P.E.R.C. NO. 80-87

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CAPE MAY CITY BOARD OF EDUCATION,

Respondent,

Docket No. CO-79-60-27

-and-

CAPE MAY CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

In an unfair practice case the Commission adopts the Hearing Examiner's recommendation and dismisses the complaint filed by the Education Association against the Board of Education. The Commission concluded, in agreement with the Hearing Examiner, that the Association had failed to prove that the Board's actions in cutting back its physical education program were motivated by a desire to discriminate against the physical education teacher for his exercise of protected rights. The Commission found that the action of the Board was not based on anti-union animus.

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CAPE MAY CITY EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Martin R. Pachman, Esq.

For the Charging Party, Greenberg & Mellk, Esqs.
(Mr. William S. Greenberg, of Counsel and
Mr. Alan G. Kelley, of Counsel)

DECISION AND ORDER

On September 12, 1978, an Unfair Practice Charge was filed by the Cape May Education Association (the "Association") alleging that the Cape May City Board of Education (the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Association alleged that the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (a)(3),[1/] by reducing the employment of George Loper, a physical

1/ These subsections prohibit 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 and (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."

education teacher, from five (5) to three (3) days per week effective with the 1979-80 school year with an attendant reduction in salary; closing the school swimming pool which Loper supervised for a period of time during April 1978; and commencing in July 1978, requiring Loper to undergo a physical examination to determine his physical ability to conduct the physical education programs within the school district, all as part of an effort to harass and intimidate Loper because of protected activities he had engaged in on behalf of the Association.

It appearing that the allegations of the Unfair Practice Charge, if true, might constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on October 16, 1978. Hearings were held on May 30, 31, June 1, and August 2, 1979 before Robert T. Snyder, Hearing Examiner of the Commission, at which time both parties were represented by Counsel and were given the opportunity to present evidence, to examine and cross-examine witnesses and to argue orally. Subsequent to the close of hearing, the parties submitted post-hearing briefs, the final one being received on October 17, 1979.

On November 9, 1979, the Hearing Examiner issued his Recommended Report and Decision,[2/] which included findings of fact, conclusions of law and a recommended order. The original of the report was filed with the Commission and copies were served upon

2/ H.E. No. 80-20, 5 NJPER ___ (¶____ 1979).

the parties. A copy of this report is attached hereto and made a part hereof.

The Hearing Examiner recommended the dismissal of all allegations of the Charge filed against the Board. The Hearing Examiner found that the Board had valid business justifications for each of its decisions involving Loper that had been complained of in the unfair practice charge filed against the Board. He concluded that the Association had failed to establish any discriminatory motivation, i.e., anti-union animus, in the face of evidence of a legitimate budgetary crisis in which the Board chose to reduce a five day physical education program without the loss of any significant physical education services, and substantial evidence reflecting the Board's concern with safety factors involved in the operation of the pool in light of the lapse of Loper's Water Safety Instructor's Certification following an incapacitating back injury suffered by Loper.

Exceptions to the Hearing Examiner's Report were filed by the Association on November 28, 1979.3/

The Association's exceptions related to both the Hearing Examiner's findings of fact and his determinations relating to the pertinent legal standards to be applied in discrimination cases and his legal conclusions derived from the application of these legal standards.

With regard to the Association's factual exceptions, the Association raises a series of objections to the Hearing

3/ The Commission received a motion to dismiss exceptions and brief in support of that motion from the Board of Education on January 10, 1980. These submissions have not been considered by the Commission inasmuch as they were not timely filed pursuant to N.J.A.C. 19:14-7.3(d). No extension of time was sought by the Board to file said motion and supporting papers.

Examiner's findings relating to Loper's proposal for a physical education curriculum developed at the time Loper was first hired by the Board, e.g. whether these proposals in fact established the physical education curriculum within the school district or in any way required that a swimming instructor employed by the Board hold a valid Red Cross Lifesaving or Water Safety Instructor's Certificate. Other exceptions relating to factual findings question the accuracy of the Hearing Examiner's statements concerning which grievances handled in part by Loper were not pursued to arbitration; whether Loper's periodic notations in his personnel folder concerning the maintenance of the aforementioned Water Safety Certifications established his recognition that the maintenance of these certificates was a district and/or state requirement; and whether it was the administrative principal or Association representatives that refused to attend a particular meeting relating to a grievance.

With regard to its legal exceptions and objections, the Association, while acknowledging the applicability of the Commission's "Haddonfield" standards adopted to determine whether an employer's alleged discriminatory conduct is violative of N.J.S.A. 34:13A-5.4(a)(3),[4/] asserts that the applicable test is "whether the entire course of the Board's conduct herein has operated to

4/ The Commission in In re Haddonfield Board of Education, P.E.R.C. 77-36, 3 NJPER 71 at 72 (1977) declared that:

> A violation of N.J.S.A. 34:13A-5.4(a)(3) should be found it if is determined that a public employer's discriminatory acts were motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the effect of so encouraging or discouraging employees in the exercise of those rights.

See the decision in the cases cited therein for a fuller statement of the standard in such cases.

discourage Loper's exercise of guaranteed rights or, in any event, have the intent of so doing." (Association's letter exceptions at page 5). The Association appears to maintain that it met its burden of proof in the instant case by establishing that Loper was an active participant in numerous protected activities and that the Board had actual knowledge of such activities inasmuch as the Board never advanced a sustainable argument as to why it reduced the physical education program from five to three days or why it cloaed the swimming pool for a period of time when Loper's Red Cross Certification had lapsed.[5/] The Association states that the Board's announced reasons for the physical education cutback and the pool closure were pretextual, i.e. that there was no budgetary crisis because of the existence of a substantial surplus and no reason to anticipate that the Board faced any insurance or liability problems when Loper's Water Safety Instructor's Certificate lapsed. More specifically, the Association maintains that the Board failed to proffer corroborative documentary or testimonial support for its contention that certain programs had to be pared because of budgetary problems or that physical education programs bore less of a relationship to the maintenance of basic educational programs than did library services which were not reduced by the Board.

5/ In its exceptions, the Association does not press further its allegations relating to the Board's decision to require a Doctor's certificate from Loper in July, 1978.

The Commission, after careful consideration of the record and the exceptions, adopts the Hearing Examiner's findings of fact, conclusions of law, and recommended order substantially for the reasons stated in the Hearing Examiner's Recommended Report and Decision. A few comments, however, are in order with regard to certain specific exceptions raised by the Association.

The Association's factual exceptions, even if sustained, do not mandate a reassessment of the significant facts relied upon by the Hearing Examiner in his legal analysis. For example, there is ample record support to establish that Loper, by his actions, viewed the maintenance of Red Cross certification as a requirement for the supervision of the district's swimming programs, even if the Association's contentions that Loper's proposal for a physical education curriculum did not mandate Red Cross certification are correct. The noted factual exceptions bear little if any relationship to the Hearing Examiner's crucial determinations that (1) the Board established legitimate reasons for the physical education cutbacks [6/] and the temporary closing of the pool in April 1978 and (2) that the Association failed to establish that the Board was improperly motivated by anti-union animus when it made its decisions affecting Loper and the district's physical education programs.

6/ It may be noted that the Association does not challenge the Hearing Examiner's finding that the only change in the students' recreational curriculum was the elimination of one fifth grade swimming period and one special fourth grade swimming program.

The Association's exceptions to the Hearing Examiner's legal analysis and determinations are reflective of its misinterpretation of the pertinent standard applied by the Commission in "(a)(3)" discrimination cases. The Association, while acknowledging the applicability of the Commission's Haddonfield standard, referred to earlier, argues essentially that Loper's exercise of protected rights coupled with the actual knowledge by the Board of these activities mandates the finding that unfair practices had been committed by the Board since the entire course of the Board's conduct had resulted in discouraging Loper's exercise of protected rights or at least had the intent of so doing. This "standard", however, makes no mention of perhaps the most important element involved in analyzing whether an (a)(3) violation has been committed by an employer, i.e. a discriminatory motive.

Consistent with N.J.S.A. 34:13A-5.4(c), the Commission has placed upon the shoulders of the charging party in these (a)(3) discrimination matters the burden of proving its case by a preponderance of the evidence. Once the charging party has shown that an employee who has been disciplined, discharged, etc. has engaged in protected activity and that the employer had knowledge of such activity, and was hostile toward a union, a prima facie (a)(3) violation is made out. The burden then shifts to the respondent which must demonstrate that its actions were taken for legitimate reasons. If the evidence produced at hearing indicates that the rationale offered by respondent is

merely pretextual, a violation of the Act may be found. However, if the evidence indicates that the respondent's justification is valid, then it becomes the obligation of the trier of fact to determine, bearing in mind that the charging party has the burden of proof by a preponderance of the evidence, that the action was taken, at least in part, in retaliation for the employee's exercise of protected rights.7/

In the present case, the Hearing Examiner found that although the Association had proven that the Board had actual knowledge of Loper's protected activities on behalf of the Association, the Board had clearly demonstrated that its actions in choosing to conduct the district's physical education program in three days and its decision to briefly close the district's swimming pool were taken for legitimate reasons. The burden of proof thus remained with the Association to establish that the actions complained of were taken at least in part in retaliation for Loper's exercise of protected rights, i.e. that the Board was influenced by a discriminatory motive -- anti-union animus. The Hearing Examiner found, as do we, that the Association did not prove that the Board acted as it did because of anti-union animus.

7/ As to the shifting burdens of proof in section (a)(3) charges see In re North Warren Regl Bd of Ed, P.E.R.C. No. 79-9, 4 NJPER 417 (¶4187 1978); In re Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (¶4123 1978) affmd App. Div. Docket No. A-4824-77 (1/9/80); In re North Brunswick Twp. Bd of Ed, P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978) affmd App. Div. Docket No. A-698-78 (4/11/79); and In re Lakewood Bd of Ed, P.E.R.C. No. 79-17, 4 NJPER 459 (¶4208 1978), affmd App. Div. Docket No. A-580-78 (9/24/79).

In its exceptions, the Association makes no attempt to specifically refute the Hearing Examiner's conclusions that no discriminatory motive was proven by the Association, but instead suggests that it was not necessary to affirmatively establish anti-union animus under the circumstances herein. In this regard, the Association in its exceptions, in a series of purely conclusory statements, argues that the Board did not prove that it had legitimate educational reasons to act as it did concerning the physical education programs administered by Loper. To illustrate this point, the Association states that there was no budgetary crisis necessitating program cuts, that there was no showing that the district's basic educational programs would suffer less from a cutback in the physical education program rather than library services, and that there were no educational health or safety reasons that could justify the Board's decision to close the swimming pool. The record evidence as summarized by the Hearing Examiner does set forth ample corroborative and testimonial support for the Board's announced reasons for the physical education cutback [8/] and pool closure, and we conclude that there is nothing to indicate that these proffered reasons were pretextual. In light of the Association's failure to except

8/ For example, it was clear from the record that the original proposed budget for the 1978-79 school year exceeded the district's budget cap by $50,410, that there were ample fiscal reasons for not deviating from the Board's past practice of utilizing no more than $40,000 of the Board's Free Appropriation Balance in formulating a budget for the next school year, and that there would only be minimal changes in the district's physical education programs as a result of the reduction in the number of days that physical education programs were offered. (See footnote No. 7, supra.)

to the Hearing Examiner's specific findings that the Board was not shown to have been motivated at all by anti-union animus in the instant matter, and after our independent examination of the record, we conclude that the Association did not prove its case by a preponderance of the evidence.

ORDER

Accordingly, for the reasons set forth above, IT IS HEREBY ORDERED that the Complaint is dismissed in its entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Parcells and Hartnett voted for this decision. Commissioner Graves voted against this decision. Commissioners Hipp and Newbaker abstained.

DATED: January 17, 1980
Trenton, New Jersey
ISSUED: January 18, 1980

H.E. No. 80-20

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

In the Matter of

CAPE MAY CITY BOARD OF EDUCATION,

Respondent,

- and -

Docket No. CO-79-60-27

CAPE MAY CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends dismissal after hearing of all allegations of a charge filed against the Cape May City Board of Education. The Cape May City Education Association alleged that the Board had reduced the employment of George Loper, the Physical Education teacher and a leading Association activist, closed the swimming pool used in the physical education program for a number of weeks and required Loper to take a physical examination to establish his current physical ability to conduct the program, all in retaliation for Loper's union activities. The Examiner found that the Board had valid business justifications for each of its decisions involving Loper. He concluded that the Association had failed to establish any discriminatory motivation in the face of evidence of a legitimate budgetary crisis in which the Board opted to reduce a five day physical education without loss of basic educational services or even significant physical education services, and substantial evidence of valid Board concern with safety factors in the pool operation in light of the lapse of Loper's Red Cross Water Safety Instructor's Certification following an incapacitating back injury suffered by Loper.

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.

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CAPE MAY CITY EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Martin R. Pachman, Esq.

For the Charging Party
Greenberg & Mellk, Esqs.
(William S. Greenberg, Esq., Arnold Mellk, Esq. and
Alan G. Kelley, Esq., Of Counsel)

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

On September 12, 1978, the Cape May Education Association ("Association" or "Charging Party") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Cape May City Board of Education ("Board" or "Respondent") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act ("Act"), as amended, N.J.S.A. 34:13A-1 et seq. Specifically, the Association alleges that the Board reduced the employment of George Loper, physical education teacher, from five to three days per week effective with the 1979-80 school year, closed the school swimming pool which Loper supervised for a period of time during April, 1978, and commencing in July, 1978 required Loper to undergo a physical examination to determine his physical ability to conduct the health, physical education and swimming program in the School District, all as part of a campaign of harassment and intimidation against Loper, motivated by anti-union animus, in violation of N.J.S.A.

34:13A-5.4(a)(1) and (3). [1]

It appearing that the allegations of the charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued thereon on October 16, 1978. By Answer served and filed on November 3, 1978, the Respondent denied the material and conclusionary allegations of the Complaint and interposed certain affirmative defenses, one of which formed the basis for an oral motion to dismiss made at the outset of the hearing. The motion was based upon a claim that the proceeding, at least with respect to the reduction of Loper's work schedule, was time barred under N.J.S.A. 34:13A-5.4(c) precluding the issuance of a Complaint upon any unfair practice occurring more than six months prior to the filing of the charge with one exception not here relevant. Ruling on that motion was reserved pending issuance of this Report and will be included herein.

Hearings on the substance of the issues joined by the pleadings were held before the undersigned on May 30, 31, [2] and June 1, 1979 at Cape May Courthouse, N.J. and on August 2, in Trenton, N.J. A preliminary hearing before Carl Kurtzman, Director of Unfair Practices, on Charging Party's unsuccessful motion to re-consolidate the instant proceeding with unfair practice proceeding in Docket No. CO-78-58-26 between the same parties was held in Trenton, N.J. on March 14, 1979. Both parties were given full opportunity to examine witnesses, present evidence and to argue orally. Both parties filed post-hearing briefs, the Charging Party on October 12, 1979 and the Respondent on October 17, 1979. [2a]

Upon the entire record in the case and from my observation of the witnesses and their demeanor I make the following:

FINDINGS OF FACT

1. The Board operates a school district located in the City of Cape May containing grades K through 6. For at least the last 10 years the Association has been the exclusive representative for purposes of collective negotiations concerning the terms and conditions of employment of the certified teachers employed

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

2/ Decision was also reserved on Respondent's subsequent motion to dismiss made at the close of Charging Party's case.

2a/ Respondent's letter reply memorandum filed November 5, 1979 was rejected as outside the fixed briefing arrangements.

by the Board. A series of successive collective agreements have been negotiated between the parties. Accordingly, I find and conclude that the Board is a public employer and the Association is an employee organization and majority representative of employees in an appropriate unit, respectively, within the meaning of the Act.

2. George Loper was employed as the sole physical and health education teacher by the Board from September, 1965 until he voluntarily resigned effective May 1, 1979. During his tenure in the District, Loper usually held a leadership role in the Association. In school year 1976-77, Loper was Vice President, PR&R (grievance) Chairman and had been Negotiations Chairman for some years prior thereto. He continued in these Association positions for school year 1977-78 and then assumed the Presidency in April, 1978, which position he continued to hold until his resignation. Loper was also a member of the Executive Committee of the New Jersey Education Association, the State-wide organization with which the Charging Party is affiliated, elected as sole representative from Cape May County from 1972 to 1979.

3. During the interview process in 1965, leading to his initial employment, Loper was asked by the then Administrative Principal to show how he would set up a complete physical education program for the elementary school which housed a swimming pool and to provide an overview of the scope of such a program for each grade level. Upon his hire, Loper, as "Director of Physical Education", prepared a lengthy document comprising a physical education curriculum for the school (R-4). While Loper interpreted his responsibilities more narrowly at the hearing (see Vol. III, p. 105) admitting only that he <u>conducted</u> the program, I find, in view of all the testimony and exhibits in the record, that Loper, as he swore in a deposition taken in connection with a Federal law suit, was responsible for <u>setting up</u> a physical education program (III, 104). The curriculum, maintained thereafter on file at the School, constituted that program (IV,134-5) and Loper implemented it where possible. Teacher preparation of curriculum, subject to administrative approval, has been the norm in the District (IV, 131-2). With respect to aquatics, generally limited to grades 4 to 6, Loper's curriculum provided that the recommendations of the National Red Cross as stated in the "Instructor's Manual of Swimming and Water Safety" would be followed and the school would work in association with the Cape May County Chapter of the Red Cross under supervision of authorized Water Safety Instructors. Loper himself maintained both the Red Cross Senior Lifesaving ("S. L.") and Water Safety Instructor ("W.S.I.") certificates through initial and

refresher courses until a back injury hospitalized him in the Spring of 1976. 3/ Loper's certificates lapsed that year (II, 160) and at least his W.S.I. certificate was not renewed until August, 1978 (III, 28) following certain events, related infra, culminating in an April shutdown of the pool and a July request by the Board for Loper's current Red Cross certification.

4. In school year 1976-77 and into school year 1977-78 Loper as grievance chairman represented Association President Charles McCarty at informal level one discussions held over a period of a little over a year with the Administrative Principal John Demarest on a series of six grievances relating to McCarty's adverse evaluations and withholding of an increment. 4/ Upon vote of the Association, not disclosed to the Board, these grievances, now submitted in writing, were heard by the Board at level two. Although Loper attended, he did not represent McCarty at these hearings. Subsequently, in a letter signed by Loper as Chairman of the PR&R Committee, the Association advised of its intent to proceed to arbitration on one or more of these disputes. Arbitration was not pursued (II, 174).

5. Commencing during the fall of the school year 1976-77, and continuing thereafter, negotiations were underway for a successor contract between the parties for the school years 1977-78 and 1978-79. By late October, 1977, problems had arisen, with the Association accusing the Board of unfair tactics (CP-1) and the Board charging the Association with a failure to put all of its proposals on the table. (II, 68; CP-28). By letter dated November 25, 1977, and addressed to Board Chairperson, Mildren Blomkvest, Loper, as Chairman of the Association's Negotiations Committee, responded to Respondent attorney Martin R. Pachman's November 10 letter which was critical of the Association's failure to provide proposals. In it, he defended the Association's good faith in the bargaining process. Ultimately, the Association submitted proposals in March, 1978 and an agreement was reached later that year. As of the close of hearing, no

3/ Evidence of completion of course work and maintenance of these certificates was entered periodically by Loper on the jacket of his Personnel folder to which the Administrative Principal had access.

4/ A number of these evaluations are the subject of a separate unfair practice proceeding in Docket No. CO-78-13-57, presently pending initial Recommended Report and Decision before another Hearing Examiner. McCarty was also granted tenure over the objection of Principal Demarest some years earlier (CP-3).

agreement had yet been concluded for the 1978-79 and 1979-80 school years.[5/]

6. In the period from October to December, 1977, Demarest was involved in correspondence with the Association relating to Loper's representation of McCarty at the informal first level meeting stage and also relating to Demarest's attempts, ultimately successful, to grieve an alleged breach by the Association of that Article of the agreement relating to its Rights and Privileges. On October 31, 1977, Demarest wrote Association President John Mathis claiming that a "teacher delegated to represent the entire Association mandated that I follow the Board-Teacher Agreement without exception." The letter had reference to an apparent difference which arose between Demarest and Loper as to Loper's right to represent McCarty at one of the informal first level meetings on an evaluation grievance (II, 124). There is no evidence in the record that the difference resulted in Loper withdrawing from such representation. On November 1, 1977, Demarest requested a meeting at level one of the grievance process to discuss an alleged breach by the Association of its responsibility under the Association Rights and Privileges Article of the contract to comply with Board policy on use of school property to transact Association business. On November 7, 1977, Mathis and Loper responded in a sarcastic vein with copies forwarded to Board members, suggesting that if Demarest had a grievance, he first discuss the matter with his immediate superior, the Board of Education. This brought a written response to Mathis from then Board President Robert LeMunyn, chiding the Association for its conduct. Finally, after Demarest formally advised Mathis by letter dated December 6, 1977 that the Board was charging the Association $10 per meeting for its use of school facilities in accordance with Board policy, Loper sought an informal grievance meeting by letter dated December 21, 1977, a meeting was held and the matter was resolved, the substance of the parties' understandings on Association use of school facilities being set forth in a letter from Demarest to Loper dated December 23, 1977 (CP-27). [6/]

5/ The Association's bargaining conduct during negotiations for these years, including its alleged delay in submitting written demands, is the subject of a separate unfair practice proceeding in Docket No. CE-79-22-77, filed by the Board in which hearing before the undersigned has been rescheduled to commence on November 19, 1979. Commission mediation efforts are underway to assist the parties in resolving their contract differences.

6/ Two other incidents in which Demarest and Loper had interaction, one relating to minor accidents suffered by children in the pool area, and the other dealing with Loper's responsibility for care of pool equipment, I consider unworthy of consideration in this Report and of no value in resolving the issues.

7. With respect to the Board's budgetary decisions for 1978-79, that process began in November, 1977, when Demarest and Board Secretary Jane Briant consulted together [7] to prepare materials for Board consideration and seek guidelines on preparation of a proposed budget. In a three page memorandum dated November 17, 1977, Demarest noted that while the Board could consider applying a portion [8] of its Free Appropriation Balance of $126,000 (surplus from the prior year), any such appropriation, while aiding in holding down or reducing school taxes, would reduce the current budget upon which state aid is based for the following year and would also reduce the Budget Cap, or percentage figure by which the current expense budget may be increased.

8. Following a meeting with the Board's Finance Committee on November 17, at which they received guidelines, Demarest and Briant prepared a proposed budget in preparation for a Board workshop to be held in the evening of December 1, 1977. That afternoon, Demarest learned from Briant that the proposal exceeded the School District's Cap limit by $50,410. [9] Demarest thereupon prepared a memorandum (R-11) providing several options for Board consideration. Under one, the Board could increase revenue sources from three areas to equal the excess appropriation. These sources were: (1) increased use of surplus by $16,000; (2) reduce instructional account by $14,000, making up the salary from State and Federal funds; and (3) reduce various other activities, including brick repairs to garage, speech, summer program, teacher supplies, field trips, legal fees and a funded portion of salary by $20,410. If unacceptable to the Board, Demarest proposed several other options due to a drop in enrollment, including reductions in services, in physical education, nurse-medical department, media teacher (librarian), kindergarten to one-half day, and instructional staff by one at the

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7/ The instant School District operates under "dual" rather than "unit" control, with the Administrative Principal and Board Secretary having equal authority in their respective spheres of education and business administration respectively, and both reporting directly to the Board.

8/ For a series of prior years, the Board had appropriated the same amount of $40,000 from surplus for inclusion in the following year's current expense budget.

9/ The so-called Local Government Cap Law, N.J.S.A. 40A:45.1 et. seq., imposes a percentage ceiling on the amount by which a particular school district's total current expense budgetary appropriations may exceed its prior year's appropriations.

first grade level.

9. On December 1, the Board determined to make reductions of the Cap excess in the following areas: (1) reduce all salaries with certain exceptions from 7 or 8 to 5 percent; (2) eliminate another $14,000 from teacher salaries; (3) reduce services in physical education to 3/5 of Loper's salary; (4) reduce library services to 3/5 of Librarian Deborah Morrell's salary; (5) reduce speech from $6,000 to $4,000; (6) eliminate field trips by $1,700; (7) transfer $8,000 proposed for brick work from expense to capital outlay; and (8) reduce $3,000 from cafeteria manager's salary by paying from non-budget(cafeteria receipt) funds. These reductions, reflected in a typed memorandum prepared the same date, resulted after the Board indicated it was not going to appropriate an additional $16,000 above its usual $40,000 from surplus and Demarest submitted his memo and recommended the alternatives grounded in falling enrollment of 25% over a number of years (IV, 52). 10/

10. On December 5, 1977, Briant revised the proposed budget, entering pen changes and corrections to accord with the Board's consensus on reductions on the document previously submitted to the Board on December 1 (R-9). The budget was now $730 under the Cap limit. At a regular Board meeting held on December 8, the proposed budget as revised by hand was adopted for submission to the County Superintendent of Schools. Then, on January 3, 1978, 11/ Briant informed the Board members in writing that the County Superintendent's office had directed them to re-compute the "budget cap" to reflect all sources of anticipated Federal aid. This had the effect of increasing the budget cap leeway from $730 to $12,630. 12/

10/ According to Demarest, he proposed the alternatives represented by the reductions related to the drop in enrollment after a 45 minute period in which the Board seemed to be floundering in resolving the source of budget reductions (IV, 53-55). In Demarest's view, and that of various Board members (see infra), these alternate cuts, particularly in the areas of physical education, media and nurse services, would have less adverse affect on the basic academic program of reading, writing and arithmetic which the Board had stressed during the past few years (IV, 57-8). In this same vein, Demarest opposed a kindergarten or first grade teacher cutback (IV, 59-61). A consensus developed among Board members, contrary to Demarest's recommendation, to retain the nurse services at present levels and to reduce physical education and media services (see IV, 8). There was not unanimity, with some members being opposed to any library reduction because of its strong academic flavor (IV, 151).

11/ All dates hereinafter will have reference to 1978 unless otherwise noted.

12/ This figure was shortly thereafter increased to $14,800, reflecting the removal of an additional sum representing unemployment compensation obligation from the Cap.

The budget adoption meeting was scheduled for January 26. Meanwhile, a special Board meeting was scheduled for January 23 to make allocation of the additional $14,800 and to take formal votes on the various reductions agreed to at the Board's December workshop which involved personnel matters.

11. The special meeting of January 23 was heavily attended. Many citizens spoke critically of the proposed program reductions during the public portion. 13/ President LeMunyon announced that due to declining enrollment the library and physical education programs may be cut but that the children would not suffer because they would have more basic instruction in other areas in the classroom. Association spokesmen Mathis and McCarty spoke of the Association and teacher concerns for maintenance of the programs. Demarest spoke of the increase in the budget cap leeway of $14,800. After a caucus to discuss personnel matters, 14/ the Board voted to increase the current expense portion of the 1978-79 budget by $14,800 and to appropriate it by increasing textbooks from $6,000 to $9,300; library books and supplies from $5,400 to $8,150, non-public pupil transportation reimbursement from $2,500 to $4,200 and replacement of equipment from $3,000 to $10,000. The Board then announced that as a result of the caucus, the physical education and library programs would be cut back from five to three days per week, the former as a result of a 6 to 1 vote and the latter as the result of a 4 to 3 vote. The Board noted that the library vote would be referred to the Board solicitor as to its legal adequacy in the absence of a majority vote of the full nine member Board (R-14).

12. At the public portion of the formal budget meeting on January 26, Mathis read a motion adopted by the Association in support of restoration of both physical education and library programs. Loper, who had not attended the January 23 meeting, objected to the Board's failure to consult him on his reduction and also spoke on Board finances. Many others spoke. The budget, as revised, failed of adoption by a 5 to 3 vote and another meeting was scheduled for January 28 to

13/ Board member Blomkvest recalled that objections were voiced most strongly to the proposed cuts in physical education (V, 66).

14/ At the caucus, by an unofficial straw vote, the Board members present rejected a restoration of the library and physical education cuts in spite of the additional $14,800 (III, 287). At the time, this constituted a rejection of Demarest's recommendation, repeated at Board request, to cut physical education and nurse services (IV, 89).

comply with the January 31 deadline for budget action under State law. At the meeting on January 28, the proposed budget cuts were reviewed. At a caucus which followed, the Board's solicitor advised that the vote on library reduction required a majority of the full membership to be effective. The full membership present then reviewed the proposed reductions and by a straw poll of 7 to 2 rejected a proposal to "also" restore the full five day physical education program. On their return to the public meeting, the Board voted 9 to 0 to rescind the motion adopted January 23 to reduce the library/media program. Board Secretary Briant recalled that at either the January 26 or 28 meeting, various Board members had noted in public their additional emphasis over the last few years on the basic skills of math and reading and voiced the opinion that the library media program was tied in with this emphasis to a greater degree than the physical education program (III, 261-2). The Board next determined to fund the $4,700 required to reinstate full library services from the following sources: $2,750 from classroom libraries and $1,950 from replacement of equipment. Board members DeSatnick and Blomkvest both testified that they believed that the physical education program could be conducted in three days with very little loss of teacher contact (IV, 154; V, 21). In school year 1978-79, after implementation of the three day physical education program, the only changes in the students' recreational curriculum was an elimination of one fifth grade swim period and one special fourth grade swimming program (IV, 90). 15/ Loper's preparation periods remained unchanged and the class sizes did not increase.

13. At a routine evaluation interview held on February 24, after a review of Loper's permanent record folder, Demarest, in writing requested Loper to submit a copy of his current, 16/ 1977-78 Red Cross S.L. certification. While Demarest conceded in the written request that State law supercedes any local certification, he noted that a possibility exists that a State certified phys. ed. teacher may not know how to swim. When the S.L. was not forthcoming, Demarest wrote Loper on March 17, reminding him of the request (CP-5). A few days later, Loper responded in writing, advising that he possessed a W.S.I., more advanced than the S.L., that

15/ Through school year 1977-78, Loper had used the pool only for 4th, 5th and 6th grades and on only two days a week (II, 81).

16/ Loper's last related entry on his folder jacket showed completion of a 1974 Instructor's refresher course in swimming. While Loper testified a certification was valid for two years (II, 160), Demarest believed it was good for three (IV, 108).

he was setting up a "refresher course" for the Spring, that he could not locate his W.S.I. but would, if not located, obtain a duplicate. Loper also disputed the necessity for such a certificate, claiming that his certification as physical education teacher qualified him by law to teach all physical education including swimming. Loper also urged Demarest to observe him at the pool if he had any doubt of his swimming ability (CP-6). By early April, Demarest had learned from a contact with the Red Cross that Loper's W.S.I. had lapsed and that he had inquired about renewing it. After checking with County Superintendent of Schools Malcolm B. MacEwan [17/] and, receiving Board President LeMunyon's approval to a course of action, Demarest informed Loper in writing on April 6 [18/] that in view of the expiration of his W.S.I. the pool was being closed until a fully certified W.S.I. would be available "...to meet the requirements as recommended by the State," and continued, "I am sure you understand the position this places the Board in with respect to possible negligence toward our students."(CP-7) [19/] The pool was closed

17/ The County Superintendent confirmed in writing to Demarest in mid-April his comments during a recent telephone conversation that the lack of a Red Cross certified swimming instructor could open the Board to a legal suit and that for the future the Board consider including it in the job description for the position (R-19).

18/ This letter is dated one day after Loper appeared at a Donaldson hearing on behalf of two teachers, Ellen Bringhurst and Susan Kornacki, whose claims of discriminatory denial of tenure were litigated before this Examiner and the Commission in Cape May City Board of Education, P.E.R.C. No. 80-37. At the same meeting, a statement of disavowel in the tenure reconsideration signed by eight teachers, including Librarian Morrell, was presented to the Board (II, 89).

19/ On April 13 a letter from Fred A. Price, Director Bureau of Teacher Education and Academic Credentials of the State Department of Education to the N.J.E.A., which had come to Demarest's attention (IV, 112), confirmed oral advise (and Loper's position in his dealings with Demarest) that State certification requirements at the time did not require the holder of the physical education certificate to hold additionally any Red Cross endorsement and that the State certificate permitted the holder to instruct in any area of physical education curriculum (CP-8). While Demarest sought permission to quote MacEwan's earlier advise in a second call to the Superintendent, he was informed that while he could do so, MacEwan was in no way instructing Demarest to close the pool and also was suggesting that any action taken should be Board action after discussion with its attorney (R-19).

on April 7 until April 17 when an aide with S.L. certification was hired. 20/ The elapsed time would normally have encompassed four days of swimming instruction for upper elementary students.

14. By letter dated August 4, Briant directed Loper to comply with Board Policy #5003 then in effect and submit to a physical examination by the school doctor to determine his physical ability to fulfill all aspects of his job as teacher of health, physical education and swimming. That policy requires such an examination when in the Board's judgment an employee shows evidence of deviation from normal physical or mental health. After Loper submitted reports from his physician dated August 10 and 14, indicating a complete recovery from surgery performed on February 10, 1976 to correct a cervical disc and a capability of performing any of his prior functions, the Board did not pursue the matter and Loper took charge of the pool program without an aide for the 1978-79 school year.

15. In a press release dated September 14, 1978, the Board announced full reinstitution of the swimming program effective September 18 following independent verification that its physical education teacher does indeed possess a lifesaving certificate. The release goes on to state, inter alia, "It was the physical education teacher's repeated refusal to supply evidence of his ability to safeguard the lives of children in the pool which led to the initial closing of the pool for a short time last spring until a lifeguard could be hired. Since that time the teacher, Mr. George Loper, has refused to provide the certificate to the Board, and has instituted two separate law suits in an effort to prevent the Board from demanding

20/ Board minutes of April 13, show passage of a motion by a 6 to 2 vote closing the pool until the Board receives word from the insurance company concerning the Board's liability, unless it could find someone with W.S.I. or S.L. to assist Loper in the pool temporarily (CP-35). Board member and Personnel Chairman DeSatnick, who made the motion, creditably testified that although she understood a W.S.I. is not required by the State Department of Education, the Board required a Red Cross certificate as a condition to reopening because the Board had operated under a curriculum prepared by the teacher providing such a standard and the certificate requirement was for the safety of the children (IV, 173-4). In crediting DeSatnick I do not conclude, as Charging Party's counsel urges at V, 77 that DeSatnick's testimony on June 1, 1979 that she didn't then recall the Board utilizing information about the insurance coverage of the pool when the pool was temporarily reopened (see, e.g. IV, 181 and 193-4) is inconsistent with that portion of her April 13th motion referring to insurance considerations. Neither do I find impeaching, DeSatnick's recollection, again at the hearing on June 1, 1979, that the Board formally voted to employ a holder of a W.S.I. at the pool (see, e.g. IV, 181) when the minutes show the Board required either a S.L. or W.S.I. certified person.

such proof of his lifesaving ability." Blomkvest is also quoted as being "outraged" at Loper's "intransigence" which caused the pool closing, the hiring of a lifeguard and the expenditure of excessive time and effort in dealing with a problem which should not have arisen (CP-9). This release became the source of local newspaper stories on the pool incidents (II, 114). It contained no mention of the fact that Loper did meet the legal requirement for performance of all his duties even during the period his S.L. and W.S.I. had expired.

16. After Loper resigned effective May 1, 1979, the three day program continued with two substitutes, one of whom possessed a W.S.I. (IV, 145, 195).

ANALYSIS

As a preliminary matter, Respondent's motion to dismiss that portion of the Complaint alleging violations of subd. (a)(1) and (3) with respect to Loper's cutback in employment based upon the Board's conduct having occurred more than six months prior to the filing of the charge, is hereby denied. The Commission regards the operative event which triggers the six month period as the implementation of the decision rather than the decision itself. In the Matter of Warren Hills Regional Board of Education, P.E.R.C. No. 78-69. The Board's decision was not implemented until the conclusion of the 1977-78 school year or the commencement of the 1978-79 school year. Whether the end of June or the beginning of September, 1978 is selected, as the charge was filed on September 12, 1978, it is well within the six month period. See In the Matter of Jamesburg Board of Education, P.E.R.C. No. 80-56.

Turning to the merits of the Association's claims with respect to Loper's reduction in employment, the Association charges violations of both subd. (a)(1) and (a)(3). [21/] As to the subd. (a)(3) violation, the Commission has adopted a two-fold test for determining whether an employer's conduct violates the Act. [22/]

21/ A characterization of Loper's resignation as "forced" appears at page 21 of Charging Party's brief. No amendment was offered to allege a constructive discharge arising from Loper's reduction in work time and subsequent resignation. Neither was any such claim litigated. Accordingly, no legal conclusions will be made in this regard. However, in view of the ultimate conclusions herein, I would be compelled to recommend dismissal had such a claim been urged by amendment and litigated in this proceeding.

22/ In re Board of Education of the Borough of Haddonfield, P.E.R.C. No. 77-36, 3 NJPER 31 (1977).

I conclude based upon the facts in the record that the Board's decision to reduce the physical education program by 2/5, thereby reducing Loper's salary by 2/5, was neither motivated in whole or in part by a desire to discourage his exercise of rights guaranteed by the Act nor did it have the effect of so discouraging Loper or other employees in the exercise of those rights.

There is no question that George Loper for many years had been a leader in the Association and had taken on active roles with respect to negotiations and grievance handling which were known to the Board. The fact of Loper's strong union advocacy is insufficient alone to establish that the Board's decision to reduce the physical education program was retaliatory in nature. It is noted that no adverse action was taken against Loper by the Board during the prior years of his leadership in the Association, even after the commencement of Administrative Principal Demarest's tenure. Furthermore, the testimony of both Demarest and Board Secretary Briant establish that the Board was facing a budgetary crisis which required it to establish educational priorities. While one might differ with the Board's judgment regarding the limitation of appropriation of surplus from a prior year to $40,000 or its initial selection of those services slated for reduction in the face of an initial $50,000 appropriation in excess of the Cap limit, I find no evidence that the deliberative process was marked by any hostility or animosity to Loper himself or even to the Association. The testimony of more than one Board member as well as the Principal reflects a legitimate concern with the maintenance of the basic educational program in a period of declining enrollment which was maintained in the face of parental objections to reductions in physical education services. The bona fides of the Board's concern is borne out by the internal debate among the members themselves which was only resolved at the January 28 meeting when final decision was made to restore the library-media services at the expense of the physical education program over parental objection. None of the debate, including the recommendations of Administrative Principal Demarest, discloses any evidence that discriminatory factors entered into the manner in which the deliberations were conducted or in the way the result was reached to reduce Loper's employment. 23/ Thus, the record lacks any nexus between Loper's activity, including his most recent representation of

23/ The Charging Party's claim that Demarest's alleged discriminatory motive unduly influenced the Board is contradicted by the evidence of the independence exercised by the Board members in reaching their final determinations on the budget. See Council of N.J. State College Locals, NJSFT-AFT/AFL-CIO v. State of N.J., P.E.R.C. No. 78-55, 4 NJPER 153 (para. 4072 1978), affmd. App. Div. Docket No. A-3422-77 (4/6/79).

Association President McCarty on grievances protesting adverse evaluations in informal meetings with Demarest, and the determination in January, 1978 to cut back Loper's services. 24/

The Association urges in its brief that Loper was never consulted or advised as to the alleged necessity for such reduction. The evidence that neither he nor the Association itself was notified of the Board's intended reduction might very well have been probative of an allegation that the Board had refused to negotiate when it made the decision in this matter, but no such violation of subd. (a) (5) has been alleged. Surely, evidence that Loper had received advance notice would not safeguard the Board's conduct from a finding of discrimination were evidence of retaliation apparent from the record, but such evidence is here lacking.

The Association further contends that the Board's selection process evidenced a disparate treatment between Loper, an outstanding union adherent, and Deborah Morrell, the librarian-media specialist, who was not very active on its behalf. The only record evidence of Board knowledge of Morrell's non-involvement in Association affairs comes on April 5, 1978 when she and seven other teachers filed the statement of disavowel with respect to the tenure claims of two teachers which the Association strongly supported. This occurred well after the series of events which culminated in the Board's decision on January 28, 1978 to reduce physical education services in the school district. Morrell's subsequent loss of interest in Association positions, whether due at all to the Board's earlier restoration of full librarian services, could not be a factor in Loper's earlier reduction of employment.

The Association further argues that the absence of any documentation at the January 28 Board meeting providing reasons for its final decision to restore the library program and not the physical education program supports its claim that the Board's motive was retaliatory and not educational. The absence of such records is no substitute for hard evidence of a discriminatory motivation. The various minutes coupled with the testimony of the Board members is sufficient evidence of the Board's concern with maintenance of a basic education program and of its prevailing judgment that the program would suffer least from a limited cut back in

24/ Unlike the facts in NLRB v. Association of Naval Architects, Inc., 355 F.2d 788 (4th Cir., 1966), cited at pages 18 and 22 and quoted at pages 26 and 27 of Charging Party's brief, there is no evidence that timing or other discriminatory factors weighed in the Board's decision to reduce Loper's work week.

the time devoted to physical education rather than librarian-media services. 25/ Finally, the Association questions the Board's failure to apply a portion of the $14,800 budget Cap leeway which became available to it in January, 1978. It is a portion of that sum which was applied to the full restoration of library services. In view of the consensus of opinion with respect to the physical education program that a limited reduction would not seriously undercut the basic educational program, I can read no retaliatory motivation into the Board's final decision, in effect, that a portion of that sum should be applied to purchase textbooks, library books, replacement equipment and provide transportation services, rather than to restore the five days of the physical education program.

Neither does the series of correspondence between Loper and Demarest relating to the negotiating posture of each and the Principal's attempts to grieve an alleged Association breach of contract manifest a particular hostility to Loper's union advocacy. From all that appears, Demarest maintained his equanimity in the face of a baiting by Loper and Mathis on the dispute which was ultimately amicably resolved. Accordingly, I will recommend dismissal of this allegation.

The Association further claims that the Board's reduction in Loper's employment as well as the closing of the swimming pool have interfered with and restrained Loper in the exercise of guaranteed rights under (a)(1). The Commission's standard for a finding of a violation of (a)(1) has been most recently reiterated by it in The Matter of Cape May City Board of Education and Cape May City Education Association, P.E.R.C. No. 80-37 at page 5 of its Decision and Order. As originally set forth in In re New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (4189, 1978) the standard is as follows:

> "The Commission in determining whether N.J.S.A. 34:13A-5.4(a)(1) has been violated applies the following general rule: It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce a reasonable employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial "business"

25/ The fact remains that the physical education services for children including swimming has been maintained with very little loss in such services since the reduction in Loper's employment. This result bears out the conclusions made by both Board members DeSatnick and Blomkvest in their testimony that limiting the physical education program to three days can be done with very little loss of teacher contact. (See Finding of Fact No. 12). The record also shows a concern with maintenance of the full nurse services for the elementary school age children (V, 9-10).

> justification. If an employer, purusant to the above standard does establish such justification, no unfair practice will be found under Section 5.4(a)(1) unless the charging party proves anti-union motivation for the employer's actions. In determining initially whether particular actions tend to interfere with, restrain or coerce a reasonable employee in the exercise of rights protected under the Act 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."

This Report has already considered the legitimate and business justification for the Board's determination to reduce the number of days during which its physical education program would be provided in school year 1978-79. With respect to the Board's decision to close the swimming pool I am pursuaded that decision also has a firm basis in education, health and safety reasons. As the facts show, the original curriculum prepared by Loper upon his initial employment as physical education teacher and director of the program, even if not formally adopted by the Board, was the curriculum which guided Loper in his conduct of the program. Loper's stress in that document on the importance of the presence of an authorized water safety instructor to supervise all phases of pool use cannot be ignored. Indeed, Loper continued to provide the administration with an update of his qualifications in Red Cross swimming certifications by entries on his personnel folder. It would be natural and reasonable for the administration to be concerned when Loper failed to provide current evidence of such certifications following an immobilizing injury to his back in 1976. The request for such information which was initiated by Demarest during a routine evaluation interview on February 24, 1978 cannot under these circumstances be viewed in any way other than as a legitimate expression of concern with the safety of the swimming aspect of the physical education program. The Board's continued emphasis on this matter appears to have resulted primarily from Loper's failure to have been forthcoming as to the lapse of his certifications. The culmination of the incident in the closing of the pool evidences an administration concern not only with safety but with the risk of liability resulting from any injury to children without the presence of a certified instructor. 26/ While these

26/ The Association's claim as to the timing of Demarest's April 6 notice to Loper informing him of the pool closing, coming one day after Loper appeared at the Donaldson hearing for teachers Bringhurst and Kornacki, is undercut by the evidence that the April 6 letter was the end result of Board concern expressed in correspondence with Loper since February.

concerns manifest a safety standard which even Demarest himself noted went beyond the Education Law, they nonetheless establish a legitimate business justification. 27/

Finally, the Association asserts that the Board's request for Loper to undergo a physical examination interferred with his rights under the Act in violation of (a)(1). As I have found that Loper's physical condition was a matter of legitimate concern to the Board and given the history of Loper's operation and his failure to update or adequately explain his failure to update his Red Cross certifications, the Board's request for current evidence of his physical abilities to perform the full duties of his position was well warranted. Upon the submission by Loper of the letters from his own physician, the Board reasonably concluded its investigation of that matter, ceasing its demand for an examination by the school doctor.

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

CONCLUSIONS OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) by reducing George Loper's employment as physical education teacher, by closing the school district's swimming pool for a limited period of time during April, 1978, or by requiring Loper during the Summer of 1978 to produce current evidence of his physical ability to conduct the physical education program.

27/ The Charging Party appears to rely upon the September 14, 1978 press release as evidence that the Board was seeking to undercut Loper because of his protected activity (CP-9). I disagree. While its tone is aggressive, it is based on facts and grounded in the Board's legitimate concerns. The Charging Party also alleges the pool closing was a discriminatory act against Loper in violation of subd. (a)(3) and the press release is urged by the Charging Party as showing that the closing had an impact upon Loper's terms and conditions of employment although admittedly neither Loper's salary, hours nor any other major terms of his employment were adversely affected thereby. If there was any evidence of discrimination toward Loper in closing the pool then the publicity attributing the closing to Loper's conduct might form a basis for a finding that as a consequence of such adverse publicity and the inability of Loper to perform his special swimming skills the terms of employment were adversely affected. See Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 228 (1974). However, in the absence of any such discriminatory motivation I deem any further discussion of this allegation unnecessary.

RECOMMENDED ORDER

The Cape May City Board of Education not having violated the Act, it is HEREBY ORDERED that the Complaint be dismissed in its entirety. 28/

Robert T. Snyder

DATED: Newark, New Jersey
November 9, 1979

Robert T. Snyder
Hearing Examiner

28/ Respondent's motion to dismiss the Complaint, on which ruling had been reserved, is thus granted in its favor, although made after the presentation of its defense.