

H.E. No. 2009-5

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 No. CO-2006-127

IRVINGTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Irvington Board of Education violated 5.4a(3) and (1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by awarding an Association representative (and unit employee) a grade of "not effective" in a portion of a section of a year-end evaluation. He recommended that the Board did not violate the Act by awarding other "not effective" grades to the employee in the same evaluation.

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

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Appearances:

For the Respondent  
Hunt, Hamlin & Ridley, attorneys  
(Ronald Hunt, of counsel)

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

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On November 9, 2005, the Irvington Education Association ("Association" or "IEA") filed an unfair practice charge against the Irvington Board of Education ("Board"). The charge alleges that on March 23, 2005, and again on May 26, 2005, Madison Avenue School Principal Julie Slattery rated teacher and Association building representative Barbara Whitaker "not effective" in several categories on an official evaluation form in retaliation for her Association activities. The charge more specifically alleges that a grievance contesting the earlier evaluation was settled upon agreement of the Association and the Board that

Slattery would conduct a second evaluation. Whitaker again received the same "not effective" assessments in the second evaluation. The Board's conduct allegedly violates N.J.S.A. 34:13A-1 et seq., 5.4a(1) and (3)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act ("Act").

On March 14, 2006, a Complaint and Notice of Hearing issued. On April 26, the Board filed an Answer, admitting that Whitaker was rated "not effective" in several categories on the evaluations and denying that it engaged in an unfair practice.

On November 1, 2006 and January 31, 2007, I conducted a hearing at which the parties questioned witnesses, presented documents and argued orally. The parties filed briefs and replies.

Based upon the record, I make the following:

#### FINDINGS OF FACT

1. Barbara Whitaker has been employed as a teacher by the Irvington Board of Education for about 30 years (1T13).<sup>2/</sup> She

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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; (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."

<sup>2/</sup> "T" represents the transcript, preceded by a "1" or "2" signifying the first or second day of hearing, followed by the page number(s). "C" represents Commission exhibits; "CP" represents charging party exhibits; and R" represents respondent exhibits.

has taught third and fourth grades at the Madison Avenue School for most of the past nineteen years and was more recently designated a school "facilitator" (1T14).

Each facilitator in a school is responsible for conveying to teachers all district initiatives, the wisdom of her teaching experience, and an appreciation of a positive professional relationship with the building principal (2T32). In that role for the past two years, Whitaker has trained teachers in the "whole school reform model"; conducted grade-level meetings among teachers; "modeled" lessons for them; and conducted "staff development" sessions after regular school hours (1T14). She also mentors new teachers (1T16).

2. Whitaker has also been an Association building representative for the past seven or eight years (1T16). Each month, the building principal, upon concluding his or her remarks at a school staff meeting, leaves the room, having allocated the following several minutes to IEA business. Whitaker and other Association representatives promptly inform the staff of the most recent Association news (1T18).

3. From November, 2004 through June, 2005, Whitaker was a stipended secretary for the building School Leadership Council (SLC), a volunteer committee of parents, teachers and administrators devoted to improving student academic achievement (1T21, 1T96, 1T97; 2T61). The Irvington SLC operated under its "Rules of Governance," a six page document reciting N.J.A.C.

6A:10A-6.1, et seq. (CP-1). The rules specify that the SLC must be comprised of at least seven members, one of whom must be the building principal. The "core management team" is comprised of a chairperson, co-chair, vice-chair secretary and fiscal secretary. The SLC is required to meet at least once each month; maintain written minutes; establish sub-committees; implement curriculum and instruction standards, etc. (CP-1). The rules also provide that SLC members, ". . . should be individuals who are not afraid to speak up, both to share opinions with the group and to advocate school improvement." They will also ". . . be individuals who have the ability to influence others" (CP-1).

Whitaker has been a member of the SLC since 1999 or 2000 (1T23-1T24). Madison Avenue School SLC meetings were normally conducted on every third Thursday of the month. The annual calendar and meeting times are established each June. Meeting times were variously set at 7:30 a.m. or 3:05 p.m. (1T28, 1T29). As secretary, Whitaker wrote the minutes of SLC meetings, and typed them for the next monthly meeting (1T41). She also prepared the agenda for every meeting, the printed copies of which were distributed to the committee members upon their arrival each month (1T30).

4. A Mr. Burkhardt was principal of Madison Avenue School from 2002 or earlier through October, 2004 (1T19). For a short period of time, the school was operated by various

administrators. Sometime in November, 2004, Julia Slattery was appointed as principal (2T61).

Slattery has been a Board employee for more than 25 years. She taught basic skills and language arts and was an acting principal before arriving at Madison Avenue School (2T57, 2T58). She was an Association representative for an unspecified period at Myrtle Avenue School (now named University Middle School) (2T58).

Principal Slattery soon learned that Madison Avenue School suffered from declining student test scores and an absence of a standardized format for teacher lesson plans. Some teachers did not submit lesson plans to the administration (2T58, 2T59). On December 9, 2004, Slattery attended her first SLC meeting at Madison Avenue School (2T62).

At the meeting, Slattery was advised of building "problems," including student overcrowding leading to off-site classes, ineffectual or dilapidated window shades and rodent infestation (1T31; 2T62, 2T63). Slattery testified that in the meeting Whitaker displayed: ". . . her aggressive demeanor toward me as to what I was going to do. Her tone, her thrusting her body forward - it is her overall demeanor" (2T64). She testified that Whitaker "aggressively" spoke about problems that were not being addressed, such as the rodent infestation and that she, a "fairly large woman," intimidated her at SLC meetings (2T98, 2T99). Slattery testified that the problem was ". . . her tone of voice,

her yelling . . ." and that her behavior was inappropriate at the "majority" of monthly SLC meetings (2T99). She testified: "I don't think aggressive or loud tones or thrusting your body forward or glaring or staring at you is appropriate by anyone at anytime to get your point across" (2T93). Slattery never cautioned Whitaker about her behavior at SLC meetings (1T39).

Whitaker did not rebut Slattery's testimony about her demeanor at SLC meetings. I credit it.

5. Slattery testified that her relationship with Whitaker was "difficult" from the outset. She elaborated:

When I would ask Ms. Whitaker questions she would become very defensive . . . So it was always things that the administration had done; what her relationship was like with [the previous principal]; it was always about the union; it was just uncomfortable for me from the beginning. [2T60-2T61]

6. In or around December, 2004, Slattery advised Whitaker, as school facilitator, that she was concerned about a lack of consistency in teacher lesson plans forwarded to her office (1T90, 1T91). I infer that the lesson plans qualitatively varied in form and content.

Slattery testified that she asked Whitaker to "develop something [i.e., a uniform lesson plan format] and to work with staff . . ." (2T88). Slattery could not remember when she spoke with Whitaker about the lesson plan format but recollected that ". . . she took it defensively, as if it was a negative against her and her job [i.e., as facilitator]" (2T60, 2T88). Slattery

testified that Whitaker said that teachers in the building opposed changing the lesson plans (2T61, 2T77). Slattery conceded that she did not write a memorandum to Whitaker or otherwise reduce her concern to writing (2T89).

Whitaker testified that Slattery one time mentioned to her, ". . . there was no uniform way of doing lesson plans" (1T41). She denied that Slattery ever directed her to devise a uniform lesson plan, though admitted she instructed her ". . . to do certain things" (1T92-1T93). Whitaker never received any writing advising her to develop a lesson plan format and was not reprimanded for failing to implement such a directive (1T43,1T91).

On an unspecified date between November, 2004 and spring, 2005, Slattery asked Assistant Superintendent of Academic Affairs Sandra Branham to conduct a workshop among Madison Avenue School faculty regarding a "uniform application of lesson plans" (2T39, 2T76). Slattery testified that she asked Branham to develop a uniform lesson plan form because Whitaker had reacted "negatively" to her earlier request (2T77-2T78). She testified:

[Whitaker] just didn't want to do it. I figured it was something that needed to be done and I would go through another avenue. I wasn't going to be arguing with Ms. Whitaker . . . I was managing and handling a lot of things. I would think after several times of asking a professional [i.e., Whitaker] that they would follow through . . . There wasn't necessarily a follow-through; there was a resistance. [2T90]



Branham testified that Slattery asked her to conduct the lesson plan workshop because ". . . it had not been rolled out to the staff properly" and she wanted ". . . to give the staff an overview of what had to be done to make sure they were all on the same page" (2T39, 2T49). Branham also testified that Slattery told her that ". . . she had spoken to Whitaker and it had not been done" (2T39, 2T50). Branham conducted the workshop and developed a lesson plan form which is now used at the Madison Avenue School and throughout the school district (2T41; R-1). Branham did not speak with Whitaker before conducting the workshop (2T49). Branham's testimony was unrebutted; I credit it.

I do not credit Whitaker's testimony that Slattery did not convey to her a wish or an instruction to develop a uniform lesson plan format. As the sole building facilitator at the Madison Avenue School, Whitaker was the staff person to whom Slattery would turn for such a need. I find it unlikely that Slattery would instruct Whitaker to "do certain things;" remark to her about the absence of a uniform lesson plan format, but not instruct her to develop one. In light of Slattery's consistent testimony on this disputed fact, Whitaker's admissions and Branham's unrebutted involvement in the process and corroboration of Slattery's testimony, I find that Slattery instructed Whitaker to develop a uniform lesson plan, to no avail.

7. The date (March 9) and 7:30 a.m. start time of the March, 2005 SLC meeting was set the previous June (finding no. 3; 1T98; 2T103). In the latter portion of each month of the school year, a SLC team parent "coordinator" issues a calendar of events for the following month, including the date and time of the upcoming SLC meeting (1T98, 1T99). Sometime in February, 2005, the March calendar was issued, specifying a 3:05 p.m. start time on March 9 for the SLC meeting at Madison Avenue school (1T98). Whitaker was not responsible for oversight of the monthly calendar (1T98).

The March 9 SLC meeting was conducted at 7:30 a.m. (2T106). Whitaker believed that the meeting would begin at 3:05 p.m., based upon the (incorrect) monthly calendar (2T106). The record is not clear whether Slattery attended the March 2005 SLC meeting. Asked on cross-examination if she blamed Whitaker for the misinformation, Slattery testified:

I blamed her for the fact that I wasn't notified and she was the secretary, she would put out notifications on you know, in passing by my office or stopping to leave a note with the secretary to notify me that there had been a change. [2T106]

Slattery admitted on cross-examination that the SLC meetings and times were set in June of the previous year; that the dates and times were not set unilaterally by Whitaker, and she did not know if Whitaker or someone else had issued the notice reporting the meeting's start time as 3:05 p.m. (2T105, 2T107).

8. On March 10, 2005, Whitaker told Slattery about an imminent Association meeting that partly concerned her governance of Madison Avenue School (1T36, 1T82). Some Association members assigned to the school were apparently concerned about: being reprimanded in a hallway in front of peers; an off-site teacher not having a duty-free lunch; another teacher objecting to the presence of a police officer in her classroom, etc. (1T33-1T36).

On the same date, Slattery received a phone call from an unspecified Board employee advising her that later that day, the Association would conduct a "no confidence" vote on her stewardship of Madison Avenue School (2T69). Slattery promptly telephoned the Board office and asked to meet with Burnham's administrative assistant, Michelle Brooks-Bey, for advice (2T69). Slattery made no effort to attend, interfere with or stop the Association meeting (1T83).

Andaiye Foluke has been employed by the Irvington Board of Education as an elementary school teacher for more than 20 years. From 1999-2005, she was Association vice-president and grievance chairperson (1T146). She knew Slattery professionally and personally, and considered her a "friend." (1T150). Foluke's daughter is also a teacher and sometimes taught at Madison Avenue School in the 2004-2005 school year (1T152). On an unspecified date during the 2004-2005 school year, Foluke asked Slattery to assign a mentor other than Whitaker to her daughter (1T152).

Around 3:30 p.m. on March 10, Foluke coincidentally met Slattery while awaiting the elevator at the Board office building. After exchanging greetings, Slattery told Foluke of her concern about a pending "no confidence" vote scheduled by the Association later that day (1T147, 1T150). Foluke was unaware of any such meeting and told Slattery that she was doubtful that the Association was "going after her" (1T148). Foluke told Slattery that she would phone Association president Madeline Edwards ". . . to find out what was going on" (1T148).

Days earlier, Whitaker had asked Edwards whether certain complaints by the membership in the Madison Avenue School were grievable. Edwards asked Whitaker to schedule a meeting which, after a postponement, took place on March 10 (1T36, 1T156-1T158). Edwards attended the meeting and answered members' questions. Among the attendees was Madison Avenue School teacher and Whitaker's fellow Association building representative, Lois Sadowski (1T112, 1T129). She testified credibly that Slattery treated her fairly before and after the March 10, 2005 Association meeting (1T129, 1T30). At the time of the meeting, Slattery was aware that Sadowski was an Association building representative (2T68). I infer that Slattery knew of her role before the meeting.

Edwards later received Foluke's phone message questioning the asserted "no confidence" vote about Slattery. Edwards telephoned Slattery the evening of March 10 and left a voice mail

message to the effect that the meeting was not about a "no confidence" vote, and did not concern any effort to remove her from the Madison Avenue School (1T162). Edwards testified that she also said in the same voice mail recording that the meeting was about "concerns or complaints . . ." (1T162). Slattery was not asked if she heard Edwards' voice mail message. She denied knowing what happened at the meeting (2T69). I infer that Slattery had no personal knowledge of the substance of the meeting.

I credit Edwards' testimony about the general topics discussed at the meeting and her voice mail message to Slattery. I infer that Slattery received that message and learned that the meeting did not pertain to a "no confidence" vote.

9. On an unspecified date in March or April of 2005, Madison Avenue School SLC members voted by secret ballot for "employee of the month," an initiative proposed by the Board Superintendent and announced by Slattery at an SLC meeting (1T44; 2T74). Nominations were taken and voted upon at the meeting (1T101). Slattery testified that in the meeting Whitaker disapproved of some nominated teachers: "If someone else mentioned another teacher she just didn't have the feeling that that teacher should be elected or nominated and she made no bones about why she felt so. She was, I remember, standing up and throwing her body forward and people felt uncomfortable about it" (2T98).

In the morning of the day of the election, a ballot box was placed upon the desk of Slattery's secretary (1T46). Slattery was not in the building until sometime in the afternoon (1T46).

The Madison Avenue School nurse at that time was Arlene Gurski (2T5). She testified that in the early afternoon on the day of the election, the main office secretary, Matty Miller, asked her permission to move the ballot box to the nearby nurse's office during her lunch period (2T6; 2T7). Gurski agreed, requesting that the box be placed on the desk in her own secretary's adjoining office. Gurski also told the secretary to post a note at the original location directing prospective voters to the health office (2T8). Whitaker witnessed the circumstances of the ballot box's relocation (1T46). One voter deposited a ballot during the 45 minutes or so that the box was in the nurse secretary's office (2T11; 2T12).

Gurski testified that around 2 p.m., Slattery entered the nurse's office where she and Whitaker were speaking (2T12). Gurski testified that Slattery asked who moved the ballot box and that she explained to her the circumstances of the relocation (1T47; 2T9). Slattery never commented to Whitaker about the ballot box (1T47).

Slattery testified that when she returned to her office, secretary Miller told her that Gurski and Whitaker had moved the ballot box to the nurse's office (2T83; 2T117). She also testified that when she opened the nurse's office door and saw

the ballot box, she asked Gurski and Whitaker ". . . who moved the box and they denied moving it. . ." (2T83). Slattery testified that the secretary did not say that she carried the box to the nurse's office (2T83).

On cross-examination, Slattery testified that she did not ask Gurski and Whitaker who had moved the ballot box (2T117).

She elaborated:

[T]here were problems with Arlene Gurski and Barbara Whitaker. They were obviously, they are good friends and they had a good relationship with the past principal. They didn't have the same type of relationship with me. No, I don't believe I asked them [who moved the ballot box]. And I did ask the secretary, she is a confidential secretary, so I believe her. [2T118]

Secretary Miller did not testify at the hearing.

I credit Gurski's testimony. Gurski is not an Association representative. She witnessed the entire sequence of ballot box placements that day, beginning with the secretary's request to move the ballot box to the nurse's office so that the secretary might take a lunch period away from her desk. Her testimony was forthright and responsive. Whitaker's testimony corroborates Gurski's.

On cross-examination, Slattery contradicted her earlier testimony that she asked Gurski and Whitaker, "who moved the box. . ." I infer from Slattery's testimony that she disbelieved Gurski's explanation because Whitaker and Gurski were "friends," i.e., they shared an interest in Association matters, among other

things, and believed the main office secretary instead because she was not included in the negotiations unit--and not aligned with the Association.

10. On an unspecified date during that school term, probably after December, 2004, Slattery asked Whitaker to serve food to students at a nearby off-site facility. Whitaker refused, advising Slattery that that duty was not part of her job description (1T48). Slattery did not caution Whitaker about insubordination and did not write a reprimand (1T49).

11. On unspecified dates in the 2004-2005 school term, Whitaker coached and assisted several named teachers in the building (1T40). She also conducted grade-level meetings for teachers twice per month (1T93).

Slattery testified that Whitaker refused to conduct "model lessons" as facilitator. She testified:

When Whitaker would come into the office, I would ask her to model lessons like other facilitators do in the district. She would always tell me that was not something that she was to do; that was not something that Temple [University] told her to do. I asked her if she worked for the Irvington Board of Education or for Temple [University].

She was resisting going into the classroom to model lessons when the teachers were in the classrooms with students. She was willing to do grade level meetings but never to be in the classroom to assist teachers. [2T111]

Slattery conceded that Whitaker "later on" -- after their "discussion" -- started "to go into the rooms" (2T112). Slattery also testified that Whitaker "resisted" going to a friend's



classroom who was having difficulty with "classroom management" (2T112).

Whitaker testified that she did not recall that Slattery asked her to perform more demonstrations in the classrooms with teachers (1T90).

Considering the specificity of Slattery's testimony about her discussion(s) with Whitaker regarding her refusal or reluctance to "model" lessons, and Whitaker's general denial, I credit Slattery's testimony. For example, Whitaker did not rebut Slattery's testimony that they mentioned her undergraduate training in reference to modeling lessons.

12. Sometime in early May, 2005, longtime Madison Avenue School fifth grade teacher Judith Liebowitz complained about Whitaker to Slattery and guidance counselor/Association building representative Lois Sadowski (1T114). Liebowitz had attended the weekly grade-level meetings convened by Whitaker (2T125). She told Slattery and Sadowski that, ". . . Whitaker is a bully and she intimidates people" (2T131). She testified that Whitaker ". . . yelled at and belittled me in my classroom and made me feel uncomfortable on many occasions" (2T127).

Terrence Henry is another fifth-grade teacher assigned to the Madison Avenue School. He also attended grade-level meetings convened by Whitaker in the 2004-2005 school year (2T138). He testified that Whitaker discussed various teaching strategies to "better serve the kids" and that he did not observe her

"intimidate" teacher Liebowitz (2T139). Sadowski testified that Liebowitz is "easily flustered," as demonstrated when she, as guidance counsellor, occasionally assisted the teacher with a student (1T114).

I credit Liebowitz's testimony that she felt bullied and intimidated by Whitaker, notwithstanding the possibility that she was easily "flustered." Teacher Henry was not a witness to Whitaker's visitations to Liebowitz's classroom.

13. On or about May 24, 2005, Slattery met with Whitaker at a routine "pre-observation conference" to discuss ". . . what [the teacher] would be doing when [the principal] came to observe me" (1T53; CP-2). Whitaker was accompanied by fellow Association building representative and guidance counselor Sadowski (1T54-1T55). Slattery was surprised by Sadowski's presence (2T78). The purpose of the conference is to apprise the teacher of the administrator's or grader's expectations of performance during the upcoming classroom observation, which lasts for at least one class period (2T19).

Whitaker credibly testified that they discussed various "criteria indicators" printed on the teacher evaluation form, a four-page document enumerating five general areas (instructional planning skills; personal/professional development; pupil indicators of progress; instructional skills; and classroom management/environment), each of them acting as an umbrella for varying numbers of descriptive "indicators," which were to be

graded. A total of about 60 indicators are enumerated on the form. The possible grades for each indicator are "effective"; "not effective"; and "not applicable." A final column on the form permits the grader to write an "overall rating" for each general topic and an elective "comment" (CP-2; 1T53). The final and signature page of the form provides a summary of the grades in all five general areas; allocates space for the grader's "narrative summary" and for the teacher's "comment" or "rebuttal"; and summarizes the teacher's attendance for the year (CP-2).

Whitaker testified that in the conference she and Slattery discussed criteria generally and some, specifically. Slattery purportedly remarked: "I was planning to give you a 'not effective' there, anyway." Whitaker replied: "How can you give me a 'not effective'? I haven't even had the observation!" (1T53). Whitaker also testified that during the conference, Slattery said to her: "I hear that you want my job. . ." to which the teacher replied: "Ms. Slattery, that has nothing to do with this . . . if you don't believe what they say about me, I won't believe what they say about you" (1T54). Whitaker also testified that Slattery said that "people were complaining about [you]" but refused to reveal their names. Whitaker responded: "How am I supposed to correct things if I don't know what they said or what is going on?" (1T55).

Whitaker's testimony was unrebutted. I credit it.

14. On or about May 26, Slattery formally observed Whitaker "model" strategies for achieving literacy to several third grade teachers (CP-2). Whitaker demonstrated techniques, such as building "word walls" and urging pupils (i.e., the teachers) to guess the meaning of words before their meaning was revealed (1T56, 1T57). Sadowski also attended at Whitaker's request (1T57).

15. On or before June 7, 2005, Slattery wrote and completed her evaluation of Whitaker on the form (see finding no. 13; 2T109; CP-2). Slattery wrote "NA" (not applicable) in four of the five general areas, including "NA's" for each "indicator" (totaling 48) in those areas (CP-2). Assistant Superintendent of Academic Affairs Branham corroborated that many of the assessable categories on the teacher evaluation form are "not applicable" to facilitators because they are not ". . . in the classroom" (2T33, 2T34). In the general area, "personal/professional development," Slattery gave Whitaker an overall rating of "E" (effective) and awarded her an "E" in nine of thirteen enumerated indicators in the section. This general area is divided into three categories.

In the category, "interpersonal and public relations skills," Slattery gave Whitaker a rating of "NE" (not effective) and specifically deemed her demonstration of "tact, courtesy, sensitivity and poise" as "not effective." Slattery wrote in the margin of the form that Whitaker "needs to be more objective in

approach and watch negative mannerism" (CP-2). Slattery testified that her written opinion was based upon:

. . . meeting with her, I alone or meetings in the hallway or SLC meetings or I had to call her in when she had a problem with one of the security guards in our building, I had to call in the building representative.  
[2T72]

Asked to describe the "nature" of the problem, Slattery testified:

It was how she reacted to people. She couldn't offer constructive criticism. She would become aggressive in nature, she would throw her [large] body forward and look over her glasses and step into your personal space. [2T72]

Asked specifically on cross-examination to describe the "problem" with the security guard, Slattery testified that the employee, Taresa Merchant, ". . . wanted her union representative to come in [because she was told 'how to do her job'] and we had a meeting about that" (2T116). I infer that Whitaker had confronted a security guard who requested the assistance of her union representative (not Whitaker) when Slattery intervened in the matter. (I take administrative notice that Board security monitors are represented for purposes of collective negotiations by SEIU Local 617 in a unit which excludes professional employees, i.e., teachers (Dkt. No. RO-2000-65)).

Slattery also gave Whitaker a "NE" in "cooperativeness with staff, parents and administrators." In the margin of the form, Slattery wrote of Whitaker on this section: "Showing effort, but

needs to continue to be more cooperative" (CP-2). She elaborated in direct testimony:

At that time I would ask her to go and perform lessons and I was met with resistance. There were people that were having classroom management issues and I was told (in reference to that person), 'that would be a difficult task to do.' But I knew that was the role and responsibility of her job. After having those conversations, slowly she as starting to go into the classroom . . . starting to show effort.  
[2T73]

In the final category, "commitment, enthusiasm and concern," Slattery awarded Whitaker an overall assessment of "E" and repeated that grade in three of the four enumerated indicator sections. Slattery gave Whitaker a "NE" in the indicator section, "capability of self-analysis; acceptance and utilization of professional criticism." Slattery wrote of this grade in the form's margin: "You respond in a negative way. You have difficulty accepting things when it's not your way" (CP-2). Slattery testified about her reasons for that grade:

In general conference, I mean we had an SLC meeting where we were asked by the Superintendent to select the teacher of the year. At the time, her recommendation was, you know, not a choice from other members and she was aggressive as to that.

There was a teacher at [a grade level] meeting that questioned the validity of the summer package she [Whitaker] had provided.  
[2T73-2T74]

I credit Slattery's reasons for awarding the "NE" grades to Whitaker on the form.

On the summary page, Slattery wrote the four precise indicator section numbers for which Whitaker received "NE" grades. She also wrote in the section, "narrative summary." Under "commendations," Slattery wrote:

Today I attended a grade level meeting for the third grade. The agenda included strategies related to 'word walls.' The group participated in hands-on activities. All activities presented can be easily utilized within the classroom. [CP-2]

Under "recommendations/areas of need," Slattery wrote:

1. Modeling and assisting in the classroom will help promote learning.
2. Objectivity and sensitivity are needed in order to create a positive productive learning environment.
3. Model classroom management for teachers who are having difficulty. [CP-2]

16. On June 7, 2005, Slattery convened a "post-observation" conference with Whitaker. Sadowski also attended on Whitaker's behalf. James Washington, a building principal and the Administrators' Association president also attended at Slattery's request and on her behalf (1T58; 2T20). Slattery asked Washington to attend because she was concerned that Whitaker would become "combative" in the conference (2T20; 2T79).

Whitaker objected to Washington's presence. Washington assured her that he intended to listen, only (2T21). Slattery gave Whitaker a copy of the completed evaluation and explained her rationale for the grades (1T59; 2T80). Whitaker testified that Slattery did not say anything about: her "aggressiveness;"

her failure to develop a lesson plan format; failure to "model" lessons; and did not say anything about teacher Liebowitz's complaint or about her conduct in the SLC meeting(s) (1T60-1T61). In the five or more consecutively preceding years, Whitaker had not received grades of "NE" in any of the indicators Slattery had so graded her (1T64-1T65).

Washington testified that Slattery said to Whitaker that she had been aggressive and intimidated staff. He testified that they discussed Whitaker's role as the building "facilitator" and about "facilitating school leadership conferences" (2T24). When asked if Slattery said anything about "that," Washington answered: "Ms. Slattery felt that Ms. Whitaker was intimidating the staff."

Fellow Association representative and unit employee Sadowski recalled on direct examination that in the meeting, Slattery told Whitaker about her problem(s) with "tact, courtesy, sensitivity and poise," specifically, that ". . . she wasn't good in that area," to which Whitaker, ". . . tried to defend herself" (1T120, 1T121). When asked if Slattery gave examples, Sadowski testified that she ". . . could not remember" (1T121). Sadowski recollected that Slattery remarked about Whitaker's problem(s) in "cooperativeness with staff, parents and administrators," though could not recall if examples were cited (1T121).

I do not credit Whitaker's testimony that Slattery did not comment upon her "aggressiveness." I infer from Washington's



credited testimony that Slattery's expressed opinion that Whitaker "intimidated" the staff amounts to a criticism of her "aggressiveness." I credit Whitaker's testimony that Slattery said to her, "people are complaining about you," but refused to disclose their names (1T59). I also credit Whitaker's testimony regarding the subjects other than her "aggressiveness," on which Slattery did not comment.

Whitaker disagreed with and largely objected to Slattery's evaluation (2T23, 2T24). Washington testified that the conference was more combative than collegial (2T24). I credit Washington's and Sadowski's testimonies, which were mutually consistent.

#### ANALYSIS

The Association contends that Principal Slattery awarded grades of "not effective" to teacher and Association building representative Whitaker in retaliation for activities protected by the Act. In re Bridgewater Tp., 95 N.J. 244 (1984), sets forth the elements that a charging party must prove to establish a violation of 5.4a(3).

Under Bridgewater, no violation will be found unless the charging party has proved by a preponderance of the evidence on the 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 does not present any evidence of a motive not illegal under the 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 unlawful motives 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 evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action.

Whitaker has engaged in protected activity. She is an Association building representative and has advised assembled teachers on Association matters each month, immediately following scheduled staff meetings. She has also protested working and safety conditions at the school in monthly SLC meetings, which Principal Slattery attended. Whitaker favored an unspecified teacher for the teacher of the month award and "aggressively" opposed other suggested candidates. Advocacy on behalf of teachers concerning employment conditions at SLC meetings is protected under our Act. Camden Bd. of Ed., P.E.R.C. No. 2007-

19, 32 NJPER 328 (¶136 2006). Whitaker also advised Slattery of a March, 2005 after-school Association meeting at which her conduct as principal would be a subject of discussion. I disagree with the Association that Whitaker was engaged in protected activity during her dispute with a security guard (see finding no. 15). I have inferred that Whitaker was acting more like a supervisor than an Association representative in that instance.

Principal Slattery was admittedly aware of this activity, some of it targeted to or about her. Slattery testimonially conceded that Whitaker spoke about "the union . . . from the beginning."

The record also reveals circumstantial evidence establishing Slattery's hostility to Whitaker's protected activity. From the outset of Slattery's appointment as principal in November, 2004, she felt annoyed or impatient with what she regarded as Whitaker's advocacy of Association matters or perspectives. Slattery also acknowledged being physically intimidated by Whitaker in monthly SLC meetings, at which the representative "aggressively" spoke on topics such as rodent infestation and teacher of the year (or month) nominees. Whitaker's advocacy for a nominee or against other nominees was Slattery's admitted main reason for awarding Whitaker a "NE" in an indicator section, despite an overall assessment of "E" in the umbrella category

("commitment, enthusiasm and concern") under which that indicator appeared.

Slattery also conceded her "problem" believing Whitaker's reply to her question seeking the name of the person who had moved the ballot box. I have inferred that Slattery disbelieved Whitaker largely because she was an Association representative. I find that Slattery's award of the "NE" indicators to Whitaker was motivated by hostility to Whitaker's protected conduct.

I next examine whether Slattery awarded NE's to Whitaker for reasons unrelated to her exercise of rights protected by the Act. The Board contends that Slattery's action was legitimate and based upon Whitaker's performance. I find that Slattery's award of NE's to Whitaker in "interpersonal and public relations skills" and in "cooperativeness with staff, parents and administrators" would have occurred in the absence of protected conduct.

Slattery testified that Whitaker's physically aggressive behavior, particularly at SLC meetings, explained in part the "NE" award in "interpersonal and public relations skills." Representational conduct may lose its statutory protection if it indefensibly threatens workplace discipline, order and respect. State of NJ (Dept. of Human Services), P.E.R.C. No. 2001-52, 27 NJPER 177, 178 (¶32057 2001). Assuming that Slattery's admission circumstantially demonstrates hostility to protected activity. I must also consider her cited instance of Whitaker's confrontation

with a security guard, which did not arise from a representational role. Slattery's criticism of Whitaker's conduct is legitimately related to "interpersonal skills." The confrontation also implicated Whitaker's "objectivity," which Slattery criticized in writing on the evaluation form's margin.

Slattery also awarded a "NE" to Whitaker for her "cooperativeness with staff, parents and administrators." Asked to explain her reason(s) for that grade, Slattery credibly testified that Whitaker had resisted her instruction to help teachers with "classroom management issues." Slattery testimonially conceded that after some time, Whitaker ". . . started to go into the classroom . . .," a fact she acknowledged in writing on the form's margin by the specific indicator section. Under all these circumstances, I find that Slattery would have awarded NE's to Whitaker in "interpersonal and public relations skills" in the absence of protected activity.

Finally, I am not persuaded that Slattery would have awarded a "NE" for the indicator, "capability for self analysis, acceptance and utilization of professional criticism" in the absence of protected activity. Slattery criticized Whitaker's reaction to a classroom teacher in a grade level meeting who openly questioned or doubted her statement(s). I do not find that that instance alone persuaded Slattery and constituted a legitimate business justification for awarding a "NE." Slattery

testified however, that Whitaker's "aggressive" opposition to the choice(s) of other SLC members for teacher of the month (or year) also was a reason for the "NE." Slattery disapproved of Whitaker's conduct at several SLC meetings. I infer from her testimony that that was the main or principal reason for the grade. I have found that Whitaker's conduct at the SLC meetings was protected under the Act. Accordingly, I find that a preponderance of evidence shows that Slattery awarded a "NE" for this indicator in retaliation for Whitaker's protected conduct.

RECOMMENDED ORDER

I recommend that the Irvington Board of Education:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., particularly by awarding a "NE" (not effective) in the area, "Personal/Professional Development," specifically indicator section 3.1, "capability for self analysis; acceptance and utilization of professional criticism" and writing an accompanying criticism on a year-end evaluation of teacher and building facilitator Barbara Whitaker in retaliation for aggressively opposing some nominees for a teacher of the year award at a School Leadership Council meeting.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or

discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by awarding a "NE" (not effective) in the area, "Personal Professional Development," specifically indicator section 3.1, "capability for self-analysis; acceptance and utilization professional criticism" and writing an accompanying criticism on a year-end evaluation of teacher and building facilitator Barbara Whitaker in retaliation for aggressively opposing some nominees for a teacher of the year award at a School Leadership Council meeting.

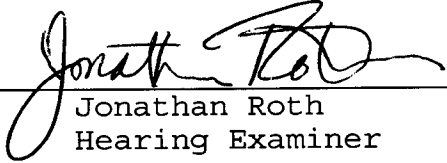
B. Take the following affirmative action:

1. Delete the "X" under "NE" awarded to Barbara Whitaker in the area, "Personal/Professional Development, specifically, indicator section 3.1 of her 2004-05 year-end evaluation form and the written comment for that section in the margin of the form.
2. Insert an "X" under "E" (effective) in the area, "Personal/Professional Development," specifically at indicator section 3.1 of Whitaker's 2004-05 year-end evaluation form.
3. Delete "3.1" from the "not effective" column on the summary page of Whitaker's 2004-05 year-end evaluation.
4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately

and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

The remaining allegations in the Complaint are dismissed.

  
Jonathan Roth  
Hearing Examiner

DATED: December 15, 2008  
Trenton, New Jersey

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

Any exceptions are due by December 29, 2008.





# 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 New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq., particularly by awarding a "NE" (not effective) in the area, "Personal/Professional Development," specifically indicator section 3.1, "capability for self analysis; acceptance and utilization of professional criticism" and writing an accompanying criticism on a year-end evaluation of teacher and building facilitator Barbara Whitaker in retaliation for aggressively opposing some nominees for a teacher of the year award at a School Leadership Council meeting.

**WE WILL** cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by awarding a "NE" (not effective) in the area, "Personal Professional Development," specifically indicator section 3.1, "capability for self-analysis; acceptance and utilization professional criticism" and writing an accompanying criticism on a year-end evaluation of teacher and building facilitator Barbara Whitaker in retaliation for aggressively opposing some nominees for a teacher of the year award at a School Leadership Council meeting.

**WE WILL** delete the "X" under "NE" awarded to Barbara Whitaker in the area, "Personal/Professional Development, specifically, indicator section 3.1 of her 2004-05 year-end evaluation form and the written comment for that section in the margin of the form.

**WE WILL** delete "3.1" from the "not effective" column on the summary page of Whitaker's 2004-05 year-end evaluation.

**WE WILL** insert an "X" under "E" (effective) in the area, "Personal/Professional Development," specifically at indicator section 3.1 of Whitaker's 2004-05 year-end evaluation form.

Docket No. CO-2006-127 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