

P.E.R.C. NO. 2004-23

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-H-2001-161
CO-H-2001-206

IRVINGTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Irvington Board of Education violated the New Jersey Employer-Employee Relations Act when it failed to appoint the president of the Irvington Education Association to the position of School-Based Technology Coordinator at either the Florence Avenue School or the Mount Vernon School, in retaliation for her Association activities and by directing the president to vacate office space she and two other teachers were using, in retaliation for her Association activities.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Docket Nos. CO-H-2001-161
CO-H-2001-206

IRVINGTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Hunt Hamlin & Ridley, attorneys
(Raymond J. Hamlin, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys
(Nancy Iris Oxfeld, of counsel)

DECISION

On December 13, 2000 and January 30, 2001, the Irvington Education Association filed unfair practice charges against the Irvington Board of Education. The first charge (CO-2001-161), amended on March 8, 2001, alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),^{1/} by failing to appoint

^{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; (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."

Association President Madeline Edwards to the position of School-Based Technology Coordinator at either Florence Avenue School or Mount Vernon School, in retaliation for her Association activity. The second charge (CO-2001-206) alleges that the Board violated 5.4a(1) and (3) by directing Edwards to vacate office space she and two other teachers were using, in retaliation for her protected activity.

On March 14, 2001, the charges were consolidated and a Complaint and Notice of Hearing issued. On April 2, the Board filed an Answer generally denying the allegations and asserting that the Commission does not have jurisdiction to consider CO-2001-161.^{2/}

On September 12 and 13, and November 15 and 28, 2001 and March 5, 6 and 7, 2002, Hearing Examiner Patricia T. Todd conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On July 11, 2003, the Hearing Examiner issued her report and recommendations. H.E. No. 2004-4, 29 NJPER 351 (¶110 2003). We summarize her factual findings.

The first charge involved the failure to appoint Association President Madeline Edwards to technology coordinator positions.

^{2/} The Board did not serve a copy of its Answer on the Association, but the Hearing Examiner denied the Association's motion to deem the Answer not filed.

Irvington is one of approximately 30 neediest school districts covered by Abbott v. Burke, 153 N.J. 480 (1998). These districts have been directed to institute Whole School Reform. Part of that program requires that each school have a School Management Team (SMT) comprised of the principal, elected teachers, certain other staff, and parent volunteers. Each SMT develops a multi-year implementation plan and a budget to meet its school's needs. Team functions also include making budget and personnel recommendations.

One of the State-mandated components of Whole School Reform is education technology. The State Board of Education created the position of School-Based Technology Coordinator to implement the technology component in each Abbott school. The district's job description requires that the candidate hold a New Jersey teaching certification.

Alan Gamba was the principal at Florence Avenue School from July 1999 until June 2001. He submitted a posting to Superintendent Ernest Smith for a technology coordinator. No one applied.

Gamba had known Madeline Edwards because he had been principal for six years at Mount Vernon School, where Edwards worked. He knew that Edwards had worked on the computer-intensive gifted and talented program, assisted Mount Vernon's

computer teacher with developing a technology budget, helped obtain laptop computers for classrooms and developed curriculum for their use, and implemented the technology component of Whole School Reform. He also recalled that her work performance was very good and that all work assignments were completed in a timely fashion.

In June 2000, Gamba approached Edwards about becoming the technology coordinator at Florence Avenue. Gamba felt pressure to fill the position and thought it would look good on reports to the State to have someone with Edwards' credentials and doctoral degree. Because of the difficulty in getting applicants for teaching positions, Gamba had hired sole applicants. He therefore recommended that Edwards be hired.

Pursuant to the parties' collective negotiations agreement, the Association president serves on a "release time schedule" with half-time devoted to the Board and half-time devoted to Association business. Gamba was initially concerned whether Edwards would be able to perform effectively while continuing to serve as Association president. After discussing his concerns with Edwards, Gamba felt convinced by Edwards that she would be able to perform the duties within the confines of her release time position.

The Florence Avenue SMT agreed with Gamba's recommendation that Edwards be appointed because they believed she would be capable and because she was the only applicant. The SMT was aware of the release time concern, but, according to one team member, "Mrs. Edwards wears many hats, she takes work home on weekends and she gets the job done."

On June 12, 2000, Gamba wrote a letter to the Director of Human Resources recommending Edwards for the position. Gamba did not receive a response. The Hearing Examiner did not credit the Director's testimony that he did not receive this letter.

The Board's Personnel Committee met on June 15, 2000 to decide what personnel actions to recommend to the Board for adoption at its next meeting. Item 6 on the agenda was transfers. The Board's resolution lists 17 staff transfers. The Edwards' appointment was listed as Item 6 (13). After the 17th item, the resolution reads, "Item 6 (13) was removed from the agenda." The meeting minutes continue, "Item 6 minus (13) moved out of committee."

Andrea McElroy is the Board's president and the chairperson of the Board's Personnel Committee. The Association directed a subpoena duces tecum to McElroy seeking, among other things, any minutes, tapes or other records of the Personnel Committee. McElroy testified that there were no minutes, tapes, or tallies

of votes; just a sheet of paper that listed attendees. Smith also testified that the Board keeps no records of the initial agenda of items considered by the Personnel Committee; only those items that are passed for consideration by the full Board are maintained.

Minutes of Personnel Committee meetings were produced by the Board after the close of hearing in connection with other litigation, and subsequently admitted into evidence upon the Association's motion to reopen the record. The Hearing Examiner therefore did not credit Smith's testimony or McElroy's testimony that such minutes did not exist. She also found that McElroy's demeanor while being questioned concerning her compliance with the subpoena was cavalier and disdainful.

McElroy testified that she could not recall Edwards' name ever coming before the Personnel Committee in connection with the technology coordinator position. Given the minutes and the fact the McElroy chaired the meeting, the Hearing Examiner found McElroy's testimony incredible.

At a meeting of the district's SMTs, members of the Florence Avenue SMT asked the Board Secretary why a technology coordinator had not been appointed at their school. He replied that the team was required to submit three names, but had submitted only one.

On July 24, 2000, Gamba wrote a second letter to the Director of Human Resources asking that he expedite Board consideration. The letter stated that the Edwards matter and others had been removed from the Board's agenda in July. Gamba did not receive a response. The Hearing Examiner did not credit the Director's testimony that he did not receive this letter.

At a principals' workshop in August 2000, Smith called Gamba aside and told him that he would have to change his recommendation for the technology coordinator position. Gamba replied that he had no other applicant. Gamba testified that Smith replied that he did not know what the problem was, but when the Board hears Gamba's name or Edwards' name, they "see red." Smith did not refute Gamba's testimony and the Hearing Examiner credited it.

A few days before the Board's August meeting, the Board's Supervisor of Staff Development told Edwards that he had seen Edwards' name on the agenda for the upcoming Board meeting to be appointed technology coordinator at Florence Avenue. Edwards attended the meeting, but her name was not on any list for transfer or appointment.

On August 23, 2000, Edwards wrote to Smith concerning the status of her and two other applications. Smith responded that most recommendations come from the principals or SMTs to the

Central Office; after careful review, he then makes a recommendation to the Board through the Personnel Committee; and the listed individuals were not approved by the Personnel Committee. Edwards assumed from this response that Smith had recommended her to the Personnel Committee.

On September 5, 2000, Edwards wrote to the Personnel Committee requesting the reasons for the denial of her appointment. Edwards did not receive a reply.

In October 2000, the SMT at Mount Vernon Avenue School asked Edwards to apply for their technology coordinator position. She refused, noting that the Board did not appoint her at Florence. The SMT persisted and Edwards reluctantly submitted an application.

Edwards attended the Board's October 2000 meeting where the Board approved the appointments of several technology coordinators. Edwards spoke to four teachers. None was aware prior to the meeting that the Board was considering transferring them. One was almost in tears because she knew nothing about technology. Smith told Edwards that he had to fill the positions and did not need to post them.

Gamba and the Florence Avenue SMT heard that Edwards had applied for the technology coordinator position at Mount Vernon, so Gamba reopened the application process. The Florence Avenue

computer teacher applied, was recommended by the SMT, and was appointed by the Board on November 15, 2000.

In December 2000, Edwards learned that a substitute teacher who did not have any teaching certifications expected to be appointed to the technology coordinator position at Mount Vernon. Apparently, the SMT was not aware of his interest in the position and did not vote on his appointment. He was appointed by the full Board on December 20. Smith testified that he did not specifically recall whether he approved this appointment.

Smith testified repeatedly that he did not recall if he had ever received a recommendation that Edwards be appointed to either position. But he also explained that he took no action on a recommendation he received - it is unclear from whom - because Edwards did not meet the qualifications for a full-time position. The Hearing Examiner discredited Smith's testimony. She found his testimony vague and contradictory, and that his explanation seemed to arise at hearing as a retroactive justification for his deliberate non-action concerning Edwards' application.

The second unfair practice charge involved Smith's order that Edwards vacate office space at Mount Vernon.

In late September 2000, Edwards agreed to assist with processing paperwork related to Title I lunch form applications by parents. Because of the volume of work, the principal also

asked Elizabeth Wallace, an academic representative of the teaching staff, to assist. Edwards decided that the Title I application information should be kept confidential and secure because it included detailed financial information, names of parents and guardians, social security numbers, places of work, public assistance and other personal information. Upon their request, the principal granted Edwards and Wallace permission to use a small cubbyhole office space to process the applications. Edwards gave a substitute teacher permission to use half of the bookcase in the room to store materials and personal items.

Edwards stopped working on the Title I project in late October. She continued to use the office space to work on the school planning budget and technology implementation plan.

At a parents' meeting in November or December 2000, Smith learned that Edwards was using an office in the school. He visited the school and directed the principal to clear everybody out of that space. Smith testified that offices are usually for employees in administrative level positions. He concluded that the area Edwards and the other teachers were using was an office, not a work space, based on the small size of the room. According to Smith, a work space is an area where teachers go to spread out work materials; an office, by contrast, is smaller and usually contains a desk, chair and perhaps a flag. The principal then

announced over the school public address system that Wallace and the substitute teacher had to remove their belongings from the office and vacate the space. Edwards was not in the school at that time.

The next day, the principal told Edwards that he had been told by Smith that Edwards could not use the office, and that two Board members - McElroy and Lorene Capers - wanted Edwards "out of that room." No use was made of the room after it was vacated.

The Hearing Examiner found that the Board discriminated against Edwards because she is Association president by failing to appoint her to the technology coordinator positions and by ordering her to vacate office space. The Hearing Examiner recommended that the Board offer Edwards her choice of accepting either technology coordinator position, when one of these positions becomes vacant. She also recommended that the Board allow Edwards to use office space at Mount Vernon School to complete any unfinished Title I work that was originally assigned to her in the year 2000.

On August 4, 2003, the Board filed a letter brief in support of exceptions. It did not file separate exceptions pursuant to N.J.A.C. 19:14-7.3.

The Board asserts that it did not appoint Edwards to the technology coordinator positions because they were full-time positions and there was no indication that Edwards was willing to

commit to the position full time. The Board objects to the Hearing Examiner's finding that Smith recommended an employee without a teaching certification to a technology coordinator position. It asserts that Smith testified that he did not recall recommending the employee. The Board also objects to the Hearing Examiner's crediting of Gamba's testimony that Smith indicated that the Board "sees red" whenever it hears Gamba's or Edwards' name. It asserts that to credit the comments as evidence of anti-union animus when the Board never considered a recommendation that Edwards be appointed to the technology positions is unsupported by the record.

The Board argues that under In re Bridgewater Tp., 95 N.J. 235 (1984), the Hearing Examiner failed to consider whether or not the desire to have a full-time commitment in a full-time position is legitimate.

As for the recommended remedy, the Board notes that since no recommendation to appoint Edwards reached the Board, at best, the remedy should be that in the event another position becomes available, Edwards' name should be recommended to the Board for consideration.

As for the second charge, the Board contends that since Edwards was not using the office space for Association business, the Board cannot be deemed to have violated the Act.

On August 18, 2003, the Association filed an answering brief. It supports the Hearing Examiner's finding that the Board's argument that a full-time employee was desired for the coordinator positions was one developed after the fact to support the decision to deny Edwards the positions. The Association points to the job description for Technology Coordinator which lists a teaching certification as a qualification, and a full-time position as a goal. The Association claims that Smith misrepresented the job description to justify the appointment of a candidate without a certification and another candidate without any knowledge of computers.

As for the second charge, the Association states that while office space can be assigned or denied for almost any reason, it cannot be assigned or denied for illegal reasons.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. 5-40). We specifically adopt her credibility determinations and reject the Board's suggestion that one of those determinations should be overturned. Gamba testified that Smith told him that the Board "sees red" when it hears his name or Edwards' name. Smith testified but did not refute Gamba's testimony. There is no basis to overturn the Hearing Examiner's determination. The Board also suggests that we should reject the Hearing Examiner's finding that Smith

recommended the substitute teacher without a teaching certification to the technology coordinator position at Mount Vernon. The Board does not cite where the Hearing Examiner made such a finding. See N.J.A.C. 19:14-7.3(b). Smith testified that he did not recall making such a recommendation. We accept that he did not so recall, but do not know how the appointment would have progressed without his recommendation.

Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. 95 N.J. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it 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, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

Applying Bridgewater, the Hearing Examiner concluded that the Board, and in particular Smith, determined not to consider Edwards for the technology coordinator positions, solely because of her position as Association president. The Hearing Examiner found that Smith's rationale, that Edwards was not eligible for the positions because of her contractual release time schedule, to be a pretext for anti-union animus. She noted that other employees were appointed without regard to their qualifications, experience or interest in the positions. Edwards was the only employee whose qualifications Smith considered.

The Hearing Examiner noted that the record provides no explanation for why Edwards' name appeared as a candidate for the position on the Board Personnel Committee's June 15, 2000 agenda, and was subsequently removed, particularly since Smith claimed that he never recommended Edwards to the Personnel Committee. The Hearing Examiner also inferred anti-union animus from Smith

and Board member McElroy's testimony that there were no Personnel Committee minutes, when, in fact, those minutes were later supplied in response to interrogatories in another matter involving the same parties. The Hearing Examiner also relied on the unrefuted testimony of Principal Gamba that he and Smith discussed Edwards' application for the technology position and that Smith stated that Board members "see red" when they hear Gamba's name or Edwards' name.

Given the Hearing Examiner's credibility determinations and the supporting evidence of anti-union animus, we adopt her recommendation to find that the Board violated 5.4a(1) and (3) when it failed to appoint Edwards to the technology coordinator positions. The Association proved that anti-union animus was a substantial or motivating factor in Smith's decision not to forward the recommendations that Edwards be appointed to the technology positions, and the Board's rationale for Smith's action was shown to be pretextual.^{3/} At Florence Avenue, Gamba and the SMT were confident that Edwards could do all the duties in the time she had and, before the litigation began, no management representative ever expressed any concern about

^{3/} The parties appear to assume, and we accept, that a recommendation was made to appoint Edwards to the teaching coordinator position at Mount Vernon School. Smith knew that Edwards had applied for the position and the SMT at Mount Vernon had voted to appoint her.

Edwards' ability to fulfill her job duties. To the contrary, Edwards was never given any reason why her name was removed from the June 15 agenda and the Board president falsely denied that she knew of that action or that any minutes of that meeting existed. Further, the Director of Human Resources gave a different reason - the lack of three recommendations - which was never cited again and which was not required for approval of other applicants. See Bridgewater (shifting reasons for personnel action may indicate an illegal motive). And the superintendent told Gamba that Edwards could not be appointed because the Board sees red when it hears her name.

We have no reason to treat Mount Vernon any differently. Neither recommendation was forwarded to the Board for consideration.

In the absence of Association exceptions, we adopt the proposed remedy. Even though the Board never acted on a recommendation to appoint Edwards, nothing suggests that, had Smith not removed her name from consideration, Edwards would not have gotten the appointments. We note that Board members, not just Smith, were reported to "see red" at the mention of Edwards' name, and that the Board president did not testify truthfully concerning the June 15 meeting of the Personnel Committee or about the minutes of that meeting.

Absent specific Board exceptions, we also adopt the Hearing Examiner recommendation that we find that the Board independently violated 5.4a(1) by Smith's determination not to consider Edwards for the technology coordinator positions due to her Association activity. That conduct tended to intimidate an employee from engaging in union activity and did not have a substantial business justification. New Jersey Sport and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979).

We also adopt the recommendation regarding the office space allegation. We agree with the Hearing Examiner that Smith's level of attention to this issue seems unusual and that his conduct demonstrates hostility to the Association. Not only did Smith visit the school to inspect the area, but he overruled the determination of the building principal to permit Edwards to use the space, and told the principal that he and Board members Capers and McElroy wanted Edwards "out of that room." Under all the circumstances, we agree with the Hearing Examiner that Smith's order that Edwards vacate the office space violated 5.4a(1) and (3). We also adopt the Hearing Examiner's recommended remedy.

ORDER

The Irvington Board of Education and its representatives and agents are ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly by failing to appoint Madeline Edwards to the position of technology coordinator at Florence Avenue School or Mount Vernon Avenue School, and by directing Madeline Edwards to vacate office space she was using at Mount Vernon Avenue School.

2. Discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to appoint Madeline Edwards to the position of technology coordinator at Florence Avenue School or Mount Vernon Avenue School; and by directing Madeline Edwards to vacate an office space she was using at Mount Vernon Avenue School.

B. That the Board take the following affirmative action:

1. Offer Madeline Edwards her choice of accepting the position of School Based Technology Coordinator at either Florence Avenue School or Mount Vernon Avenue School, when one of these positions becomes vacant.

2. Allow Madeline Edwards to use office space at Mount Vernon Avenue School to complete any unfinished Title I work that was originally assigned to her in 2000.

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

appendix "A". Copies of such notice 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.

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

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners, Buchanan, DiNardo, Katz, Ricci and Sandman voted in favor of this decision. None opposed. Commissioner Mastriani was not present.

DATED: October 30, 2003
Trenton, New Jersey
ISSUED: October 30, 2003



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

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to appoint Madeline Edwards to the position of technology coordinator at Florence Avenue School or Mount Vernon Avenue School, and by directing Madeline Edwards to vacate office space she was using at Mount Vernon Avenue School.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to appoint Madeline Edwards to the position of technology coordinator at Florence Avenue School or Mount Vernon Avenue School; and by directing Madeline Edwards to vacate an office space she was using at Mount Vernon Avenue School.

WE WILL offer Madeline Edwards her choice of accepting the position of School Based Technology Coordinator at either Florence Avenue School or Mount Vernon Avenue School, when one of these positions becomes vacant.

WE WILL allow Madeline Edwards to use office space at Mount Vernon Avenue School to complete any unfinished Title 1 work that was originally assigned to her in 2000.

CO-H-2001-161
CO-H-2001-206

Docket No.

IRVINGTON 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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

H.E NO. 2004-004

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

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-H-2001-161
CO-H-2001-206

IRVINGTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Irvington Board of Education violated N.J.S.A. 5.4a(1) and (3), by failing to appoint Madeline Edwards to the position of School-Based Technology Coordinator at Florence Avenue School or Mount Vernon Avenue School, and by ordering Edwards to vacate office space at Mount Vernon Avenue School, because she is president of the Irvington Education Association. The Hearing Examiner recommends that the Commission order the Board to offer Edwards her choice of accepting the position at either school, when one of those positions becomes vacant, and to permit Edwards to use the office space at Mount Vernon Avenue School to complete any of the specially assigned work which she was originally authorized to perform in that space.

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. 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.

H.E NO. 2004-004

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

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

Docket Nos. CO-H-2001-161
CO-H-2001-206

IRVINGTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Hunt, Hamlin & Ridley, attorneys
(Raymond J. Hamlin, of counsel)

For the Charging Party,
Oxford Cohen
(Nancy Iris Oxford, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 13, 2000, and January 30, 2001, the Irvington Education Association ("IEA" or "Association") filed separate unfair practice charges against the Irvington Board of Education ("Board"). The first charge (CO-2001-161), originally filed on December 13, 2000 and amended on March 8, 2001, alleged that the Irvington Board of Education failed to appoint Madeline Edwards, president of the Association, to the position of School-Based Technology Coordinator at Florence Avenue School or Mount Vernon Avenue School, in retaliation for her service as Association president, in alleged violation of subsections 5.4a(1) and (3) of

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)^{1/} The second charge (CO-2001-206), originally filed on January 30, 2001, alleged that Edwards was directed to vacate office space she and two other teachers were using in retaliation for her protected activity as Association president, in alleged violation of subsections 5.4a(1) and (3) of the Act.^{2/}

An Order Consolidating Cases, Complaint and Notice of Hearing were issued on March 14, 2001. The Board filed an Answer to the Complaint on April 2, 2001, generally denying the allegations and asserting separate defenses. The Board's Answer

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."

2/ In its post hearing brief filed June 7, 2002, the Association indicated that due to a typographical error, CO-2001-206 pled a violation of subsection 5.4a(2), rather than subsection 5.4a(3). The Association requested to amend its charge to reflect the nature of the proofs presented at hearing. The Board has not objected to the Association's request. The narrative of the charge clearly described the alleged violation as discrimination and retaliation for exercise of rights protected under the Act. From the facts of the charge, the Board had notice of what was at issue. I find that this matter has been fully and fairly litigated and that the allegations raised are reflective of an a(3) allegation. County of Morris, P.E.R.C. No. 2003-32, 28 NJPER 456 (¶133168 2002), citing Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). I therefore grant the Association's request to amend its charge.

did not include proof of service upon the Association in accordance with N.J.A.C. 19:14-3.2.

Hearings were held on September 12 and 13, November 15 and 28, 2001; and on March 4, 5, and 6, 2002.^{3/} At hearing on September 12, 2001, the Association requested that since the Board's Answer did not include proof of service upon the Association, that the Answer be deemed not filed or alternatively, pursuant to N.J.A.C. 19:14-3.1, that any allegations not specifically denied or explained be deemed true. I found that the Answer operated as a general denial of the allegations and denied the motion. Subsequently, the Association moved that I recuse myself as Hearing Examiner based upon the allegation that I was prejudiced against the Association and in favor of the Board of Education. I denied that motion.

On September 18 and November 20, 2002, the Association requested the Commission enforce subpoenas the Association issued requesting that the Board produce certain witnesses and documents. Upon the Board's representation that it would comply with the subpoenas, the Commission's General Counsel determined

^{3/} The Transcripts in this matter will be referred to as 1T (September 12); 2T (September 13); 3T (November 15); 4T (November 28); 5T (March 5); 6T (March 6); and 7T (March 7). "C" refers to the Commission exhibits received into evidence at the hearing. "CP" and "R" refer to Charging Party's and Respondent's exhibits, respectively.

that it was unnecessary for the Commission to enforce the subpoenas.

Initial post-hearing briefs were received by June 17, 2002.^{4/} On July 25, 2002, the Association filed a Motion to Reopen the Record to admit documents which were not introduced at the hearing; specifically, minutes of the respondent Board's Personnel Committee which had been supplied in response to interrogatories in another matter involving the same parties. The Board filed a memorandum of law in opposition to the Motion. On August 9, 2002, I granted the Motion, which I treated as a Motion to reopen the hearing since the record had not yet closed. The hearing was reopened to admit the documents.^{5/}

4/ After granting a total of four extensions for the filing of initial briefs (two at the request of the Board and two at the request of the Association), June 10 and 20, 2002 were set as the final dates for the simultaneous filing of initial and reply briefs, respectively, and the parties were advised that no further extensions would be granted. On June 21, the Board requested an additional extension of time with the Association's consent, due to Board counsel's personal circumstances. I initially declined the request because it was received after the filing date had passed. Later, after granting the Association's Motion to Reopen the Record, I granted the Board's request that its reply to that Motion be considered as its post-hearing reply brief.

5/ The documents were marked as follows:

C-4	Charging Party's Notice of Motion to Reopen Record (with attachments A-C), July 24, 2002
CP-27	Personnel Committee minutes, September 9, 1999
CP-28	Personnel Committee minutes, October 14, 1999
CP-29	Personnel Committee minutes, November 9, 1999
CP-30	Personnel Committee minutes, December 9, 1999

(continued...)

Having reopened the hearing to receive documents, I offered the parties the opportunity to present additional testimony and/or oral argument concerning the newly admitted documents. Neither party expressed interest in that opportunity. Supplemental post-hearing briefs were filed by August 23, 2002. Supplemental post-hearing reply briefs were received by September 16, 2002. The record closed on that date.

Based upon the entire record, I make the following:

FINDINGS OF FACT

A. Irvington generally

1. Irvington is an 8000-student school district with twelve schools: eight K-5 schools, one sixth grade center, two middle schools, and a high school (1T71, 1T72).

2. Dr. Ernest Smith has been the superintendent of schools for the Board since July 1, 1999 (1T69, 7T4). Prior to becoming superintendent, Smith served as assistant superintendent of schools in Irvington from 1994 to 1996, and has worked in school districts in Langhorne, Pennsylvania, and Lawrenceville, Morristown, and Old Bridge, New Jersey (1T69-1T70). Smith's

5/ (...continued)

- CP-31 Personnel Committee minutes, January 13, 1999
- CP-32 Personnel Committee minutes, February 10, 2000
- CP-33 Personnel Committee minutes, March 9, 2000
- CP-34 Personnel Committee minutes, April 11, 2000
- CP-35 Personnel Committee minutes, May 11, 2000
- CP-36 Personnel Committee minutes, June 15, 2000
- CP-37 Personnel Committee minutes, June 28, 2000

duties as superintendent include responsibility for personnel, buildings and grounds, finance, athletics, curriculum, and technology (1T71).

3. The Irvington Board of Education is composed of nine members (1T73, 4T5). Andrea McElroy is the Board president and has held that position for five consecutive terms (3T90). Board members oversee the policies of the school district, consider the recommendations of the superintendent or his designee concerning hiring and firing, and budget approval (3T90). Subcommittees of the Board, including curriculum, buildings and grounds, finance, technology, athletics, and personnel, meet monthly before the full Board's public meeting on the third Wednesday of each month (1T73). As Board president, McElroy also chairs the Board meeting (3T90).

4. The Irvington Education Association represents all professional certificated employees of the Board, as well as units of transportation, secretarial, and paraprofessional employees (5T10, 5T101). The Association currently represents more than one thousand employees (5T13).

B. Whole School Reform

5. In 1998, the New Jersey Supreme Court issued a decision in Abbott vs. Burke, 153 N.J. 480 (1998), concerning approximately thirty school districts in New Jersey, considered to be the State's "neediest" districts in terms of expenditures

and performance (4T116). Pursuant to that decision, these districts, including Irvington, were directed to institute an improvement process known as Whole School Reform (1T72, 2T6, 5T16).

Whole School Reform is a comprehensive state plan for teachers, community and students to reform schools pursuant to a particular learning model designed by a developer and selected by the district (2T7, 4T117, 5T17-5T18). Whole school reform programs are produced by various vendors, mostly universities (5T17).

Each school in an Abbott school district must have a multi-year implementation plan, consisting of nine basic elements which must be addressed to improve student performance (4T126-4T129, 5T23-5T24; CP-17, CP-18, CP-19).

Every school must also have a school management team (SMT), composed of set percentages of all of the "stakeholders" in the school system - the school principal, and elected classroom teachers, certain other staff, and parent volunteers - who work together to oversee the implementation of the reform plan (1T79, 1T138, 2T9, 2T25, 3T70, 3T71, 4T116). Each SMT develops a plan and a budget to meet its school's needs (2T8). Teams meet twice a month in accordance with a yearly schedule set by the members of the team and provided to the Board (2T29-2T30). Team functions may also include making budget recommendations to the

State Department of Education, reporting budget information to the superintendent of schools, and making personnel recommendations (1T79, 1T80).

The state approved the school management teams established in Irvington for 1999 and 2000-2001 (4T119; CP-13). Additional state guidelines issued in 1999 provided for the SMT, in concert with the chief school administrator and the state, to "establish criteria (and) make recommendations for the appointment, transfer or removal of teaching staff members, principals and instructional aides" (4T120; CP-13). The regulations further required the SMT to submit three recommendations to the chief school administrator for consideration when filling a school principal vacancy (4T121, 4T122; CP-13, CP-14).

C. School-Based Technology Coordinator

6. One of the state-mandated components of whole school reform is educational technology (4T133). The State Board of Education created the position of School-Based Technology Coordinator ("technology coordinator") to implement the technology component in each Abbott school (1T81). Generally, the technology coordinator is expected to work with classroom teachers to help them improve their classroom technology skill level (1T81). Additional duties include the development of a technology plan for the school; determining all school technology needs; ensuring that existing equipment is operating; and

assisting in solving technology-related problems in classrooms and throughout the school building (2T10; CP-32).

7. In Irvington, the technology coordinator is a full-time, non-teaching position (1T81, 1T137, 7T4, 7T5). A general job description issued by the state Department of Education includes valid New Jersey teaching certification as a qualification for the position only if the position is responsible for developing and/or delivering curriculum. However, a specific job description approved by the Board's personnel committee at its meeting on February 10, 2001 indicates teaching certification is required in the Irvington district (CP-7, CP-32). There is currently a technology coordinator in each of Irvington's twelve schools (7T7).

D. Personnel Recommendation Process

8. When filling a vacancy, recommendations generally first come from principals or school-based management teams to the office of the personnel director; personnel administrators consult with the superintendent; and the superintendent makes a recommendation to the Board through the personnel committee (1T112, 4T67, 4T68; CP-6).

9. The personnel subcommittee of the Board is composed of four Board members (1T74, 4T4). The function of the personnel committee is to review the superintendent's recommendations concerning all personnel matters, including hiring and firing

(1T74, 4T5). Board President Andrea McElroy is presently a member of the personnel committee and has been for the last five years (4T6). McElroy chairs the personnel committee meeting, which usually takes place on the Thursday prior to the full Board's scheduled public meeting, ten months of the year (4T4, 4T25).

The personnel committee's agenda, consisting of the superintendent's recommendations concerning leaves of absence, appointments, transfers and reassignments, and special services, is prepared by the director of human resources (1T77). In order for an item to be approved for consideration by the full Board at its monthly public meeting, it must be moved by one subcommittee member and seconded by another; the item then moves forward to a vote of the full Board on whether to accept the superintendent's recommendation (1T142, 1T76, 1T89, 1T93, 4T6, 4T11, 4T12, 4T23, 4T25). The superintendent, the director of human resources, and the school business administrator generally attend personnel committee meetings, but the superintendent and director of human resources do not have a right to vote on the recommendations presented (1T85, 4T7).

The committee minutes record the committee's action in bold type directly under each agenda item, i.e., approved items are indicated as "moved out of committee." The director of human resources is responsible for keeping the minutes of the personnel

committee's meeting, which are distributed to all Board members for approval at the public Board meeting (1T86-1T87; CP-27 to CP-37).

E. Madeline Edwards

10. Madeline Edwards has been employed by the Board since February 1978 (5T4). Edwards holds a B. A. degree, a master's degree in curriculum of teaching, and a Doctorate of Education (5T5). Edwards holds the following New Jersey teaching certifications: teacher of elementary subjects; supervisor's certificate, and principal-supervisor's certificate of eligibility (5T5-5T6, 5T98). Edwards is currently assigned as a math resource teacher at Mount Vernon Avenue School (5T4-5T5, 5T87).

11. In 1995, Edwards was elected president of the IEA (5T4-5T5, 5T87). Edwards' duties as IEA president include ensuring that members are represented in negotiations and grievances; acting as a spokesperson for the Association; appointing committees and committee chairs; and conducting monthly executive board and representative council meetings of the Association (5T8-5T9). Edwards receives a \$7000 annual stipend from the Association for serving as president (5T112).

12. Pursuant to the collective agreement between the Association and the Board, the Association president serves on a "release time schedule," with half time devoted to the Board and

half-time devoted to the Association (5T12, 5T90-5T91). The Association president maintains teaching certification, receives full-time salary and benefits, and is exempt from any after-school or extracurricular assignments (5T13, 5T15, 5T114).

13. There are six teaching periods in a typical school day, beginning at 8:45 A.M. (5T88). Edwards performs her duties as a math resource teacher from first period through the end of third period at eleven a.m., assisting students and/or teachers in a different classroom each period (5T106-5T108, 5T109). Thereafter, Edwards leaves the school building to conduct Association business, generally from eleven a.m. to three p.m. (5T91, 5T102-5T103).

F. School-Based Technology Coordinator position at Florence Avenue School

14. Both Irvington's Florence Avenue and Mount Vernon Avenue Schools chose a learning model developed at Temple University called Community for Learning (2T7, 3T23). The philosophy of the Community for Learning model calls for an entire school to "work together in a systematic way to achieve student satisfaction and student success" in both academic and non-academic areas (5T21).

15. Alan Gamba served as principal at Florence Avenue School, from July 1999 until June 2001 (1T100, 3T14, 3T48).

16. Prior to June 2000, Gamba submitted a posting to the superintendent advertising for a technology coordinator, which

was one of several positions which had yet to be filled in compliance with the Community for Learning model (3T16, 3T23, 3T25). Gamba waited three to four weeks until the application deadline passed; there were no applicants (2T13, 3T36).

17. Gamba has known Madeline Edwards professionally since he served as the principal at Mount Vernon Avenue school for six years prior to becoming principal at Florence Avenue (3T48). Gamba was aware that while he was at Mount Vernon, Edwards had worked on the gifted and talented program which was computer technology intensive; she had also assisted Mount Vernon's computer teacher with developing a technology budget, helped obtain laptop computers for classrooms and developed a curriculum for their use, and implemented the technology component of Whole School Reform (3T34, 3T39, 3T51, 3T54, 3T63, 3T79, 5T21-5T22). Edwards had also assisted in writing the Whole School Reform competitive grant application and the technology budget; using and teaching the use of new computer equipment to staff and students; and arranging for the equipment to be stored at the end of the school year (5T22-5T26, 5T134-5T136). Gamba recalled Edwards' work performance as very good and that all work assignments were completed in a timely fashion (3T51, 3T54).

18. In June 2000, Gamba approached Edwards about becoming the technology coordinator at Florence Avenue (5T37, 5T59).

Gamba told Edwards that he had posted the technology coordinator position, but that no one had applied (5T59).

Gamba felt "pressured . . . by the people at Community for Learning" to appoint a technology coordinator and felt that it would "look good" on reports to the state to have someone with Edwards' credentials and doctoral degree on the school management team (3T30, 3T34). Moreover, because of the difficulty in getting applicants for teaching positions, Gamba hires a sole applicant for a teaching position if the applicant is appropriately certified (3T45-3T46). Therefore, Gamba felt it would be appropriate to recommend Edwards although she was the only applicant for the position (3T47).

19. Gamba was initially concerned whether Edwards would be able to perform effectively in the position while continuing to serve as Association president (3T50). Full-time teachers at Florence Avenue School work seven periods per day; five teaching periods, a lunch period, and a period devoted to preparation for teaching responsibilities (3T30-3T31). When Gamba was principal at Mount Vernon, Edwards had worked four straight periods, the fourth period ending at approximately a quarter to twelve; eaten lunch, and then left the school to conduct union business (3T27, 3T59). Therefore, Gamba reasoned, Edwards was available only one period less than a full-time teacher (3T29).

After discussing his concerns with Edwards, Gamba felt "convinced" by Edwards that she would be able to perform the duties of the technology coordinator position within the confines of her release time schedule (3T50-3T51). Gamba felt that Edwards would be responsible enough to reconcile her Association duties with the demands of the position, on her own time if necessary (3T56, 3T57).

20. Initially, Edwards refused to apply (2T35). Edwards was concerned that she would not have a room to work in and/or access to a telephone (2T35). After Gamba assured Edwards that she would have such accommodations, she agreed to apply (2T36-2T38, 5T61).

21. The members of the school management team at Florence Avenue during the 1999-2000 school year included Gamba, Lynn Molinari, facilitator; Karen DeMarco, chairperson; Jacqueline Hirschfeld, classroom teacher; Irene Perodin, ESL bilingual teacher; Dennis Remme, director of Media Services and Technology; Anna Camacho, medical clerk; Ann Marie Brown, parent; Mrs. Dixon, parent; and Janis Lindsay, paraprofessional (2T15, 2T22, 2T24, 3T47). Gamba met informally with Molinari, DeMarco, two teachers, a parent, and the parent coordinator to discuss Edwards' candidacy (3T18).

Members of the Florence Avenue SMT were aware that part of Edwards' thesis had been done on technology, and that she was

familiar with developing school budgets (2T15). The team felt that Edwards had performed many duties which were similar to those of the technology coordinator position at Mount Vernon Avenue school the year before, and was familiar with the specialized budget, start-up grants and implementation plan necessary for Whole School Reform (2T42-2T43, 4T132, 5T20-5T21). The team agreed with Gamba's recommendation that Edwards be appointed because they believed she would be capable and because she was the only applicant for the position (2T15-2T16, 2T34, 2T38, 2T40, 3T16, 3T18, 3T19). The team recommended Edwards despite their awareness that she was Association president and spent part of her time on Association duties; according to Molinari, "Mrs. Edwards wears many hats, she takes work home on weekends and she gets the job done" (2T38, 2T42).

22. At Gamba's request, Edwards provided a letter of application and a copy of her resume for Gamba's submission to the Personnel Committee (5T61; CP-8).

23. On June 12, 2000, Gamba wrote a letter to then-Director of Human Resources Belinda Smiley, with a copy to Smith, recommending Edwards for the position (3T19, 3T35; CP-3).

After Gamba and the team submitted the recommendation, according to Gamba and Molinari, "nothing happened" and neither Edwards nor anyone else was appointed as a result of the recommendation (2T16, 3T20). On July 24, 2000, Gamba wrote a

second letter to Smith to remind him that certain positions that he (Gamba) and the SMT had recommended be filled for September 2000 remained unfilled, and to request that Smith "expedite" Board consideration (2T20, 3T65, 3T67; CP-4). The positions Gamba referenced were Edwards for the technology coordinator position, Lynn Molinari for facilitator for Whole School Reform, Theresa Misita for summer guidance counselor, and Marsha Morgenstern for computer teacher (CP-4). Gamba indicated that these recommendations had been "removed from the Board agenda in July" (CP-4). Gamba received no response to the second letter (2T21). Smith testified that he doesn't recall receiving either the recommendation or the second letter (1T101, 1T104, 1T155; CP-3, CP-4). I do not credit Smith's testimony.

24. A meeting of the Board's personnel subcommittee was held on June 15, 2000 (CP-36). Board members in attendance at the meeting were committee chairperson Andrea McElroy; Sandra Jones, Robert McLaurin, and Eugene Lawson. Administrators present were Smith, Human Resources Director Belinda Smiley, Employee Benefits Manager Pat McLoughlin, and Board attorneys Ronald Hunt and Raymond Hamlin.

Item 6 of the agenda read as follows:

6. TRANSFERS

Resolved, the Board of Education accepts the recommendation of the Superintendent and approves the transfer of the following staff

members, effective 9/1/00, at the indicated locations and positions.

(CP-36, p. 8).

The resolution listed a total of 17 staff members, the staff member's current work location, and the location to which the Superintendent had recommended the staff member be transferred.

Item 6(13) read as follows:

Madeline Edwards, Prep teacher, Mt. Vernon Avenue School, to Technology Coordinator, Florence Avenue School.

After the 17th item listed, the resolution reads:

Item (6) 13 was removed from the agenda.

The minutes continue:

Item 6 minus (13) moved out of committee.

(CP-36, p. 9).

25. Prior to the November 15, 2001 hearing date in this matter, the Association directed a subpoena duces tecum (CP-9) to McElroy requesting certain documents. A Rider to the subpoena requested, in pertinent part:

(a)ny minutes, tapes and other records of meetings of either Respondent or the Personnel Committee of Respondent at which the appointment to fill the position of Technology Coordinator at either Florence Avenue School or Mt. Vernon School was proposed and/or discussed and/or voted upon.

The subpoena also requested all documents, recommendations, agendas or applications received by the Board or the personnel committee concerning the technology

coordinator position at Florence Avenue or Mount Vernon Avenue schools.

(CP-9).

26. On direct examination by the Association's counsel, McElroy testified that she did not bring any documents to the hearing in response to the subpoena. She said:

Q. Mrs. McElroy, do you see item number one, second page?

A. Yes.

Q. Did you bring any documents today in response to that document?

A. Any minutes, tapes and other records of meetings of either respondents or personnel committee of respondent at which the appointment to fill the position of technology coordinator of either Florence Avenue School or Mount Vernon Avenue School was proposed and/or discussed and/or voted upon. Quite difficult for me to answer that question because some of the things being requested don't exist.

Q. Are there things that are requested in number one that do exist?

A. The personnel committee. No, we don't have minutes. We don't use tape-recordings.

Q. Is there any other records of minutes of the personnel committee?

A. That's a vote. That's just a sheet.

Q. Is that a written document?

A. No. It's just a sheet of paper that tells you the number of people that was in attendance.

Q. Is it a tally of the votes or just who's present?

A. Who's present.

Q. As far as -- how about the Board of Education which is the respondent in this matter, does the Board of Education keep minutes of its meetings?

A. No.

Q. You don't have minutes?

A. Of personnel, no.

(3T92-3T93).

27. McElroy indicated that as Board president, she requested Director of Human Resources Anthony Salters to supply documents in response to the subpoena to Board counsel, but that all McElroy brought to the hearing was "(her) Bible, (her) pocketbook and a soda" (3T96).

28. Smith also testified that the Board keeps no record of the initial agendas of items considered by the personnel committee; only those items which are passed for consideration by the full Board are maintained (1T91-1T94).

29. I find that CP-36 is a document fitting the description set forth in the original subpoena duces tecum directed to McElroy, constituting the "minutes" of the June 15, 2000 meeting of the personnel committee (CP-36, CP-9). CP-36 consists of a cover sheet indicating the meeting attendees, a 25-page agenda indicating the committee's action on each item in bold type directly underneath the item, and a page with the signatures of the attendees. CP-36, and several other editions of such minutes, was produced by the Board after the close of the hearing in connection with other litigation, and subsequently admitted into evidence upon the Association's Motion to Reopen the Record (CP-4, CP-27, CP-37). I find that the record does not reveal how Edwards' name came to appear on CP-36.

I do not credit Smith or McElroy's testimony on this issue. McElroy and Smith did not merely testify that the minutes existed

but could not be found in response to the subpoena in time for hearing, but that such minutes were not kept by the school district and so did not exist. Given that the Board ultimately produced the minutes, such testimony was clearly incredible. I note that McElroy's demeanor while being questioned by the Association's counsel concerning her compliance with subpoena duces tecum was cavalier and disdainful; at times she audibly snickered.

It is especially difficult to credit that Smith, whose experience in the district dates to 1994, or McElroy, who had been Board president and/or a member of the Board's personnel committee for the last five years, would be unaware that the Board kept such records. Therefore, I do not credit their testimony that the meeting minutes did not exist because no written record was kept of personnel committee actions.

30. McElroy knew that Madeline Edwards was a teacher who is a math specialist at Mount Vernon Avenue school and was also the IEA president (4T17). McElroy testified she could not recall Edwards' name ever coming before the personnel committee in connection with the school-based technology coordinator position, and that she had no role in determining whether Edwards would be appointed to the position (4T21, 4T27-4T29). Since the cover sheet, the first page and the signature sheet attached to CP-36 indicate that McElroy attended, and in fact chaired, the June 15,

2000 meeting of the personnel committee, I find it disingenuous that she would not recall that Edwards' name appeared on that meeting's agenda and was subsequently "removed" (CP-36). I find that McElroy's incredible testimony concerning the existence of personnel committee minutes, coupled with her cavalier demeanor concerning the Board's obligation to supply documents in response to the Association's subpoena, support a conclusion that her lack of recall of Edwards' name in connection with the technology coordinator position is not believable. Thus, I do not credit that testimony.^{6/}

31. Molinari testified that at some point after the Florence Avenue SMT recommended Edwards, teachers and facilitator members of all the Board's school management teams met at the Board's central office with Lynda Byrd, Supervisor of Early Childhood and Whole School Reform, and Board Secretary Victor Demming. Members of the Florence Avenue SMT asked Demming why a technology coordinator had not been appointed at that school.

^{6/} Edwards described seeing her name on a personnel committee agenda on a secretary's desk in the Human Resources office in June 2000, indicating that Edwards was to be transferred and appointed to the technology coordinator position at Florence Avenue School; at the monthly Board meeting the following week, Edwards was "surprised" to find that her name did not appear on the agenda, and questioned human resources director Belinda Smiley about its absence (5T62-5T65, 5T205-5T213). Although I have found that it is unclear how Edwards' name came to appear on CP-36, I have not considered Edwards' description of these events in reaching that conclusion or my recommended decision herein.

Demming replied that the team was required to submit three names, but had submitted only one (2T16-2T17).

32. At a principals' workshop in August 2000, Smith called Gamba aside and told him he would have to change his recommendation for the technology coordinator position (3T22). Gamba replied that he had no other recommendation because there had only been one applicant (3T22). According to Gamba, Smith replied that he did not know what the problem was, but when the Board hears Gamba or Edwards' names, they "see red" (3T23, 3T60, 3T87). Smith did not refute Gamba's statements. I credit Gamba's testimony.

33. On August 23, 2000, Edwards wrote to Smith concerning the status of her application for the Florence Avenue technology coordinator position, as well as the applications of Misita and Molinari for the positions about which Gamba had previously inquired (5T66-5T67, 5T213; CP-4, CP-5).

Smith responded by memorandum to Edwards that same day (5T67; CP-6). Smith wrote as follows:

I received your memorandum of August 23, 2000 and I wanted to respond in a timely manner. Please understand the following process which occurs in regard to employment in the Irvington Public Schools:

1. Most recommendations come from Principals and or School Based Management Teams to the Central Office.

2. After careful review a personnel administrator will consult with the Superintendent. The Superintendent then makes a recommendation to the Board of Education through the Personnel Committee.

The individuals of whom you spoke in your memo were not approved by the Personnel Committee of the Board of Education. Therefore, their names were not placed on the agenda that was presented to the full Board. As always, your full support for the Board of Education and the Irvington Township's schools is greatly appreciated.

(CP-6).

Edwards found Smith's response "heartening" because she felt that Smith's response indicated that he had recommended to the Board's personnel committee that Edwards be appointed to the technology coordinator position (5T68). Molinari and Morgenstern were ultimately appointed to the positions referenced in Gamba and Edwards' letters; Misita was not appointed (CP-4, CP-5; 5T68).

34. A few days prior to the August 2000 Board meeting, Edwards and Association Vice-President Andiaye Foluke arrived early for a scheduled negotiations session at the Board offices (4T39). Edwards and Foluke went to visit Dr. Richard Hangge, Board supervisor of staff development, concerning the Association's role in planning the annual new teachers orientation (6T35). Hangge congratulated Edwards, who asked why (5T65, 6T6, 6T35-6T36). Hangge said, "Oh, the technology

coordinator's position, you have it." (6T36). Foluke asked how Hangge knew that information (6T36). Hangge said that he had seen Edwards' name on the agenda for the upcoming Board meeting to be appointed technology coordinator at Florence Avenue School (6T36). Edwards responded, "Oh, that's news to me" and thought perhaps the Board had "changed its mind" (5T66, 6T5). Edwards attended the August Board meeting but her name was not on any list for transfer or appointment (5T66).

35. On September 5, 2000, Edwards wrote to Board personnel committee members Andrea McElroy, Lorene Capers, Sandra Jones and Eugene Lawson, with a copy to Smith (R-3). In her letter, Edwards requested the committee's "reasons for denial of [her] appointment to a posted vacancy for the position of School-based Technology Coordinator, Florence Avenue School." Edwards wrote:

It is my understanding that the superintendent recommended my application at the June 15th personnel meeting and again at the August personnel committee meeting.

Curiously, during a conversation on mentoring, on Thursday August 10, Dr. Richard Hangge, the District's Public Information Officer, voluntarily informed me that I was going to Florence Avenue School as Technology Coordinator. When I responded that I did not know about this, he stated, "well, you are on the Board agenda next week". My colleague, a member of the negotiations team and a witness to this conversation, asked me how Dr. Hangge would know the contents of the personnel agenda, an agenda that is confidential until disseminated at a public meeting of the Board.

I await your prompt reply.

(R-3). Edwards did not receive a reply to R-3.

G. School-Based Technology Coordinator Position at Mount Vernon Avenue School

36. Glenda Pratt became chair of the SMT at Mount Vernon Avenue School in the spring of the 2000-2001 school year (3T104-3T106, 3T109). The other members of the SMT during that school year included Franklin Saunders, principal; Mayra Ogurek; facilitator; Nina Appiah, teacher; Alice Adeusi, parent; Gwendolyn Bethea, parent coordinator; Mohamed Baala, teacher; Doris Manley, paraprofessional; Janis Andrews, teacher; Cathy Martin, teacher (an alternate team member); Edward Wilson, parent; Burnelle Hurdle, parent; and Edwards (3T107-3T108).

37. In October 2000, the school management team at Mount Vernon Avenue School asked Edwards to apply for the technology coordinator position (5T70). Edwards refused, replying, "Fat chance, I couldn't get the appointment at Florence, what makes you think the Board is going to appoint me to this position at Mount Vernon?" (5T71). The team persisted in asking Edwards to apply (5T71). On October 13, 2000, Edwards "reluctantly" submitted a resume and letter of application to the team, but "didn't have any hope" (5T71, 6T7; CP-24).

38. At an SMT meeting on October 16, 2000, team member Mayra Ogurek moved that Edwards be appointed technology coordinator for Mount Vernon, seconded by Baala (3T110; CP-10).

Pratt prepared the minutes of the October 16 meeting (3T111; CP-10).

39. John Fajimolu has been employed by the Board since September 2000 (3T8). Prior to September 2000, Fajimolu worked as a substitute teacher for the Board, including five months at Mount Vernon Avenue school as a permanent substitute computer teacher (3T9, 3T12, 3T13).

Fajimolu saw the technology coordinator position for Mount Vernon Avenue School posted at the Board's central offices and submitted an application (3T9). In July 2000, Fajimolu was interviewed by Franklin Saunders, principal of Mount Vernon School (3T10). Fajimolu was not interviewed by a school management team (3T11). After the interview, Saunders made a written recommendation, which Fajimolu saw and believed was a resolution to the Board, that Fajimolu be appointed to the position (3T10-3T11). Fajimolu began working at Mount Vernon (in what position is unclear) at the beginning of the 2000-2001 school year (3T11). Fajimolu does not possess any New Jersey teaching certifications, but understands that he was not hired to be a teacher (3T12).

Edwards learned from Fajimolu in December 2000 that he expected to be Board-appointed the School-Based Technology Coordinator (5T72). To Edwards' knowledge, neither Fajimolu's name nor any other candidate had previously come before the

school management team; this was why the team had asked Edwards to apply (5T72). Pratt subsequently learned of Fajimolu's appointment from principal Saunders (3T112). The SMT did not vote on Fajimolu's appointment (3T112). Fajimolu was appointed technology coordinator at Mount Vernon School at the full Board meeting on December 20, 2000 (1T97, 4T91; CP-2, CP-12).

40. Gamba and members of the Florence Avenue team learned that Edwards had applied for the technology coordinator position at Mount Vernon Avenue School. There were still no other applicants for the position at Florence Avenue School (2T18). Gamba began to feel pressure to appoint a technology person right away in order to comply with the Community for Learning model for the coming school year, and reopened the application process (3T23, 3T36).

Marsha Morgenstern, who had been appointed the computer teacher at Florence Avenue by Gamba's recommendation at the beginning of the school year, approached Gamba and said that she would like the technology coordinator position (3T24, 3T84; CP-4). Gamba had not previously approached Morgenstern about the position (3T62). The SMT interviewed Morgenstern (3T24). On October 30, 2000, since there were no other applicants for the position, Gamba and the team recommended Morgenstern (2T16, 3T24; CP-16). The Board approved Morgenstern's appointment at the November 15, 2000 Board meeting (2T19; CP-1).

41. In October 2000, Edwards attended the full Board's public meeting at Berkeley Terrace School. At that meeting, the Board approved the appointments of several technology coordinators (5T28).

Edwards spoke that night with Barbara Skichillis, a resource teacher in government programs at University 6 School; Deborah Ellis, a computer teacher at Thurgood Marshall Elementary, and Susan Kobrin and Robert Baker, both Board computer resource teachers; all were on the agenda to be reassigned as technology coordinators (5T30, 5T33, 5T34, 5T201, 6T34). Edwards testified that none of these individuals were aware prior to the Board meeting that the Board was considering transferring them to the technology coordinator position (5T35-5T36, 5T203). Skichillis was "almost in tears" at the prospect of her reassignment because it had not been discussed with her and she "knew nothing about technology." (5T31, 5T202). Edwards and Skichillis went to speak with Smith who was in the next room (5T31). Skichillis asked Smith why he had her name down as technology coordinator; that she wanted to keep her job and didn't feel confident about serving as technology coordinator (5T31). Smith replied, "Oh, no, I have to appoint a technology coordinator and you are the one" (5T31). Edwards subsequently telephoned Smith to ask why the individuals were "unilaterally" appointed to the new positions (5T36). Smith responded that he had to fill the

positions, that it was not required that he post them, and that he was taking individuals out of offices rather than classrooms (5T36). Smith did not refute Edwards' testimony concerning this incident. I credit Edwards' testimony.

42. Smith recommended to the personnel committee that Morgenstern be appointed technology coordinator at Florence Avenue School (1T124). In reviewing the recommendation for Morgenstern's appointment, Smith relied upon the information he received from Board human resources director Salters that Morgenstern possessed the appropriate certification (1T125). Smith knew Morgenstern was a teacher at Florence Avenue at the time and inferred that she was full-time, but does not recall Morgenstern's specific qualifications (1T123). Smith assumed that Morgenstern met the criteria for the position or she would not have been recommended by Salters (1T125-1T126).

43. Smith did not specifically recall whether he approved a recommendation that Fajimolu be appointed technology coordinator (1T131). He testified that he thought that Fajimolu possessed teaching certification at the time he was appointed technology coordinator at Mount Vernon School; otherwise Fajimolu would not have been recommended to Smith (1T129).

44. Smith knew Edwards was Association president (1T99). He did not recommend her for the position of School-Based Technology Coordinator at Mount Vernon or Florence Avenue (1T106,

1T109, 1T156, 1T131, 7T5, 7T6, 7T36). He was aware that Edwards had applied for the positions at either Florence Avenue or Mount Vernon Avenue Schools, but testified repeatedly that he could not recall if he had ever received a recommendation that Edwards be appointed to either position (1T106, 1T154, 1T155, 7T36). However, Smith also explained that he took no action on a recommendation he received - it is unclear from whom - because Edwards did not meet the qualifications for a full-time position (1T138). He testified why he would not have made such a recommendation:

Q (Board counsel Hamlin): Did you recommend her for the position of School-Based Technology Coordinator at Mount Vernon or Florence Avenue?

A: No.

Q: Why not?

A: It is my understanding that she is not eligible for it because she is only eligible to do half time assignments under the IEA current contract.

Q: And did you have any information that she was not going to continue as the president of the IEA?

A: No, I did not.

(7T6).

45. Smith understood that Edwards' employment was part-time as employee and part-time performing duties as president of the union. He would not have recommended Edwards for a full-time position because he believed that would require Edwards to give up the union presidency to work the full-time position (1T109, 1T115). He did not discuss with Edwards "someone else's

recommendation" that she receive the technology coordinator position (1T106). His understanding of Edwards' terms of employment as the Association president was that Edwards gets half a teacher assignment, and is free for the remainder of the day to perform Association business (1T115, 7T6). Smith testified that Edwards' union role and part-time schedule would "conflict" with her ability to perform the technology coordinator position (1T148). Because Edwards never communicated to Smith that she was willing to relinquish her position as Association president in order to perform the duties of technology coordinator on a full-time basis, Smith never considered her for the position (1T137). He decided, without asking Edwards, that because she was part-time she could not fill the position (1T116). Neither Edwards nor anyone on her behalf requested that Smith obtain a waiver from the State Board of Education to permit Edwards to serve as technology coordinator on a part-time basis (1T138, 1T148).

46. I do not credit Smith's testimony. Preliminarily, I note that Smith's testimony concerning whether he received or took action on Edward's application for the technology coordinator position was vague and contradictory. Smith admitted that he was aware of Edwards' applications, but he claimed not to recall receiving Gamba's recommendation or his followup letter (1T101, 1T104, 1T155; CP-3, CP-4). Further, Smith, as well as

McElroy, was present at the personnel committee meeting on which agenda Edwards' name appeared (CP-36). I have already found McElroy's testimony, professing a lack of knowledge concerning Edwards' candidacy for the technology coordinator position, to be highly suspect; I find Smith's testimony on this point equally suspicious. Finally, although Edwards inquired about the status of her candidacy twice in writing (CP-5; R-3), Smith never explained to either Edwards or Gamba the reason he considered Edwards ineligible for the position. Smith's explanation seemed to arise at hearing as a retroactive justification for his deliberate non-action concerning Edwards' applications. Having found Smith's testimony concerning his awareness of Edwards' application to be suspect, and his testimony concerning the existence of the Board personnel committee minutes to be incredible, I further find that the lack of credibility evident in Smith's earlier testimony tends to undermine his explanation of Edwards' ineligibility for technology coordinator position.

47. No member of the Board, nor Smith, ever advised Edwards that because she was working half-time for the Board she was ineligible for appointment to the position, or asked Edwards if she would be willing to work full-time in order to be technology coordinator (5T75, 5T76, 5T169, 5T170). Edwards' appointment to technology coordinator would have been a lateral move with no additional compensation (5T170).

48. Edwards had no intention of relinquishing her role as IEA president when she applied for the technology coordinator position at either Florence Avenue or Mount Vernon (5T195, 6T7). She wanted to perform the duties of the technology coordinator position at Florence Avenue School within the confines of her release time schedule as IEA president (5T161, 5T167, 5T172 - 5T175).

H. The "Office Space" at Mount Vernon Avenue School

49. Most children in "Abbott" school districts qualify for free or reduced price lunches under the "Title 1" federal subsidy program (5T16).

Title 1 applications are evaluated to determine a student's eligibility for reduced-price breakfast or lunch based upon family size and income (5T79). Edwards estimated that eighty to eighty-five percent of families at Mount Vernon submitted Title 1 forms (5T79). There was a marked increase in paperwork that year due to a student turnover rate of approximately 76% in September and October (5T77, 5T79).

50. Franklin Saunders is the principal of Mount Vernon Avenue School (5T76). In late September 2000, at Saunders' request, Edwards agreed to assist with processing paperwork related to Title 1 lunch form applications by parents (5T76, 5T129, 6T9).

Because of the volume of the work, Saunders also asked Elizabeth Wallace, an academic representative of the teaching staff, to assist processing Title 1 paperwork during her unassigned duty periods (5T77, 5T78).

Saunders and Edwards agreed that Edwards would review available Title 1 forms during the first period of each day and perform her math assignment during the next two periods (5T76). After Edwards completed what she could during the first period, Wallace would complete the remainder during times when she did not have another assignment (5T78).

51. There is a staff room with round tables at Mount Vernon (5T109). The staff room also contains a vending machine, kitchen and bathroom (5T111). The room is accessible to the entire school staff, who may congregate there prior to the beginning of first period, including thirty-eight to forty teachers, secretaries, custodians, the principal, parent coordinators, and occasionally parents (5T109-5T110, 5T129, 5T131).

52. Edwards decided that the Title 1 application information should be kept confidential and secure because it included detailed financial information, names of parents and guardians, Social Security numbers, places of work, public assistance and other personal information, and therefore should not be processed in an open area such as the staff room (5T77, 5T79, 5T131-5T132, 6T14). Upon their request, Saunders granted

Edwards and Wallace permission to use a small "cubbyhole" office space to process the Title 1 paperwork (5T77, 6T27). The space had a desk, a couple of chairs and shelves, and a locking door, and had been used by a security guard as a place to store a personal television the prior year (5T77, 5T129, 6T9). Edwards and Wallace also used the office to conduct interviews to inform parents of deficits in their application or rejection by the program (5T80).

53. Edwards "gave" Larry Keanan, a substitute world languages teacher at Mount Vernon, half of the bookcase in the cubbyhole office to store his materials and personal items because Keanan "had no place" to put them (5T78, 5T132). Edwards used the other half of the bookcase to store the Title 1 applications and her own math materials and teachers' guides unrelated to the Title 1 program. She also hung her coat in the room (5T78, 6T21-6T23, 6T24). Edwards, Wallace and Keanan had keys to the room (6T10, 6T13).

54. Edwards stopped working on the Title 1 project in late October. She continued to use the office space through November for up to three periods daily or after school hours to work on the school planning budget and the technology implementation plan with Mayra Ogurek (6T11, 6T12, 6T19). Edwards had decided that the budget information was "semi-confidential," involving State forms containing employee names, job descriptions and salaries

which would not become public until the budget was approved, so that a secured space was necessary to perform the work (6T20).

55. During a parents' meeting at the school in or around November or December 2000, Smith learned that Edwards was using an office in the school (7T8, 7T35). He took notes concerning what he heard at the meeting, and followed up with a visit to the school (7T8). The purpose of Smith's visit was to see if Edwards was in fact using an office at the school (7T9). During his visit to the school, Smith found that Edwards appeared to be sharing an office space with two other teachers (7T9). Smith assumed that the building principal gave authorization for the space to be used, but then directed Saunders:

to clear everybody out of that space . . .
because we don't provide office space for any
of our teachers in the school district. If
we was [sic] to start then the IEA would
require us to do it for all of the teachers,
and we couldn't begin to do that.

(7T9, 7T10).

56. Smith testified that it is his responsibility to make sure that personnel policies are consistent throughout the Board's schools (7T10). He testified that offices in the school system are usually for employees in administrative level positions, including the superintendent, supervisors, principals, directors and other administrators. Edwards did not hold an administrative level position (7T8).

Smith did not know if the practice of not providing offices to teachers has ever been placed in writing (7T12). He testified his knowledge of the practice was based upon his own experience in Irvington and other school districts in which he has been employed, including Old Bridge, where he worked as assistant superintendent for curriculum from 1997 to 1999 (7T13). He testified that teachers in districts throughout the state, with few exceptions, are provided work rooms or lunch rooms, not offices; Smith considers that conclusion to be "common sense" (7T25, 7T26, 7T27, 7T37).

Smith concluded that the area Edwards and the other teachers were using was an office, not a work space, based upon the small size of the room (7T29). He thought a work space was an area where teachers could go to spread out work materials, i.e., to correct papers, plan, or put materials together for presentation; an office in the public schools, by contrast, is smaller than a work space and usually contains a desk, a chair, and perhaps a United States flag (7T28). I credit his testimony.

57. On or around the afternoon of November 27, 2000, Saunders announced via the school public address system that Wallace and Keanan had to remove their belongings from the office and vacate the space (5T81, 5T83, 6T24, 6T29). Edwards was not present in the school at the time the announcement was made (6T29). Wallace informed Edwards of the announcement (6T29).

58. The next day, Edwards spoke with Saunders. Edwards protested, saying that she and Wallace were voluntarily assisting Saunders by performing the administrative task of processing the Title 1 forms, and that they needed a confidential place to work (5T81-5T83). Saunders replied that he had been told by Smith that Edwards could not use the office, and that Board members Andrea McElroy and Lorraine Capers wanted Edwards "out of that room" (5T82). McElroy lived down the street from Mount Vernon and Capers' son attended the school (5T82). Edwards explained that Wallace and Keanan also used the office and asked whether the reason was a racial issue (because Edwards is white) or a union issue (because Wallace held an Association office) (5T82-5T83). Saunders responded that all three had to vacate the office (5T83). Edwards, Wallace and Keanan refused to remove their belongings from the office and return the keys until Saunders confirmed the demand in writing (5T86, 6T28; CP-25). All three wanted the demand in writing to document "the horrible treatment" they received by Saunders giving the order to vacate over the school public address system (6T24, 6T25).

59. On December 8, 2000, Saunders issued a memorandum to Edwards, with copies to Smith, McElroy, and Ethel Davion, Assistant Superintendent, as follows:

By directive handed down to me by Dr. Ernest H. Smith, you are to cease from using the room you are using, remove all of the things that belong to you, inform the other staff

members who share that room to remove their belongings and turn the keys over to me.

This must be done immediately.

There will be nothing coming from the Board office in writing with reference to this directive.

I expect your cooperation in seeing that this is done.

(CP-25).

60. Wallace and Keanan were not given any other office space in the school (5T85). Wallace was given a desk in the staff room, an open setting, to work (5T85). No use was made of the room after it was vacated by Edwards, Wallace and Keanan (5T85).

61. There was no provision in the collective bargaining agreement authorizing Edwards to use the office space (5T128).

62. Smith denied that he asked Edwards to vacate the space because she is president of the IEA (7T10).

ANALYSIS

In re Bridgewater Tp., 95 N.J. 235 (1984), articulates the standards for assessing allegations of retaliation for engaging in protected activity. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the

employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it 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, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner, and then the Commission, to resolve.

The decision on whether a charging party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

The Association has proved the first two parts of the Bridgewater test - it is undisputed that Edwards has engaged in protected activity by her position as Association president since 1995, and that the employer knew of this activity. Several Board witnesses, particularly superintendent Smith, who worked for the Board from 1994 to 1996 and returned in 1999, and Board president McElroy, who has served in that capacity since approximately 1997, acknowledged having interacted with Edwards in her role as Association president.

The inquiry, therefore, turns to the last component of the Bridgewater test - whether the Board was hostile to Edwards' protected activity.

1. Failure to Appoint Edwards Technology Coordinator

Based upon the Bridgewater standards, I find that the Association has established by a preponderance of the evidence that the Board violated 5.4a(3) when it refused to appoint Madeline Edwards to the position of technology coordinator at Florence Avenue and Mount Vernon Avenue Schools. I find that the Board, and particularly Smith, determined not to consider Edwards for the technology coordinator position, solely due to her position as Association president.

Smith explained that he did not recommend Edwards for the position of School Based Technology Coordinator at Mount Vernon or Florence Avenue, because he determined Edwards to be

ineligible for that position due to her half time work schedule under the collective agreement between the Board and IEA.

Therefore, by his own admission, Smith unilaterally disregarded Edwards' applications due to her union position.

I specifically find the Board's defense, articulated by Smith, that Edwards was not eligible for a full-time position due to her contractual release time schedule, to be a pretext for union animus.

The Commission has previously held that an employer may not unilaterally conclude that an employee is ineligible for a position simply because the employee holds a union position.

Willingboro Tp. Bd. of Ed. and Employees Ass'n of the Willingboro Schools and Joann Phelps, P.E.R.C. No. 98-113, 24 NJPER 171 (¶29085 1998); aff'd and rem'd on remedy, 25 NJPER 322 (¶30138 App. Div. 1999).

In Willingboro, the Commission found that the Board violated the Act when it denied Joann Phelps a promotion to Supervisor of Transportation. Phelps was President of the Employees Association of the Willingboro Schools, had performed many of the duties of the supervisor position, and was recommended by several administrators and the Superintendent of Schools. The Board members who voted to deny Phelps promotion were all aware of her union position, because Phelps' union had opposed these Board members' candidacy in the most recent school election. In

expressing her opposition to the appointment, the Board president stated that she would not support Phelps' promotion because the union had been "involved in the election; bad mouthing." 24 NJPER at 172. The Board members asserted that they had voted against Phelps' appointment because they felt she lacked adequate supervisory experience; however, none had reviewed the job description for the position nor any of Phelps' specific qualifications. Id. at 173.

In recommending that the Commission find that the Board denied Phelps promotion due to union animus in violation of N.J.S.A. 34:13-5.4a(1) and (3), the hearing examiner noted that "the mere fact that a person has held a union position is not a legal reason by itself to believe that the person, if promoted, would not be able to perform supervisory duties effectively." Willingboro, 23 NJPER at 407, citing Hackensack v. Winner, 82 N.J. 1, 20 (1980); see also Pacific American Shipowners Ass'n, NLRB No. 99, 29 LRRM 1376 (1952).

In adopting the hearing examiner's decision, the Commission found that since the Board members did not independently investigate Phelps' credentials or experience, and in light of the strong showing of animus, the Board had not proved that, absent its hostility, any concerns about Phelps' supervisory experience would have led it to override the unanimous recommendation of its management team. 24 NJPER at 173.

I find that, as in Willingboro, the Board did not prove on the record as a whole that it would have taken the same action absent Edwards' protected activity.

Here, I find that Smith did not exercise independent judgment concerning the qualifications of Morgenstern and Fajimolu, the individuals he appointed to the technology coordinator positions for which Edwards applied. With respect to those appointments, Smith said he relied upon his "staff," Gamba and Salters, respectively, to have established the candidates' qualifications prior to recommending each individual to Smith. In fact, the record revealed that although Fajimolu admittedly lacked appropriate certification for the position, he was appointed on Smith's recommendation. Similarly, concerning Morgenstern, Smith "inferred," but never verified, that she was a full-time teacher and appropriately certified for the position.

The Board argues that the technology coordinator position is full-time and that the Board's desire to fill that position with an employee willing to devote a full school day was not grounded in union animus; and that the personnel action in question would have occurred even in the absence of any protected activity, because the technology coordinator position would have been denied to any applicant who was not willing to commit to it full-time. On the contrary, the record shows that both Gamba and the Mount Vernon SMT had already considered the potential issues

presented by Edwards' time commitment to the IEA prior to presenting separate recommendations that she be appointed to the position. Gamba, in fact, personally discussed his concerns with Edwards and felt "convinced" by her that she would devote all the time necessary to the position. Smith only second-guessed his staff concerning Edwards' recommendation. He relied on only one criterion in rejecting her candidacy: her union presidency.

Moreover, in appointing four technology coordinators at the Board's October 2000 meeting, Smith considered no specific criterion or qualifications at all, and appointed individuals who had not even inquired about the positions. Smith recommended these individuals' appointments without regard to whether they had any job-specific experience, or even any interest in, the technology coordinator position. In fact, Edwards was the only employee whose qualifications Smith specifically considered.

The Board further argues that Edwards' testimony that she did not intend to cease her service as Association president if appointed to the technology coordinator position, renders the issue moot.

Although he essentially denied ever receiving either recommendation, Smith stated that he "had no information that Edwards was not going to continue" as the president of the IEA, assuming that in order to be appointed to the position, Edwards would be required to relinquish the IEA presidency. Since Smith

never considered Edwards' viewpoint in advance of his decision, Edwards' testimony that she did not intend to relinquish the presidency is not probative as a retroactive justification for Smith's decision. Nor is the issue rendered moot, because it was not the prerogative of Smith or the Board to determine that Edwards would not or could not perform the duties of the technology coordinator position unless she relinquished the Association presidency. See Union County Board of Social Services, P.E.R.C. No. 89-35, 14 NJPER 651 (¶19273 1988) (employer violated the Act where it denied employee two promotions due to her role as union president; it was not employer's prerogative to decide in advance whether employee could adequately perform both job and union duties).

The record provides no explanation why Edwards' name appeared as a candidate for transfer to the school technology coordinator position on the Board personnel committee's June 15, 2000 agenda (CP-36) and was subsequently removed, particularly since Smith claimed he never recommended Edwards for the position. I note that Edwards' proposed appointment was not merely disapproved by the committee; it was removed from their agenda, and hence their consideration, altogether.

Although offered the opportunity after the Motion to Reopen the Record was granted, the Board provided no additional testimony on the record to explain this document or to clarify

McElroy and Smith's previous testimony. In its Memorandum of Law in opposition to Charging Party's Motion to Reopen the Record, the Board argues that the documents submitted showed that the personnel committee exercised their prerogative to decline to move Edwards' name to the full Board for consideration. The Board further argues that the fact that Edwards' name appeared on a personnel committee agenda does not mean that she was entitled to a position; "all it means is that her name must have been discussed at the meeting and that there was a determination by the Superintendent of Schools that it should not be presented to the full board of education for their consideration," because the board will not "rubber stamp" the recommendations of the superintendent without question. Without additional facts on the record, I can make no finding concerning the significance of the events at this meeting.

The Board further argues that the "best advantage" the Association can claim from the Board's "oversight" in not having provided CP-27 through CP-37 at hearing in response to the subpoenas issued by the Association would be a conclusion that the Board "was in error about" its record keeping and that the testimony elicited at hearing about whether Edwards' name came before the personnel committee is "inaccurate." However, I do find that the lack of credibility illustrated by both Smith and McElroy's testimony concerning the existence of personnel

committee minutes, including CP-36, to be suggestive of union animus.

Still further evidence of such animus is provided by Gamba's unrefuted assertion that he and Smith discussed Edwards' application for the technology coordinator position, and Smith stated that Board members "see red" when they hear Gamba's or Edwards' names. A hearing examiner can credit a witness's testimony, particularly when it is unrebutted, and draw a negative inference from a witness' failure to deny remarks attributed to that witness. City of New Brunswick, P.E.R.C. No. 83-26, 8 NJPER 555 (¶13254 1982); Clark Tp. and Xifo, P.E.R.C. No. 80-117; 6 NJPER 186 (¶11089 1980), aff'd NJPER Supp. 2d 91 (75 App. Div. 1981); State v. Clawans, 38 N.J. 162, 171 (1962); Wild v. Roman, 91 N.J. Super. 410, 414 (App. Div. 1966).

I therefore conclude that the Board, through Smith, was hostile to Edwards because of her protected activity, and because of that hostility, failed to appoint her to the technology coordinator position at Florence Avenue and Mount Vernon Avenue Schools, in violation of 5.4a(3).

I next consider whether the Board independently violated 5.4a(1). Cases raising interference and independent 5.4(a)(1) allegations are decided by the standards established by the Commission in New Jersey Sports and Exposition Auth., P.E.R.C.

No. 80-73, 5 NJPER 550 (¶10285 1979). In that case, the

Commission held:

It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.

5 NJPER at 551, note 1. See also Camden County Sheriff, P.E.R.C. No. 2001-55, 27 NJPER 184 (¶32060 2001), Orange Board 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); New Jersey Sports and Exposition Auth., *supra*. See generally Hardin, The Developing Labor Law, 76 (3d ed. 1992); Gorman, Basic Text on Labor Law, 132-34 (1976). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. Mine Hill Tp.

In Commercial Tp., *supra*, the Commission held that where an employer's conduct deliberately attempts to restrain employee participation in protected activity, it independently violates subsection 5.4(a)(1) of the Act. It further reiterated that proof of actual interference, intimidation, restraint, coercion or motive is unnecessary to prove an independent (a)(1) violation. The tendency to interfere is sufficient. Rutgers Medical School; Mine Hill Tp.

I find that the Board independently violated 5.4a(1) by Smith's determination not to consider Edwards for the technology coordinator position due to her protected activity. I have concluded that Smith's reasons for not appointing Edwards were pretextual, and that further circumstantial evidence of such animus is provided the fact that Smith appointed several other individuals to the technology coordinator position upon staff recommendation without further investigation, but declined to consider Edwards' recommendation because of her Association position; by Smith and McElroy's lack of credibility concerning their knowledge of Edwards' candidacy and their denial of the existence of the minutes of the Board's personnel committee; and by Gamba's unrefuted testimony that Smith stated that Board members "see red" when they hear Gamba's or Edwards' names. As noted by the hearing examiner in Willingboro, such conduct and statements by the employer "inevitably (have) the tendency to intimidate any employee from engaging in such activity." See Willingboro, 24 NJPER at 173, adopting H.E. No. 97-28, 23 NJPER at 409.

In Black Horse Pike Reg. Bd. Ed., P.E.R.C No. 82-19, 7 NJPER 502(¶12223 1981), the Commission explained that an employer must differentiate between an employee's status as an employee representative, and the individual's status as an employee of that employer. The Commission wrote:

. . . where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment. Id. at 503.

The Commission further explained that an employer could criticize the employee representatives for their conduct, but it must do so appropriately. A Board cannot:

. . . use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. Id. at 504.

Under Black Horse Pike, it is impermissible for the Board to impute any tension in its relationship with Edwards as an Association representative into its relationship with Edwards as an employee.

2. The "Office Space" at Mount Vernon Avenue School

The Board asserts that the collective agreement between the Board and the Association creates no entitlement to "offices" for teachers in Irvington.

The Board has the right to enforce the terms of its collective bargaining agreement with the Association and to avoid the establishment of practices which might conflict with the agreement's provisions. Smith specifically stated that he was concerned that if Edwards and the other two teachers were

permitted to continue to use the space, that "the IEA would require us to do it for all of the teachers."

But the level of attention accorded to this instance by Smith himself seems unusual. Smith correctly assumed that Edwards had been authorized by Saunders to use the space, but did not make himself aware of any specific purpose for the authorization or whether the work was ongoing or had been completed. Smith then took time to personally visit the school to inspect the area occupied by Edwards instead of merely ascertaining the facts from Saunders as the building principal. After investigating, Smith determined that the space was an "office" to which Edwards and the other staff members were not contractually entitled, rather than a "work space" to which, according to Smith's reasoning, they would have been entitled. This level of interest, coupled with the sheer arbitrariness of Smith's logic, suggests that Smith determined that the teachers must vacate the space specifically because Edwards was one of the teachers in question. Smith's concern was whether Edwards was using the space, and once he ascertained that fact, he directed that she vacate it. I believe that Smith's conduct and statements suggest a level of hostility to the Association.

The Board essentially presented no factual evidence to refute the Association's contentions concerning the use of the "office space" in question. Nor did the Board call any witnesses

to refute Edwards' testimony that Saunders stated that Smith, Capers and McElroy wanted Edwards "out of that room". See City of New Brunswick, Clark Tp. and Xifo, Clawans, Wild.

Upon consideration of all of the evidence, I conclude that Smith's order that Edwards vacate the space at Mount Vernon constituted further evidence of the hostility to her protected activity, as well as the Association as a whole, which led him to deny her consideration for the technology coordinator positions at Mount Vernon and Florence Avenue schools, in violation of 5.4a(1) and (3).

REMEDY

As a remedy, the Association requests that Edwards be offered the opportunity to choose whether she will take either technology coordinator position; that she and the other individuals who occupied the office space at Mount Vernon Avenue School be allowed to return to that space; and, that appropriate findings of violations of the law and directions of posting be made.

In a(3) cases where employers have refused to promote, the Commission has ordered the promotions, back-pay and other benefits. City of Newark, H.E. No. 2002-728 NJPER 98 (¶33036 2001) adopted by silence, 2001; Willingboro; Bloomfield Tp. and Pross, et. al., P.E.R.C. No. 88-34, 13 NJPER 807(¶18309 1987), aff'd NJPER Supp. 2d 217 (191 App. Div. 1989), certif. den. 121

N.J. 633 (1990). This matter, however, concerns Edwards' lateral transfer without an increase in pay and, therefore, does not implicate the issue of back pay.

In Willingboro, the Appellate Division found that a remedy ordering an employee to be reinstated to a position which that employee was unlawfully denied may be accomplished in two ways:

The first is known as "bumping" which requires the prevailing employee to displace the incumbent employee in order to place the wronged employee in a position to which he or she is entitled. See Abbamont v. Piscataway Bd. of Ed., 314 N.J. Super. 293, 305 (App. Div. 1998); Granziel v. City of Plainfield, 279 N.J. 104, 108-09 (App. Div.), remanded for reconsideration on unrelated issues, 142 N.J. 513 (1995). The other method is known as the "rightful place" theory, which requires the wronged employee to await the next job promotion, but compensates him or her financially at the higher salary for that waiting period. Willingboro, 25 NJPER at 324.

The court noted that the Commission's decision appeared to adopt the "bumping" method, but remanded the matter for a determination as to the appropriate remedy in implementing the decision. Willingboro (App. Div.), 25 NJPER at 324. However, to date, no decision on the remand has been issued.^{2/}

The record establishes that the two technology positions in question are currently occupied by other staff. The Commission has been sensitive to the effects of remedies which may displace

^{2/} The parties subsequently settled the litigation.

innocent parties, to avoid achieving justice for one employee at the expense of others, although the remedy is necessary to vindicate that employee's rights and the Commission's statutory responsibility. See Bloomfield and Pross, et. al., P.E.R.C. No. 88-34, 13 NJPER 807 (¶18309 1987); comparing Walters v. City of Atlantic, F.2d , 42 FEP Cases 387, 397-398 (11th Cir. 1986). I recommend that as a remedy, Edwards be offered the option of choosing to occupy either of the technology coordinator positions at Florence Avenue School or Mount Vernon Avenue School, as soon as one of those positions becomes vacant, in accordance with the "rightful place" theory. In this way, no other employee will be displaced by the Board's violation of the Act.

The parties' collective bargaining agreement is not part of the record in this case; therefore, I cannot conclude whether it entitles the Association president to serve a release time schedule while employed in a non-teaching position such as technology coordinator. My recommendation is based only upon my conclusion that Edwards was denied the technology coordinator position for reasons in violation of the Act. By this finding, I do not address whether Edwards is still entitled to a release time schedule if she accepts a technology coordinator position. I emphasize that the remedy I recommend herein is not intended to, and should not, create a new contractual entitlement for the Association president where there is none.

Although I find violations occurred with respect to the "office space" at Mount Vernon Avenue School, there is no apparent legal or contractual right of Edwards and the other two staff members to use the space in question. The Association is not entitled to a benefit it did not negotiate; nor do I find that the use of the space by Edwards, Wallace and Keanan established a practice by which the Board can be bound. If Edwards remains assigned to Mount Vernon, I recommend that she be permitted to utilize the space for the limited purpose for which Saunders granted permission - to do Title 1 work. Since the two other staff members are not parties to this case, I do not recommend that they be permitted to return to the office. If there is no longer a need for Title 1 work to be done in the office, the violation may simply be remedied by an appropriate posting.

CONCLUSIONS OF LAW

The Irvington Board of Education violated 5.4a(1) and (3) by failing to appoint Madeline Edwards to the position of School Based Technology Coordinator at Florence Avenue School or Mount Vernon Avenue School, and by ordering Edwards to vacate office space at Mount Vernon Avenue School, because she is president of the Irvington Education Association.

RECOMMENDATIONS

I recommend the Commission ORDER that:

A. The Irvington Board of Education cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly by failing to appoint Madeline Edwards to the position of technology coordinator at Florence Avenue School or Mount Vernon Avenue School, and by directing Madeline Edwards to vacate office space she was using at Mount Vernon Avenue School.

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 by failing to appoint Madeline Edwards to the position of technology coordinator at Florence Avenue School or Mount Vernon Avenue School; and by directing Madeline Edwards to vacate an office space she was using at Mount Vernon Avenue School.

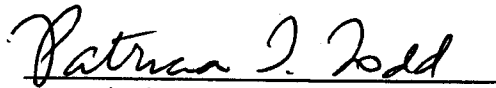
B. That the Board take the following affirmative action:

1. Offer Madeline Edwards her choice of accepting the position of School Based Technology Coordinator at either Florence Avenue School or Mount Vernon Avenue School, when one of these positions becomes vacant.

2. Allow Madeline Edwards to use office space at Mount Vernon Avenue School only to complete any unfinished Title 1 work that was originally assigned to her in 2000.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as appendix "A". Copies of such notice 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.

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


Patricia T. Todd
Hearing Examiner

Dated: July 11, 2003
Trenton, New Jersey



RECOMMENDED



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 the rights guaranteed to them by the Act, particularly by failing to appoint Madeline Edwards to the position of technology coordinator at Florence Avenue School or Mount Vernon Avenue School, and by directing Madeline Edwards to vacate office space she was using at Mount Vernon Avenue School.

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 by failing to appoint Madeline Edwards to the position of technology coordinator at Florence Avenue School or Mount Vernon Avenue School; and by directing Madeline Edwards to vacate an office space she was using at Mount Vernon Avenue School.

WE WILL offer Madeline Edwards her choice of accepting the position of School Based Technology Coordinator at either Florence Avenue School or Mount Vernon Avenue School, when one of the positions becomes vacant.

WE WILL allow Madeline Edwards to use office space at Mount Vernon Avenue School only to complete any unfinished Title 1 work that was originally assigned to her in 2000.

Docket No. CO-H-2001-161
CO-H-2001-206

Irvington 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