

P.E.R.C. NO. 89-125

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

GLOUCESTER COUNTY VOCATIONAL TECHNICAL
SCHOOL DISTRICT BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-88-115

GLOUCESTER COUNTY VOCATIONAL TECHNICAL
SUPPORT STAFF ASSOCIATION, NJEA and
WILLIAM E. PELASCHIER,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission remands to the Hearing Examiner for a supplemental hearing, findings and report, an unfair practice charge filed by the Gloucester County Vocational Technical Support Staff Association, NJEA and William E. Pelaschier against the Gloucester County Vocational Technical School District Board of Education. The Commission concludes that the Board did not demonstrate that nondiscriminatory reasons motivated it to suspend Pelaschier. It remands the case to the Hearing Examiner to reconsider findings concerning an allegedly discriminatory nonrenewal.

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SUPPORT STAFF ASSOCIATION, NJEA and
WILLIAM E. PELASCHIER,

Charging Parties.

Appearances:

For the Respondent, Capehart & Scatchard, Esqs.
(Alan R. Schmoll, of counsel)

For the Charging Parties, Selikoff & Cohen, Esqs.
(Steven R. Cohen, of counsel)

DECISION AND ORDER

On October 26, 1987, the Gloucester County Vocational
Technical Support Staff Association, NJEA ("Association") and
William E. Pelaschier filed an unfair practice charge alleging that
the Gloucester County Vocational Technical School District Board of
Education ("Board") violated subsections 5.4(a)(1), (3) and (4)^{1/}

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

of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when it suspended Pelaschier and later did not renew his contract. The Association claims the actions were in retaliation for his protected activities: serving as the Association's president; testifying against the Board in an unfair practice proceeding; processing grievances, and representing the Association in negotiations.

On October 30, 1987, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On November 13 and December 22, 1987, the Board filed an Answer and amended Answer. It asserts that Pelaschier's suspension and nonrenewal were based on his poor work attitude and performance, his abuse of sick days, and his harassment of a female employee.

On March 21, 22, 23, 24 and April 8, 1988, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by June 30, 1988.

On August 31, 1988, the Hearing Examiner recommended the Complaint's dismissal. H.E. No. 89-8, 14 NJPER 613 (¶19258 1988). He first found that certain Board administrators were hostile to Pelaschier's exercise of protected rights. He relied on: a

1/ Footnote Continued From Previous Page

(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."

statement by William Borisch, Pelaschier's supervisor, that the Board was out to get Pelaschier; a statement by Board Secretary Orlando Stallings that "before Pelaschier and the union [were] around, [the Board was] able to do things...without people bothering them"; and the apparent surveillance of Pelaschier by William Gerson, the Board's Coordinator of Personnel Services, at an open house the evening before Pelaschier was suspended. The Hearing Examiner concluded that Pelaschier's protected activities were a substantial or motivating factor in the Board's decisions to suspend and not renew him. The Hearing Examiner also concluded, however, that, even in the absence of his protected conduct, the Board would have suspended and not renewed Pelaschier because of his poor work record and two statements submitted to the Board by Connie Pluta, another custodian. The Hearing Examiner characterized Pluta's first statement (CP-9) as an accusation that Pelaschier verbally abused her. Pelaschier was suspended shortly after Pluta gave CP-9 to Stallings. Pluta's second statement (CP-4F), submitted the day the Board decided not to renew Pelaschier's contract, accused Pelaschier of sexually harassing her.

On October 13, 1988, the Association filed exceptions. It contends that the Hearing Examiner overlooked critical facts, misinterpreted several findings, and erred in crediting Board rather than Association witnesses.

The Association asserts that the Hearing Examiner should have found that Pelaschier had not received a written reprimand

prior to Superintendent Morella's hiring in December 1986; that John DuBois gave Pelaschier permission to sign in early on December 29, 1986; and that Pelaschier never received certain security memoranda. The Association argues that the Board's attempt to use the memoranda as support for Pelaschier's removal was pretextual.

The Association asserts that the Hearing Examiner mischaracterized Pelaschier's confrontation with Borisch on the evening of April 3, and that it was Borisch's "nasty attitude and tone of voice" that precipitated their encounter that evening. The Association asserts that the Hearing Examiner failed to find that Pelaschier knew that there were wet mop heads in a storage closet when Bardsley insisted that there were not, and that this knowledge caused Pelaschier's frustration during the April 3 argument.

The Association asserts that the Hearing Examiner erred in not finding that Article VI.A of the collective agreement provides for a 30 minute meal break on each shift but does not specify which 30 minutes are to be used. The Association argues that the Hearing Examiner did not properly evaluate Borisch's credibility, or a memo from Borisch to Stallings accusing Pelaschier and three other custodians of overstaying their meal break by 15 minutes.

The Association asserts that the Hearing Examiner ignored Morella's failure to respond to a memorandum from Vice Principal Constantine describing a hallway conversation in which Pelaschier allegedly said to Pluta that he "[would] like to have sex with [Pluta] in a closet."

The Association asserts that the Hearing Examiner should have credited Pelaschier's account of the incidents which led to his loss of three days' pay for an alleged abuse of sick leave.

The Association excepts to the Hearing Examiner's crediting of Pluta, rather than four Association witnesses, about Pluta's demeanor on the job. The Hearing Examiner found Pluta a "forthright, truthful, sincere and genteel witness" (14 NJPER at 617) and credited her denial of the Association witnesses' testimony that she used foul language, provoked sexually oriented conversations and was a willing participant in off-color humor with the night crew.

Finally, the Association argues that the Hearing Examiner mischaracterized Pluta's first written statement to the Board (CP-9) and should not have believed her second (CP-4F). It also argues that the Board's purported reliance on Pelaschier's work record and on Pluta's statements (their reliability notwithstanding) was a pretext.

On November 9, 1988, the Board filed a reply. It asserts that the Hearing Examiner's credibility determinations should not be disturbed and that his decision should be affirmed.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-23) are mostly accurate, but incomplete. We incorporate them with these modifications and additions.

We add to findings 4 and 8 that the Board hired Joseph Mangarella, a contractor, to negotiate its first agreement with the Association. Dr. Joseph English, then the superintendent, also

occasionally attended negotiations for the Board while it was negotiating the "skeleton agreement" with the Association. Eugene Sharp, an NJEA UniServ Representative, and Pelaschier attended all sessions on behalf of the Association, and John Betson, the Association's shop steward, occasionally sat in (1T38-1T39).

English was succeeded in June 1986 by Acting Superintendent Martin, who attended a few negotiations sessions. Martin served as superintendent until November 1986 and was succeeded by Morella in December 1986. By December 1986, the Board's team consisted of Mangarella and Stallings. This Board team remained intact until negotiations for a comprehensive agreement had been completed in July 1987 (1T40-1T41).

During negotiations the parties had several discussions about Pelaschier's duties and whether his evening supervisor/security title should be excluded from the Association's unit. Shortly before a February 25, 1987 meeting, the Board had posted a vacancy for a new title, craft employee/supervisor, which eventually replaced Pelaschier's evening supervisor/security title. Pelaschier was concerned that the posting was an attempt to undermine the Association because it was done without notifying him or discussing it with the Association. When confronted by Sharp and Pelaschier, Mangarella assured them that the Board was not "out to get" Pelaschier. The Board maintained that it posted the craft employee/supervisor vacancy because it felt it needed a supervisor on both the day and night shifts. The Board wanted someone to evaluate employees on the two shifts and to assist it in hiring and

firing (1T50-1T53; 2T103). It posted the new non-unit position because Pelaschier had refused to evaluate employees on the night shift (2T122-2T123).

Though not specifically discrediting Pelaschier's testimony, the Hearing Examiner, at Finding 11, accepts DuBois' rather than Pelaschier's version of the December 29, 1986 sign-in incident. We adopt the Hearing Examiner's finding as supported by the record. We similarly adopt the Hearing Examiner's findings about the security memoranda, R-2 through R-7.

We add to finding 11 that when Borisch introduced himself to Pelaschier he offered to shake Pelaschier's hand. Pelaschier ignored the offered handshake and walked away from Borisch without saying a word. We adopt the Hearing Examiner's findings about Pelaschier's April 3 encounter with Borisch, based on the totality of the Hearing Examiner's findings, including those based on credibility, not because of the total improbability of a contrary finding.

We add to finding 11 that Pelaschier was convinced that there were wet mop heads in the storage closet on April 3, 1987 because, as the former night shift supervisor, Pelaschier was responsible for the storage closets' contents.

We add to finding 11 that the collective agreement provides for a 30 minute meal break on each shift but does not specify when the 30 minutes must be taken. Borisch did not know when Pelaschier

and the other employees had begun their meal break, though he thought the break was to begin at 7:00 p.m.

We add to finding 11 that Morella did not respond to Constantine's memorandum.

We add to finding 11 that Pelaschier told Gerson that when Bardsley saw him in his pick-up, Pelaschier was returning home from a pharmacy where he had gone to buy some cold pills. Pelaschier refused to charge his three days off as vacation days because he thought he was entitled to take them as sick days.

We add to finding 12 DuBois' statement attached to his April 24 evaluation of Pelaschier.

Mr. Pelaschier, as you are aware, you received three warnings in writing this year regarding your unsatisfactory performance. We have not seen any improvement in your ability to get along with your fellow workers or your supervisor, nor have we seen any improvement in your attitude since you are constantly defensive and do not accept constructive criticism. Therefore, if we do not see improvement in this area within 30 days, your employment will be terminated effective June 30, 1987.

We modify finding 14 to explain the "embarrassing encounter" referred to by the Hearing Examiner. Shortly after Pluta arrived at work on April 24, 1987, she walked by Pelaschier who, while staring at her chest, said "Hello Connie." We also quote CP-9's entire text:

When the Union was first brought up, I was not going to join it. I went thru a lot of verbal abuse from several of the men in here on the night crew. After about 6 weeks of it, I so to say joined them. I thought with a Union in here I would have a place to work where every thing would be fair, how wrong I was. Instead of being better it got worse. Mr. Pelaschier how ever his name is spelled, became carried away with his

title of President. I thought I'd stay out of this trouble, but I can't. A Union so that we would be treated fair not join a Hitler organization. When I wanted to do extras, I got told no, it was against the union rules, many a time extra work should be done that wasn't. When I took it on myself to do extras I was afraid some night to even go to the staff lounge. I have been called names, told what to expect if I didn't go along with the regime how ever it's spelled. I sincerely doubt Mr. Sharp or the union has any part in some of this stuff and if they do I wouldn't be told. Only a chosen few are aware of what the meetings are about. At one point I was told what would happen to me or my car if I was going to be a scab. I work and mind my own affairs in here but I'm not going to be forced or pushed on any more. I will not be told by another employee what my actions should be. I've taken alot of abuse in here and my only thought is, if a union is so fair why am I going thru this stuff when all I want is to work. I came here today on my own, my nerves are shot from simple stuff and I don't know what will happen to my car if I don't go along with this personal war. I just wanted to know where I stand because as far as I'm concerned, I wasn't taking all this when a union wasn't here. I worked and nobody bothered me then and now it's just not worth it. Me and my son isn't taking any more by being silent. I'm not a simple woman or a smart one, but I know what's fair and for over a year it hasn't been fair. We would be better with a union rep. handling us, at least the rest of us custodians would have a chance, I'm not alone in my way of thinking, there are four others, that are tired of it to.

We add to finding 17 that shortly after Pluta arrived at work on April 27, 1987, Betson called her a slut. She later wrote her second statement (CP-4F), which was witnessed by a secretary in Stallings' office. Pluta said she wrote the second statement to record her reasons should she decide to quit her job (4T126). We also add that when Pluta wrote her second statement she thought that

Pelaschier already had been fired (4T117). Finally, we add that the Board did not question Pluta or Pelaschier about Pluta's two written statements, nor did it investigate her accusations before suspending Pelaschier.

We modify finding 23 to indicate that Morella's May 12 letter (CP-4) apparently listed the suspension for sexual harassment as one of the reasons for the nonrenewal.

Under In re Bridgewater Tp., 95 N.J. 235 (1984), the charging party must prove by a preponderance of the evidence on the entire record that anti-union animus motivated the employer's adverse personnel action. In the absence of any direct evidence of anti-union motivation, a charging party must prove that the employee engaged in protected activity, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected right. Id. at 246. If the charging party shows that anti-union animus motivated the personnel action, the employer can avoid an unfair practice finding by proving that it would have taken the same action absent the protected activity.

We consider first the allegation that the Board violated subsections 5.4(a)(1), (3) and (4) when it suspended Pelaschier on April 24. We agree with the Hearing Examiner that Pelaschier's protected activities were a substantial or motivating factor in the decision. Pelaschier was very active on behalf of the Association as its president and negotiations spokesperson. He also helped Pluta obtain a shift change and Ford resolve a grievance. He

testified as an Association witness in a July 1986 unfair practice proceeding. The Board admittedly knew of Pelaschier's activities. Finally, the Board, by the conduct of its administrators, was hostile toward Pelaschier's exercise of protected rights. We rely on the statements of Stallings and Borisch (infra p. 3) and Gerson's apparent surveillance of Pelaschier the night before the suspension. We rely also on the fact that Pelaschier was suspended within hours of Morella's receiving CP-9.

CP-9 is Pluta's criticism of Pelaschier's conduct as Association president. She accused Pelaschier of running the Association unfairly - as a "Hitler organization." She complained that Pelaschier admonished her for doing extra work. She complained also of "verbal abuse from several of the men...on the night crew" when she was "not going to join" the Association. She said she had "been called names, told what to expect if [she] didn't go along with the regime." She complained that she was "told what would happen to me or my car if I was going to be a scab." She added that she "wasn't taking all of this when a union wasn't here. I worked and nobody bothered me then, and now it's just not worth it."

Pluta's accusations are essentially condemnations of Pelaschier's actions as Association president. An employer may criticize a union official's tactics, but it cannot change that official's terms and conditions of employment unless the tactics were unprotected. Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). Rather than investigate the allegations to determine whether Pelaschier's actions were

unprotected, the Board suspended him. We are satisfied that the Association has met its burden under the Bridgewater test and turn now to the question of whether the Board would have suspended Pelaschier, even absent his protected activities.

The Hearing Examiner concluded that, "since Morella possessed sufficient non-discriminatory information upon which to base his suspension of Pelaschier...his action was based upon a legitimate business justification independent of Pelaschier's exercise of protected activities." 14 NJPER at 620. The question, however, is not whether the Board possessed "non-discriminatory information" but whether it relied on this information when it suspended Pelaschier. Cf. Price Waterhouse v. Hopkins, ___ U.S. ___, No. 87-1167 (5/1/89). We conclude that it did not.

When DuBois evaluated Pelaschier early in the afternoon on April 24, he told him that he had 30 days to improve his performance or he would be terminated. Morella admitted that he had no intention of suspending Pelaschier on April 24 until he received CP-9. The Hearing Examiner's conclusion that the Board possessed sufficient "non-discriminatory" information upon which it could have legitimately suspended Pelaschier may or may not be accurate. Based on that information, however, the Board had decided to give him 30 days to improve his performance. Had Morella not received CP-9, he would not have suspended Pelaschier.

The Board's subsequent and shifting explanations of its reasons for suspending Pelaschier cloud the issue of its motivation rather than prove that it would have suspended him absent protected

activity. Morella's April 28, 1987 letter to Pelaschier (CP-1) states that "as per our meeting of April 24, 1987 you have been suspended...pending an investigation of alleged harassment of custodial staff, a poor work attitude and poor performance." Morella, however, made no reference to any allegations of "harassment" when he told Pelaschier on April 24 that he was suspended. Morella's May 12, 1987 letter to Sharp (CP-4) states that Pelaschier was suspended due to "sexual harassment of a female custodial employee." Pluta, however, had not yet written her accusation of Pelaschier's sexual harassment when he was suspended on April 24. Given Morella's reliance on CP-9 and the other shifting and unsupported explanations, we conclude that the Board did not demonstrate that non-discriminatory reasons motivated it to suspend Pelaschier.^{2/}

We now address the allegations concerning Pelaschier's nonrenewal. The Hearing Examiner initially found that the charging party proved that Pelaschier's protected activity was a substantial or motivating factor in the Board's April 27 nonrenewal decision. 14 NJPER at 619. This conclusion requires the Board to prove that it would have not renewed Pelaschier even absent its hostility to

^{2/} Given our disposition of the other issues, we will defer consideration of the proper remedy to cure the illegal suspension until the case returns to us. We dismiss the subsection 5.4(a)(4) allegation because the Board's decision was in response to CP-9, not Pelaschier's testimony in an unfair practice proceeding.

his protected conduct. But the Hearing Examiner later concluded that the Board acted without any illegal taint. 14 NJPER at 620. That conclusion is inconsistent with his earlier finding. It must be reconsidered in light of our finding today concerning the reasons for the earlier suspension. Accordingly, we remand this case to the Hearing Examiner to reconsider these findings.

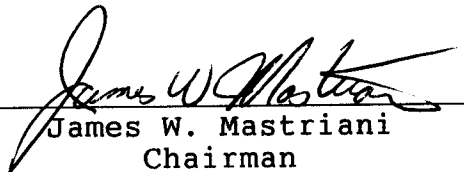
At the same time, the Hearing Examiner should reopen the record to allow testimony regarding the May 21, 1987 hearing. The Association began to offer testimony about the hearing in an attempt to show that the Board's reasons were pretextual. When the Hearing Examiner discouraged the Association from proceeding with that line of questioning, the Association relented. We are concerned about the suddenness of the Board's initial nonrenewal decision in light of our discussion regarding the suspension and the Board's failure or inability to investigate the charges before acting just hours after the charges were made. See Clinton Food 4 Less, 288 NLRB No. 80, 130 LRRM 1441 (1988)(failure to investigate misconduct indicates discriminatory intent). We note that Pelaschier was not given any opportunity to respond to the allegations before the Board acted on April 27. We cannot ignore, however, the seriousness of the accusations facing Pelaschier. Because of that fact, even if the initial suspension and nonrenewal decisions were illegally motivated, it does not necessarily follow that the Board would not have ultimately decided against retaining him even absent its hostility to his protected conduct. We make no judgment about that now. A complete record including evidence about

the extent of the Board's investigation prior to the May 21 hearing, the hearing itself, and the Board's post-hearing reasons for the nonrenewal is necessary to render that determination.

ORDER

The case is remanded to the Hearing Examiner for a supplemental hearing, findings and report concerning Pelaschier's nonrenewal.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
May 15, 1989
ISSUED: May 16, 1989

H.E. NO. 89-8

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

In the Matter of

BOARD OF EDUCATION OF GLOUCESTER
COUNTY VOCATIONAL-TECHNICAL SCHOOL,

Respondent,

-and-

Docket No. CO-H-88-115

GLOUCESTER COUNTY VOCATIONAL-
TECHNICAL SUPPORT STAFF ASSOCIATION,
NJEAN/NEA & WILLIAM E. PELASCHIER,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board did not violate Subsections 5.4(a)(1), (3) or (4) of the New Jersey Employer-Employee Relations Act when it first suspended and then refused to renew the employment contract of Pelaschier at its meeting on April 27, 1987. Pelaschier had been the President of the Association since his hire in mid-October 1985, and had engaged in extensive protected activities, but the Hearing Examiner concluded that even though a prima facie case had been made out by the Charging Party under Bridgewater, the Board established a legitimate business justification for its action of non-renewal independent of any retaliation for Pelaschier's exercise of protected activities. Pelaschier had developed a disciplinary history between December 30, 1986 and his suspension on April 24, 1987, and, thus, his non-renewal was justified. The triggering event was the statement of a female co-employee on April 24, 1987, alleging harassment and verbal abuse by Pelaschier, which was followed on April 27th by a second statement alleging specific acts of "sexual harassment" over a period of many months.

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

H.E. NO. 89-8

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

In the Matter of

BOARD OF EDUCATION OF GLOUCESTER
COUNTY VOCATIONAL-TECHNICAL SCHOOL,

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TECHNICAL SUPPORT STAFF ASSOCIATION,
NJEA/NEA & WILLIAM E. PELASCHIER,

Charging Party.

Appearances:

For the Respondent, Capehart & Scatchard, Esqs.
(Alan R. Schmoll, of counsel)

For the Charging Party, Selikoff & Cohen, Esqs.
(Steven R. Cohen, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 26, 1987, by the Gloucester County Vocational-Technical Support Staff Association, NJEA/NEA & William E. Pelaschier ("Charging Party," the "Association" or "Pelaschier") alleging that the Board of Education of Gloucester County Vocational-Technical School ("Respondent" or the "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that Pelaschier, who was employed as a

custodian from October 1985 through June 30, 1987, engaged in such protected activities as serving as the Association's president, testifying for the Association in an unfair practice proceeding before the Commission in July 1986, representing the Association's members with respect to grievances, and serving as the Association's principal negotiator; the Board was aware of and was hostile to Pelaschier's engaging in the foregoing protected activities; on April 24, 1987, Pelaschier was suspended from his duties as custodian by the Board; on April 28, 1987, the Board advised Pelaschier that he would not be reemployed for the 1987-88 school year and in letters dated April 28 and May 12, 1987, the Board advised Pelaschier of the reasons for having suspended him and also provided him with the reasons for the non-renewal of his contract; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1), (3) and (4) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

October 30, 1987. Pursuant to the Complaint and Notice of Hearing, hearings were held on March 21 through March 24 and on April 8, 1988, in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by June 30, 1988.

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

Upon the entire record, the HE makes the following:

FINDINGS OF FACT

1. The Board of Education of Gloucester County Vocational-Technical School is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Gloucester County Vocational-Technical Support Staff Association, NJEA/NEA is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. William E. Pelaschier is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

4. The Association has been the majority representative of a unit consisting of all custodial and maintenance employees

since February 27, 1986, when it was certified by the Commission in Docket No. RO-86-99 following an election (2 Tr 45). Thereafter, negotiations ensued between the Board and the Association and on August 14, 1986, a Memorandum of Agreement was executed for a period of one year: July 1, 1986 to June 30, 1987 (R-1). The Memorandum of Agreement described the document as a "skeleton" agreement, which set forth limited terms and conditions of employment, including a grievance procedure and a salary schedule. The parties thereafter negotiated a complete successor agreement, effective July 1, 1987 through June 30, 1989 (J-1).

5. Prior to his employment with the Board, Pelaschier was employed by the GAF Corporation in Gloucester City from 1958 to September 1984 where he was a member of the United Rubber Workers, serving as a shop steward for three years, Vice-President for one year and President for 15 years until the shutdown of the plant on September 12, 1984 (2 Tr 31-33).

6. After Pelaschier was employed by the Board on October 15, 1985, as a custodian, he remained in this position until July 1, 1986, when he assumed the position of Evening Supervisor/Security. On April 3, 1987, Pelaschier returned to his original position as custodian and continued as a custodian until July 1, 1987, when the non-renewal of his employment contract became effective. The non-renewal followed the suspension of Pelaschier

with pay by the Board's Superintendent, Victor C. Morella,^{2/} on April 24, 1987. [See 1 Tr 9-12; 2 Tr 33, 34; CP-1 & CP-8].

7. Pelaschier became the President of the Association shortly after beginning his employment and he remained as President until November 1987 when Anthony P. Hodge became President (1 Tr 110; 2 Tr 31).^{3/}

8. Eugene Sharp, an NJEA Field Representative, was the spokesman for the Association in the negotiations, which resulted in R-1 and J-1, supra, and he was joined by Pelaschier and the Shop Steward, John Betson (1 Tr 38, 39, 43; 2 Tr 12). Pelaschier's negotiations activities on behalf of the Association spanned the period from April 1986, when negotiations commenced, which resulted in the execution of R-1 on August 14, 1986 through the completion of negotiations for the successor agreement (J-1), which post-dated Pelaschier's termination on July 1, 1987 (1 Tr 38-43; 2 Tr 96-102).

9. In the early part of July 1986, the Association instituted an unfair practice proceeding, seeking interim relief

^{2/} Morella was hired as Superintendent on December 1, 1986 (5 Tr 13).

^{3/} The Board in its Answer has admitted that Pelaschier engaged in such protected activities as serving as the Association's President, testifying in an unfair practice proceeding before the Commission in July 1986, representing the Association's members with respect to grievances and disciplinary disputes and serving as the Association's principal negotiator in the negotiations which resulted in R-1 and J-1, supra (1 Tr 13; C-2 & C-3, ¶4). Further evidence of the exercise of protected activities by Pelaschier is found in subsequent findings of fact.

before Commission designee, Edmund G. Gerber (1 Tr 66, 67). When Sharp made service of "papers" upon Orlando Stallings, the Board's Secretary, prior to the hearing date, Stallings appeared to be "upset about it, and indicated that before Pelaschier and the union was around, they were able to do things like this without people bothering them..." (1 Tr 66). The Association's application for a temporary restraints involved the Board's unilateral discontinuance of its prior practice of scheduling a four-day work week for custodians in the months of July and August. Pelaschier was the only custodian to appear at the hearing and testify. The matter was settled on the day of the hearing. [1 Tr 66, 67].

10. Notwithstanding that Betson was the Association's Shop Steward, Pelaschier was the primary representative of the Association in the filing of informal grievances, none of which were ever reduced to writing (3 Tr 54). Although J-1 became effective on the date that Pelaschier's employment was terminated, July 1, 1987, this agreement does provide in Article III, Grievance Procedure, Section B(2)(a) that the Association "...shall discuss the alleged grievance with the employee's immediate Supervisor in an attempt to resolve the matter informally at that level..." [J-1, p. 5].^{4/}

Pelaschier's grievance activity included his representation of Constance A. Pluta in arranging two shift changes for her with Stallings during the summer of 1986, which Pelaschier was able to

^{4/} There is no corresponding provision in the original "skeleton" agreement (R-1, supra).

resolve as requested by Pluta (2 Tr 56-58; 5 Tr 51, 52).^{5/} Also, in February 1987, Pelaschier represented a custodian, George Ford, in a complaint against William M. Gerson, the Board's Coordinator of Personnel Services, Ford having alleged that he was being harassed by Gerson, who was timing him while he (Ford) was on a break (2 Tr 73-75; 4 Tr 57, 58). No grievance was filed (4 Tr 58, 59).

11. Prior to Pelaschier's suspension on April 24, 1987, he had the following disciplinary history:

[1] On December 30, 1986, Stallings formally reprimanded Pelaschier for an incident that occurred on December 29th (CP-4A) when Pelaschier had called John C. DuBois, the Board's Property Services Director to inform him that he (Pelaschier) was going to be late for work because he had to go to the Motor Vehicle office to renew his driver's license. However, Pelaschier did not report until 9:10 a.m., and told DuBois that he signed in at 9:00 a.m., as to which DuBois said "no problem." On the following day, December 30th, DuBois noticed that Pelaschier's sign in time for December 29th read "8:30." When Stallings learned of this he directed Pelaschier to change the sign in time to 9:00 a.m. and to

^{5/} Pluta's denial that Pelaschier had any involvement with her requested shift changes is not credited since Betson corroborated the testimony of Pelaschier and Stallings in his testimony did not refute Pelaschier's version of this incident (2 Tr 11, 12; 4 Tr 89, 90).

initial it. Stallings then issued his written reprimand, supra. [2 Tr 40-44; 4 Tr 4-7, 136; CP-4A & CP-13].^{6/}

[2] During the time that Pelaschier performed the duties of Evening Supervisor/Security between July 1, 1986 and April 3, 1987.^{7/} He received a series of six security or work performance memoranda from DuBois between the dates of January 13, 1987 and March 17, 1987, which DuBois conceded did not arise to the level of written reprimands (R-2 through R-7; 4 Tr 35-37). These memoranda were not a factor in Pelaschier's subsequent evaluation, nor were they brought up at his evaluation conference on April 24, 1987 (3 Tr 176, 177; 4 Tr 17-19; 5 Tr 48; CP-14);^{8/}

[3] On April 3, 1987, William G. Borisch assumed the duties of "Craft Employee/Supervisor" on the night shift (3 Tr 111, 112; CP-17).^{9/} At the beginning of the night shift (3:30 p.m.)

6/ Pelaschier acknowledged that he signed where indicated at the bottom of CP-4A on January 2, 1987 and he did not file a grievance. A copy of CP-4A was placed in his personnel file and a copy was sent to Morella. [2 Tr 41; 3 Tr 9-11].

7/ Pelaschier was promoted to this position on July 1, 1986, after being interviewed by Stallings, who was impressed, inter alia, by his significant prior union experience (4 Tr 138-140; R-8). As Evening Supervisor/Security Pelaschier received a stipend of \$1200 per year (3 Tr 6, 7).

8/ The Hearing Examiner rejects as inherently improbable the testimony of Pelaschier that he never saw Exhibits R-2 through R-7 and that he did not discuss them with DuBois (3 Tr 19-26).

9/ This is the date that Pelaschier was relieved of his duties as "Evening Supervisor/Security." Borisch then assumed the duties of that position but the title was changed to "Craft Employee/Supervisor." Pelaschier resumed his prior position as a custodian on April 3rd.

Borisch introduced himself individually to each custodian, stating his expectations and offering to provide any help (3 Tr 111, 113-115). When Borisch encountered Pelaschier he told Borisch that he (Borisch) "...had no right to pass judgment on anybody until (he) ...knew who they were..." (3 Tr 117). Borisch and Pelaschier then started arguing and heated words were exchanged. Pelaschier stated at one point that Borisch was "...a funny sort of guy..." and that he didn't like what Borisch was trying to say to him (3 Tr 118). The exchange concluded with Borisch stating to Pelaschier that if he continued his "...arrogance toward (him)..." and stepped on his feet then Borisch would step on his (3 Tr 118).^{10/} Later in the shift Borisch encountered Pelaschier with Betson, who inquired about the earlier incident with Pelaschier. Borisch told Betson that it was no concern of his, after which Borisch went to see Stallings for supervisory advice. [3 Tr 119, 120]. When Borisch arrived at Stallings' office Pelaschier and Betson had followed him and, in their presence, Stallings stated that Pelaschier and Betson were to do as Borisch requested (3 Tr 121, 122). When Stallings mentioned the right of Pelaschier and Betson to file a grievance,^{11/} Borisch

10/ The Hearing Examiner cannot credit Pelaschier's version of his conversation with Borisch, which casts Borisch as aggressively prejudiced against Pelaschier, and who, according to Pelaschier, used expletives and displayed a nasty attitude since it is totally improbable that Borisch, even as a supervisor, would inveigh against Pelaschier during the first hours of his new assignment as Craft Employee/Supervisor without provocation (2 Tr 136, 137; 5 Tr 47).

11/ Pelaschier never filed a grievance regarding his encounter with Borisch on April 3rd (3 Tr 12, 13).

first learned of their union involvement (3 Tr 122). Thereafter, Borisch reduced these events to writing in a memorandum to Stallings and DuBois, which was ultimately typed and dated April 6, 1987, with copies to Morella and Pelaschier (CP-17; 3 Tr 123, 124).

[4] Harold F. Bardsley was the Craft Employee/Supervisor on the day shift on April 3, 1987. At about 3:00 p.m. Pelaschier asked him for a 24-inch wet mop with a metal head, because the one that Pelaschier had was too wide. Bardsley told Pelaschier that there were none in storage and that he would look for one. Several minutes later Pelaschier returned and, finding no mop as requested, threw the handle across the room. Pelaschier candidly admitted that he was wrong. There were no further complaints from Bardsley about Pelaschier. [2 Tr 129-135; 3 Tr 33; 4 Tr 154, 155; 5 Tr 36, 37; CP-16).

[5] In an April 8, 1987 memorandum to Stallings and DuBois, Borisch cited Pelaschier and three other employees for having overstayed their lunch period by 15 minutes on April 6th, noting that at 7:45 they were still in the A-2 Dining Room (3 Tr 124-128; CP-11). On April 17, 1987, Pelaschier sent a response to Stallings and DuBois, claiming that the actual time was not 7:45 p.m. as stated by Borisch but instead was 7:32 p.m. (an overstay of two minutes) [CP-10]. Pelaschier also contended in this memorandum that Hollenshead, one of the four named employees, was not present on April 6th. The Hearing Examiner attaches no significance to whether Hollenshead was present or not since Pelaschier was admittedly present. [See CP-11, CP-10 and 3 Tr 145, 146].

[6] On April 10, 1987, Raymond Constantine, the Board's Vice-Principal, sent a memorandum to DuBois, in which he related an incident on April 6, 1987, where he encountered Pelaschier and Pluta in conversation in the hallway of "E" Wing. Constantine overheard Pelaschier state to Pluta that he would "...like to have sex with (her)...in a closet..." (3 Tr 157; CP-4D). In Constantine's memorandum he also stated that he subsequently encountered Pluta on April 8th and that she said that she had not let the incident bother her and that "she could handle Bill..." (CP-4D). Admittedly, Pelaschier did not receive a copy of Constantine's memorandum but Morella did.

[7] On April 15, 1987, Morella sent Pelaschier a letter, advising him that "...the question of your continuation of employment as a custodian will be presented to the Board at its meeting on Monday, April 27, 1987..." (CP-15).

[8] On April 21, 1987, Gerson sent Morella a letter (CP-4B), in which he explained what had transpired between him and Pelaschier on April 20th when Pelaschier came to his office requesting his paycheck. Pelaschier had been absent due to alleged illness for three days, April 14 through 16, 1987, and Gerson requested a doctor's note or else Pelaschier was to be docked three days' pay (2 Tr 46). When Pelaschier claimed that District policy required a doctor's note only after five days' absence, Gerson explained that the policy also gave the Superintendent discretion to request a doctor's note for less than five days' absence (2 Tr 47; 4

Tr 40). Gerson also stated that the policy afforded Pelaschier the opportunity to charge his absence to three days of vacation^{12/} but Pelaschier refused (2 Tr 47; 4 Tr 63). Gerson's action in docking Pelaschier was based upon a report of Bardsley that he had observed Pelaschier operating a pickup truck, dressed in a sports coat or suit and a tie, on one of the three days that Pelaschier was absent (4 Tr 40, 41, 152-154).^{13/}

12. On April 24, 1987, the date of Pelaschier's suspension, he received his evaluation from DuBois. It is undisputed that DuBois had prepared it in two parts, namely, pages one and two were completed on April 3rd and page three was prepared on April 10th. Pelaschier signed his evaluation on April 24th at about 2:30 p.m. after a brief conference with DuBois. [CP-14; 2 Tr 81-89; 4 Tr 26-30]. Page three of CP-14 is a memorandum addressed to Pelaschier from DuBois, in which DuBois gave Pelaschier 30 days to improve his performance or he would be terminated as of June 30, 1987. In this memorandum DuBois recited the fact that Pelaschier had received three written warnings in 1987 and that Pelaschier was admonished to improve his performance in three areas. The 30-day notice to improve his performance was the subject of a brief discussion between DuBois and Pelaschier on April 24th (2 Tr 88; 4

^{12/} Morella testified that the District does not have a policy of permitting employees who misuse sick days to charge such days against their vacation (5 Tr 38).

^{13/} The testimony of Pelaschier does not contradict the essentials of Bardsley's testimony (2 Tr 47, 48).

Tr 30). When DuBois prepared the first two pages of CP-14 on April 3rd he had in his possession at that time only copies of Exhibits CP-4A and R-2 through R-7 (4 Tr 11-18). DuBois conceded that the first two pages of CP-14 did not contain any references to R-2 through R-7 or their contents (4 Tr 17-19). DuBois rated Pelaschier in three categories where, based on a "5.0" perfect rating, Pelaschier received "2.7" for Personal Characteristics, "1.8" for Work Attitude and Initiative and "3.3" for Custodial Management with a summation that Pelaschier "...handles his assigned work as a custodian, but had many weaknesses as a supervisor..." (CP-14, pp. 1, 2).^{14/} However, when DuBois conferred with Pelaschier regarding his evaluation on April 24th he had in his possession at that time copies of CP-4A, R-2 through R-7, CP-10, CP-11, CP-16 and CP-17, supra. Notwithstanding the negative substance of these documents, DuBois conveyed to Pelaschier that he had 30 days, in which to improve his performance, or he would be terminated as of June 30, 1987 (4 Tr 11-18, 21, 27-30).^{15/}

13. Evidence of hostility by the Respondent toward Pelaschier was adduced by the Charging Party as follows:

14/ The reference to "supervisor" is, of course, to Pelaschier's having been Evening Supervisor/Security until the initial date of the evaluation, April 3, 1987.

15/ Morella admitted that he had seen the third page of CP-14, i.e., the 30-day notice of improvement sometime in the second week of April 1987 and never directed the rescission of this notice (5 Tr 35, 36).

[1] Hodge was one of the custodians who was alleged to have overstayed his lunch break on April 6, 1987, and, thus, received a copy of the memorandum from Borisch to Stallings and DuBois dated April 8, 1987 (CP-11, supra; 1 Tr 121-123). Hodge later signed Pelaschier's April 17th letter to Stallings and DuBois, which sought to correct the actual time of the alleged overstay of the lunch break on April 6th (CP-10, supra; 1 Tr 123, 124). Hodge testified that several days after April 8th, Borisch approached him and told him not to worry about "the letter" (CP-11) because it was not going into his file nor into the file of Hollenshead, another custodian involved, because "...That (sic) [they] were out to get Mr. Pelaschier..." (1 Tr 124). Borisch added that if Hodge were to mention it he (Borisch) "...would deny it..." (1 Tr 125). Hodge also testified that he did not say anything to Borisch at the time because of his fear of being fired or getting a reprimand (1 Tr 124). However, on cross-examination, after acknowledging that he signed Pelaschier's letter of April 17th, supra, Hodge admitted that nothing had occurred between April 6th and April 17th that would have made him "...not afraid to stand up..." to Borisch and that no one has threatened to fire him since that time, including when he became the President of the Association in November 1987 (1 Tr 110, 143). Hodge then reiterated that Borisch had stated "...They're out for Pelaschier..." without making any reference to the "union" (1 Tr 143, 144).

[2] Pelaschier testified on cross-examination, regarding his intervention on behalf of Ford in connection with Gerson having harassed Ford in February 1987, supra (3 Tr 40-42). While acknowledging that he never filed a formal grievance in that matter, and that Gerson denied harassment of Ford, Pelaschier testified that Gerson was hostile to him during their five-minute meeting "...By his tone of voice and his action and his vocabulary..." (3 Tr 42). Pelaschier provided no specifics.

[3] William J. Smith, a custodian, testified that, in a conversation with Gerson in mid-January 1987, Gerson insisted that Smith should speak to him directly and not to Pelaschier or the union about any problems that Smith might have about the new dental plan (1 Tr 92, 93). This situation arose when Smith stated that he was going to speak to Pelaschier about any questions regarding the negotiated dental plan and Gerson stated, "...Oh, no, wait a minute. Don't go to Bill Pelaschier about anything. If you want to know about anything, you come to me..." (1 Tr 93).

[4] In July 1986, when Sharp had decided to file an unfair practice charge and proceed for interim relief before the Commission, he served a copy of the papers involved upon Stallings, who seemed to be upset about the matter and "...indicated that before Pelaschier and the union was around, they were able to do things like this without people bothering them..." (1 Tr 66).

[5] On April 23, 1987, the Respondent held an "Open House" for about 2,000 persons and, due to several recent incidents

of vandalism and fire, the administration decided that there "...should be some type of security web through the school..." to avoid any incidents (4 Tr 42-44). Representatives of the administration were deployed and Gerson was assigned to the "E" Wing where he encountered Pelaschier on a number of occasions, in the course of which Pelaschier asked Gerson if he was evaluating or watching him (2 Tr 75-79; 4 Tr 45-51). Betson, the Association's Shop Steward, testified that during that evening Gerson rebuffed him as Shop Steward when he intervened on behalf of Hodge, claiming that Gerson was harassing Hodge (2 Tr 15, 16). Hodge testified that Gerson was following Pelaschier "...wherever he went..." during the evening and confirmed that Betson had spoken to Gerson about Gerson's having followed Pelaschier ever since "...you came to work..." (1 Tr 125-129). Pelaschier testified that Gerson followed him with a pen and pad into every room that he entered during that evening (2 Tr 75-79).

14. On April 24, 1987, Pelaschier reported to work at about 2:30 p.m. and, after having his evaluation conference with DuBois about five minutes later, he performed his custodial duties until about 5:00 p.m. (2 Tr 89, 90). At about 4:00 p.m. on April 24th, Pluta, after having had an embarrassing encounter with Pelaschier^{16/} went to Stallings' office of her volition (4 Tr 71, 72, 74). In the presence of Stallings and Gerson, Pluta wrote a

^{16/} See 4 Tr 72, 73.

statement by hand, in which she complained about verbal abuse, fear of entering the staff lounge and having been called names, the thrust of which was that Pelaschier was primarily involved (CP-9; 4 Tr 75-77, 141-143).^{17/} Stallings read Pluta's handwritten statement and gave it to Morella between 4:00 p.m. and 4:30 p.m. After Morella had read CP-9, he asked Stallings to have Pelaschier come into his office. [4 Tr 143; 5 Tr 28, 29, 42].^{18/}

15. About 5:00 p.m., Pelaschier was paged to Morella's office (2 Tr 90; 4 Tr 143; 5 Tr 30). Present at the meeting were Morella, Stallings, Gerson, Pelaschier and Betson as Shop Steward (2 Tr 17, 18, 90, 91; 4 Tr 144). Morella and Stallings placed the length of the meeting with Pelaschier at about 15 to 20 minutes while Pelaschier and Betson testified that it was about five or six minutes in length (2 Tr 18, 91; 4 Tr 144; 5 Tr 18, 30). Pelaschier and Stallings were the only witnesses who testified as to what was said at the meeting; Pelaschier stated that he was informed by Morella that he was being suspended "...because of work performance, with pay..." (2 Tr. 91). Stallings testified to the same effect (4 Tr 144). Morella testified that he had also received recommendations from Stallings and Gerson that Pelaschier be

^{17/} Pluta's statement (CP-9) was witnessed by Vicki Houts, Morella's secretary (4 Tr 114, 115, 134; 5 Tr 21).

^{18/} Prior to Pelaschier's arrival, Morella made two telephone calls, first to the Board President to confirm his "emergency" authority to suspend Pelaschier and second, to counsel for the Board (5 Tr 29, 44).

suspended (5 Tr 45). When the meeting concluded, Pelaschier was escorted to his car (2 Tr 18, 91; 4 Tr 145).^{19/}

16. Morella acknowledged that he had no intention of suspending Pelaschier when he (Morella) reported for work on the morning of April 24, 1987 (5 Tr 44), notwithstanding that he then had in his possession copies of the following Exhibits:

(a) CP-4A - Stallings' letter to Pelaschier, dated December 30, 1986, warning him about his falsification of an entry in the sign-in log on December 29th when Pelaschier changed his arrival time from "9:00 a.m." to 8:30 a.m.

(b) CP-4B - Gerson's letter to Morella, dated April 21, 1987, in which he related that he had required a doctor's note from Pelaschier for having been absent on three days, on one of which "...he was spotted on the road dressed in suit and tie...", and, thus, was docked three days' pay.

(c) CP-4D - Constantine's memorandum to DuBois on April 10, 1987, regarding an incident on April 6th when he encountered Pelaschier and Pluta and overheard Pelaschier say "...I'd like to have sex with you in a closet..." and subsequently, on April 8th, that Pluta told Constantine that she did not let "...it bother her and she could handle Bill..."

^{19/} At this suspension meeting Pelaschier was not informed of Pluta's statement of that day (CP-9) nor was he questioned about it (2 Tr 72, 73).

(d) CP-11 & CP-10 - Borisch' April 8, 1987, memorandum to DuBois and Stallings, in which he complained that Pelaschier and four other custodians had over-stayed their lunch break on April 6th, to which Pelaschier responded on April 17, 1987.

(e) CP-14 - Pelaschier's evaluation by DuBois, dated April 3, 1987 and April 10, 1987.

(f) CP-15 - Morella's letter to Pelaschier, dated April 15, 1987, in which Morella advised him that the question of his continued employment as a custodian would be presented to the Board at its April 27, 1987 meeting. Compare: Morella's letter to Betson of the same date, April 15th, where Betson was also advised of the April 27th Board meeting but that the purpose of the meeting was "...to discuss and approve recommendations for the status of each individual contract for the ensuing school year..." (CP-12).

(g) CP-16 - Bardsley's memorandum to DuBois of April 6, 1987, complaining that Pelaschier on April 3rd threw a mop handle across the room.

(h) CP-17 - Borisch's memorandum to Stallings and DuBois, dated April 6, 1987, in which DuBois complained that on April 3rd Pelaschier questioned his authority as the newly appointed Craft Employee/Supervisor for the night shift, following which Borisch told Pelaschier that he would not tolerate Pelaschier's challenge to his authority nor Pelaschier's arrogance and disrespect.

17. At about 3:30 p.m. or 4:00 p.m. on April 27, 1987, Pluta again went to Stallings' office where she wrote a second statement, which explicitly charged Pelaschier with "sexual harassment" (CP-4F; 4 Tr 79, 80, 124). Pluta, in her supporting testimony, impressed the Hearing Examiner as a forthright, truthful, sincere and genteel witness, who testified that Pelaschier would not leave her alone, that he pulled down a "pink and white V-top" to her waistline on one occasion, that he touched her with a feather duster from her neck to her thighs, that he bit her on her right breast, that he and others told her dirty jokes and that he kissed her on more than one occasion (4 Tr 80-84). Pelaschier denied in detail that he had ever sexually harassed Pluta (see, for example, 2 Tr 54, 69-71; 5 Tr 52).

18. The Hearing Examiner refuses to discredit the testimony of Pluta, notwithstanding the testimony of the Charging Party's witnesses, Pelaschier, Hodge, Smith and Betson that Pluta constantly used foul language, initiated sexually oriented conversations and told off-color jokes, etc. [1 Tr 82-84, 86-92, 98-102, 112-115; 2 Tr 8-10, 52-54]. The Hearing Examiner credits Pluta's denials and her explanations of the facts as testified to by the Charging Party's witnesses above (4 Tr 86-88, 93, 98-100, 127-130).

19. Morella received Pluta's April 27th written statement alleging "sexual harassment" (CP-4F) that afternoon, approximately three or four hours before the 7:00 p.m. Board meeting, at which the

Board voted not to renew Pelaschier's employment contract for the 1987-88 school year (5 Tr 39-41, 43). Morella testified that he had shared with the Board Exhibits CP-9, CP-4F and all other documents pertaining to Pelaschier's performance (5 Tr 43).^{20/}

20. The next day, April 28th, Morella sent two letters to Pelaschier, the first stating that he had been suspended with pay "...pending an investigation of alleged harassment of custodial staff, a poor work attitude and poor performance..." (CP-1). The second letter advised Pelaschier of the Board's action of April 27th not to employ him for the 1987-88 school year (CP-8).

21. Also, on April 28, 1987, Meredith Flynn, the Board's Special Services Director, sent a memorandum to Stallings about an incident which occurred "during the month of February" where she observed Pelaschier grab the front of Pluta's blouse and advised Pelaschier that this could be "grounds for sexual harassment" (CP-4E)[3 Tr 148-154]. Flynn testified that she did not reduce the incident to writing at that time, nor did she report it to anyone in administration, because she felt that it was an isolated occurrence (3 Tr 149). Flynn reduced the incident to writing on April 28th when she was requested to do so at about 3:30 p.m. by Stallings in order to substantiate Pluta's sexual harassment claim (3 Tr 152).

^{20/} Morella acknowledged that at no time prior to the Board's April 27th meeting was Pelaschier contacted regarding the contents of CP-4F (5 Tr 39).

22. On May 5, 1987, Morella sent another letter to Pelaschier, advising him that his hearing before the Board had been rescheduled to May 21st at 7:00 p.m. (CP-2), the original hearing date having been May 14th (CP-1).

23. Also, on May 5, 1987, Sharp sent a letter to Morella, in which he asked for specifics as to the reasons given by Morella on April 28th for suspending Pelaschier (CP-3). Sharp asked that Morella "...outline specifically the dates, times, circumstances, and those persons involved in each and every incident of alleged harassment of employees, poor work performance and exhibition of poor attitude upon which you have based the suspension and recommendation for non-renewal..." On May 12th Morella responded (CP-4), giving as the reasons for "non-renewal": Pelaschier's "poor work performance," as indicated in his signed evaluation (CP-14); his "poor attitude," evidenced by verbal and physical actions toward his supervisors; his falsification of time sheets on December 30, 1986; and his misuse of sick days. As to Pelaschier's "suspension," Morella stated that he had been involved with "sexual harassment of a female custodial employee..." which was observed by two administrators on separate occasions and verified by Pluta. To this letter of May 12th, Morella attached the documentation which was received in evidence as CP-4A through CP-4F, supra.

24. On May 20, 1987, Sharp sent a second letter to Morella, in which he acknowledged the receipt of CP-4 and the attached documentation (CP-6). Sharp then requested some additional information for Pelaschier's Board hearing on May 21st.

25. The Board hearing was held as scheduled on May 21, 1987, where Pelaschier, Sharp and four employees were present (1 Tr 73, 74). On May 22nd Morella sent Pelaschier a letter, advising him that the Board's final determination was not to renew his employment contract for the 1987-88 school year and that his suspension with pay would continue through June 30, 1987 (CP-7).

26. The major witnesses for the Respondent had, except for Gerson and Morella, been members of labor organizations or, in the case of Stallings, had had dealings with labor organizations in a bargaining context prior to having been employed by the Respondent: Borisch - NJEA (3 Tr 110); DuBois - Local 56, AFL-CIO (3 Tr 164, 165); and Stallings - U.S. Navy dealing with a civilian employees union (4 Tr 135, 136). All five of these witnesses disclaimed any animus or hostility toward Pelaschier because of his "union activities" and each denied that they were out to "get" Pelaschier (3 Tr 130, 160; 4 Tr 59, 135; 5 Tr 17). Pelaschier acknowledged that no representative of the Board's administration ever directly stated to him that he or she was "...out to get..." him (3 Tr 8).

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate
 §§5.4(a)(1), (3) And/Or (4) Of The Act
 Because It Established A Legitimate
 Business Justification For Its Non-renewal
 Of William E. Pelaschier For The 1987-88
 School Year

This case is governed by Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) where the New Jersey Supreme Court adopted the analysis of the National Labor Relations Board in

Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980)^{21/} in "dual motive" cases, involving an alleged violation of Section 8(a)(1) or Section 8(a)(3) of the National Labor Relations Act.^{22/} In such cases, Wright Line and Bridgewater articulated the following test in assessing employer motivation: (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision, in this case the Board's non-renewal of Pelaschier's contract; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242), i.e., the employer must establish a legitimate business justification for its action.^{23/}

The Court in Bridgewater further refined the above test by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity (see 95

^{21/} The United States Supreme Court approved the NLRB's "Wright Line" analysis in NLRB v. Transportation Mgt. Corp., 562 U.S. 393, 113 LRRM 2857 (1983).

^{22/} These provisions of the NLRA are directly analogous to Sections 5.4(a)(1) and (3) of our Act.

^{23/} The Commission has also had occasion to apply the Bridgewater analysis to a Section 5.4(a)(4) allegation such as is involved in the instant case: see Hunterdon Cty. Bd. of Chosen Freeholders, P.E.R.C. No. 87-150, 13 NJPER 506, 507 (¶18188 1987), aff'd. App. Div. Dkt. No. A-5558-86T8, appeal to Supr. Ct. pending, Dkt. No. 28,806.

N.J. at 246).^{24/} Finally, as in any case involving alleged discrimination, the Charging Party must establish a causal connection or nexus between the exercise of the protected activity and the employer's conduct in response thereto: see Lodi Bd. of Ed., P.E.R.C. No. 84-40, 9 NJPER 653, 654 (¶14282 1983) and University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447 (¶16156 1985).

As to the first part of the Bridgewater test, it is clear that Pelaschier engaged in extensive protected activities under the Act during the period of his employment from his date of hire on October 15, 1985, through the date of his suspension on April 24, 1987. He became the President of the Association shortly after commencing his employment and remained in that position in the Association until November 1987. This was admitted by the Respondent along with such other protected activities as testifying in an unfair practice proceeding before the Commission in July 1986, representing the Association's members with respect to grievances and disciplinary disputes and serving as the Association's principal negotiator in the negotiations which resulted in the initial "skeleton" memorandum of agreement (R-1) and the complete successor agreement, which became effective July 1, 1987 (J-1). [See Findings of Fact Nos. 7-10, supra].

^{24/} The Court in Bridgewater stated further that the "Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action" (95 N.J. at 242).

The fact that Pelaschier's "grievance" activity was informal in nature since he never filed a formal written grievance, is irrelevant to the issue of protected activity under the Act. The Commission in Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, 9 (¶17002 1985) stated that "...Under Bridgewater...any level of protected activity could satisfy the first part of the test if that activity motivated the discipline..." (emphasis supplied). Also, the Commission many years ago decided that "...individual employee conduct whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employees in a recognized or certified unit, constitute protected activities under our Act...": North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (at fn. 16) [¶4205 1978]. Further, subsequent decisions of the Commission with respect to filing of grievances as protected activity have never distinguished between formality or informality regarding the filing of grievances, complaints, etc. as set forth in North Brunswick, supra. For example, see Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); and Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986).

It cannot be gainsaid that Pelaschier's extensive protected activities were known to the Respondent, having either been admitted

or proven on the record. Hence, the next question is whether or not there is prima facie evidence that the Respondent Board manifested hostility or anti-union animus towards Pelaschier, sufficient to satisfy the Bridgewater caveat, supra, that the "Mere presence of anti-union animus is not enough..." The Charging Party must also establish that "...anti-union animus was a motivating force or a substantial reason..." for the Board's decision not to renew Pelaschier's employment contract for the 1987-88 school year.

The Charging Party's proofs as to hostility or anti-union animus establish the following: In Finding of Fact No. 13[1], supra, Hodge testified on both direct and cross-examination that Borisch stated that "they" were out to get Pelaschier, it being unmistakable that "they" referred to the Board's administration. Additionally, in Finding of Fact No. 13[3], Smith testified that Gerson stated to him, in connection with questions about the dental plan, that Smith should not go to Pelaschier "about anything" and that if he had any questions he should come to Gerson, thus, undermining Pelaschier and the Association as Smith's representative. Further, in July 1986, when Sharp had decided to file an unfair practice charge with the Commission, he was told, upon serving a copy of the papers upon Stallings, who seemed to be upset about the matter, that "...before Pelaschier and the union was around, they were able to do things like this without people bothering them..." (see Finding of Fact No. 13[4]).

Finally, at the "Open House" on April 23, 1987, the day before Pelaschier was suspended, Gerson, who was assigned to the "E" Wing, encountered Pelaschier on a number of occasions, which prompted Pelaschier to ask Gerson if he was evaluating him or watching him; Betson stated that Gerson rebuffed him as Shop Steward when he intervened on behalf of Hodge, who claimed that Gerson was harassing him; Hodge testified that Gerson was following Pelaschier "...wherever he went..." and that Betson had spoken to Gerson about his having followed Pelaschier ever since "...you came to work...." with Pelaschier insisting that Gerson followed him with a pen and pad into every room during that evening (see Finding of Fact No. 13[5]).

The Hearing Examiner concludes that Gerson on April 23rd created at least the impression among Betson, Hodge and Pelaschier that he was engaged in "surveillance" within the meaning of NLRB v. Historic Smithville Inn, 414 F.2d 1358, 71 LRRM 2972 (3rd Cir. 1969); NLRB v. Simplex Times Recorder Co., 401 F.2d 547, 69 LRRM 2465 (1st Cir. 1968); and Keystone Pretzel Bakery, Inc., 242 NLRB No. 77, 101 LRRM 1214 (1979). Thus, an inference of animus may be drawn from Gerson's surveillance on April 23rd.^{25/}

^{25/} An additional inference of animus may be drawn from the "timing" of Gerson's surveillance activities since this conduct occurred on the evening before Pelaschier's suspension at 5:00 p.m. on April 24th: see University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447, 448, 449 (¶16156 1985); Downe Tp. Bd. of Ed., supra, (12 NJPER at 8); and Essex Cty. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988).

Further, the Hearing Examiner finds that the statement of Stallings in July 1986 when Sharp served Stallings with "papers" in connection with an unfair practice proceeding before the Commission, manifested hostility by the Board toward Pelaschier when he indicated that before the "...union was around" the Board did not have "...people bothering them..." Finally, the testimony of Hodge that Borisch said that they "...were out to get Mr. Pelaschier..." coupled with Smith's testimony that he should not go to Pelaschier "...about anything..." indicates clearly to the Hearing Examiner that there was a manifestation of hostility or anti-union animus by the Board through its agents toward Pelaschier.

The Hearing Examiner is, thus, convinced that the conduct of Gerson on April 23, 1987, coupled with the statements of agents of the Board made to Sharp, Smith and Hodge between July 1986 and several days after April 8, 1987, warrants the conclusion that the Charging Party has satisfied the final prima facie requisite of Bridgewater. Having done so, the Charging Party has met the first part of the Bridgewater test, namely, that its proofs support an inference that Pelaschier's protected activities were a "substantial" or a "motivating" factor in the Board's decision at its meeting on April 27, 1987, not to renew Pelaschier's contract for the 1987-88 school year.

It now remains to determine whether the Respondent Board has demonstrated by a preponderance of the evidence that the same action would have taken place even in the absence of Pelaschier's

protected activities (95 N.J. at 242). In other words, has the Respondent proven that the non-renewal of Pelaschier's contract for the 1987-88 school year would have occurred even in the absence of his exercise of protected activities? It is the conclusion of the Hearing Examiner that the Respondent Board has met this burden by a preponderance of the evidence.

Notwithstanding that the Hearing Examiner, in concluding above that the Charging Party has met the first part of the Bridgewater test, the framework of analysis changes in deciding whether or not the second part of Bridgewater has been satisfied by the Respondent. It will be recalled that Pelaschier's hire on October 15, 1985, was preceded by a 15-year history of extensive union activities in his prior employment dating back to 1958, which was apparently not a consideration when he was hired by the Respondent as a custodian. Pelaschier became the President of the Association almost immediately and was its principal negotiator in negotiations for the "skeleton" agreement, which commenced in April 1986 and concluded on August 14, 1986. Shortly thereafter negotiations commenced and continued for the successor agreement, which became effective July 1, 1987. [See Findings of Fact Nos. 4-8, supra]. Pelaschier encountered no problems in his relationship with the Board until December 30, 1986, notwithstanding that since October 1985 he had participated actively in negotiations, supra, and had appeared and testified for the Association in a Commission proceeding in July 1986 together with his representation of Pluta in

a shift change request during the summer of 1986. [See Findings of Fact Nos. 8-10, supra].

However, Pelaschier's relations with the Board took a dramatic turn when Stallings issued a written reprimand on December 30, 1986, because Pelaschier had altered the time of his "sign in" on the previous day (see Finding of Fact No. 11[1], supra). Thereafter, Pelaschier, who had been "promoted" to Evening Supervisor/Security on July 1, 1986, based upon his significant union experience,^{26/} received a series of disciplinary notices, beginning January 13, 1987, and continuing through April 21, 1987, when Pelaschier was docked three days' pay for taking unauthorized "sick days" (see Finding of Fact No. 11[2] through [8], supra).

The Charging Party may argue that certain of these incidents in Pelaschier's disciplinary history between December 30, 1986 and April 21, 1987, are inconsequential, but the fact remains that notices of discipline were given to Pelaschier and he never formally filed a written grievance, which arguably could have resulted in the expunging of the "discipline" imposed from the Respondent's records. Admittedly, there was no formal grievance procedure in the contract between the Association and the Respondent until J-1 became effective July 1, 1987 (see Finding of Fact No. 10, supra). However, the initial "skeleton" Memorandum of Agreement, provided in Article II that an allegation by an employee or the

^{26/} See Finding of Fact No. 11[2], supra.

Association "...that this agreement has been violated..." could result in "...binding...arbitration as the last step..." (R-1, pp. 2, 3). However, this provision of R-1 was never utilized and, thus, the "disciplinary" actions imposed upon Pelaschier between December 30, 1986, and April 21, 1987, stood unchallenged until this Unfair Practice Charge was filed.

We now move on to April 24, 1987, when Pelaschier had his evaluation conference with DuBois about five minutes after he reported for work at 2:30 p.m. Pelaschier's evaluation, which had been prepared by DuBois in two parts, beginning on April 3rd and concluding on April 10th, disclosed that Pelaschier's job performance was rated considerably below the "5.0" perfect rating for "Personal Characteristics," "Work Attitude and Initiative," and "Custodial Management," the lowest rating of "1.8" being for "Work Attitude and Initiative." (See Finding of Fact No. 12, supra). The second part of the evaluation by DuBois was a letter dated April 10, 1987, which gave Pelaschier 30 days to improve his performance or he would be terminated as of June 30, 1987. This was briefly discussed between DuBois and Pelaschier on April 24th.

At about 4:00 p.m. on April 24th, Pluta made her first written statement, in which she complained about verbal abuse, fear of entering the staff lounge and having been called names, the thrust of which pointed to Pelaschier as the person primarily involved (CP-9). Stallings read Pluta's statement and gave it to Morella between 4:00 p.m. and 4:30 p.m. and, after Morella had read

the statement, he asked Stallings to summon Pelaschier to his office. [See Finding of Fact No. 14, supra].

By the time that Pelaschier appeared in Morella's office at about 5:00 p.m., Morella had spoken to the Board President to confirm his "emergency" authority and to counsel for the Board. Also, although Morella acknowledged that he had had no prior intention of suspending Pelaschier on that date, he had in his possession the complete disciplinary history of Pelaschier from December 30, 1986 through April 21, 1987, supra plus Pluta's statement [CP-9](Finding of Fact No. 11[1] through [8]).^{27/} With Pelaschier and Shop Steward Betson present, Morella suspended Pelaschier "...because of work performance, with pay..." in the course of a brief meeting. Morella testified credibly that in imposing the suspension upon Pelaschier, he had received recommendations to that effect from Stallings and Gerson.

While Morella's handling of Pelaschier's suspension on April 24th may have been somewhat lacking in sophistication, his decision on that date appears to have been devoid of discriminatory motivation.^{28/} Since Morella possessed sufficient

^{27/} It was uncontradicted that Morella had neither informed Pelaschier of Pluta's statement of that day nor had he questioned him about it. [See Findings of Fact Nos 14-16, supra].

^{28/} The Hearing Examiner refuses to impute any discriminatory motive to Morella in this proceeding because of his having

nondiscriminatory information, upon which to base his suspension of Pelaschier on April 24th, the Hearing Examiner finds that his action was based upon a legitimate business justification independent of Pelaschier's exercise of protected activities.

Following Pelaschier's suspension on April 24th, Pluta made her second statement on April 27th, in which she explicitly charged Pelaschier with "sexual harassment" (CP-4F; Finding of Fact No. 17, supra). The Hearing Examiner finds and concludes that each of Pluta's statements were unsolicited by the Respondent and were made voluntarily, having been prompted by Pelaschier's conduct on April 24, 1987, prior to 4:00 p.m. (4 Tr 72, 73). It is from this conclusion that the Hearing Examiner also finds that there was no complicity or conspiracy on the part of the Respondent's agents in the suspension and the ultimate termination of Pelaschier.

On April 27, 1987, Morella shared with the Board the two statements of Pluta and all of the other documents pertaining to Pelaschier's performance as a custodian; the Board voted not to renew his contract for 1987-88 (Finding of Fact No. 19, supra). Thereafter, Pelaschier had a hearing before the Board on May 21st,

28/ Footnote Continued From Previous Page

testified as a supervisor while employed by the Salem County Board for Vocational Education, a case before the Commission, which involved a discriminatory discharge: see P.E.R.C. No. 79-99, 5 NJPER 239 (¶10135 1979), aff'd App. Div. Dkt. No. A-3417-78 (1980)[5 Tr 19, 20]. Remoteness in time plus Morella's demeanor in this proceeding supports this conclusion.

and the Board decided again not to renew his contract (Findings of Fact Nos. 20, 22-25, supra). The Hearing Examiner concludes that this final action of the Board was based upon a legitimate business justification.

The absence of any illegal "taint" in the Board's initial action of April 27, 1987, in not renewing Pelaschier's contract, which it confirmed on May 21st, after Pelaschier's hearing, is reinforced by the fact that Pelaschier was given prior notice of this possibility in Morella's letter of April 15, 1987 (see Finding of Fact No. 7, supra). In other words, the events which led first to Pelaschier's suspension on April 24th and then to his non-renewal on April 27, 1987, occurred in the context of 12 days' prior notice of the possibility that the Board might not renew his contract. Clearly, Pluta's first statement precipitated Morella's decision to suspend Pelaschier just as her second statement no doubt played a substantial role in the Board's April 27th decision not to renew his contract.^{29/} It will be recalled that underlying both of these events was Pelaschier's disciplinary history and job performance since December 29, 1986, of which both Morella and the Board had full knowledge by April 24th.

^{29/} It is well settled that an employer may terminate an employee for good, bad or no reason at all so long as its purpose is not to interfere with the exercise of protected activities: NLRB v. Loy Foods Stores, Inc., 697 F.2d 798, 801 (7th Cir. 1983).

The Hearing Examiner has given little weight to the fact that the Board also had before it on May 21, 1987, Flynn's April 28th statement, stating that she witnessed a "sexual harassment" incident in February 1987, when Pelaschier allegedly grabbed Pluta's blouse since it came after the fact of the Board's April 27th decision (see Finding of Fact No. 21, supra). However, whether Pelaschier was deemed to have been non-renewed because of "poor attitude" and/or "poor work performance" or because of "sexual harassment" based on CP-4F becomes irrelevant.^{30/} Either ground would have been a basis for non-renewal: As to termination for poor work performance, etc., see Mercer Cty. Comm. Coll., P.E.R.C. No. 86-30, 11 NJPER 585, 586 (¶16204 1985) and as to sexual harassment see Meritor Savings Bank v. Vinson, ___ U.S. ___, 106 S. Ct. 2399, 40 FEP Cases 1822 (1986).^{31/}

The Hearing Examiner also discounts as not probative the fact that Morella had since the second week of April 1987 been aware

^{30/} The Hearing Examiner does not accept the Charging Party's contention that a discriminatory motive should be found in Morella's suspension of Pelaschier and the Board's terminal action on April 27th and May 21st because of "shifting reasons" allegedly given by Morella to Pelaschier and to Sharp on and after Pelaschier's suspension (see Charging Party's Main Brief, pp. 25-27, 42, 43, citing Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985). This doctrine is not applicable to the record in this case.

^{31/} The two contrary cases cited by the Charging Party are deemed not applicable since Pluta is found not to have encouraged sexual harassment by her own conduct: Gan v. Kepro Circuit Systems, Inc., ___ F. Supp. ___, 28 FEP Cases 639 (E.D. Mo. 1982) and Ukarish v. Magnesium Elektron, ___ F. Supp. ___, 31 FEP Cases 1315 (D.N.J. 1983).

that DuBois was giving Pelaschier 30 days to improve his performance or be terminated as of June 30, 1987 (see Finding of Fact No. 12, supra). Pluta's first statement clearly relieved Morella of any obligation to honor the 30-day grace period which DuBois had given to Pelaschier at 2:30 p.m. on April 24th, the date of his suspension.

Thus, the Hearing Examiner concludes that the Respondent Board has fully satisfied the second part of the Bridgewater test in that it has proved by a preponderance of the evidence that its actions were motivated by a legitimate business justification and, additionally, that Pelaschier's termination would have occurred even in the absence of his extensive protected activities.

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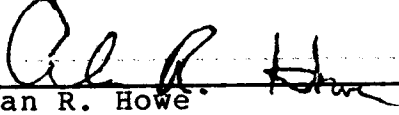
Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1), (3) or (4) when on April 24, 1987, the Respondent's Superintendent, Victor C. Morella, suspended William E. Pelaschier with pay nor did the Respondent Board violate the Act when it refused to renew Pelaschier's contract for the 1987-88 school year on April 27, 1987, since the Respondent's Superintendent and the Board had a legitimate business justification for their actions.

RECOMMENDED ORDER

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



Alan R. Howe
Hearing Examiner

Dated: August 31, 1988
Trenton, New Jersey