

H.E. 2004-10

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

In the Matter of

LAKEHURST BOARD OF EDUCATION,

RESPONDENT,

-and-

Docket No. CO-2002-154

LAKEHURST EDUCATION ASSOCIATION,

CHARGING PARTY.

**SYNOPSIS**

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Lakehurst Board of Education violated the New Jersey Employer-Employee Relations Act when the Superintendent and the Principal made remarks to certain employees which tended to interfere with their protected rights, and when the Principal issued a reprimand to certain employees and a negative evaluation to other employees because of the filing and processing of a grievance. However, the Hearing Examiner found that the Board did not violate the Act by certain remarks by the Principal, and earlier reprimands and evaluations issued by the principal, or by a letter from the Superintendent to the union president.

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.

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Appearances:

For the RESPONDENT,  
Sinn, Fitzsimmons, Cantoli, West & Pardes, attorneys  
(Kenneth B. Fitzsimmons, of counsel)

For the CHARGING PARTY,  
Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attys.  
(Richard A. Friedman, of counsel)

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On November 30, 2001 and July 29, 2002, Lakehurst Education Association (Association or Charging Party) filed an unfair practice charge (C-1A) and amended charge (C-1B) with the New Jersey Public Employment Relations Commission (Commission), alleging that the Lakehurst Board of Education (Board or Respondent) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-5.4a(1), (2), (3) and

(5).<sup>1/</sup> The original charge alleges that between June and November 2001 through Superintendent Karl Calderone and Principal Eva Marie Raleigh, the Board was hostile to Association President Cherie Menchini, Grievance Chair Barbara DiCicco, Association Vice President Susan Tatlow, Negotiations Chair Larry Wenger, and Professional Development Committee Chair Pattie Loughran, and others for the exercise of their rights under the Act.

The Charging Party more specifically alleged that: DiCicco and Wenger received adverse evaluations in planning and preparation (on June 1, 2001) because of their exercise of protected activity and not because of their teaching performance; on June 4, 2001, Calderone/Raleigh reprimanded two teachers [Michael Loughran and Kathleen Toohey] because DiCicco and Wenger had filed a grievance over their June 1 evaluations; on June 12, 2001, Raleigh made remarks that the Board may not be required to honor its negotiations obligations with the Association if the

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Board became an Abbott district; on June 25, 2001, Raleigh criticized Pattie Loughran for contacting the NJEA, and telling her DiCicco and Tatlow were using her and she "better watch her back"; on August 27, 2001, Raleigh told Pattie Loughran she was associating with the wrong teachers and DiCicco and Tatlow were using her as a pawn; on September 19, 2001, DiCicco and Wenger received unfavorable evaluations after prevailing on their grievance, and that those evaluations were completed to appear as if DiCicco and Wenger had signed them; on October 18, 2001, Calderone sent a derogatory letter to Menchini for pursuing grievances; and on November 1, 2001, Calderone said that fifth grade teachers DiCicco and Wenger were uncooperative and he accused DiCicco of engaging in "passive/aggressive" behavior in the manner she conducted Association activities.<sup>2/</sup>

In the amended charge, the Association alleged that on May 30, 2002, Superintendent Calderone interfered with Association business by making remarks to Association member Pattie Loughran intended to chill and dissuade her from communicating with the Association, particularly Association officers DiCicco and Tatlow, and from seeking its assistance.

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<sup>2/</sup> The charge also alleged a number of incidents in 1999 and 2000 as evidence of hostility. Since the charge was filed on November 30, 2001, those alleged incidents are outside the six month statute of limitations provided in the Act. N.J.S.A. 34:13A-5.4(c).

The Association seeks a cease and desist Order, and an Order expunging all reprimands and evaluations issued in retaliation for protected conduct and a posting.

A Complaint and Notice of Hearing was issued regarding the original charge on May 24, 2002. On August 2, 2002, I ordered the Complaint be amended, pursuant to the Charging Party's request. N.J.A.C. 19:14-1.5(a). The Board's position statement received on January 22, 2002 (C-2A), became its answer to the original charge. The Board admitted certain facts, but denied taking action in violation of the Act. On August 9, 2002, the Board filed an amended answer to the Complaint, as amended. It denied taking any action violating the Act.

A hearing was held on October 9 and 10, 2002, and June 19, 2003.<sup>3/</sup> Both parties filed post-hearing briefs the last of which was received on November 14, 2003.

Based upon the entire record, I make the following:

Findings of Fact

1. Barbara DiCicco has been employed by the Board as an elementary school teacher for over 30 years. During that time she has held several positions with the Association, and has been the grievance chairperson for at least the last eleven years. In the 2000-2001 school year she taught fifth grade (3T6-3T9).

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<sup>3/</sup> The transcripts will be referred to as 1T, 2T and 3T, respectively.

Susan Tatlow has been employed by the Board as a teacher for over 27 years. She was President of the Association from 1992 until November 1, 1999; vice president from June 2000 until June 2002, and is currently president (2T77-2T78).

Larry Wenger has been employed by the Board as a teacher for over 33 years. He has been president and vice-president of the Association and has been on the negotiations committee for over 25 years. During the 2000-2001 school year he was the negotiations committee chairperson, and taught fifth grade (1T71-1T74).

Karl Calderone became the Board's superintendent in April 1997 (2T4, 3T227). About 50 contractual grievances were pending before the Board when he assumed his position. Calderone characterized the Board's relationship with the Association at that time as "strained" (3T227).

Kevin McGlynn was the school principal for this one school district for one year from August 1999 through June 2000 (2T15). Eva Marie Raleigh became principal in approximately August 2000 (3T124).

2. In early June 1999, DiCicco and Tatlow were working with Calderone to resolve a problem with the prescription drug plan. Shortly thereafter, in June, students were sent home early because of the hot temperature in the school, but teachers were required to remain. DiCicco filed a grievance regarding that

matter the next day. The grievance was resolved by a memo Calderone issued the following day. On June 15, 1999, DiCicco filed a grievance regarding the prescription drug problem in order to preserve the grievance's timeliness, but by letter of that date (CP-22), Calderone requested Tatlow have future grievances submitted by committee approval and not by DiCicco alone (2T79-2T80, 2T108). CP-22 states:

I am requesting that a committee of at least three people present all future grievances to me. I feel that this procedure will help to maintain accurate communication between my office and the Lakehurst Education Association.

Tatlow met with Calderone regarding CP-22. As grievance chair, DiCicco attempted to resolve grievances with Calderone, but Calderone felt that DiCicco was miscommunicating or misrepresenting their discussions. Tatlow did not believe there was any miscommunication and thought the request could raise doubt about the way DiCicco performed her grievance duties (2T80-2T82). DiCicco considered CP-22 demeaning since she had been the only one handling grievances (3T99-3T100).

3. Shortly after McGlynn was hired in August 1999, Tatlow invited him to meet with her and the Union Executive Committee, including DiCicco, at a local restaurant to get better acquainted (2T15, 2T117, 3T34, 3T100-3T101). McGlynn told Calderone of the invitation and Calderone advised him not to meet alone with Tatlow, DiCicco and the others. Calderone also told McGlynn that

Tatlow and DiCicco were "troublemakers" and that they "could not be trusted" (2T94, 3T248).

On cross-examination, Calderone denied telling McGlynn that DiCicco and Tatlow caused problems and couldn't be trusted in connection to the restaurant invitation, but admitted he said those things sometime during the school year (3T271). I do not credit his denial. Calderone was asked on direct examination about McGlynn's comments at a March 28, 2000 Board meeting at which he was non-renewed and whether he (Calderone) had told McGlynn not to talk to Tatlow and DiCicco. Calderone testified:

. . . what I said was that you need someone else really present when you talk to them, and that they were potential troublemakers.  
[3T248]

I credit that testimony (2T12; 2T27-2T30, CP-13). Having found that on March 28, 2000 Calderone admitted referring to Tatlow and DiCicco as troublemakers I believe he made that reference to McGlynn in August 1999. On that same point I also credit Tatlow's hearsay testimony that Calderone told McGlynn that she and DiCicco were not to be trusted (2T94, 2T118). Calderone's own cited testimony supports Tatlow's hearsay testimony.

On a later date in August 1999, DiCicco visited McGlynn in his office at the school. Several minutes later, Calderone called McGlynn and told him he was not allowed to meet alone with DiCicco. In October 1999, McGlynn told DiCicco that Calderone told him he was not allowed to meet alone with her or Tatlow



because of their union positions (3T34-3T35). I credit DiCicco's testimony.

4. In September 1999, Tatlow learned that two unit members received payment in advance of upcoming stipended work, but other unit members were not paid in advance for similar work. Tatlow and Wenger questioned the practice and requested of Calderone that all members be paid for the upcoming work in September. Calderone replied that the early payment was an error, that he was refusing to pay the other employees in September, and that they would be paid in December. On September 14, 1999, Tatlow sent Calderone a letter, writing that the Board's handling of the matter was unfair and discriminatory and might result in an unfair labor practice charge (2T82-2T83, 2T98-2T103). By letter of September 15, 1999 (CP-15), Calderone responded to Tatlow's letter accusing her of being inflammatory and threatening (2T83-2T88). Calderone's letter states:

This is in response to your letter dated September 14, 1999 regarding payments for yearly stipend positions. As you are aware, I indicated to you that the two teachers who were paid in September were done so through an error in our payroll department. I explained to you that it was not intentional and that it would be corrected. It was neither discriminatory nor unfair labor, it was simply a mistake.

I understand that you need to put things in writing in order to protect the benefits of your members. However, you should know that I consider your letter to be inflammatory and threatening. Sentences like "The practice in

this district is to comply" and "Failure to do so or to make exceptions will be viewed as both discriminatory and an unfair labor practice" continue to perpetuate the animosity that had previously existed between the administration and the [T]eacher's [A]ssociation. I see no need for the contentious attitude that is continually displayed. Since we are all in this together, I would expect that problems could be resolved in a more collegial manner.

It is my hope that the LEA can forget about the past difficulties they have experienced with previous administrators and turn the page so that everyone in this district can be winners. [CP-15]

The other employees were paid in December and the Association did not pursue the matter further (2T88; 2T99-2T100).

5. At a meeting on March 28, 2000, the Board approved Calderone's recommendation not to renew Principal Kevin McGlynn's contract (2T28, 2T30). McGlynn spoke against Calderone in public session, mentioning that Calderone warned him to have no contact with Tatlow or DiCicco unless he (Calderone) or the business administrator were present. Calderone acknowledged that statement (see finding no. 3). The exchange between Calderone and McGlynn at that Board meeting follows in CP-13:

McGlynn: I was instructed to have no contact with them unless Mr. Parlman or Mr. Calderone was present, is that true?

Calderone: I made that statement, I'll tell you I made that statement.

Calderone: And let me tell you how, let me tell you how this started because

everything is getting taken out of context. The LEA, Local Education Association, over the summertime invited Kevin to a luncheon on a I don't know if was I don't know what day of the week it was, um to the Pilot House in Brick, and I said to Kevin, I said Kevin, he said should I go there, he brought the invitation in to me and I said Kevin, that's not a good idea. I don't recommend you going there because uh that's not an appropriate thing to do. If they want to meet with you, what did I tell you Kevin, where should you meet?

McGlynn: In the office.

Calderone: In the office, ok and the Association you know was 100% backing Kevin, Sue Tatlow and Barbara DiCicco talked to him and wanted to meet with him and I wanted to let Kevin know that in my opinion, those people have caused troubles in the past here with the local Association and the Board of Education and I wanted to let him know up front to watch himself when it comes to them because those people can create problems and they have a history of it and I said I don't want you meeting with them, you've got to be careful and protect yourself, you need to be other and I won't meet without them and I don't want you meeting without them. I told him that. But that's the reason.

McGlynn: Members of my staff. I'm the principal, they're members of my staff. I can't even meet with them without Mr. Parlman or Mr. Calderone.

Calderone testified he made those statements (2T12; 2T27-2T30). I credit that testimony.

Sometime before March 28, 2000, teacher Pattie Loughran heard that the Board was going to vote on McGlynn's contract and she urged several unit members to attend the March meeting. Loughran sat next to McGlynn's wife. On March 29, teacher Donna Sullivan, who subsequently married Superintendent Calderone, criticized Loughran for supporting the union. Calderone brought Loughran and Sullivan into his office and told Loughran she was listening to the wrong people, referring to Tatlow and DiCicco (1T134-1T137).

6. Cherie Menchini was the Association's president from June 2000 to June 2002. On or about June 14, 2000, Menchini met with Calderone in order to begin a good working relationship. During their discussion, Calderone told Menchini she should not share all of the information they discussed with Tatlow or DiCicco because he did not think they could be trusted. Menchini considered the remarks inappropriate (2T49, 2T52-2T55).

The next day, Menchini told Calderone that she would share information with Tatlow and DiCicco because she needed to work with them. Calderone repeated his remark that she should not share information with Tatlow and DiCicco (2T57).

Eva Marie Raleigh was hired on August 28, 2000 to replace McGlynn as school principal (2T148). Calderone promptly told her

that she should not meet alone with executive members of the Association, and that Tatlow and Diccico could not be trusted (2T21-2T22).

7. On September 13, 2000, Raleigh issued a memorandum (R-1) to fifth grade teachers Barbara DiCicco and Larry Wenger, and sixth grade teachers Michael Loughran and Kathy Toohey, informing them of the social studies curriculum for the 2000-2001 school year. The fifth grade teachers were responsible for chapters 1 through 10 and for teaching the states and capitals, and the sixth grade teachers were responsible for teaching chapters 6 through 17.

On May 15, 2001, Raleigh observed DiCicco teaching a class after which she wrote a performance review (CP-16) which was signed on June 1, 2001. DiCicco was not criticized in CP-16, in fact, Raleigh wrote in the planning, preparation, organization section:

Ms. DiCicco generally plans and prioritizes well. She plans and organizes her time efficiently and she plans ahead for additional resources. Ms. DiCicco usually integrates changes smoothly into existing plans. She sets measurable, realistic goals and objectives for herself. She works in an organized manner. [CP-16]

In the final paragraph of the review, entitled "Comments/Suggestions", Raleigh praised DiCicco for a "job well done", but suggested that she notify students of each lesson's

objective before teaching the lesson. Raleigh wrote nothing about "curriculum completion" in the review, and DiCicco was satisfied with the evaluation (3T11).

Sometime between May 15 and June 1, 2001, DiCicco and Wenger had a grade level meeting with Raleigh regarding the problems they were having completing the social studies curriculum. They had previously asked that the curriculum be adjusted, but their request was denied. Raleigh asked how much of the curriculum had been completed. They responded that the states and capitals and chapters 1 - 5 had been completed, and they expected to teach through chapter 8 by the end of the school year (3T12). Prior to the meeting, DiCicco had not received any complaint about how much of the curriculum she had completed nor had Raleigh commented about it at the grade level meeting (3T12-3T13).

A day or two after the grade level meeting, both DiCicco and Wenger received identical written reprimands (CP-6 and CP-17) from Raleigh dated June 1, 2001, for failing to complete the social studies curriculum (3T13). In those identical documents Raleigh wrote:

As an experienced teacher with more than 20 years of classroom teaching, I would have hoped that you would have been able to accomplish the task of completing the 5th grade social studies curriculum this year. The new books arrived early enough for an experienced teacher to outline a yearly plan of progression.

While comments were made to this administration regarding the timeliness of the subject area in the daily schedule, at no time was it communicated to what extent the material would not be covered. With two weeks of school left, 5 chapters are not complete; this is almost 50% of the 5th grade social studies curriculum.

You failed to comply with a directive communicated to you on September 13, 2000 (attachment) regarding the 5th grade social studies curriculum. Your inability to cover this material has caused a hardship to the 6th grade teachers, who also had to cover additional chapters and materials this year due to a gap caused by the new textbook series. In order to be compliant with the New Jersey Core Curriculum Content Standards changes across all grade levels and subject areas are necessary and ongoing. Covering 5 chapters during the last two weeks of school is not a sound, educational practice.

I regard your failure to comply with my directive on September 13, 2000, as inexcusable, especially, considering the fact that you are not inexperienced or new to the grade level. Much emphasis has been placed on changes relating to the Core Curriculum Content Standards and the gap our social studies curriculum between grades 5-8 this year. These changes have been discussed at faculty meetings, grade level meetings and in-service training. In the future, noncompliance with administrative directives will be considered as insubordination.  
[CP-6; CP-17]

On June 4, 2001, the Association filed a grievance (CP-9) on behalf of DiCicco and Wenger seeking to expunge the reprimand letters from their records. DiCicco and Wenger also provided

written rebuttals to the reprimands (attached to CP-9) dated the same day as the grievance. The rebuttals contained the following identical language:

. . . [M]y plan book clearly indicates my progression in the social studies curriculum. Planbooks are handed to you monthly. Acknowledgment of my lesson plans having been read by you, is indicated by your signature every month.

. . . [A]t no time in the past did you consider making adjustments nor did you provide suggestions for the yearly plan to progress as you had anticipated.

On June 6, 2001, Raleigh met separately with both DiCicco and Wenger at which time their respective annual performance reports were mutually developed (CP-8, CP-18, 3T16, 3T118-3T119). Both annual performance reports, CP-8 (Wenger's) and CP-18 (DiCicco's) contained good markings on all but one performance review category. That category, "Planning and Preparation" was left blank, but next to it was the following note, "Pending resolution of grievance 6/6." That note referred to the grievance in CP-9 concerning the reprimands received by DiCicco and Wenger for not completing their social studies curriculum (1T79, 1T84; 3T16-3T17; 3T117-3T118). Raleigh left the Planning and Preparation category blank because the grievance was pending. She intended to grade that category after the grievance was resolved (3T152-3T153). Wenger, DiCicco and Raleigh signed the



evaluations on June 6, 2001 with the one category blank (1T86, 3T118).

Raleigh testified that she was unaware of Wenger's or DiCicco's union activity and DiCicco's grievance chair position at the time she wrote their June evaluations, but knew of their activity by the time she did their final evaluations in September 2001 (3T154, 3T195-3T196). I do not completely credit that testimony. I previously found that in August 2000 Calderone told Raleigh that DiCicco (and Tatlow) "could not be trusted" (2T21-2T22). Raleigh may not have known of Wenger's specific union activity by June 2001, but having been told not to trust DiCicco back in August 2000, I cannot believe she was not told or did not learn that Calderone did not trust DiCicco because of her consistent support for Association causes. Nevertheless, I do not find that Raleigh issued the June 1 reprimands to Wenger and DiCicco (CP-6 and CP-17) because of their exercise of protected activity.

8. Prior to coming to Lakehurst, Raleigh had worked in Asbury Park which was considered an "Abbott" school district, its funding and management substantively provided by the State. During her time there she witnessed an event where the individual appointed by the state to operate the district required certain information from teachers that was not required by the teachers

collective agreement. As a result of that event, Raleigh then formulated the belief that state requirements in an Abbott district may supersede a negotiated agreement (2T142-2T143).

In August 2000, Lakehurst was one of 17 school districts seeking, through litigation, an Abbott designation in order to obtain additional state funding. Lakehurst teachers were often informed about the pending litigation at faculty meetings (2T147-2T148). At one faculty meeting in June 2001, Raleigh commented that Lakehurst might become an Abbott district, and when asked whether the collective agreement would still be "effective" Raleigh spoke of her experience in Asbury Park. But she did not say the Lakehurst Board would not be required to honor the collective agreement (2T143-2T144).

9. Michael Loughran and Kathleen Toohey are sixth grade social studies teachers. Neither one was or is a union officer, but both knew DiCicco, Tatlow, Wenger and Menchini (1T9-1T10, 1T24-1T26). Michael Loughran is Pattie Loughran's husband.

On or about May 30, 2001, Toohey (and possibly Loughran) had a grade level meeting with Raleigh. Toohey told her (Raleigh) that she and Loughran had nearly completed and were on schedule for completing their social studies curriculum and that they

would complete 100% of the curriculum (1T35, 1T37-1T38, 3T159, CP-5).<sup>4/</sup>

On June 5, 2001, Raleigh met separately with both Loughran and Toohey to deliver their annual performance evaluations. Raleigh gave both teachers the highest grades of "good" on all categories, including planning and preparation (CP-1, 1T17-1T18, 1T26). Raleigh provided no written or verbal indication that she was dissatisfied with the amount of social studies curriculum they had completed by that date which totaled approximately 86% (1T16-1T17, 1T19, 1T26, 1T28-1T29). In fact, during their respective evaluation meetings Raleigh complimented both Loughran and Toohey for doing a good job in covering almost all of the assigned material (CP-3; CP-5; 1T28-1T29; 3T184).

After learning of the reprimands DiCicco and Wenger received for not completing their social studies curriculum, and of the grievance they filed, Toohey reviewed with Loughran their progress in completing their social studies curriculum. When she realized they might not complete all of the curriculum, Toohey so informed Raleigh on June 6, 2001. Raleigh still commended Toohey, telling her that she and Loughran had done a great job in

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<sup>4/</sup> On cross examination Raleigh said that at their meeting on May 30th Toohey told her she and Loughran had completed 100% of the curriculum (3T182). I do not credit that testimony. Rather, I credit Raleigh's testimony on direct examination when she said Toohey told her she and Loughran "would complete 100 percent of the curriculum that they had" (3T159).

teaching nearly all the material. During that meeting with Toohey, Raleigh also distinguished the Toohey/Loughran situation from the DiCicco/Wenger situation saying that Toohey and Loughran's implementation of the material was acceptable, but DiCicco and Wenger's was not (3T159-3T160, 3T162, 3T185; CP-5).

On June 7, 2001, Raleigh summoned Loughran and Toohey to her office and gave each of them identically written memos dated that same day (Exhibits CP-2 and CP-4, respectively) noting they did not complete 100% of the social studies curriculum (1T14). CP-2 and CP-4 provide:

The directive communicated to you on September 13, 2000 (attachment) regarding the 6th grade social studies curriculum was not fully implemented this year. As last reported, to me on June 6, 2001, you have completed approximately 86% of the outlined curriculum.

In order to be compliant with the New Jersey Core Curriculum Content Standards changes across all grade levels and subject areas are necessary and ongoing. Your inability to cover this material has caused a hardship to the 7th grade teacher, who also had to cover additional chapters and materials this year due to a gap caused by the new textbook series. Additionally, the new books arrived early enough for an experienced teacher to outline a yearly plan of progression.

Much emphasis was communicated to you this year regarding changes related to the Core Curriculum Content Standards and a gap in our social studies curriculum between grades 5-8. These changes have been discussed at faculty meetings, grade level meetings and in-service training.

Please be advised that the memo dated 9-13-00 is no longer valid for the 2001-2002 academic year. We will outline a new starting point for next year's curriculum once this year is complete. It is hoped that 100% of the curriculum in social studies will be covered next year. Your efforts to complete the task are not unnoticed.

On June 12 and 13, 2001, Toohey and Loughran, respectively, sent rebuttal letters to Raleigh (CP-5 and CP-3) objecting to their receipt of reprimands (CP-2 and CP-4) for failing to complete 100% of the social studies curriculum. Toohey, in her letter (CP-5) referred to the June 7th meeting and wrote:

At that meeting you indicated that because of a grievance filed by the fifth grade teachers, you were forced to place a letter in my file.

Loughran, in his letter (CP-3) referred to having been praised by Raleigh at his evaluation meeting on June 5, 2001, but concluded with the following comment:

Two days later you called Mrs. Toohey and I into your office to inform us that even though we had completed 86% of the material, we would be receiving letters because the fifth grade teachers had filed a grievance in regards to the letters they received. . . . I'm confused. Was my letter that I received a sincere reprimand for not following a directive or were you just trying to save face as a result of the grievance?

10. Loughran testified that at the June 7th meeting Raleigh said that since the fifth grade teachers (DiCicco and Wenger) filed a grievance (CP-9 objecting to the reprimands they received--CP-8 and CP-18--for not completing their social studies

curriculum) he and Toohey would also have a letter of reprimand placed in their files (1T13). Toohey gave similar testimony (1T27-1T28).

Loughran further testified that Raleigh said that if Loughran and Toohey agreed with her, their letter of reprimand would not be as severe (1T13).

Raleigh testified that CP-2 and CP-4 were placed in Loughran and Toohey's files, respectively, because Toohey had told her she (Toohey) and Loughran would not be completing 100% of the social studies curriculum, and Raleigh thought it "only fair" to note that in their records (3T160-3T162). When pointedly asked on direct examination whether she gave those letters to Loughran and Toohey in response to the grievance filed on behalf of DiCicco and Wenger (CP-9), Raleigh said:

I guess, but it was more on the fact that I didn't have that information prior. I did it because they gave new information to me, and regardless of the grievance, I felt it would be only fair to do the same thing. [3T161]

On cross-examination, Raleigh was asked again about her motives for issuing the letters to Loughran and Toohey. The record shows the following exchange between her and Association counsel:

- A. Because I felt it was fair.
- Q. Did you tell them that?
- A. Yes.

Q. You used the term "grievance"?

A. Yes. I said it would only be fair.

Q. Because -

A. Because if a grievance was filed, I would need to also address their issue that they did not complete it. Yes, I think that is only fair.

Q. Because a grievance was filed?

A. Not because a grievance had been filed because I placed a letter in their file as well -

Q. But did you tell them -

HEARING EXAMINER ZUDICK: Please let her finish her answer.

A. I - I put - I wrote the letter to Ms. DiCicco and Mr. Wenger because they completed 50 percent of the curriculum. And they decided - when they received it, they filed a grievance. And when the new information came to light, I met with the other two teachers and told them I was putting a letter in their file.

I did mention the grievance. It wasn't because of the grievance they were getting the letter. They were going to be getting a letter regardless, because I needed to ensure that 100 percent of their curriculum each year was going to be accomplished. [3T188-3T189].

Raleigh was also asked:

What did you tell them about the relationship between the grievance and the letter they were going to get?

She responded:

I thought it would be fair for them to also have a letter placed in their file. [3T189-3T190].

I credit the testimony by Loughran, Toohey and Raleigh, including the statements by Loughran and Toohey in CP-3 and CP-4, that Raleigh did mention the grievance filed over the letters given to DiCicco and Wenger, in connection with her (Raleigh) giving CP-2 and CP-4 to Loughran and Toohey. Raleigh did not deny making those remarks.

Raleigh's testimony was particularly revealing. I find that she issued CP-2 and CP-4 primarily because as Loughran and Toohey testified, she knew a grievance (CP-9) had been filed over the similar but harsher letters she had given to DiCicco and Wenger (CP-8 and CP-18) for not completing the fifth grade social studies curriculum, because she had learned Loughran and Toohey would not complete 100% of the sixth grade curriculum. In her testimony Raleigh struggled to explain why she issued CP-2 and CP-4, and I found her explanation linked the issuance of CP-2 and CP-4 to the filing of CP-9.

Consequently, I find that Raleigh's issuance of CP-2 and CP-4 was motivated by the grievance. Given her acknowledgment that Loughran and Toohey had completed nearly all of the curriculum, and much more than DiCicco and Wenger, and her compliments to Loughran and Toohey for their efforts, I am not convinced Raleigh would have issued CP-2 and CP-4 (to Loughran and Toohey) had the



grievance not been filed by DiCicco and Wenger and they merely accepted their reprimands. Raleigh simply did not want to appear inconsistent or "unfair" regarding the curriculum issue when the grievance was processed.

11. On June 11, 2001, DiCicco met with Calderone in an effort to settle the curriculum grievance at level one. By letter of June 13, 2001 to DiCicco (CP-19), Calderone offered to modify the letters that she and Wenger received, but refused to sustain the grievance. The matter was not resolved and eventually was heard by the Board on August 7, 2001. The grievance had expanded by that date to include the curriculum letters sent to Loughran and Toohey.

By letter of August 29, 2001 (CP-10), the Board resolved the grievance by deciding to remove the letters (CP-8, CP-18, CP-2, CP-4) from the personnel files of the four social studies teachers, DiCicco, Wenger, Loughran and Toohey.

CP-10 provides:

The Lakehurst Board of Education has reviewed information and documentation and has heard personal testimonies that were presented to the Board on August 7, 2001.

After a thorough review, the Board feels the information presented appears to be contradictory in nature and has made the decision to remove the letters in the Personnel files of the four Social Studies teachers in the fifth and sixth grades.

We require each staff member to complete all assigned materials as stipulated in the

District Curriculum as aligned with the Core Curriculum Content Standards as set forth by the Department of Education. As well, the Board of Education supports the efforts of the administration and expects each staff member to follow all future directives.

By memorandums of September 19, 2001, Raleigh informed DiCicco and Wenger, respectively (R-4 and R-2), that the Preparation and Planning item in their 2000-2001 Annual Performance Reports had been completed since the curriculum grievance had been resolved and she attached copies of their respective reports (DiCicco CP-20, Wenger CP-7). The reports issued in September were identical to those issued in June (CP-18, CP-8), except the September reports had an "NI" (needs improvement) in the planning and preparation section with Raleigh's initials and the date "9/18" underneath. Attached to each of the September reports was a separate page explaining the "NI" in the planning and preparation section with the following statement:

This area of performance received a NI - Needs Improvement due to the non-completion of the Social Studies Curriculum for the 2000-2001 academic school year. [CP-7, CP-20].

Raleigh entered the "NI" and the explanatory "statement" into CP-7 and CP-20 without first meeting with DiCicco and Wenger and without giving them the opportunity to sign or reject signing the evaluation with the "NI" included, unlike the way CP-8 and CP-18 were prepared. Consequently, the signatures of DiCicco and

Wenger on CP-20 and CP-7, respectively, were obtained prior to the inclusion of the "NI" on those documents (1T84-1T87, 1T97, 1T99, 1T111; 3T23, 3T78, 3T117-3T119; CP-11, CP-21).

By letters of September 21 and 30, 2001 (CP-21 and CP-11) to Raleigh; DiCicco and Wenger, respectively, responded to CP-20 and CP-7, contesting the fact that those annual performance reports appeared as if they had been signed by them with the "NI" included. Both DiCicco and Wenger also noted in CP-21 and CP-11, respectively, that the Board's favorable disposition of the curriculum grievance (CP-9), negated the "NI" in CP-20 and CP-7.

12. After the curriculum grievance was sustained by the Board, the schedules for the social studies teachers were adjusted so they could more easily meet the social studies curriculum for the 2001-2002 academic year. The Board requested a meeting to check their progress in covering the curriculum (3T49).

The meeting was held on November 1, 2001, and attended by DiCicco, Wenger, Loughran, Toohey, Raleigh, Calderone, and Board members Pemberton and Septor (3T48, 3T254). The teachers demonstrated the progress they had made in keeping up with the curriculum. Then Calderone said he wanted to discuss "cooperation" and indicated that the teachers were not cooperating. Loughran and Toohey perceived they were being

reprimanded and requested permission to leave. Their request was granted (3T50).

Calderone began referring to DiCicco as "passive aggressive" and asked DiCicco if she knew what he meant (3T50, 3T249). Calderone explained that "passive aggressive" people have a difficult time conforming to expectations; often do something other than what they're supposed to do; and do not recognize good things that are said about them because of their own "negativity" (3T256, 3T258).

He gave examples at this hearing of DiCicco's behavior that he believed fit his definition of the term:

1. She applied for a serious illness day using the wrong form. Calderone told her she'd get the day but asked that she use the correct form. DiCicco, he said, became argumentative and accused him of changing the form. A friend told her the form had not changed.

2. A fire drill occurred during DiCicco's prep time; she wouldn't leave the building. Calderone asked her to leave but she argued she hadn't left in years and it was her prep time.

3. DiCicco was a member of the Ocean County Professional Development Committee but never offered assistance to the Lakehurst Professional Development Committee despite their struggle to remain in existence (3T256-3T258).

13. On or about September 17, 2001, teacher Susan Tatlow received a note in her school mailbox from Raleigh requesting that they meet. They met later that day and Raleigh asked Tatlow why she (Tatlow) had passed her (Raleigh) in the hallway twice and not said hello. Tatlow responded she had not seen the principal, and Raleigh responded that was no way to act. Raleigh

also questioned Tatlow about being rude to the presenter at a teachers workshop (CP-25B).

Tatlow was upset by Raleigh's comments which resulted in a grievance filed by Association President Menchini on October 1, 2001 (CP-25A). The grievance provides:

On September 17, 2001, the grievant was called into the office and verbally reprimanded for not saying "hello" to the principal in the morning. The Association contends that this is discipline without just cause. [CP-25A].

On October 18, 2001, Calderone sent Menchini a letter (CP-14) critical of the Association's conduct and of its processing of the Tatlow grievance, and five other grievances.

The letter states in pertinent part:

This is a follow-up to our meeting on October 17, 2001 regarding the six Level One grievances that were filed by the L.E.A. An attempt was made by this administration to resolve these grievances in an informal manner. It was apparent, however, that during this process a reasonable approach to resolve these issues was not what the Lakehurst Education Association wanted. It is unfortunate that some of the smaller, frivolous items were even presented. The inability to compromise on the part of the Association continues to foster the adversarial environment that I encountered when I first arrived in the Lakehurst School District. I firmly believe that this attitude continues to interfere with the overall morale of our faculty. In fact, I have approached you, as the President of the L.E.A., on several occasions to work together in an effort to help eliminate the adversarial position that historically has existed in our district. I found that

yesterday's meeting was a continuation of more of the same behavior. Until the Association is willing to work cooperatively, in a professional manner, students, faculty members, and this community will continue to be adversely affected by the manner in which the Association chooses to conduct its business.

Having said this, a summary of my comments related to each grievance is listed below.

Grievance #1

The principal greeted a teacher twice by saying "Good Morning". When the teacher failed to respond, the Principal called her into the office to find out why she was being ignored. This was done in an effort to identify a problem if one existed. The teacher stated that a problem did not exist and that she probably just did not hear the principal. They both apologized to each other for this situation. Several days later, the teacher alleged that this conversation constituted a reprimand and filed a grievance. According to Webster's Dictionary, a reprimand means to severely rebuke. This was clearly a situation where the Principal was trying to make a perceived problem better. Since the teacher was not given a reprimand, I am not acting on this grievance. This is one of those grievances that should have been discouraged by the Association since it is frivolous in nature.

The letter also suggests that the other grievances were frivolous and should not have been pursued by the Association.

Menchini was angered by CP-14. She believed Calderone was trying to convey that the Association was not working amicably with him and it made her feel uncomfortable in pursuing

grievances and she thought the teachers morale was low (2T58-2T63).

On direct examination, Menchini was asked if she had any concern over the comments Calderone made about the grievances in CP-14. She responded:

No, he has a right to his opinion about particular things. [2T64].

Menchini also testified that Calderone was allowed to have his own opinion about grievances (2T67-2T68). I credit her testimony.

On March 4, 2002, an arbitration decision and award issued (CP-25B) upholding the October 1, 2001 Tatlow "hello" grievance and ordered the Board not to consider the related events in any of Tatlow's performance evaluations. The award was confirmed in court on June 21, 2002 (CP-25C).

14. In 2001, teacher Pattie Loughran was a member of the Lakehurst Professional Development Committee, and a member of the class team that meets in the summer to review standardized test scores and provide advice to improve the scores. Raleigh was also a member of both groups. The "norms and code of ethics" for the professional development committee (R-15) provided in relevant part:

All members will be given the opportunity to participate in dialogue/debate on issues presented to the board.

Members will respect and listen to the ideas of other members.

An issue had arisen at a committee meeting that caused Loughran to contact a New Jersey Education Association (NJEA) UniServ representative to guide her as to the correct manner in which to handle the issue. On June 25, 2001, Loughran reported the information she received from the NJEA representative to the committee and Raleigh sharply criticized her (Loughran) for contacting the UniServ representative before coming to her (Raleigh) or the committee on the issue (3T58).

Raleigh admitted making remarks about Loughran's call to the NJEA. On direct examination, she testified:

And in June, when we had our meeting, I questioned something in the meeting. I questioned something she had written or something she had said. And she called a Union Rep. She called UniServ to ask a question, and I did say to her, 'Why did you do that?' I mean we're a committee. We work together to - you know, to break the trust of the committee, I think that's worse, you know. 'Why couldn't you just ask me? Why couldn't we talk about it? I mean I have every right, as well as you, to question things. My name is going to go on that document just as anyone else's name, as a producer of that document.' [3T146-3T147]

On cross examination she testified:

I told her she should have come to me first. I felt that we were working together and as I - as I said, it was an up and down roller coaster ride all year long between her seeking advice against me, with me, for me. [3T198]

The class team group meets during the summer to review standardized test scores to see where the students are deficient,



and to set goals for the individual grade levels (1T123). Raleigh testified that during the class team meeting with Loughran in August 2001, Pattie was visibly upset and referred to "they", and Raleigh said she told her "[Y]ou need to take care of yourself. You need to be careful" because she believed that people were using her [3T148]. I credit that testimony.

Loughran testified that Raleigh told the class team group that they should include in their advice that the fifth and sixth grade teachers must complete one-hundred percent of their social studies curriculum and teach health every other marking period (1T124). Loughran was upset that Raleigh raised the curriculum issue during the time the curriculum grievance was moving forward and she said she called an NJEA UniServ representative about the matter (1T124-1T125). On what Loughran referred to as the "final day" she told the group at a "class team meeting" that she called a UniServ representative (1T126). Loughran described Raleigh's reaction:

. . . Raleigh told me I was a back stabber, I went over the committee, instead of working it with the committee. I was a back stabber. . . . that I had no right to call UniServ.  
[1T127]

I credit Loughran's testimony that Raleigh raised the curriculum issue during a meeting Loughran attended, and that Raleigh criticized Loughran for calling the NJEA. However, I do not find that their exchange was in August at a class team

meeting. Although Loughran testified to the best of her recollection, her memory often combined events that occurred at different times into one thought, making it difficult for me to follow the chronology of her testimony. I credit DiCicco and Raleigh testimonies that the UniServ discussions occurred in June 2001 (3T58; 3T146-3T147).

Loughran also testified that in June 2001 Raleigh told her that DiCicco and Tatlow were trying to run the school, but were really being divisive and causing problems (1T131); and in August or September 2001 Raleigh told her to watch her back, and that they (DiCicco and Tatlow) were using her as a pawn (1T132-1T133). Raleigh denied telling Loughran to watch her back or that she was being used as a pawn (3T210-3T211). But she testified:

I told her [Loughran] I felt she was being  
used and she - and she should be careful. . . .  
I said to watch out. [3T210]

Raleigh testified she was not referring to anyone in particular when she told Loughran to watch out and be careful. She denied saying DiCicco and Tatlow were using her (Loughran) (3T210-3T212).

I credit Loughran's testimony and find that Raleigh was referring to DiCicco and Tatlow when Raleigh told Loughran to "watch her back". Raleigh's denial about that, and her insistence that she was not referring to DiCicco and Tatlow is not credible. Given Raleigh's distrust for DiCicco and Tatlow,

and the implausibility that her remarks were not referring to anyone in particular, it is more logical that she was trying to keep Loughran from interacting with them.

15. In the spring of 2002, Pattie Loughran applied for an open social studies position. She interviewed with Calderone, but within an hour after the interview she learned the position had been filled beforehand (1T118). Loughran was angered by the way Calderone handled the matter and wrote him a letter on June 4, 2002 (CP-12) expressing her feelings. She wrote that what he did was unkind, and that the interview was conducted under false pretenses and a charade, among other things. Loughran did not write about DiCicco or Tatlow in CP-12, nor obtain their assistance in writing the letter (1T119-1T120, 1T122).

Calderone and Loughran met to discuss CP-12. Loughran testified that Calderone said that DiCicco and Tatlow had "put her up" to writing the letter and that he felt Loughran had been coached. Loughran testified that Calderone said DiCicco and Tatlow were using her and she was choosing the wrong people (3T121, 3T173-3T174). Calderone testified the social studies position was filled after Pattie Loughran's interview (3T233).

I credit Loughran's testimony regarding CP-12 and Calderone's remarks to her, except I make no finding about whether the social studies position was filled before or after Loughran's interview.

**ANALYSIS**

The Association's charge alleged the Board's actions herein violated 5.4a(1), (2), (3) and (5) of the Act, but I did not find that the more detailed timely written allegations or the evidence adduced at hearing supported the finding of an a(2) or (5) violation. There was insufficient evidence that the Board's actions dominated or interfered with the administration of the Association, and no evidence that the Board failed or refused to negotiate in good faith. I, therefore, recommend the a(2) and a(5) allegations be dismissed.

The issue in this case is whether specific comments and actions by Calderone and/or Raleigh violated 5.4a(1) and (3) of the Act. There are different standards for considering whether those sections of the Act have been violated. N.J.S.A. 34:13A-5.4a(1) of the Act is generally worded to protect public employees from employer interference and coercion. Establishing an a(1) violation does not require proof of motive or intent to coerce or interfere. Rather, the standard is whether the employer's comments/actions had "the tendency" to interfere with an employees protected rights and lacked a legitimate and substantial business justification. New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422-423 (¶4189 1978); N.J. Sports and Exposition Auth., P.E.R.C. No. 5 NJPER 550, 551 (Note 1) (¶10285 1979); Commercial Twp. Bd. Ed.,

P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). See also, Middletown Twp., P.E.R.C. No. 84-100, 10 NJPER 173 (¶15085 1984); Mine Hill Twp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); UMDNJ-Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Jackson Twp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988).

In N.J. College of Medicine and Dentistry, the Commission explained:

In determining . . . whether particular actions tend to interfere with, restrain or coerce a[n] . . . employee . . . we will consider the totality of evidence proffered during the course of a hearing and the competing interests of the public employer and the employee organization and/or affected individuals. [emphasis added]. Id. at 422-423.

More recently, the Commission in Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998), explained how the a(1) standard works:

[W]e must first determine whether the disputed action tends to interfere with the statutory rights of employees. . . . If the answer to that question is yes, we must then determine whether the employer has a legitimate operational justification. If the employer does have such a justification, we will then weigh the tendency of the employer's conduct to interfere with employee rights against the employer's need to act. [citation omitted]  
25 NJPER at 21.

Consideration of the a(1) standard includes the right of public employers to criticize employee representatives for their

comments or actions in their role as an employee representative without violating 5.4a(1) as long as they do not criticize them or take action against them as employees for actions they (the employees) took in the exercise of protected activity. The Commission explained this right in Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (§12223 1981), holding in pertinent part:

A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However, . . . the employer must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer. See, In re Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 115 (§10068 1979) and City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (§14001 1977).

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible, criticism may be appropriate and even legal action, . . . may be initiated to halt or remedy the other's actions. However, . . . 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.

7 NJPER at 503

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The Board may criticize employee representatives for their conduct. However, it 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. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity.  
7 NJPER at 504.

The a(3) standard for finding that a public employer discriminated against a public employee for engaging in protected activity is different from the a(1) standard. The a(3) standard requires a finding of motive. That standard was established by the Court in In re Bridgewater Tp., 95 N.J. 235 (1984).

The Court held that no violation of 5.4a(3) will be found unless the charging party has proved, by a preponderance of the evidence, 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 does 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 a motive unlawful under our Act and another motive 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 about the employer's motives are for the hearing examiner and then the Commission to resolve.

I have considered the findings of fact and applied the above legal standards to them as discussed below:

Raleigh's "Abbott" Remark

In its post-hearing brief the Association, relying on Raleigh's own testimony, claimed she said that if Lakehurst became an Abbott district the Board would not be required to honor any of its negotiated obligations. That claim is unfounded. That is not what Raleigh testified. I credit Raleigh's testimony that she told the teachers about the Asbury Park example she was personally aware of and did not say the Board would not honor its contract with the Association.



Raleigh's advising the employees of the Asbury Park Abbott example was not an insinuation that the Board would abrogate its contract with the Association, and it did not otherwise have the tendency to interfere with the employees protected rights. I, therefore, recommend that allegation be dismissed.

DiCicco and Wenger

The Association alleged that Raleigh's reprimands to DiCicco and Wenger, CP-6 and CP-17, for failure to complete their social studies curriculum were issued because they engaged in protected activity rather than because of their work performance. That allegation lacks merit.

While I believe Raleigh was aware that DiCicco was active on behalf of the Association, I find insufficient evidence that Raleigh issued CP-6 and CP-17 (the reprimands) and CP-8 and CP-18 (the June 6th evaluations) because DiCicco and Wenger engaged in protected activity. Raleigh had observed DiCicco on May 15, 2001 and issued a very good performance review (CP-16) which was signed on June 1. Raleigh complemented DiCicco and made no negative comments. It was after May 15 when Raleigh met with DiCicco and Wenger when she focused on the curriculum problem. Raleigh apparently realized, perhaps for the first time, how much of the social studies curriculum was incomplete and she reacted by issuing CP-6 and CP-17. I believe those reprimands were in response to what Raleigh believed was a poor job by DiCicco and

Wenger, and not in response to any union activity. In fact, there was no evidence of particular protected activity between May 15 and June 1 that would trigger animus by Raleigh.

Raleigh's issuance of CP-8 and CP-18 (the evaluations) on June 6 occurred after the Association filed the grievance (CP-9) over the reprimands (CP-6 and CP-17) on June 4, 2001. Raleigh was aware of CP-9 when she issued CP-8 and CP-18 but I do not find her treatment of the Planning and Preparation section of those evaluations in violation of the Act. Raleigh left that section blank pending resolution of the grievance, once again, an action that does not suggest animus at that time.

Having found that Raleigh's issuance of CP-6, CP-17, CP-8 and CP-18 did not violate the Act I recommend the allegation they did be dismissed.

While I found above that Raleigh believed DiCicco and Wenger did a poor job on the social studies curriculum, I take no position on that issue. The grievance regarding that matter was resolved by the Board when it issued CP-10 on August 29, 2001, in which it removed CP-8 and CP-18 from DiCicco and Wenger's personnel files (and CP-2 and CP-4 from Loughran and Toohey's files). But despite the issuance of CP-10, Raleigh, on September 19, 2001, issued another evaluation to DiCicco and Wenger with an "NI" "needs improvement" in the planning and preparation section

(CP-20 and CP-7). The Association alleged that Raleigh's issuance of CP-20 and CP-7 violated the Act. I agree.

In its post hearing brief, the Board argued that DiCicco and Wenger admitted they only completed fifty percent of the social studies curriculum; they were obligated to do all the work, and were merely dissatisfied with the "NI" grade. That argument suggests the Board sees the issue as whether the employees had in fact not completed their curriculum assignment. But that is not the issue in the case. I am not ruling upon the educational/instructional element of the curriculum assignment. I find that placing a "needs improvement" in DiCicco's and Wenger's evaluations after the Board ordered the removal of CP-6 and CP-17 from their personnel files violated 5.4a(1) and (3) of the Act. Raleigh's issuance of CP-20 and CP-7 with the "NI" in the planning and preparation section of the evaluations was intentional, not consonant with the Board's directive and motivated, I find, by her unhappiness that the Association filed the grievance (CP-9), and her subsequent disappointment that the Board sustained the grievance and ordered the reprimands withdrawn.

Raleigh's issuance of CP-20 and CP-7 was predominantly hostile to the successful processing of CP-9, sending a message that the filing and winning of a grievance could not prevent the principal from criticizing DiCicco and Wenger, and by doing so it

had a chilling effect on the right of employees and their union to file grievances under the parties collective agreement. Grievance filing and processing is one of the most important protections provided by the Act. Atlantic City Bd. Ed., P.E.R.C. No. 98-119, 24 NJPER 209 (¶29099 1998) State of N.J. (Dept. of Human Services), P.E.R.C. No. 87-88, 13 NJPER 117 (¶18051 1987); Hunterdon Co. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685(¶17259 1986); Lekwood Bd. Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978).

I am not suggesting that the principal is not entitled to criticize and discipline teachers for failure to complete assigned curriculum. But here, the Board considered that issue and chose to withdraw the discipline because of "contradictory information" and emphasize instead that staff were expected to follow "future directives." The Board's actions suggest an end to criticizing DiCicco and Wenger regarding the 2000-2001 social studies curriculum. Raleigh ignored that, I find, because the grievance was successful, demonstrating her hostility to the grievance process and thereby satisfying the Bridgewater requirements for finding an a(3) violation.

I recommend that CP-20 and CP-7 be withdrawn from DiCicco and Wenger's personnel files and not be considered in any future

actions regarding those employees.<sup>5/</sup> The original evaluations, CP-8 and CP-18, may remain in the personnel files.

Finally, I find the Board violated 5.4a(1) of the Act when Calderone stated that DiCicco was "passive aggressive." The Board seemed to argue in its brief that Calderone's remark was acceptable when it wrote that Calderone's "characterization was accurate", his examples documented his point, and that no action was taken against DiCicco. To be clear, I am not judging whether DiCicco is or is not "passive aggressive", nor am I deciding the truth or accuracy of the examples Calderone gave of her behavior or whether DiCicco knew what Calderone meant. The issue in this matter is whether the remark had the tendency to interfere with and intimidate DiCicco for engaging in protected conduct. I find it did, and Calderone did not have substantial business justification for making that statement in the context of the November 1 meeting.

This record shows that Calderone did not trust or like DiCicco because of her persistent exercise of protected activity. Evidence from incidents in 1999 and 2000 show Calderone's animus toward DiCicco (and Tatlow) in particular and union activity in general. The November 1, 2001 meeting with Calderone, Raleigh,

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5/ I do not believe Raleigh's failure to ask DiCicco and Wenger to resign CP-20 and CP-7 with the "NI" included demonstrated a conscious intent to violate evaluation procedures. Nevertheless, since I recommend the removal of those evaluations I believe this issue is moot.

Board members Pemberton and Spetor, and DiCicco, Wenger, Loughran and Toohey, was supposed to be about the progress the teachers were making in covering the curriculum. It was not a meeting intended to evaluate or criticize DiCicco's employee behavior, thus, there was no substantial justification for Calderone's "passive aggressive" remark at that meeting, nor was it protected by Black Horse Pike even if the remarks were true. Loughran and Toohey perceived Calderone's change in topic as a threat and left the meeting. The remark, I find, was an extension of Calderone's animus toward DiCicco, she was aware that he considered her a "troublemaker", thus, under those circumstances the remark had the tendency to intimidate and coerce DiCicco for exercising protected conduct.

Loughran and Toohey

Raleigh's issuance of reprimands CP-2 and CP-4 to Loughran and Toohey over not completing 100% of their social studies curriculum violated 5.4a(1) and (3) of the Act. As in the DiCicco/Wenger curriculum discussion, I am not judging here whether the principal had the right to reprimand teachers for not completing 100% of their curriculum. The Board's attempt in its brief to justify the issuance of CP-2 and CP-4 suggesting the letters were accurate and the final sentence even complimentary, misses the point. The issue here is why did Raleigh issue those reprimands? If she did it in reaction to CP-9, the grievance

over DiCicco and Wenger's reprimands, it violated the Act. If she would have issued them regardless of CP-9 it would not have violated the Act. I found the former.

This is an unusual a(3), but one still meeting the Bridgewater requirements. The protected conduct here was the grievance, CP-9. Neither Loughran nor Toohey filed CP-9. They personally had not engaged in the protected conduct, the Association did, it filed the grievance. While CP-9 was primarily filed over the reprimands to DiCicco and Wenger, a union's grievance intending to enforce rights provided in its collective agreement is generally presumed one filed on behalf of all unit members. Consequently, this satisfies the first Bridgewater requirement.

Raleigh was obviously aware of the grievance, and while she may have thought of herself as being "fair" in issuing CP-2 and CP-4, since the grievance was the substantial motivating factor for issuing reprimands to Loughran and Toohey that in turn establishes the Bridgewater hostility requirement. I would reach the same conclusion even had the grievance been filed by DiCicco and Wenger and not the Association.

The key to understanding this issue is finding, as I did, that Raleigh would not have issued CP-2 and CP-4 were it not for CP-9. Raleigh thought Loughran and Toohey did a good job in covering their curriculum but she did not want to be accused of

unfairness for not criticizing them when the DiCicco/Wenger grievance was processed. Thus, the motivation for issuing CP-2 and CP-4 was the perceived need for a defense to the grievance. Consequently, her issuance of those reprimands was a hostile reaction to the filing of CP-9 and violated 5.4a(1) and (3) of the Act. Contrast Tinton Falls Bd. Ed., P.E.R.C. No. 2001-78, 27 NJPER 293 (¶32107 2001), aff'd 28 NJPER 407 (¶33147 App. Div. 2002) (attendance not the grievance was motivating factor for termination). As a result of the successful processing of CP-9, the Board has already ordered CP-2 and CP-4 withdrawn from Loughran and Toohey's personnel files. I add only that these reprimands not be considered in any future employment matters.

Letter to Menchini

The Association argued that Calderone's letter of October 18, 2001 to Association President Menchini (CP-14) violated 5.a(1) of the Act because it derogatorily criticized the Association for filing certain frivolous grievances and that it was harming the District by processing other grievances. Menchini claimed the letter made her uncomfortable pursuing grievances. While I understand Menchini's sensitivity to Calderone's criticism, CP-14 did not violate the Act. That letter is precisely the kind of communication protected under Black Horse Pike.



Calderone did not send CP-14 to Menchini in her role as a teacher, he did not criticize her teaching or work performance or threaten her or discipline her for engaging in protected conduct. He sent CP-14 to Menchini because she was the union president, he treated her as an equal, and limited his comments to Association business. He expressed his opinion that the attitudes of the Association and its representatives were inconsistent with good labor relations and detrimental to the students, faculty and the community, all of which was protected by Black Horse Pike because he did not convert his statements into criticism of Menchini's teaching performance, or threaten adverse action to her as an employee. Menchini and the Association were entitled to respond to CP-14, and entitled to continue processing existing grievances and file new grievances she/it felt were needed to protect unit members and the collective agreement.

Based on the above, I recommend the allegation CP-14 violated the Act be dismissed.

Pattie Loughran

The Association alleged the Board violated the Act by certain remarks Raleigh and Calderone made to Pattie Loughran in separate conversations.

Raleigh's criticism of Loughran for speaking to an NJEA representative about a matter raised in the professional development committee was not motivated by animus, Raleigh was

just expressing her disappointment that Loughran did not first raise the matter within the committee. Nevertheless, the issue before me is not motivation, it is whether the remark tended to interfere with Loughran's protected rights. N.J. College of Medicine and Dentistry. One of those rights was to seek assistance from her union on employment matters without intimidation from her employer. State of N.J. (Trenton State College), P.E.R.C. No. 88-19, 13 NJPER 720 (¶18269 1987) (College interfered with employee rights by advising employees that certain topics should not be discussed with union president).

The Board in its brief relied on the committee code of ethics requiring members to listen to the ideas of other members, and on the fact that no adverse action was taken against Loughran to excuse Raleigh's remarks. Raleigh's NJEA remark, however, had the tendency to chill Loughran's right to seek assistance from the Association, it violated the holding in Trenton State College, and was not outweighed by operational justification, thus it violated 5.4a(1) of the Act.

Raleigh's June 2001 remark to Loughran that DiCicco and Tatlow were causing problems also violated 5.4a(1) of the Act. Loughran knew DiCicco and Tatlow were active union proponents. Raleigh's remark tended to intimidate Loughran because by criticizing DiCicco and Tatlow for engaging in protected conduct Raleigh was ostensibly suggesting Loughran refrain from engaging

in similar conduct or she'd also be perceived as "causing problems". Orange Bd. Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994) (Board unlawfully interfered when principal criticized union leadership at faculty meeting).

Raleigh's remark to Loughran in August 2001 that she was being used as a pawn, referring to DiCicco and Tatlow, and Calderone's remark to Loughran in June 2002 that DiCicco and Tatlow were using her violated 5.4a(1) of the Act for the same reason as the June 2001 remark.

Accordingly, based upon the above findings and analysis, I make the following:

#### **Conclusions of Law**

1. The Lakehurst Board of Education violated 5.4a(1) of the Act by certain remarks made by Superintendent Calderone and Principal Raleigh.
2. The Board violated 5.4a(1) and (3) of the Act by issuing negative evaluations to certain employees because of their exercise of protected conduct.
3. The Board did not violate 5.4a(2) and (5) of the Act.

**RECOMMENDED ORDER**

I Recommend the Commission **ORDER**:

A. That the Board cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by Superintendent Calderone and Principal Raleigh making remarks to employees that intimidated and criticized them for engaging in protected conduct; and by reprimanding certain employees and issuing a negative evaluation to other employees because of the filing and processing of a grievance.

2. Engaging in conduct which has the tendency to interfere with, restrain or coerce its employees from engaging in conduct protected by the Act, particularly by Superintendent Calderone making remarks to employees DiCicco and Pattie Loughran, and Principal Raleigh making remarks to Pattie Loughran including criticizing her for speaking to a union representative, all of which intimidated and criticized them for engaging in protected conduct.

3. 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 reprimanding employees Toohey and Michael Loughran, and issuing a negative

evaluation to employees DiCicco and Wenger because of the filing and processing of a grievance.

B. That the Board take the following action:

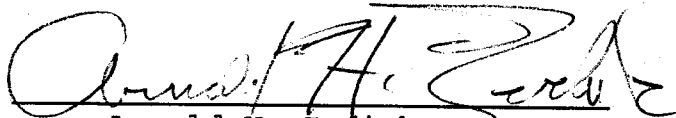
1. Withdraw Raleigh's June 7, 2001 reprimands of employees Toohey and Michael Loughran (CP-2 and CP-4) from their respective personnel files and do not consider those reprimands in any future employment matters.

2. Withdraw Raleigh's September 19, 2001 evaluations of employees DiCicco and Wenger (CP-20 and CP-17) from their respective personnel files and do not consider them in any future employment matters.

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

C. That all other allegations be dismissed.



Arnold H. Zudick  
Senior Hearing Examiner

Dated: January 13, 2004  
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** cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by Superintendent Calderone and Principal Raleigh making remarks to employees that intimidated and criticized them for engaging in protected conduct; and by reprimanding certain employees and issuing a negative evaluation to other employees because of the filing and processing of a grievance.

**WE WILL** cease and desist from engaging in conduct which has the tendency to interfere with, restrain or coerce our employees from engaging in conduct protected by the Act, particularly by Superintendent Calderone making remarks to employees DiCicco and Pattie Loughran, and Principal Raleigh making remarks to Pattie Loughran including criticizing her for speaking to a union representative, all of which intimidated and criticized them for engaging in protected conduct.

**WE WILL** cease and desist from 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 reprimanding employees Toohey and Michael Loughran, and issuing a negative evaluation to employees DiCicco and Wenger because of the filing and processing of a grievance.

**WE WILL** withdraw Raleigh's June 7, 2001 reprimands of employees Toohey and Michael Loughran (CP-2 and CP-4) from their respective personnel files and will not consider those reprimands in any future employment matters.

**WE WILL** withdraw Raleigh's September 19, 2001 evaluations of employees DiCicco and Wenger (CP-20 and CP-17) from their respective personnel files and will not consider them in any future employment matters.

**WE WILL NOT** prevent or criticize employees for speaking or meeting with their union representatives.

Docket No. CO-2002-154

Lakehurst 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