rixford seemingly did not understand or chose to ignore.

Also, the Association had recently rejected Rixford's suggestion that in exchange for days off at Christmas, custodians work certain holidays that they were contractually entitled to, but that fell on staff development days. Immediately thereafter Rixford told the Association co-presidents that the custodians would have to work the Christmas holiday since it was in his discretion to grant this time or not.

The timing of these events supports an inference of hostility. Camden Bd. of Ed., P.E.R.C. No. 2003-77, 29 NJPER 223 (¶68 2003). The Board rejects this conclusion and responds that the filing of these grievances as well as this unfair practice charge demonstrates that the Association was out to get Rixford for the stances he was taking. This contention implies that the Association's grievances were frivolous and harassing. The many awards sustaining the grievances, however, refute this argument. Moreover, the Board's argument mirrors Rixford's view that the Association's actions - actions protected by our Act, represented unwarranted challenges to his authority. Rixford retaliated by exercising his discretion to grant time off in adverse ways.

Additionally, there is a nexus between statements made by Rixford at an August meeting with Association President Lazzara and two custodians (Navarre and Amato) and the actions taken by him regarding discretionary time off. At that meeting to discuss the elimination of maintenance-only assignments, Rixford

explained that if they didn't work with him, he wouldn't work with them. The grievances filed in September and October, as well as the Association's rejection of his proposals for custodians working in-service staff development days and diverting the mail-run stipend for other uses, could have, in Rixford's opinion, represented the Association's and/or the custodians' decision not to "work with him." Rixford's determination, therefore, not to grant discretionary time off now and "for the foreseeable future" without considering the merits of such a future request was in retaliation for these activities and violated 5.4a(3) and derivatively (1) of the Act.

Finally, the Association makes an additional argument that the filing of the unit clarification petition, triggered another adverse personnel action. It asserts that, shortly after the filing of the petition, principals in the three schools notified their secretaries that they would be responsible for handling banking, a function previously performed by confidential secretaries. The increased workload, the Association maintains, was in retaliation for the filing of the petition.

The evidence supports that the work was reassigned because it was thought that the banking would more easily be handled by the individual schools since the money was allocated for school functions such as field trips. It appears that even if the evidence supported Board hostility to that activity or a link

between the petition's filing and any alleged hostility, the Board had a legitimate business justification for assigning this work to the school secretaries. There is, therefore, no basis to find a violation in this instance. I, therefore, recommend dismissal of the allegation that the secretarial workload was increased by the assignment of banking duties after the filing of a clarification of unit petition.

Based on the foregoing, however, I find that certain actions of Superintendent Rixford - e.g. (a) issuance of a memorandum (CP-3), entitled "Discretionary Work Periods," to secretaries and custodians announcing that he would not be granting any discretionary time both now and in the foreseeable future; (b) his refusal, at the request of the Association, to find extra tasks for the custodians so that they could have days off over the Christmas holidays as in the past; (c) his response to a step 2 grievance (CP-4) regarding early-release time before Thanksgiving by refusing to grant such time presently and in the foreseeable future; and (d) his insistence that custodians work the Christmas holiday, discretionary time they previously had off after the Association rejected his proposal they work in-service days - were taken in retaliation for the filing of grievances and/or the rejection of his proposals to change negotiable terms and conditions of employment. I recommend that these actions violated 5.4a(3) and derivatively (1) of the Act.

The independent 5.4a(1) allegations

The Association contends that Rixford's statements to the Association presidents that they should not consult Uniserv representative Loccke but should consult with another Uniserv representative, Carol Pierce, independently violated 5.4a(1). I do not agree. The Association also asserts that statements made by Rixford during a meeting with Association President Lazzara and two custodians regarding the elimination of maintenance-only assignments violated 5.4a(1). As to the former statements, I find no violation. As to the statements at the meeting to discuss maintenance only assignments, I find the Board violated 5.4a(1).

An employer independently violates 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp. P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. The tendency to interfere is sufficient. Mine Hill Tp. Where, however, the action complained of implicates free speech, the Commission balances the right of union representatives to have access to and represent employees with the employer's right to be free of abusive and inappropriate conduct by such representatives. See generally, State of New

Jersey (Human Services), P.E.R.C. No. 2001-52, 27 NJPER 177 (¶32057 2001) (Shop steward's speech after meeting to employer representative not protected by Act); State of New Jersey (OER), I.R. No. 2000-14, 26 NJPER 266 (¶31103 2000) (Commission Designee determined not all statements of employee representative are protected by Act).

In Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), a case involving free speech, the Commission held:

> A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However,. . . the employer must be careful to differentiate between the employee's status as the employee representative and the individuals coincidental status as an employee of that employer (citations omitted).
>
> When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible, criticism may be appropriate and even legal action. . . . may be initiated to halt or remedy the other's actions Id. at 503.

Here, Rixford told the Association presidents that they should not go to Loccke, their uniserv representative, for advice but should talk to another uniserv representative with whom he had a good relationship in this prior employment. In Rixford's opinion, Loccke was an impediment to resolving issues with the Association and was causing them to file grievances as opposed to amicably resolving issues. Certainly, Rixford had justification for believing that Loccke would not cooperate with him based on Loccke's strong statements to the Board attorney about Rixford - statements that Rixford perceived as threats. In communicating his feelings regarding Loccke, Rixford exercised his right to criticize what he viewed as Loccke's actions that were inconsistent with good labor relations.

Similarly, Loccke had the right and, in fact, exercised the right to criticize what he viewed as Rixford's mishandling of many issues and lack of labor relations experience, particularly his disregard of the parties' past practices. Loccke communicated this to the Board's attorney and told him that he would attempt to dissuade the Board from renewing Rixford's employment contract.

Here, Loccke was not an employee/subordinate of Rixford; the parties were dealing as equals, in a position to criticize each other's behavior. The fact that Association President Tashayodi was new to her position and became "nervous" after Rixford

communicated his feelings about Loccke to her does not amount to undermining the employee's rights to select their organizations leaders. Her "sensitivity" to Rixford's comments did not obviate his right to make them absent evidence of threat to her employment or promise of benefit. See Matawan-Aberdeen Reg. Bd. of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989) (assistant superintendent's criticism of union president for delaying negotiations at voluntary meeting with Association officers not a violation because parties were dealing as equals). Contrast Orange Bd. of Ed., P.E.R.C. 94-124, 20 NJPER 287 (¶25146 1994) (principal's critical comments at captive audience staff meeting about how union representatives handled members tended to undermine the union's leadership and lacked any legitimate management concern).

Based on the foregoing, I do not find that Rixford's comments about Loccke and Pierce violated 5.4a(1) of the Act.

The Association makes an additional contention that during a meeting with the Association President Lazzara and two custodians to discuss the elimination of maintenance-only assignments, Rixford threatened to sub-contract the maintenance work. The evidence, however, did not support that Rixford threatened to sub-contract. His statements in this regard were made, not as threats, but in response to the custodians posing hypothetical questions regarding certain high-level maintenance work such as a

leaking roof. Rixford communicated what he thought was the Board's position that such work would have to be done by outside vendors. This was not a threat, it was a response to their questions.

Nevertheless, Rixford, during the course of this conversation stated, that if the custodians did not work with him, he would not work with them and mentioned laying off custodians. Lazzara took these comments together as a threat to the two custodian in conjunction with Rixford's mentioning of outside vendors performing maintenance work, something she had not heard mentioned before. Rixford's statements suggest that either they cooperate with him or he would not cooperate with them in a negative and threatening way. There was apparently no legitimate business justification for these statements, other than to quell any dissent relative to the reorganization of custodial duties.

Based on the foregoing, I find that Rixford's statements about not working with the custodians if they did not work with him together with his statement about possibly laying off custodians constitutes a threat, and therefore, independently violated 5.4a(1) of the Act.

The 5.4a(5) and derivative (1) allegations

The Association contends that the Board violated 5.4a(5) and derivatively (1) when Rixford directed Wittig to poll custodians

regarding his (Rixford's) proposal that the custodians work certain holidays, to which they were contractually entitled, in exchange for Rixford giving them discretionary time off over the Christmas vacation, discretionary time off that they had received in past years. In essence, the Association asserts that the Board dealt directly with custodians over changes to terms and conditions of employment that should have been negotiated with the Association as the majority representative.

N.J.S.A. 34:13A-5.3 provides that representatives selected by the majority of employees in an appropriate unit for the purpose of collective negotiations shall be the exclusive representatives of employees for such purposes. The exclusivity principle is the cornerstone of the Act for regulating the relationship between public employers and unions. The New Jersey Supreme Court affirmed this principle in Lullo V. Intern. Assoc, of Fire Fighters, 55 N.J. 409, 426 (1970) and explained that this equitable balance of power would be diluted and lead to unhealthy divisiveness if individual employees represented themselves. Parity of power between employers and employees would be unobtainable under such circumstances. Thus, labor stability would suffer. See generally, Matawan-Aberdeen, supra, (Board violated Act when it dealt directly with clerical and custodial employees during negotiations rather than Association's officially designated representative). Contrast Mt. Olive Bd. of

Ed., P.E.R.C. No. 84-73, 10 NJPER 34 (¶15020 1983) (no violation where superintendent met with employees, including shop steward, to resolve grievance as had been the previous practice and union never disavowed authority of stewards at initial informal grievance discussions).

Here, Rixford wanted to have custodial coverage during certain in-service days when custodians were contractually entitled to time off. In exchange, Rixford proposed giving them time off during the Christmas vacation. He asked his supervisor, Jack Wittig, to solicit custodial opinion regarding this proposal. Rixford, however, never negotiated the issue with the custodians. He met with the Association co-presidents and attempted to gain their agreement to the proposal.

This set of circumstances is akin to Rumson-Fair Haven Reg. Bd. of Ed., P.E.R.C. No. 87-46. 12 NJPER 831 (¶17318 1986). In Rumson-Fair Haven, the Board submitted a proposal during negotiations concerning the length of the teachers' work day and work schedules for science teachers. About a month after the beginning of negotiations, the superintendent sent a memo to science teachers soliciting their interest in before-school or after-school labs. The Commission found no direct dealing arising from the survey because no evidence supported that the Board sought to negotiate this issue with anyone other than the

Association, no terms and conditions were adjusted and no unilateral action was taken.

The Commission distinguished Rumson-Fair Haven from Newark Bd. of Ed., P.E.R.C. No. 85-24, 10 NJPER 545 (¶15254 1984) where it found the Board directly dealt with employees when it unilaterally created a salary incentive bonus program and then solicited employee suggestions concerning the nature of the award. See also, Englewood Bd. of Ed., P.E.R.C. No. 94-1, 19 NJPER 409 (¶24180 1993) (no direct dealing found where, during negotiations, Board distributed survey seeking teachers' opinions regarding year-round classroom instruction), but contrast Hillsborough Tp. Bd. of Ed., P.E.R.C. No. 2005-54, 31 NJPER 99 (¶43 2005) (where Board violated Act by directly dealing with part-time clerical assistants regarding waivers of health insurance benefits).

Like Rumson-Fair Haven, Rixford never sought to negotiate his proposal about the in-service day work with custodians. He merely solicited their opinions through their supervisor Wittig. The evidence does not support the Association's contention that, after it rejected the proposal, Rixford sought to negotiate or did negotiate with the custodians directly nor did he implement the changes he proposed without Association agreement.

Based on the foregoing, I do not find that the Board violated 5.4a(5) and derivatively (1) by polling custodians regarding his proposal that they work in-service days.

The 5.4a(4) allegations

The Association alleges that shortly after Secretary Sharon Lovas and Custodian Massimo Amato testified in the hearing in this matter they were reassigned and/or transferred in retaliation for that testimony. Based on the evidence, I do not find that Lovas' reassignment was in retaliation for her testimony, but I do find that Amato was transferred in violation of 5.4a(4).

In Hunterdon Cty., supra, the Supreme Court approved the Commission's use of In re Bridgewater, supra, in assessing whether a public employer violates 5.4a(4) of the Act. The legal test is identical. In the absence of direct proof of retaliation, the charging party must demonstrate that: (1) s/he engaged in one or more enumerated protected activities, such as testifying at a PERC hearing; (2) that the employer had knowledge of such activity; (3) that the employer was hostile to that activity and (4) that a causal nexus exists linking the employee's activity, the employer's hostility and the alleged retaliatory act. State of New Jersey(Human Services), P.E.R.C. No 91-41, 16 NJPER 587, 590 (¶21258 1990).

Here, both Lovas and Amato testified on April 30, 2008 at the first day of hearing in this matter. The Board was aware of that testimony. The question remains whether hostility can be inferred indirectly from Rixford's actions in reassigning Lovas for the 2008-2009 school year to another position in Memorial School and transferring Amato for the same year from Memorial School to Charles Olbon School with new hours of work. Both were notified in May 2008 of these changes.

As to Lovas, her reassignment to work under the supervisor of curriculum and instruction, a newly created position, was initiated by Rixford in the fall of 2007, well before she testified in this matter. She had not requested such a reassignment nor had she been informed beforehand of the decision. Certainly, this unanticipated personnel action, coming within weeks of her testimony in this matter, suggests from the timing of events an inference of hostility. Mendham Boro. Bd. of Ed., supra.

Rixford, however, selected Lovas for the assignment because of her demonstrated expertise with computer programs and her adaptability to learning new skills. Even if Rixford harbored some animosity growing out of Lovas' testimony in 2006 in the various grievances filed by the Association, his justification for reassigning her for the 2008-2009 school year is legitimate. That Rixford would have made the reassignment regardless of

Lovas' testimony is supported by a preponderance of evidence on the entire record.

Unlike Lovas, the circumstances of Amato's transfer establish a wholly unanticipated personnel action, taken within weeks of his testimony in this matter, and unrelated to any legitimate non-pretextual business justification. Specifically, Amato testified on the first day of this hearing - April 30, 2008. Like Lovas, Amato had neither requested the transfer nor been notified beforehand. Two weeks after testifying he was notified of his assignment for 2008-2009 transferring him from Memorial School, where he had worked the previous 13 years, and that his work shift would be changed from 9:00 a.m. to 6:00 p.m. to 7:30 a.m. to 4:30 p.m., an adverse change in Amato's work hours causing difficulty with childcare arrangements. The timing of the transfer is suspicious and supports an inference of hostility.

Early in Rixford's tenure, Amato and Custodian Sal Navarre challenged Rixford,, regarding the abolishment of their maintenance-only assignment. During that meeting Rixford communicated that if the custodians did not work with him, he would not work with them. Subsequently, the custodians did not "work with" Rixford. For instance, Rixford clearly resented the Association's rejection of his proposal to have custodians' work in-service days as well as the Association's filing of the

mail-stipend grievance on behalf of the custodians. Shortly after the latter filing, Rixford summarily rejected Tashayodi's request that he find extra assignments for the custodians in November so that they could get some discretionary time off at Christmas. These events as well as Amato's testimony at this hearing and the timing of his transfer so soon after the testimony establish hostility.

Like an a(3) analysis, even if the charging party makes out a prima facie case under a(4), the employer has the affirmative defense that its action against the employee was based on legitimate business reasons. That defense has not been established by the Board. Rixford's explanations for his decision to transfer Amato to Charles Olbon School are illogical and, thus, must be rejected as pretextual.

For instance, Rixford claimed that he transferred another custodian, Dennis Pacelli, to Memorial from Beatrice Gilmore School where he had been for several years, because he thought Pacelli would be better at a larger school. Rixford did not provide a rationale for reaching this conclusion, but explained that Pacelli's transfer resulted in an additional custodian at Memorial, implying that one custodian had to be sent to another school. One would presume that Pacelli's transfer created an opening at Beatrice Gilmore, but the transfer of Amato was to

Olbon School. No explanation was provided for the shifting of personnel in this fashion.

Next, Rixford explained that Navarre and Amato were his two strongest custodians, so he wanted one each at his two largest schools - Memorial and Olbon. Thus, Amato was transferred. Why then did Rixford not have Amato assigned to Olbon when he revised the custodial assignments after the elimination of the maintenance-only duties the previous year, if it was so important to have Navarre and Amato each in one of these schools? Why wait until two weeks after Amato testified to transfer him? Moreover, Rixford never explained why he transferred Amato and not Navarre.

Another explanation offered by Rixford for Amato's transfer is that the composition of the Board had changed, and there was renewed interest in resurrecting the maintenance-only assignments previously held by Navarre and Amato. Rixford never elucidated how transferring Amato from the school he had been working in for the past 13 years addressed that Board change.

Next, Rixford explained that the quality of Amato's work factored into his decision to transfer Amato. I find this explanation self-serving. Rixford certainly did no favor to an employee he found to be exemplary by placing him in an adverse position regarding day care situation. The transfer was no reward for work well-done.

Finally, Rixford testified that he consulted with Wittig about the transfer decision, but Wittig was never called as a witness to buttress Rixford's testimony. I credited Amato's testimony that when he received notice of his transfer, he was sitting with Wittig who told him that he knew nothing about it. I find it highly improbable that Rixford acted with Wittig's knowledge or input as he claimed. Therefore, I conclude that Rixford's decision to transfer Amato was a result of animus to the exercise of protected activity, namely Amato's testimony at the hearing in this matter. Rixford's unsuccessful attempt after-the-fact to accommodate Amato's request for different work hours by getting Board approval for an adjustment is immaterial to the finding of retaliatory transfer.

Based on the above, I find that the Board violated 5.4a(4) of the Act when Rixford transferred Amato for the 2008-2009 school year to Charles Olbon School and changed his hours of work from 9:00 a.m. to 6:00 p.m. to 7:30 a.m. to 4:30 p.m. I recommend dismissal of the allegations as to Lovas' reassignment for 2008-2009.

The 5.4a(2) allegation

The Association alleges that Rixford's actions violated 5.4a(2). I do not find the evidence supports this alleged violation.

Commission cases dealing with a(2) claims generally involve organizational rights or the actions of an employee with a conflict of interest caused by his membership in a union and his position as an agent of an employer. Union Cty. Reg. Bd. of Ed., P.E.R.C. No 76-17, 2 NJPER 50 (1976). While motive is not an element of a 5.4a(2) violation, there must be a showing that the acts complained of actually interfered with or dominated the formation, existence or administration of the employee organization. Domination exists when the organization is directed by the employer and goes beyond mere interference. To establish a violation, employer conduct must amount to pervasive control of the employee organization itself. Atlantic Comm. Coll., P.E.R.C. No. 87-33, 12 NJPER 764, 765 (¶17291 1986), aff'd NJPER Supp. 2d 182 (¶159 App. Div. 1987).

In Matawan-Aberdeen Reg. Bd. of Ed., H.E. No. 89-41, 15 NJPER 356 (¶20159 1989), aff'd by P.E.R.C. No. 89-130, supra, the hearing examiner rejected claims of an a(2) violation finding that, at all relevant times, the Association through its leadership continued to exist and administer the employee organization. Here, although Rixford took actions that the Association subsequently grieved, it remained in control of its membership and was not dominated by Rixford's actions. Nor was it prevented from filing grievances protesting violations of its collective agreement and going to binding arbitration. Despite

Rixford's attempt to dissuade them from seeking Uniserv Representative Loccke's advice and assistance, Association co-presidents Lazzara and Tashayodi nevertheless sought Loccke's help and guidance.

Based on the foregoing, I recommend dismissal of the 5.4a(2) allegations.

CONCLUSIONS OF LAW

The Board independently violated 5.4a(1) when, during a meeting to discuss the elimination of maintenance-only assignments, Superintendent Rixford threatened to layoff custodians and suggested that he would not work with them, if they did not work with him.

The Board violated 5.4a(3) and derivatively (1) of the Act when, in retaliation for the filing of grievances and/or the rejection of his proposals to alter terms and conditions of employment, Superintendent Rixford (a) issued a memorandum (CP-3), entitled "Discretionary Work Period," to secretaries and custodians announcing that he would not be granting any discretionary time both now and in the foreseeable future; (b) refused, at the request of the Association, to find extra tasks for the custodians in November so that they could have days off over the Christmas holidays as in the past; (c) responded to a step 2 grievance regarding early-release time before Thanksgiving by refusing to grant such time presently and in the foreseeable

future and (d) insisted that custodians work the Christmas holiday, discretionary time they previously had off, after the Association rejected his proposal they work in-service days that they were contractually entitled to as time off.

The Board violated 5.4a(4) when Superintendent Rixford transferred Custodian Massimo Amato from Memorial School to Charles Olbon School and changed his hours of work from 9:00 a.m. to 6:00 p.m. to 7:30 a.m. to 4:30 p.m. in retaliation for his testifying at the April 30, 2008 hearing in this matter.

I recommend that the Commission dismiss the remaining allegations of the Complaint alleging that (a) the Board reassigned Secretary Sharon Lovas for the 2008-2009 school year in retaliation for her testimony at this hearing; (b) the Board violated 5.4a(5) and derivatively (1) by Superintendent Rixford dealing directly with the custodians regarding their willingness to work certain holidays in exchange for days off at Christmas; and (c) that the Board violated 5.4a(2) of the Act.

RECOMMENDED ORDER

I recommend that the Commission ORDER that:

A. Respondent Board cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly by Superintendent Rixford threatening to layoff custodians and not work with them if they didn't work with him;

by Rixford issuing a memorandum refusing to grant secretaries and custodians discretionary time off presently and in the foreseeable future; by Rixford refusing to grant secretaries early release time before holidays after the filing of a grievance over Thanksgiving release time; and by refusing to give extra tasks for custodians to perform in November 2006 in order to get discretionary time off during the Christmas break after the filing of a mail-run grievance.

2. Discriminating in regard to the tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act particularly when, in retaliation for the filing of grievances and/or the rejection of his proposals to alter terms and conditions of employment, Superintendent Rixford (a) issued a memorandum (CP-3), entitled "Discretionary Work Periods," to secretaries and custodians announcing that he would not be granting any discretionary time both now and in the foreseeable future; (b) refused, at the request of the Association, to find extra tasks for the custodians so that they could have days off over the Christmas holidays as in the past; (c) responded to a step 2 grievance regarding early-release time before Thanksgiving by refusing to grant such time presently and in the foreseeable future and (d) insisted that custodians work the Christmas holiday, discretionary time they previously had off, after the Association

rejected his proposal they work in-service days that they were contractually entitled to as time off.

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 transferring Massimo Amato from Memorial School to Charles Olbon School and changing his hours of work from 9:00 a.m. to 6:00 p.m. to 7:30 a.m. to 4:30 p.m. in retaliation for his testifying at the hearing in this matter.

B. That the Board take the following affirmative action:

1. Cease and desist from threatening to layoff custodians and refuse to work with them, if they don't work with Superintendent Rixford.

2. Immediately rescind the memorandum refusing to grant discretionary time off to secretaries and custodians "both now and in the foreseeable future" (CP-3) and exercise that discretion in a non-retaliatory manner.

3. Immediately give Massimo Amato the option to transfer back to Memorial School with his previous work schedule of 9:00 a.m. to 6:00 p.m.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as appendix "A". Copies of such notice on forms to be provided by

the Commission shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be 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.

5. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Wendy L. Young
Hearing Examiner

DATED: March 31, 2009
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by April 13, 2009.

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 employees in the exercise of rights guaranteed to them by the Act, particularly by Superintendent Rixford threatening to layoff custodians and not work with them if they didn't work with him; by Rixford issuing a memorandum refusing to grant secretaries and custodians discretionary time off presently and in the foreseeable future; by Rixford refusing to grant secretaries early release time before holidays after the filing of a grievance over Thanksgiving release time; and by refusing to give extra tasks for custodians to perform in November 2006 in order to get discretionary time off during the Christmas break after the filing of a mail-run grievance.

WE WILL NOT discriminate in regard to the tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act particularly when, in retaliation for the filing of grievances and/or the rejection of his proposals to alter terms and conditions of employment, Superintendent Rixford (a) issued a memorandum (CP-3), entitled "Discretionary Work Periods," to secretaries and custodians announcing that he would not be granting any discretionary time both now and in the foreseeable future; (b) refused, at the request of the Association, to find extra tasks for the custodians so that they could have days off over the Christmas holidays as in the past; (c) responded to a step 2 grievance regarding early-release time before Thanksgiving by refusing to grant such time presently and in the foreseeable future and (d) insisted that custodians work the Christmas holiday, discretionary time they previously had off, after the Association rejected his proposal they work in-service days that they were contractually entitled to as time off.

WE WILL NOT discharge or otherwise discriminate 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 transferring Massimo Amato from Memorial School to Charles Olbon School and changing his hours of work from 9:00 a.m. to 6:00 p.m. to 7:30 a.m. to 4:30 p.m. in retaliation for his testifying at the hearing in this matter.

WE WILL cease and desist from threatening to layoff custodians and refuse to work with them, if they don't work with Superintendent Rixford.

WE WILL immediately rescind the memorandum refusing to grant discretionary time off to secretaries and custodians "both now and in the foreseeable future" (CP-3) and exercise that discretion in a non-retaliatory manner.

WE WILL immediately give Massimo Amato the option to transfer back to Memorial School with his previous work schedule of 9:00 a.m. to 6:00 p.m.

Docket No. CO-2007-255 West Paterson 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, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"