

H.E. NO. 2003-7

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-H-2001-101

CAPE MAY CITY EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relation Commission recommends the Commission find that the Cape May City Board of Education did not violate the New Jersey Employer-Employee Relations Act by transferring employees Lucas and Tarr, not giving employee Duus safety patrol duties or by any other actions it took in August 2000.

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

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Appearances:

For the Respondent, Cassetta, Taylor, Whalen and
Hybbeneth, Labor Relations Consultants
(Bruce Taylor, Consultant)

For the Charging Party, New Jersey Education Association
Thomas G. Myers, UniServ Representative

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 20, 2000, Cape May City Education Association ("Association" or "Charging Party") filed an unfair practice charge (C-1) with the New Jersey Public Employment Relations Commission alleging that the Cape May City Board of Education (Board or District) violated the New Jersey Employer-Employee Relations Act

(Act), specifically N.J.S.A. 34:13A-5.4a(1), (3) and (5).^{1/} The Association alleged many facts but only alleged that the Board violated the Act by: 1) voting on August 10, 2000 to transfer eight (actually seven) teachers because of their exercise of protected activity; 2) ultimately transferring teachers Kathleen Lucas, Association President, and Lee Anne Tarr effective September 2000 because of their exercise of protected activity; 3) refusing to make Board minutes of a closed Board session available to the Association; and, 4) refusing to assign Barbara Duus as safety patrol director because of her exercise of protected activity.

The Association sought an order finding the Board's transfer decision of August 10, 2000; its actual transfer of Lucas and Tarr; its refusal to provide minutes; and, its refusal to assign Duus to oversee safety patrol violated the Act. It seeks compensation for Lucas and Tarr for the additional time they needed to transfer personal and academic materials; release of the minutes from the closed Board session; and the appointment of Duus to the safety patrol position for the balance of the 2000-2001 school year.

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

On February 7, 2001, the Association filed an amended charge (C-1A) withdrawing its allegation that the Board refused to provide minutes of a closed session and its request for release of those minutes.

A Complaint and Notice of Hearing was issued on March 28, 2001. The Board filed an answer (C-2) on April 6, 2001 denying the allegations. A hearing was held on January 3 and 15, 2002.^{2/}

Both parties filed post hearing briefs by April 1, 2002.

Based upon the entire record, I make the following:

Findings of Fact

1. The Board oversees a one school kindergarten to sixth grade district with approximately 22 full time and 5 part time teachers, a social worker and a school psychologist (2T4). Projected school enrollment for the 2000-2001 school year was 196 students (R7; 2T72).

The school's enrollment is significantly affected by changes at the United States Coast Guard base in the District. As much as 50% of the student population are children of Coast Guard personnel (2T5).

In planning for the 2000-2001 school year, the Board was considering the consolidation of two third grade classes and the

^{2/} The transcripts will be referred to as 1T and 2T, respectively.

RIF^{3/} of one teacher because of declining enrollment due to changes at the Coast Guard base, and because of concerns raised by a taxpayers group claiming that class sizes were getting too small. The Board generally likes to keep class size low (between eleven and thirteen students) because of its transient student population (2T5-2T6). The third grade had the least number of students (2T7).

In January 2000, Elizabeth Dworsky, the Board's administrative principal/chief school administrator, also referred to as its superintendent, sent all teachers a memo asking for their requests for teaching assignments for the upcoming 2000/2001 school year. Second grade teacher Nancy Wilson responded (R-9) that she wanted second grade, but conceded that she might do better as basic skills teacher because of a serious hand injury.

Seniority in the District is a factor in determining which teacher might be RIFed. Teacher certifications and all of the special teaching areas are also considered. By late winter 2000, Superintendent Dworsky provided the Board with the teacher certifications and the amount of experience each teacher had in the District. The Board attorney concluded that teacher Lee Anne Tarr had the least seniority without a specialized certification. On March 26, 2000, he recommended to the Board at its budget meeting that she be RIFed (2T8, 2T10, 2T57; R-1 (letter 3/27/00)).

^{3/} Reduction in Force or layoff of an employee.

2. Lee Anne Tarr was first employed by the Board in 1992 as a teacher aide for 1 1/2 years, working with kindergarten teacher Kathleen Lucas. In 1994, she was hired as a full time teacher and taught first grade for four years. In 1998, Dworsky reassigned Tarr to teach fifth grade in anticipation that she (Tarr) would do well with that particular class. Tarr taught fifth grade for two years (1T82, 1T88, 1T98-1T99, 2T32, 2T35).

Dworsky considered Tarr an excellent educator and did not want Tarr's position eliminated (2T60). On March 27, 2000, Dworsky wrote to the Board (R-1) proposing that funds be pieced together from different programs and that the summer education center program be eliminated in order to retain Tarr's teaching position (2T9). By April 2000 it became apparent to Dworsky that the Board was not following her proposal to retain a position. Realizing that Tarr might lose her job, Dworsky contacted the principal in the Dennis Township School District to see if he had an available position for Tarr (2T15-2T16, 2T60-2T61).

3. Kathleen Lucas was the Association's president-elect and/or grievance chairperson during the 1999-2000 school year. She became president in June 2000. In a March 2000 Board meeting, Lucas learned of the possibility that a teacher position might be reduced. She asked if it was a position or a teacher and inferred from Dworsky's responses that it was a position. Dworsky told her that two classes would probably have to be combined, but Lucas was not specifically told that a teacher would be RIFed (1T18-1T19).

After the school budget passed in April and the teachers returned from their Easter recess, seven teachers received RICE notices (1T20).^{4/} Although Lucas had not been provided any official notice that a particular teacher might be RIFed, citizens in the community told her that Lee Anne Tarr would be RIFed (1T23).

On April 1, 2000, a "candidates night" was held at the Cape May City Hall at which candidates for local office presented their views and answered questions from the community. Dworsky, Lucas, two Board members, and eight to ten teachers were present (1T24). Lucas spoke in support of the school and small classes (1T25).

A Board meeting was scheduled for May 4, 2000. About 85% of the teaching staff, including Lucas, Tarr, Barbara Duus, Sandra Sandmeyer-Bryan, Dorothy Pieper, Karen Slack, Linda DiMaio and Karen Dilfield, picketed at the beginning of the meeting in protest of the seven RICE notices and the possibility that teachers may not be renewed. The meeting was attended by over one hundred citizens. Each of the seven RICE notice recipients waived their right to have any personnel matter affecting them held in a private meeting. The Association was, nevertheless, told by the Board that the renewal of teacher contracts would not be considered by the Board at that meeting, but comments by the public were permitted. Many people spoke against RIFing teachers (1T20-1T22, J-2).

^{4/} A RICE notice is written notification to an employee that the board of education intends to consider personnel matters related to him/her; see Rice v. Union Cty Reg. H.S. Bd. Ed., 155 N.J. Super. 64 (App. Div. 1977).

The minutes of the meeting reflect the following remarks by Lucas. She said:

she is dismayed and upset. The teachers did a lot of work to help pass the budget. Seven teachers received letters stating this would be discussed tonight and next week and those seven teachers agreed to an open discussion, but the Board is now not willing to "discuss." At candidates night, the new Board members said they wanted open Board meetings (J-2, p.3; 1T31).

Another Board meeting was scheduled for May 11 to discuss teacher contracts (2T15).

4. On May 9, 2000, Dworsky sent the Board a second proposal (R-1) to avoid the elimination of a teacher position. She proposed that RIFing a teacher could be avoided and the summer education program retained by using money from the 1997 Impact Aid allocation. Lucas knew Dworsky was looking for a plan to avoid an employee layoff (1T77).

On May 10, 2000, an article appeared in a local newspaper (CP-1) concerning the possibility that the Board might dismiss a teacher and it referred to the notices that had been served on seven teachers.

On May 11, 2000, the Board held its meeting regarding the teacher contracts. The Association again picketed at the beginning of the meeting to protest the potential RIF of a teacher (1T115, 1T143). This meeting was also attended by 85% of the teachers and over 200 citizens (1T82, 1T84). A motion was presented to the Board to approve contracts for 2000-2001 for all tenured teachers except Lee Anne Tarr. Another motion was presented to approve contracts for all tenured teachers (J-3).

Dworsky was asked to state her opinion on the motions. She stated her opposition to RIFing a teacher. She reviewed the proposals she had previously sent to the Board and stated that she preferred a reallocation of money in order to retain a teacher (J-3). Lucas, Debbie Sandmeyer-Bryan, Tarr and many other Association members were included in as many as 50 people who spoke in favor of retaining Tarr (1T84, J-3). The Board minutes recount Lucas' remarks as follows:

She was told this was not a money issue in February. She told the Board they are RIFing a person, who was an aide for two years in her class, a special person, and the Board will never find another Lee Anne Tarr. [J-3]

Roll call votes were taken on the two motions, and both failed. Tarr and all other tenured teachers were renewed (1T34, 1T85, 2T12-2T13, J-3). No teacher was RIFed. Dworsky was certainly aware of the Association picketing that occurred at the beginning of the May 4 and May 11 meetings in opposition to a potential RIF (2T89), but she did not pay attention to which teachers actually picketed (2T61). I credit Dworsky that she did not specifically identify the picketers, but I also find she knew that Lucas and Tarr were among them.

5. At its meeting on May 25, 2000, the Board decided how to fund Tarr's teaching position, and it reviewed teacher assignments for the 2000/2001 school year. It determined that the two third grades would be merged (J-4). On June 1, 2000, Dworsky provided written notice to all teachers of their tentative

instructional assignments for the 2000/2001 school year pursuant to Article VIII, Section B of the parties' collective agreement (J-1) (2T27, R-8).^{5/} Lucas was tentatively scheduled for kindergarten, Tarr for fifth grade, Dorothy Pieper for basic skills, Debbie Sandmeyer-Bryan for fourth grade, Barbara Duus for physical education, Nancy Wilson to second grade, Theresa Riper to special education and Karen Dilfield to first grade (R-7, R-8). The first sentence of the assignment letters listed each teacher's assignment, and then continued identically. An example (Lucas' letter) follows:

Please be advised that your tentative instructional assignment for the 2000/2001 school year will be kindergarten. There is, however, always a possibility that your assignment might change in the future due to such factors as enrollment fluctuation or program needs. Should it become necessary to change your assignment you will be notified as soon as possible.

I look forward to working with you in providing continued quality education for the children of Cape May City School District in the next academic year. [R-8]

On July 3, 2000, guidance counselor/basic skills instructor Doris Borne informed the Board of her resignation (R-2). The Board accepted her resignation at its meeting on July 13, 2000 and confirmed it by letter of July 24, 2000 (J-6, p.6; R-3). On August 3, 2000, PACE/Enrichment teacher Carolyn Morey, informed the Board of her resignation (R-4). The Board accepted her resignation at its

^{5/} Article VIII, Section B provides: Teachers shall be given written notice of their tentative assignments not later than June 1.

meeting on August 10, 2000 and confirmed it by letter of August 14, 2000 (J-7, R-5). At its meetings on July 13 and August 10, 2000, the Board approved Tarr's requests to attend graduate courses at Rowan University (J-6 p.6; J-7 p.6; payment for those courses were approved by the Board on September 14, 2000, J-9 p.6). By letter of August 9, 2000 (R-6), teacher Linda DiMaio (who last taught third grade) informed the Board of her resignation. The Board accepted her resignation on August 10 (J-7 p.6).

6. At its meeting on August 10, 2000, in addition to accepting Morey's and DiMaio's resignations (J-7 p.6), the Board announced the reassignment of seven teachers: Lucas from kindergarten to second grade; Tarr from fifth to third grade; Pieper from basic skills to kindergarten; Bryan from fourth to first grade; Wilson from second to basic skills; Riper from special education to one half basic skills and one half guidance counselor; and, Dilfield from first to fourth grade (J-7, J-8, R-7, 1T38, 1T79). Neither the Association, Lucas or the other teachers had advanced notice of those reassignments (1T42, 1T48-1T49).

Lucas believed the August 10 reassignments were inconsistent with Article 8 Section B the June 1 notice provision of the parties collective agreement (1T35-1T42). During the August 10 meeting she objected to the reassignments. The minutes reflect Lucas' remarks:

. . .[C]lassroom assignments were to be made by June 1, yet 7 teachers' assignments were changed tonight. She also noted that vacancies must be first posted internally before advertising. She

noted a total of 45 assignment changes from Dr. Dworsky. [J-7 p.12, Section XIII]

Dworsky testified that the mid-August reassignments were made in reaction to the three resignations (Borne, Morey, DiMaio) the Board received that summer and the Board decision to fill those vacancies, all of which impacted teaching assignments (2T17, 2T22). I credit Dworsky's testimony. There was no contradictory evidence, and it is logical that three teacher resignations within a month before the start of school would cause the Board to reconsider its fall assignments. In fact, four assignment plans (R-7: A, B, C & D; D is part of J-8) were presented to the Board for consideration. Lucas was scheduled to teach second grade in each plan; Tarr was scheduled to teach sixth grade in plan A; fifth grade in plan B; and third grade in plans C and D. Plan D was selected with final modifications made on August 31, 2000 (R-7, J-7, and J-8, 2T23-2T26).

At the August 10th Board meeting, teacher Dorothy Pieper spoke against her reassignment from basic skills to kindergarten, stating that she was not qualified to teach kindergarten (1T104-1T105). Following the meeting, Pieper learned of an opening in a fifth grade class. On August 14, 2000, Pieper sent Dworsky a letter (CP-7) in response to her August 10th reassignment to kindergarten. Pieper wrote she did not have the training or interest to teach kindergarten and requested to teach fifth grade, instead. By letter of August 24, 2000, Pieper again wrote Dworsky, explaining that the physical demands of teaching kindergarten would cause her back injury, and she included a note from her physician

describing her chronic low back pain. Pieper requested a teaching position in fifth or another grade above kindergarten (CP-7).

Pieper's request was granted on August 31, 2000 (1T110).

At its meeting on August 31, 2000, the Board announced final teacher assignments for the 2000-2001 academic year. There were three changes between the August 10 and August 31 meetings (Pieper, Bryan & Dilfield). Lucas was assigned to second grade; Tarr to third; Pieper to fifth; Bryan to fourth; Wilson to basic skills; Riper to half basic skills, half guidance; Dilfield to first; and a new hire was assigned to teach kindergarten (J-8).

7. Lucas believed that the Board's failure to provide prior notice of the August 10 reassignments was in response to the Association's role in the picketing that took place at the May 4 and 11 Board meetings (1T34-1T35, 1T44). She explained that early notification of transfers is important because it gives teachers time to adjust to a different curriculum and grade level, and time to physically move to a new classroom (1T42-1T43).

Teachers usually have one and one half weeks to get their classrooms ready. That year (Fall 2000) many teachers did not have that much time, in part because of the installation of new air conditioning, and in part because of the late change in teacher assignments (1T46-1T47).

As a result of the August 10 teacher reassignments, Lucas and Association grievance chairperson Karen Slack decided to file grievances with the Board. Consistent with level one of the

grievance procedure (J-1, Article III, Section C4(a)), Lucas and Slack met with Dworsky on or about August 29, 2000 in an attempt to verbally resolve the matter. In testimony, Lucas conceded that Dworsky had the right to transfer teachers, and that resignations caused some of the transfers, but her complaint was with the way the transfers were done. She testified that she was neither consulted nor told, even on the day of the Board meeting (August 10), that there was the possibility or probability that she and/or other teachers would be transferred. For that reason Lucas felt Dworsky had acted arbitrarily (1T44-1T45, 1T47-1T49). I credit Lucas' testimony.

The grievances were not resolved at that level, however, thus, Lucas and Slack filed three formal grievances with Dworsky on August 30, 2000 (CP-2, 1T45).

The first grievance alleged a violation of the June 1 notice provision Article VIII Section B for the following reasons:

1. According to past practice, grade assignments given out in the spring have remained intact for the following school years.
2. The seven changes made in August have impacted every grade from kindergarten through fifth grade, and also several special area teachers.
3. The changes made late in August undermine the strength of Article VIII-B. [CP-2]

The second grievance alleged a violation of Article VIII Section C:

As soon as possible, all teachers shall be notified of vacancies and vacancies will be

posted in the central office plus the staff lounge.

The reasons for alleging a violation of that article follow:

1. Only one teacher, the association president, received notification.
2. If the vacancy was posted in the central office and staff lounge, teachers would not have had access to these notices because staff members were not allowed in the building.
3. The vacancy created by the resignation of the guidance/basic skills teacher was never advertised to the staff.
4. The failure of the CSA to notify "all teachers" of vacancies undermines the strength of article VIII-C.

The third grievance alleged a violation of Article XIX

Section C:

It is recognized that unilateral reduction of benefits which are terms and conditions of employment is unlawful. Therefore, proposed new rules or modifications of existing rules concerning terms and conditions of employment shall be negotiated with the majority representative prior to implementation.

The reasons for alleging a violation of that article follow:

1. Past practice has allowed teachers the benefit of preparing themselves for their new grade assignments over the summer.
2. Past practice has allowed teachers the benefit of switching personal materials from one classroom to another before the end of the school year.
3. Past practice has allowed teachers the benefit of preparing their new classrooms before the end of the school year.
4. A unilateral reduction of benefits occurred when the vacancies were sent to Mrs. Lucas,

association president. The salary was stated to be step one of the salary guide. Association members interested in these positions should be placed on the appropriate level of the guide based upon their current step.

8. Lucas had been the Association grievance chairperson since 1986. She had filed many grievances over the years and resolved 80% of them at the first level with Dworsky. Despite her grievance filings over the years, and her participation in picketing in prior years and in May 2000, Lucas believed she and Dworsky had a good relationship going into the spring of 2000, but felt there was a lack of trust in the relationship thereafter. She believed Dworsky misled her about whether a teacher or a position would be eliminated in May 2000 (1T66-1T70). Lucas had an excellent teaching record and evaluations by Dworsky over the years. Her evaluation in June 2000 was done in the afternoon of the last day of school and was neither positive nor negative (1T60-1T63).

Prior to May 4 and 11, 2000, Lee Anne Tarr had never protested at Board meetings (1T82-1T83). In 1996, her evaluation by Dworsky (CP-4) complimented her for her well executed lesson and care for her students (1T92). Dworsky wrote:

Ms. Ledwin's lesson was well-organized with a great variety in content plus suitable to the age ability levels of the students in her charge. Bravo for a well-executed lesson and for your regularly demonstrated concern, plus care for your students. [CP-4] (Ledwin was Tarr's given name.)

Tarr testified that Dworsky's narratives in each of her annual evaluations from 1996 through 2000 were generally positive,

but her 2000 and 2001 evaluations, CP-6 (1/24/01) and CP-5 (10/25/01) included only narratives without complimentary or reflective comments. Tarr's most recent evaluations did not show she had any weaknesses and Dworsky verbally praised her as an excellent teacher doing a great job upon doing the evaluations (1T92-1T97). I credit Tarr's testimony that while CP-5 and CP-6 did not contain comments complimenting her work, Dworsky verbally complimented Tarr's performance.

Dorothy Pieper picketed at the May 4 and 11 meetings on behalf of Tarr, and spoke at the August 10 meeting on her own behalf. She had taught in the District for many years but was still required to interview for an opening in fifth grade. Although she received that position, she was unaware of any other teacher who had already taught for the Board being required to interview for another District teaching position (1T100-1T110).

Debbie Sandmeyer-Bryan has taught in the District for many years, picketed at the May 4 and 11 Board meetings, and made public remarks at both meetings, which led to a verbal altercation with the Board president (1T140-1T143). Sandmeyer-Bryan considered her August 10 transfer from fourth to first as harassment and punishment for her participation in the May meetings, and for her similar remarks opposing changes at the August 10 meeting. She was told she was selected for transfer to help first grade students be more prepared for the fourth grade ESPA examinations, but by August 31 she was, as she requested, reassigned to fourth grade (1T149-1T152).

9. The year to year reassignment/transfer of teachers to different grade levels for teaching is common in the District (2T41). Some years there were no reassignments, some years there were several (1T39, 1T80). Tarr and Sandmeyer-Bryan have been reassigned in the past (1T88, 1T98-1T99, 1T148).

Dworsky testified that she tried to match the instructional strength of certain teachers with particular student groups and provide for professional growth and development of the teachers (2T41-2T42). She also considered the impact of the summer resignations and the certifications held by, and the requests of, certain teachers (2T57-2T58). I credit her testimony.

The five reassignments that were ultimately implemented by the Board on August 31, 2000 included: Lucas from kindergarten to second in place of reassigned teacher Wilson; Tarr from fifth to third in place of resigning teacher DiMaio; Pieper from basic skills to fifth in place of reassigned teacher Tarr; Wilson from second to basic skills in place of reassigned teacher Pieper; and, Riper from special education to one-half guidance and one-half basic skills in place of retiring teacher Borne. All but Riper's reassignment were interrelated.

Doris Borne had been the Board's guidance counselor/basic skills instructor. Her resignation in July 2000 forced the Board to decide whether to continue her duties. Once the Board decided to maintain the guidance position and fill the other open positions, Dworsky reassigned Riper into Borne's guidance/basic skills position

because Riper was the only other professional employee employed by the Board with a guidance certificate. A new hire replaced Riper in special education (2T30, 2T58, J-8, 2T84, 2T86).

The other four reassignments were interrelated. They began with DiMaio's resignation which opened what was expected to be her position in third grade (2T32).^{6/} Dworsky wanted to improve the results of the fourth grade ESPA scores (2T33, 2T62, 2T64-2T66), and believed that since the summer resignations created a need to make changes in teacher assignments, this was the time to address her concerns about the ESPA scores (2T64-2T66).

Dworsky wanted strong teachers in strategic positions, first, second and third grades, as a feed-in to fourth grade in hope of improving the testing program (2T35, 2T66). She decided that would be first grade teacher Phyllis MacNaughton working in conjunction with Lucas and Tarr (2T37, 2T66).

A good working relationship had existed between MacNaughton, Lucas and Tarr for several years. Tarr had been a kindergarten aide for Lucas and/or MacNaughton in her early tenure with the Board (2T35, 2T37), and MacNaughton and Lucas had been grade level partners in kindergarten for several years (2T34-2T35, 2T37). Dworsky reassigned Tarr from fifth to third because she believed Tarr had a good foundation and background in process writing which covers a portion of the ESPA exam. Leaving Tarr to

^{6/} DiMaio had been on leave in the 1999-2000 academic year but was expected to return to third grade for 2000-2001.

teach fifth grade would have limited her impact on the exams, and rendered ineffectual her good working relationship with Lucas and MacNaughton. She reassigned Lucas from kindergarten to second for similar reasons, her good working relationship with MacNaughton and Tarr, and because she believed Lucas was a strong primary grade level teacher (2T34-2T35).

Dworsky acknowledged that she could have announced transfers prior to July 1 to address the ESPA scores, but at that time she wanted to stabilize her work force presumably because of the emotions that were raised at the May Board meetings. She explained, however, that the summer resignations and the Board's decision to retain the positions created a "domino effect" leading to the changes (2T64).

Dworsky knew that both Lucas and Tarr had been active on behalf of the Association in the spring of 2000 and that Lucas had processed and resolved grievances with her over the years. She saw such activity as a natural process by which the Association must express its concerns. Dworsky testified emphatically that their (Lucas and Tarr) protected activity had no effect upon her decision to reassign them for 2000-2001 (2T37, 2T39-2T40). I credit that testimony. In fact, I credit Dworsky's detailed explanation for reassigning Lucas, Tarr and the other teachers. I found Dworsky to be an honest witness, her explanations were logical and viable. There was no contrary direct evidence.

The third grade opening caused by DiMaio's resignation opened the position to move Tarr, but Dworsky still needed a second grade position in which to move Lucas. That problem was obviated by Wilson's request (R-9) to be moved from second grade to basic skills due to a wrist injury (2T29, 2T66-2T67). Dworsky sought to accomplish Wilson's move to free up second grade for Lucas, by moving Pieper from basic skills to Lucas' kindergarten position. After Pieper's objection to the kindergarten position, however, (CP-7), Dworsky moved her to Tarr's open fifth grade position which freed the basic skills position for Wilson and the second grade for Lucas (2T30-2T31). The Board hired a new kindergarten teacher to replace Lucas.

10. As a result of the late August reassignments Lucas was unable to move her personal items and supplies from her prior kindergarten classroom to her second grade room by the start of school in September. Consequently, Lucas, on the first day of school, went back to her former kindergarten room, explained the situation to the new teacher and removed some of her personal items, but she intended to return several times to complete the process (1T52, 1T53).

Kathy Saporito has been both a paid and unpaid teacher aide in the District for over ten years (2T72-2T74). She was an aide to Lucas in her kindergarten classroom for several years prior to the 2000-2001 school year and was a volunteer aide for her second grade class in September 2000 (1T50-1T52).

On September 26, 2000, Saporito was assisting Lucas with an art project. When it became apparent that the project would not be completed that day and that Saporito would return, Lucas reminded her they needed certain supplies to complete the project. Saporito said that she had purchased those items for Lucas' kindergarten room last year and that she would retrieve the items (1T53).^{7/}

Saporito went into the kindergarten classroom while a lesson was being taught. Dworsky learned of her presence there, walked into the classroom and asked Saporito to leave the classroom and get the supplies at a different time. They retreated to Dworsky's office. Saporito felt annoyed with how Dworsky had reacted, they discussed the matter and Saporito left (2T50-2T51). On September 27, 2000, Dworsky sent Saporito the following letter (CP-3) with a copy to Lucas:

You have repeatedly entered the kindergarten classes during your volunteer time this week to look for supplies for Mrs. Lucas or other teachers. This has caused disruption to the teaching/learning process. You must immediately cease this practice. If you continue to be a disruption, you will be removed from our volunteer list.

^{7/} I am unable to conclude whether Saporito completely volunteered to return to the kindergarten room or whether Lucas actually sent Saporito on that mission. Lucas testified that subsequent to September 27, 2000 she told the new kindergarten teacher that she (Lucas) had sent Saporito down to the classroom (1T55). While Lucas might have made that remark to the kindergarten teacher, I believe Saporito may have voluntarily gone to retrieve the items. This fact is not material to the disposition of this case.

Lucas was outraged by CP-3 and thought Dworsky's handling of the Saporito incident was inappropriate (1T54-1T55). In the hall the next day Lucas asked Dworsky to apologize to Saporito and Dworsky said she would if she hurt her feelings or was wrong. Then Dworsky told Lucas to go back to work (2T81-2T82). Lucas also reminded Dworsky that her personal belongings and supplies were still in the kindergarten classroom and she asked if she could retrieve them (1T54-1T55). At a later time Dworsky and first grade teacher MacNaughton assisted Lucas in removing most of the material she needed from the kindergarten classroom (2T52, 2T74-2T75).

11. Barbara Duus has been the Board's physical education teacher for nineteen years. She is the Board's only physical education teacher (1T127). She regularly attends Board meetings and picketed at the Board's May 4 and 11 meetings (1T112-1T116).

As the Board's only physical education teacher Duus knows all the students in the school. All students must take physical education. In addition to her physical education duties Duus is also primarily responsible for getting the bus students safely on the buses in the afternoon. She was assigned bus duty to accommodate her preference not to be assigned lunch duty (1T138-1T139, 2T47, 2T81). Approximately sixty percent of the students ride the bus. In order to accomplish her bus duties Duus relies on the safety patrol students to assist her in getting the kindergarten students safely on the bus (1T125, 1T127).

Bus pick up and drop off are at the entrance to the wing of the building by the gym closer to the back of the building. Buses usually pick up students between 3:00 and 3:05 p.m. (1T131).

The safety patrol students function in both the front and back (bus side) of the building. For the walking students there are at least four safety patrol students in the front of the building at various locations (1T131-1T135).

Kindergarten students taking the bus and presumably those walking, are escorted by the safety patrol beginning approximately 2:50 p.m. The remaining students, both walkers and riders, are released five to eight minutes later (1T131-1T133). Three safety patrol students assist the bus students, one for each bus (1T134). The safety patrol functions are completed once the buses and the walkers are gone, usually by 3:08 p.m (1T131-1T133).

In addition to her afternoon bus duty responsibility, Duus was appointed to an extracurricular position for the 2000-2001 school year, overseeing the physical education after school activities on Tuesdays and Thursdays which take place in the gym immediately after school (1T133, 2T45-2T46).

On August 29, 2000, Duus asked Dworsky if anyone had signed up to become the safety patrol advisor. When the response was "no", Duus told Dworsky she would be interested in the position because she already interacts with the safety patrol in supervising the afternoon buses (1T124-1T125). On September 5, 2000, Duus, consistent with her August 29th discussion, sent Dworsky the

following handwritten letter (CP-8) regarding the safety patrol duties:

As per our conversation on Tuesday, 8/29, regarding Safety Patrol. If no one else has applied for the position, I should like to be considered since I feel it definitely ties in with the buses.

Thank you.

Dworsky chose to assign the 2000-2001 safety patrol advisor duties to new teacher David Martin. Martin had a substitute certification when hired, then obtained an emergency certification and finally his regular certification (2T79). Dworsky informed Duus that she was appointing Martin to the position so he could join in some extracurricular activities (2T42, 2T44-2T45). Duus did not know if Martin had applied for the position (1T137). The afternoon safety patrol duties last from about 2:50 p.m. until about 3:08 p.m. (1T131-1T133, 2T44).

Dworsky appointed Martin to the safety patrol position because as a new teacher she wanted him to become involved with other faculty members; because Duus would not have been able to cover her after school activities on Tuesday and Thursday while covering the safety patrol; and, because safety patrol duties may have made it improbable for Duus to oversee the afternoon bus duties (2T47-2T48). Dworsky believed that due to her other responsibilities Duus was less available than Martin to oversee the safety patrol locations (2T89). Dworsky denied that Duus' exercise of protected activity affected her decision to not appoint Duus to

be safety patrol advisor (2T48). I credit that testimony. There was no evidence of animosity between Dworsky and Duus and it is entirely logical that Duus' after school bus and physical education duties made it impractical for her to also oversee the safety patrol duties.

By letter of September 11, 2000 (CP-8), Dworsky notified Duus that she was recommending the Board appoint Martin to the safety patrol position. The Board approved Martin for that position on September 14, 2000 (J-9, p.5). Lee Anne Tarr was appointed safety patrol advisor for the 2001-2002 academic year (2T52-2T53).

ANALYSIS

This case primarily involves the 5.4a(3) allegation: whether the Board's August 10, 2000 decision to reassign seven employees, its actual reassignment of Lucas and Tarr, and its refusal to appoint Barbara Duus to safety patrol advisor were implemented because of the teachers exercise of protected conduct.

The standard for deciding a(3) allegations was established by the New Jersey Supreme Court in In re Bridgewater Tp., 95 N.J. 235 (1984). There the Court held: "no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing 1) that the employee engaged in activity protected by the Act, 2) that the employer knew of this activity, and 3) that the employer was hostile toward the exercise of the protected activity." Id. at 246.

If the employer did not present evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner, and then the Commission to resolve.

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

Here, the Association established the first two Bridgewater elements, but not the third. Lucas, Tarr, Duus, Pieper and others were engaged in protected conduct--picketing at two Board meetings, and for some of them speaking at certain Board meetings--and the

Board, particularly Dworsky, was aware of that activity. The issue here is whether Dworsky's decisions affecting those employees was in reaction to their protected activity. I found it was not.

The Association's witnesses presented evidence showing their participation in protected conduct, the preferences for class assignments some teachers had, Duus' duties, the timing of events, the impact the reassignment had on Lucas, the actions that Dworsky took, the teachers' reactions and other facts. But they did not show animus by Dworsky.

Lucas testified she lost trust in Dworsky when Tarr was selected for the RIF because she (Lucas) was led to believe that only a position, and not a teacher would be eliminated. Although Lucas blamed Dworsky for not telling her that a teacher was being targeted for a RIF, the facts show Dworsky was opposed to the RIF and attempted to persuade the Board against it up to and through the meeting on May 11. Her efforts indicate that she may have withheld that information from Lucas while quietly seeking to prevent the issue from being pursued by the Board.

Lucas drew negative inferences from being evaluated on the last day of June, and from Dworsky's failure to advise her of the teacher transfers that were going to be announced at the August 10th Board meeting. But neither was evidence of animus. While an end of year evaluation raises suspicion, the evaluation was not bad, and I found Dworsky considered Lucas one of her better primary teachers. I agree with Lucas, however, that Dworsky should have at least

warned her--the Association president--of the impending announcement of teacher transfers in August. Dworsky may have withheld the names of the affected teachers, but the "heads-up" message to Lucas would have fostered better relations. Certainly Dworsky's decision not to tell Lucas of those transfers was unwise, but it was not evidence of animus, it was a breakdown in good labor-management communications.

Lucas also testified about the Saporito incident and not having immediate access to her supplies in her former kindergarten room. While Dworsky may have been too harsh on Saporito in CP-3, Saporito was not an employee, Dworsky's actions were not related to protected activity, and Dworsky, nevertheless, indicated her willingness to apologize for her actions. There was no evidence of recrimination by Dworsky toward Lucas over that matter, and Dworsky subsequently assisted Lucas in removing her supplies from the kindergarten room none of which supports a finding of hostility.

Tarr's testimony focused primarily upon her reaction to the attempted RIF, but very little on her reaction to being transferred to third grade. In fact, there was no evidence the transfer posed a hardship.

Dworsky was not responsible for the emotional anxiety created by the attempted RIF. The record conclusively shows that she opposed the RIF, evidenced by her March 27 and May 9, 2000 letters and by her comments at the May 11 Board meeting. Tarr explained that her 2000 and 2001 evaluations by Dworsky did not include praising comments, perhaps suggesting that the omission was

prompted by animus. Yet Tarr also testified that Dworsky verbally complimented her work. Tarr was approved for graduate courses in the summer of 2000, and was appointed safety patrol advisor for the 2001-2000 school year. Both facts suggest that Dworsky/the Board was not hostile.

Debbie Sandmeyer-Bryan considered her August 10th reassignment from fourth to first grade as harassment and punishment for her remarks at the May 4 and 11 Board meetings. If animus were the basis for Bryan's selection for reassignment I do not believe Dworsky would have reassigned her to fourth grade, but she did so upon Bryan's request.

Pieper objected to her August 10 reassignment to kindergarten and drew a negative inference from being required to interview for an opening in fifth grade. Despite the objection and inference, however, Dworsky quickly acceded to Pieper's request and assigned her to fifth grade. Such facts do not support a finding of hostility.

Finally, Duus' testimony is devoid of any evidence of animus. Duus testified about her duties and wrote CP-8 asking for the safety patrol duties: "If no one else has applied for the position." Duus did not know if Martin had applied for the position and the Charging Party did not otherwise establish that he did not apply. There was no evidence of animosity between Duus and Dworsky, and Duus' own testimony shows the potential for a schedule or time conflict if she had been assigned the safety patrol duties in

addition to her regular after school bus duty and her Tuesday and Thursday after school physical education program. Under these circumstances, Dworsky's knowledge of Duus' mere participation in the May 4 and 11 picketing does not prove hostility.

The Association has attempted to prove hostility through negative inferences gleaned from Dworsky's actions and her explanations for them. But I have found that Dworsky was a credible and reliable witness whose decisions on and rationales for the transfer selections were reasonable. Her credibility is evidence by her letters of March 27 and May 9, 2000; her argument before the Board on May 11 to prevent Tarr's RIF; and her approval of Tarr's July/August request to take graduate courses.

In its post-hearing brief, the Association argued that the R-1 letters (March 27 and May 9, 2000) were irrelevant to subsequent events. I disagree. The letters show that Dworsky supported her staff. The May 9th letter obviously occurred after the May 4th Board meeting at which Tarr, Lucas and most of the Association members picketed. Her remarks on May 11 in opposition to the RIF occurred after the picketing on May 4 and 11. If she was offended by the picketing or was hostile toward the Association's actions or remarks by Tarr, Lucas and the others on those days, she would likely not have spoken against the RIF. The Board also has a history of reassigning its teachers to different positions or grade levels. Tarr had been reassigned from first to fifth grade just a few years earlier. The original June 1 assignment letters (R-8)

reserved the right to change those assignments. If the Association believed, as it did here, that changes in teaching assignments after June 1 violated the parties collective agreement it had the right to file a grievance over such a change. The Association filed a grievance, but the merits of that grievance are not before me and must proceed in the appropriate forum.

The change in assignments in this case became necessary when three certificated employees resigned that summer. The Association contends that Morey's and DiMaio's resignations had no impact on Tarr and Lucas. I disagree. Once the Board decided to fill the vacated positions, Dworsky had to hire new teachers and it was reasonable for her to consider the overall assignments of her entire staff at that time to provide the best education for the students. She had to move Riper from special education to half basic skills and half guidance because she was the only employee with a guidance certificate. Months earlier Wilson had asked to be transferred from second to basic skills.

Due to the summer resignations, the need for new hires and Wilson's request, Dworsky decided to also address her concern about improving the ESPA scores when she considered the new assignments. The Association believed Dworsky's ESPA reasoning was pretextual because she could have announced changes to address the ESPA scores by June 1. The evidence does not support that argument. Dworsky admitted she could have made assignments in June to address the ESPA scores but did not because of the emotion raised by the RIF

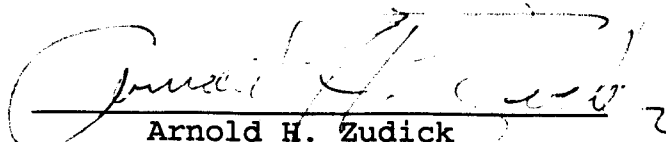
attempt. I credit that explanation. Having observed Tarr and Lucas testify about the attempted RIF, and their impassioned demeanor regarding it, I credit Dworsky's testimony that June was an inopportune time to reassign employees. By August, however, Dworsky acted out of necessity to make changes. The facts show there was historically a close working relationship between Tarr, Lucas and MacNaughton. They worked well together, Dworsky considered Lucas and Tarr two of her stronger teachers, thus, it made sense Dworsky would rely on them to address the ESPA problem.

Finally, Dworsky's handling of the Pieper and Bryan matters showed genuine interest for their individual requests, not animus because of the exercise of protected activity. Her decision to assign Martin to safety patrol oversight rather than Duus was only logical, given Duus' already crowded after school duties. Martin's possession of a substitute or provisional certification at that time was irrelevant to my consideration of why Duus was not assigned the safety patrol duties. The issue here was not whether Martin was properly certified, the issue was whether Duus' was denied those duties because of protected activity. She was not. Dworsky could not overlook Duus' other after school responsibilities in considering whether she would be a viable candidate for the safety patrol duties.

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

RECOMMENDATION

I recommend the complaint be dismissed.


Arnold H. Zudick
Senior Hearing Examiner

Dated: October 24, 2002
Trenton, New Jersey