

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLETOWN TOWNSHIP BOARD OF  
EDUCATION,

Respondent,

-and-

Docket No. CO-85-237-175

MIDDLETOWN TOWNSHIP EDUCATION  
ASSOCIATION,

Charging Party,

MIDDLETOWN TOWNSHIP ADMINISTRATORS  
ASSOCIATION,

Intervenor.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Middletown Township Education Association against the Middletown Township Board of Education. The charge alleged the Board violated the New Jersey Employer-Employee Relations Act when two of its administrators discriminated against several teachers in retaliation for their union activities. The charge further alleged the Board attempted to circumvent the Association by dealing directly with employees and unilaterally changing terms and conditions of employment. The Commission, in agreement with the Hearing Examiner, finds that portions of the charge were not timely filed and the remainder of the charge was not proved by a preponderance of the evidence.

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ASSOCIATION,

Intervenor.

Appearances:

For the Respondent, Kalac, Newman & Griffin, Esqs.  
(Howard Newman, of counsel)

For the Charging Party, Oxfeld, Cohen & Blunda, Esqs.  
(Mark J. Blunda, of counsel)

For the Intervenor, Wayne Oppito, Esq. and Harry Morris

DECISION AND ORDER

On March 18, 1985, the Middletown Township Education Association ("Association") filed an unfair practice charge against the Middletown Township Board of Education ("Board"). The Association alleges the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

specifically subsections 5.4 (a)(1), (2), (3), (5) and (7),<sup>1/</sup> when two of its administrators allegedly discriminated against several teachers employed at Thompson Junior High School in retaliation for their protected activities. It further alleges the Board attempted to circumvent the Association by dealing directly with employees and unilaterally changing terms and conditions of employment.

On April 8, 1985, the Middletown Township Administrators and Supervisors Association moved to intervene.

On June 28, 1985, a Complaint and Notice of Hearing issued.

On July 19, 1985, the Board filed an Answer denying it violated the Act.

On October 1, 2 and 3, December 5, 1985 and January 21, 22, 23 and 24 and February 5, 1986, Hearing Examiner Richard C. Gwin conducted a hearing. The parties examined witnesses and introduced exhibits. When the record opened, the Board moved, alternatively, to: (1) dismiss the charge for failure to allege facts which, if true, would constitute unfair practices, and (2) dismiss all

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<sup>1/</sup> 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

allegations concerning events prior to September 18, 1984, the operative date of the statute of limitations, N.J.S.A. 34:13A-5.4(c). The Hearing Examiner denied the motions and permitted background testimony about events outside the limitations period. At the conclusion of the Association's case, the Board again moved to dismiss the Complaint. The Hearing Examiner reserved ruling on that motion. Post-hearing briefs were filed by April 29, 1986.

On February 24, 1987, the Hearing Examiner recommended the Complaint be dismissed. H.E. No. 87-49, 13 NJPER 233 (¶18097 1987). He concluded that the Association had failed to prove that the administrators' conduct tended to interfere with employees' exercise of protected rights or that the two administrators discriminated against the teachers in retaliation for protected activity. He further concluded that: (1) the Association had offered no evidence of 5.4(a)(2) or (7) violations, and (2) any events involving 5.4(a)(5) issues had occurred before the effective date for the statute of limitations.

On April 1, 1987, the Association filed exceptions. It claims the Hearing Examiner's report is void and that the Association is entitled to a new hearing since the decision was rendered ten months after the record's close. It relies on N.J.S.A. 52:14B-10, N.J.A.C. 1:1-16.3 and N.J.A.C. 19:14-6.3. It further asserts the Hearing Examiner made selective findings of fact and omitted numerous facts critical to its case. It attached copies of pages 6-25 of its proposed findings of fact.

P.E.R.C. NO. 88-25

On April 13, 1987, after an extension, the Board filed a brief supporting the Hearing Examiner's report. It contends the statute and rules cited by the Association apply only to cases referred to the Office of Administrative Law and that N.J.A.C. 19:14-7.1 does not fix any time period for a Hearing Examiner to complete a report. It argues that to reschedule an additional nine days of hearing would only compound the amount of time already elapsed. Finally, the Board recommends adoption of the Hearing Examiner's findings of fact and his application of In re Tp. of Bridgewater, 95 N.J. 235 (1984) to the allegations of retaliatory and discriminatory conduct.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-22) are generally accurate. We adopt and incorporate them here with these modifications.

We add to finding no. 4 that McKenna's observation of Webb was not scheduled ahead of time. Webb believes it was prompted by the testing dispute (TA61-TA62). He had given McKenna three or four dates to come in to observe him introduce a lesson, but she did not observe him on those days (TA63). Webb wrote a rebuttal and attached it to the observation. The grievance went to arbitration (TA33). After the grievance was filed, McKenna asked Webb if he was aware that class action grievances had wide-ranging ramifications or far-reaching effects and that the art curriculum had already been rearranged once to save his job (TA34). When asked what far-reaching effect meant, McKenna testified "that is up to history

to decide" (TI147). Webb testified that he was not aware that Taylor created the art design curriculum to save his job (TA91).

Webb sent the extra students to the guidance counselor because he believed it was the proper procedure. Gage confirmed that children not on the class list are sent to the guidance office for paper work (TC8).

Early in the 1983-84 academic year, McKenna directed several teachers, including Webb, to prepare more specific lesson plans. Webb had not been putting down an objective or a procedure every week. A grievance was filed and resolved after several meetings (R-3; R-4).

McKenna wrote Webb's 1984 annual performance report and Webb did not find fault with it (TA91; R-5).

We add to finding no. 5 that Fedak told Taylor that what he had been doing in his class was approved. Her name was on his lesson plans, observations and professional improvement plan (TA130). Taylor testified that he improvised and developed, through the course of the year and one-half, the gifted and talented seventh grade curriculum. He believed he had the flexibility to develop a program for them as he saw fit (TA55). Taylor testified that Fedak expressed the desire not to take professional days and leave his classes, but to write the curriculum guide over the Christmas holidays (TG50). When Fedak met with the superintendent, he told him that he did not view the administration's actions as being personally directed at him, but as a weakness of the school

administration (TA171). When asked if the harassment he felt Taylor had imposed on him was in any way associated with Association activity, Fedak responded, "in no way, shape or form" (TB125).

We add to finding no. 6 that Gage testified that Sconzo indicated the contents of the meeting would be kept private, not that there would be no reprisals (TC99-TC100).

We add to finding no. 7 that Graham testified that at the February 8, 1985 meeting between Thompson administrators and the faculty, Taylor indicated she felt there was organizational rot in the building and that a large part of the responsibility for the climate and dissatisfaction in the building was due to the faculty themselves (TD22). McKenna testified that Taylor may have used the words organizational rot, intellectual wasteland, and unionism (TI213).

Graham characterized the department coordinators' role in hiring as a traditional courtesy (TD78).

We add to finding no. 8 that the administration never interfered with the Association's ability to have meetings in the school (TD70).

Marcelli testified that her cafeteria duty assignment could be viewed either as a reprisal for Association activity or as her turn (TE111).

McKenna testified that normally when a teacher is absent and there is no lesson plan, the administration goes to the department coordinator and has the coordinator make something up

(TI103). McKenna never called a teacher at home before or after calling Marcelli (TI190).

We add to finding no. 9 that Jameson was late to school several times. She admitted being late four or five times; the Board claimed it was chronic and due to a personal problem. No discipline was imposed (TE181-TE183).

Once, McKenna questioned whether Jameson was working on MTEA materials on class time because she saw something with the MTEA letterhead among Jameson's possessions. Jameson told McKenna she was an officer of the MTEA and therefore carried MTEA materials with her at any given time. The matter was dropped (TE191). After Jameson informed Gernsbeck that she was not interested in transferring to the high school, she received a telephone message that she had an appointment with the principal of the high school for an interview for a math position. Jameson testified that the high school math supervisor told her that Taylor had told the supervisor to arrange the interview because Jameson wanted to transfer. Jameson explained that she did not want to transfer until September 1986 (TE159-TE160).

Taylor testified that it was an oversight not to list Graham on the memorandum for the first transition committee meeting (TH94).

We first address the Association's concern with the amount of time the Hearing Examiner took to issue his report. We share that concern, but note that the hearing lasted nine days and the



Hearing Examiner's report was 39 pages. We have recently reiterated the need for labor-management disputes to be resolved expeditiously. Somerset Cty. College, P.E.R.C. No. 87-129, 13 NJPER 361 (¶18150 1987). Delay, however, will not generally make an administrative decision invalid, particularly where no prejudice is shown. In re Garber, 141 N.J. Super. 87, 91 (App. Div. 1976).<sup>2/</sup> The Association has not argued that it has in any way been prejudiced by delay. Accordingly, we reject this procedural exception and deal now with the merits.

This case involves a series of allegations that Principal Taylor and Assistant Principal McKenna retaliated against certain teachers because of their protected activity. The Hearing Examiner concluded that the Association had failed to prove that hostility to protected activity was a substantial or motivating factor in any of the Board's actions. He examined the individual allegations and determined that many were untimely,<sup>3/</sup> and that other actions were not the result of animus or discrimination regarding a term or condition of employment. We agree with those determinations. We have also examined whether the entire course of employer conduct, viewed as a whole, violates the Act. We find it does not.

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<sup>2/</sup> We do not agree with the Association that N.J.S.A. 52:14B-10 and N.J.A.C. 1:1-16.3 make the report invalid. The Commission is exempt from the assignment of administrative law judges. N.J.S.A. 52:14F-8. Even if the time periods of N.J.A.C. 1:1-11.3 apply, the remedy for violation of those time periods is not and should not be starting all over again.

<sup>3/</sup> Many of the claims relate to actions well before the six month period preceding the charge. Those earlier allegations cannot be the basis for finding a violation. See N.J.S.A. 34:13A-5.4(c).

To help understand that entire course of conduct, we include an overview of some of the important events.<sup>4/</sup> Only those actions taken after September 1984 could independently violate the Act; however, we have looked back to 1980 to appreciate the nature of this dispute.

- 1980                    Observation of Fedak by Taylor is discarded and Taylor conducts a second evaluation. Fedak writes a rebuttal based on the discarded first evaluation.
- September 1983        McKenna directs teachers, including Webb, to prepare more detailed lesson plans and Association grieves.
- Graham involved in grievance relating to after-school hours. Association wins in arbitration.
- 1983-1984             Grievance relating to requirement that certain teachers supervise testing during professional period.
- That same day, Webb is observed and the Association files a grievance asserting post-observation procedural violations. McKenna meets with Webb and asks him if he is aware of the ramifications of filing grievances.
- The next week, McKenna and Taylor visit the library where Webb is teaching.
- Marcelli is Gernsbeck's office assistant.
- May 1984              Teachers, including Webb, sign a petition complaining about the condition of the school.

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<sup>4/</sup> This chronology is not meant to be as complete as the findings of fact.

- Association meets to discuss morale, maintenance and discipline.
- May 17, 1984 Meeting between building representatives, Association officers and two Board members.
- That morning, Taylor called a meeting with reps to discuss meeting's purpose. She was upset they were going to the Board and not her.
- In response, Taylor forms committees which the Association grieves and she disbands.
- Marcelli assigned cafeteria duty for 1984-1985
- August 1984 Building reps, Association officers, Sconzo and building administrators meet to discuss morale, maintenance and discipline.
- September 1984 Graham not included in interviews for sudden vacancy. Later, he was not included in transition committee meetings.
- Webb sends extra students to guidance office.
- Marcelli intends to take family illness day when she stayed out to care for her dog.
- McKenna tells Jameson to remove construction paper from computer room window.
- November 1984 Fedak first meets with McKenna and Taylor about parental complaint.
- December 1984 Fedak meets with Sconzo and explains that he feels he is being harassed.
- December 11, 1984 McKenna observes Marcelli and comments that she wears many hats. Marcelli considers evaluation to be negative despite the satisfactory ratings in all categories.
- January 7, 1985 McKenna calls Marcelli at home regarding substitute teaching plans.
- February 1, 1985 Faculty meets with Sconzo. Gage is one of the teachers that complains. A few days later, Taylor asks Gage why she went to Sconzo rather than to the department coordinator. The Association filed a grievance but did not seek arbitration.

February 8, 1985 Meeting to review climate survey where Taylor talks about organizational rot and the public perception of unionism.

A few days later, Taylor gives Marcelli and Jameson permission to use the cafeteria for an Association meeting.

One week later, Marcelli tells Taylor the teachers are uncomfortable with Taylor's presence at their lunches. Taylor asks if Marcelli is truly representing their desires.

Spring 1985 Fedak informed he is to be assigned to modular classroom.

Jameson claims the administration attempts to transfer her.

March 18, 1985 Charge filed.

By the end of the 1983-1984 school year, the Association was worried about staff morale, building maintenance and student discipline. Teachers signed a petition and told Board members and the superintendent about their concerns and complaints. The building administrators were then concerned and disturbed that the teachers went over their heads to complain about the way they ran the school.

During that year and the next, the parties had a series of disputes. Some led to grievances, others did not. Disputes alone, however, do not necessarily evidence illegal conduct or hostility that could form the basis for a finding of illegality at a later date. For example, Taylor's observation of Fedak in 1980 led to a conflict, but did not evidence hostility to protected rights. Also, Taylor's meeting with building representatives to discuss their meeting with Board members evidenced Taylor's displeasure with their

going over her head, not interference with protected rights. Webb's complaint regarding a post-observation procedural violation led to a grievance and was properly resolved through that mechanism. Contract violations alone do not evidence illegal conduct. See State of New Jersey (Dept. of Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The Association was within its rights to approach the Board and superintendent with its concerns. At some points, McKenna's displeasure with that exercise of protected rights motivated comments that approached the thin line separating legal and illegal employer comments. In Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981), we described conduct on the legal side of that line.

A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal.  
[Id. at 503]

Subsection 5.4(a)(1) forbids conduct on the other side - actions which tend to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by the Act.

When McKenna asked Webb, in 1983-1984, whether he was aware of the wide-ranging ramifications of filing grievances and then alluded to the Board's previously saving his job, she crossed the line and committed an unfair practice. However, subsection 5.4(c)

precludes our finding a violation for actions occurring before September 1984. By contrast, when Taylor lectured teachers about organizational rot, the public's perception of unionism and her preference that they protest substitute's pay, her statements fell within the area of protected employer speech. It did not contain the threats, explicit or implicit, which would trigger a violation.

For the allegations concerning acts which occurred during that period of time for which we could find an unfair practice violation, we have carefully reviewed the entire record in light of the Bridgewater standards.<sup>5/</sup> We are unable to find that the Board's responses constituted discrimination in regard to hire or tenure of employment or any term or condition of employment.

N.J.S.A. 34:13A-5.4(a)(3). Bridgewater requires both hostility and

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<sup>5/</sup> Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

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

an adverse personnel action. While there may have been some earlier hostility to protected activity, hostility did not motivate any adverse personnel actions after September 1984. Graham was not included in the interview process because he was teaching and was unintentionally excluded from the initial transition committee meeting. Marcelli agreed it was more proper to take a personal day for her dog's illness. McKenna had a valid reason to ask Jameson to remove the paper from the computer room window. Marcelli's evaluation was satisfactory. McKenna may have deviated from her practice in calling Marcelli at home, but no adverse action was taken. Taylor merely asked Gage why she went directly to Sconzo rather than the department coordinator. The administrators ate lunch with the teachers to improve communication after the teachers complained to the superintendent about morale. Other teachers had complained that Fedak's commanding voice disrupted their classes. Jameson was never transferred. Therefore, we do not believe that these actions violate the Act.<sup>6/</sup>


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<sup>6/</sup> The Association alleged a series of contract breaches. Even if timely, those matters should be resolved through the parties' grievance procedure. Human Services. We dismiss the subsection 5.4(a)(2), (5) and (7) allegations and the remaining 5.4(a)(1) allegations for the reasons stated by the Hearing Examiner.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
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James W. Mastriani  
Chairman

Chairman Mastriani, Commissioners Wenzler and Johnson voted in favor of this decision. Commissioner Smith voted against this decision. Commissioners Reid and Bertolino abstained.

DATED: Trenton, New Jersey  
September 23, 1987  
ISSUED: September 24, 1987



H.E. NO. 87-49

STATE OF NEW JERSEY  
BEFORE A HEARING EXAMINER OF THE  
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MIDDLETOWN TOWNSHIP BOARD OF  
EDUCATION,

Respondent,

-and-

Docket No. CO-85-237-175

MIDDLETOWN TOWNSHIP EDUCATION  
ASSOCIATION,

Charging Party.

SYNOPSIS

The Hearing Examiner recommends dismissal of a complaint filed by the Middletown Township Education Association ("Association") which alleges that the Middletown Township Board of Education ("Board") violated sections 5.4(a)(1), (2), (3), (5) and (7) of the Act. The Hearing Examiner concludes that the Association failed to prove by a preponderance of the evidence on the entire record that two Board administrators discriminated against several junior high school teachers in retaliation to the teachers' exercise of protected activity. The Hearing Examiner further concludes that: (a) the Association proffered no evidence of 5.4(a)(2) or (7) violations; (b) any events involving 5.4(a)(5) issues happened prior to the effective date for the statute of limitations; and (c) the Association failed to prove that the administrators' conduct tended to interfere with employees' exercise of protected rights.

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.

H.E. NO. 87-49

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Appearances:

For the Respondent  
Kalac, Newman & Griffin, Esqs.  
(Howard Newman, Esq.)

For the Charging Party,  
Oxfeld, Cohen & Blunda, Esqs.  
(Mark J. Blunda, Esq.)

For the Party at Interest  
Wayne Oppito, Esq. and Harry Morris

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On March 18, 1985, the Middletown Township Education Association ("Association") filed an unfair practice charge with the Public Employment Relations Commission ("Commission") alleging that the Middletown Township Board of Education ("Board") violated

sections 5.4(a)(1), (2), (3), (5) and (7)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

The Association alleges that two of the Board's administrators, Michael McKenna and Victoria Taylor, have discriminated against several teachers employed at Thompson Junior High School ("Thompson") in retaliation for the teachers' exercise of protected rights. The Association also alleges that the Board has attempted to circumvent the Association by dealing directly with employees, has unilaterally changed terms and conditions of employment, and has interfered with its employees' exercise of protected conduct.

On June 28, 1985, the Director of Unfair Practices issued a Complaint and Notice of Hearing.

On July 19, 1985, the Board filed an answer denying any violation of the Act.

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<sup>1/</sup> 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative; (7) Violating any of the rules and regulations established by the commission."

I conducted a hearing on October 1, 2 and 3, 1985; December 5, 1985; January 21, 22, 23, and 24, 1985; and February 5, 1986. The parties examined witnesses and introduced documents. When the record was opened, the Board moved to dismiss the charge for failing to allege facts which, if true, would constitute unfair labor practices, and, alternatively, to dismiss all allegations concerning events occurring prior to September 18, 1984, the operative date for the statute of limitations, N.J.S.A. 34:13A-5.4(c). I denied the Board's motion to dismiss and permitted, as background, testimony about events occurring outside the limitations period. I later advised the parties that this testimony could not independently form the basis for a finding of liability under the Act.<sup>2/</sup> At the conclusion of the Association's case, the Board again moved to dismiss the charge. I reserved ruling on the Board's motion and the Board presented its case.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Board is a public employer within the meaning of the Act and is subject to its provisions.
2. The Association is an employee organization within the meaning of the Act and is subject to its provisions.

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<sup>2/</sup> N.J.S.A. 34:13A-5.4(c) provides in pertinent part that, "no complaint shall issue based upon any unfair practice occurring more than six months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the six months period shall be computed from the day he was no longer so prevented."

3. The Middletown Township Administrators Association is an employee organization within the meaning of the Act and is subject to its provisions. It participated in this proceeding, with the consent of the Board and Association, on behalf of Victoria Taylor, principal of Thompson, and Michael McKenna, an assistant principal at Thompson.

4. Ronald Webb has been an industrial arts teacher at Thompson for 9 years and is a member of the Association.

Early in the 1983-84 academic year, McKenna directed several teachers at Thompson, including Webb, to prepare more specific lesson plans. On September 22, 1983, the Association filed a grievance alleging that McKenna's directive changed the lesson plan format, in violation of the parties' collective agreement (R-1). The grievance was resolved in arbitration in favor of the Association.

Webb was involved in a second grievance during the 1983-84 school year. He was assigned to supervise freshmen testing resulting in the reduction of his professional period by ten minutes for three days. He told McKenna that he would not supervise the testing during his professional period. McKenna told him that she would "write that down." (TA 29)<sup>3/</sup> Webb was advised by

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<sup>3/</sup> TA refers to transcript dated October 1, 1985; TB to October 2, 1985; TC to October 3, 1985; TD to December 5, 1985; TE to January 21, 1986; TF to January 22, 1986, TG to January 23, 1986; TH to January 24, 1986; and TI to February 5, 1986.

Association building representative, Lenora Marcelli, to complete the assignment and grieve later. The Association filed a related grievance that was ultimately resolved informally.

On the same day that Webb told McKenna that he would not forfeit ten minutes of his professional period, McKenna conducted a classroom observation of Webb. A few days later, Webb met with her to discuss the observation. A few minutes after their post-observation interview, McKenna presented Webb with a written performance evaluation, in which two of eleven categories were marked "needs improvement." The remaining categories were marked "satisfactory." (CP-2, dated 3/27/84). Webb characterized this as his first "negative" evaluation in his nine years at Thompson. The Association filed a related grievance claiming that McKenna did not follow the established procedure of considering the post-observation meeting before completing the written evaluation.

Shortly after the grievance was filed, McKenna met with Webb. She told him that she had discussed her classroom observation and the evaluation with an Assistant Superintendent, who had told her that she was too lenient in the way she rated Webb. McKenna asked him if he was aware of the ramifications of filing grievances. Webb testified that he was intimidated and felt his job was threatened.

During the week following McKenna's classroom observation of Webb, McKenna and Taylor visited the library, where Webb held a photography class. McKenna and Taylor made at least three of these

visits. Other classes and activities were under way in the library during these visits. On one occasion Webb asked McKenna and Taylor if he could help them. They said no, he could not. The reason offered by Taylor and McKenna for their visits was that the library recently had been vandalized.

Webb signed a petition, dated May 5, 1984, complaining about the condition of the Thompson school building (CP-3).

At the beginning of the 1984-85 school year, a problem with class assignments developed. Students' schedules were inconsistent with teachers' class lists. Approximately ten too many students had been assigned to one of Webb's classes. Their names were not on his class list and he did not have the desks to accommodate them. He sent the students to the guidance office with directions to resolve their scheduling problems there. Taylor later called Webb to her office and told him that she was disappointed because one of the students he sent to the guidance office was crying and felt rejected. Webb exchanged words with the guidance secretary about the incident. He does not remember what he said to her, only that he later apologized for saying it. Webb did not have nor seek to have an Association representative present when he met with Taylor. He said he did not feel that he needed one because he had a good rapport with Taylor. Nothing further resulted from his meeting with Taylor.

During the 1984-85 school year, Webb received satisfactory performance evaluations from Fred Gernsbeck and Robert Herbert,

vice-principals at Thompson. McKenna worked with Webb in preparing his annual performance improvement plan. (R-5). Webb was satisfied with the plan.

5. Raymond Fedak has been a social studies teacher at Thompson for 24 years. He has been the social studies department coordinator and has taught several courses for gifted and talented students. He is generally regarded as an outstanding teacher by his colleagues and the Thompson administration.

In late November and December 1984, he was involved in an incident about a student in his seventh-grade gifted and talented class. On November 30, 1984, McKenna told Fedak that she had been called by a parent and was arranging a meeting with her. The parent was apparently concerned about Fedak's curriculum and teaching techniques. A meeting was scheduled for December 4, 1984, between McKenna, Taylor and Fedak. Fedak asked Marcelli, a building representative, to attend this meeting, as a friend. He said he might also want her present as an Association representative. At the meeting McKenna asked Fedak about Marcelli's presence. McKenna told Fedak that Marcelli could stay, if there in her representative capacity, but not if she was there as a friend. Marcelli stayed, without objection from Taylor or McKenna.

At the December 4 meeting, Taylor conveyed to Fedak the parent's concern about her son's treatment in his class and asked Fedak for a response. Fedak was disturbed and insulted by what he felt was an unfair demand to respond to the perceptions of a 12 year



old child. Fedak also claims that Taylor accused him of leading a faculty movement against her. Fedak denied any involvement in such a movement and Taylor responded that she was pleased to hear that. The result of the December 4 meeting was that a conference was to be arranged between Fedak and the parent.

On December 5, 1984, Fedak met with Taylor and Fred Gernsbeck, an assistant principal at Thompson. The administrators wanted to know how Fedak planned to respond to the parent's questions about his curriculum. During their meeting, Taylor told Fedak that Marcelli could not attend the parent conference to "hold his hand." Fedak responded that he did not need Marcelli to hold his hand and that, "the only reason Mrs. Marcelli was there [at the December 4 meeting] was to ensure your [Taylor's] professional conduct. I'm tired of your unprofessional conduct. I'm tired of the name calling I've been subjected to...I'm tired of the false accusations....I don't believe it ever happened [a reference to the alleged faculty movement against Taylor]...Will you acknowledge in front of Mr. Gernsbeck that you had called me unprofessional, a trouble maker, uncooperative, a union follower and paranoid." Fedak then walked out of the meeting (TA 160).

Fedak met with the parent on December 6, 1984. The parent was concerned about the curriculum he used in the gifted and talented class: she thought it was a course on Latin American History and that Fedak was teaching something else. Fedak explained that he was attempting to provide his students with technical skills

to facilitate their social studies rather than following an outdated curriculum.

A few days later, Fedak again met with Taylor. She asked him why he was teaching a class that was not State-approved and had no written curriculum. Fedak told her there was no curriculum for the class because he had not written one. Taylor handed him a curriculum for Latin American history that he had prepared years ago for another class. She told him to teach Latin American history to his students and that a refusal to do so could be considered grounds for insubordination. Taylor told him that she was not suggesting that he might lose his increment. She did suggest that Fedak write a curriculum for the class during his professional time. Fedak declined, offering instead to write it on his own time.

Fedak did not have an Association representative at his meeting with Taylor. He did not request one. In this regard, he testified that he was, "a maverick in terms of labor and management and on contractual obligations" (TB 98). Fedak testified that he was intimidated at his meeting with Taylor, particularly by her references to insubordination and his increment.

Fedak never wrote the curriculum for the seventh-grade gifted and talented class. He was not offered to teach the class for the following school year but was offered to teach an eighth-grade honors class.

Shortly after his meeting with Taylor, Fedak met with Diane Swaim, the Association president. Swaim asked him if he would meet

with the Superintendent to discuss his situation. Fedak agreed and Swaim arranged the meeting. Fedak met with the Superintendent and explained that he felt he was being harassed.

Not long after his meeting with the Superintendent, Fedak passed McKenna in the school hallway. McKenna said, "Well, hello Mr. Fedak. How are you?" Fedak responded, "Mrs. McKenna I believe you're greeting me like many of the others. This is a charade. I do not wish to be part of it. I find it hypocritical. I have little to no respect for you for what has occurred." (TB 174). Fedak offered this exchange as an example of the harassment he received after his meeting with the Superintendent.

Fedak was present at a February 1, 1985 luncheon meeting with the Superintendent, at which the faculty at Thompson expressed their concerns about the condition of the school building and the problems they were having with the Thompson administration. The Association had arranged this meeting. At the meeting it was suggested (it is not clear by whom but it does not appear to be Fedak) that McKenna and Taylor be transferred.

Fedak was also present at a meeting between Thompson administrators and the faculty on February 8, 1985. At this meeting Taylor spoke about the results of a "climate survey" that had been circulated among Thompson faculty. Accounts of exactly what Taylor said at this meeting vary. Fedak remembers Taylor saying that many teachers, particularly those who have taught a long time, suffer from a lack of self-esteem. She said she sympathized with their

desire for more money. She also said that, while she was not their mother, she would be available to hear complaints. She offered to eat lunch with the faculty.

Fedak was "mortified" by Taylor's presentation. (TB 182). He characterized it as a temper tantrum but his description of what she said does not seem to support this characterization. Fedak also claims that Taylor made vague references to the faculty's February 1, 1985 meeting with the Superintendent.

Later in the 1984-85 school year, Fedak was informed that his classroom was being changed the next year. He had been assigned to teach in a detached room which has been variously described (largely through leading questions by counsel for the parties) as "a little bit more artistic than a construction shack" to "a modular classroom." The "modular classroom" description appears to be more accurate. The room is carpeted and, occasionally, the carpet becomes mildewed. It is the only air-conditioned classroom. It has always been used as a classroom. Fedak asked why he was moved and was told that members of the child study team, who taught in a room adjacent to his, had complained that his teaching performance disrupted their classes. When Fedak attempted to confirm this with the child study team, they told him that it was not a personal thing, just a function of the facilities (thin walls).

I credit the reasons given Fedak for the change in room assignment. Mr. Fedak speaks with a commanding (and sometimes loud) voice and I have no doubt that he teaches with enthusiasm, with the

unfortunate result that he can be overheard by teachers and students in adjoining rooms.

Mr. Fedak's performance evaluations document his talent as a teacher. They are full of laudatory remarks. Fedak was upset, however, about an observation conducted by Taylor in 1980. Taylor told Fedak she thought he had unjustly criticized a student and may be teaching material too sensitive for his students. This observation was discarded and Taylor conducted a second which formed the basis of a good evaluation report. Fedak nevertheless wrote a rebuttal to the evaluation based on the discarded first observation.

6. Patricia Gage has been a home economics teacher at Thompson for twelve years. Prior to the 1984-85 school year she had a good professional relationship with Taylor.

Gage attended the February 1, 1985 meeting with the Superintendent and complained about the condition of the equipment in her classroom. At the conclusion of this meeting, the Superintendent assured all those present that no reprisals would be taken against them. The Superintendent informed Taylor of Gage's concern about the classroom. A few days later, after school hours, she coincidentally met Taylor in the school office. Taylor asked her why she went to the Superintendent with her complaints rather than to the department coordinator or to Taylor. Gage replied that she tried the established channels but was unsuccessful. A secretary, a parent and a teacher were also in the office during this conversation. A few days later, Gage asked the Association to file

a grievance. The Association did file a grievance, alleging that Taylor had violated contractual language requiring that any criticism of a teacher be made privately. The Board denied the grievance and no demand for arbitration was made. When asked if anything further came of the incident, Gage said nothing had until the following summer, which is after the filing of the Association's unfair practice charge.

7. Kevin Graham has been a social studies teacher at Thompson since 1977. In 1982 he took over Fedak's department coordinator position and still holds it. He is also a cluster leader. He has been a building representative for the Association since September 1982.

Graham was involved in a grievance filed by the Association on behalf of department coordinators in September 1983. The grievance involved after-school hours and resulted in an arbitrator's award in favor of the Association.

Graham was present at Association meetings held in May and June 1984, where the issues of staff morale, building maintenance and student discipline were discussed. On May 17, 1984, he attended a meeting, called at the Association's request, between building representatives, Association officers and two Board members.

On the morning of the day on which the meeting with the Board members was scheduled (May 17, 1984), Taylor called a meeting with the building representatives to discuss its purpose. Graham described this meeting as tense. Taylor asked the representatives

what was going on in the building. She was upset that the faculty's concerns were being placed before the Board rather than her. Little was said at the meeting: it lasted only two or three minutes.

In an apparent response to the meeting between the Association representatives and the Board members, Taylor formed three committees to deal with the problems of staff morale, building maintenance and student discipline.

On June 5, 1984, the Association grieved the formation of the committees. The Board dissolved them in settlement of the grievance.

In August 1984 Graham was present at a meeting between the building representatives, Association officers, the Superintendent and Thompson administrators. They discussed the problems of morale, student discipline and maintenance.

Graham testified that, as a result of his participation in the Association activities mentioned above, he was discriminated against by Thompson administrators (specifically, Taylor) by not being invited to participate in the interviewing process for a new social studies teacher and by being excluded from a committee.

A vacancy occurred for a social studies teacher at the beginning of the 1984-85 school year. A history and latin teacher with several years of experience at Thompson decided, just as the new school year began, to accept a transfer to a roving Latin teaching assignment. This left an opening that had to be filled quickly.

This was the first vacancy for a Social Studies teacher at Thompson since Graham became a teacher there. There is some evidence of a practice whereby department coordinators observe the interviews of applicants. The department coordinator job description, however, does not call for participation in the hiring process. Graham was not asked to participate in the interviews. Due to his other responsibilities and the need to fill the position quickly, Graham would not have been available to participate in all of the interviews. Taylor decided that it was more important for Graham to be with his students during their first classes of the new school year than to participate in the interviews. Since Graham would have been available for only one of the interviews, in fairness to the applicants, Taylor felt that Graham should not participate in any of the interviews.

During the 1984-85 school year, plans were being made for the transition of Thompson from a junior high school (grades 7 through 9) to a middle school (grades 6 through 8). A transition committee was established. Department coordinators were told to submit to the Board the names of volunteers from their departments to serve with them on the committee. Graham could not find a volunteer and made no recommendation. Only two of the seven coordinators did. Graham and one other coordinator were not invited to the first committee meeting. It is unclear whether this was an oversight on Taylor's part or a consequence of Graham's unavailability due to his teaching assignments and extra-curricular



activities. Taylor was discouraged at the overall lack of participation on the committee. The committee was dissolved after a few meetings.

8. Lenora Marcelli is a math teacher at Thompson and is an Association building representative. She was involved in the processing of the grievances discussed above.<sup>4/</sup> She circulated the petition (CP-3) protesting the condition of the Thompson school building. She participated in the meetings between Association officers, building representatives, Board members and Thompson administrators. She was a member of a liaison committee (sanctioned by the parties' collective agreement) formed after the dissolution of the three committees handling student discipline, staff morale and building maintenance. This liaison committee consisted of representatives from each of the school's departments and from the administration. At one liaison committee meeting, McKenna asked

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<sup>4/</sup> During the 1983-84 school year, Marcelli's duty assignment was to be Vice-principal Gernsbeck's office assistant. Gernsbeck had complimented Marcelli for her service and indicated that he would like to have her in the same capacity during the 1984-85 school year. During either the end of the 1983-84 year or the summer before the 1984-85 year, Gernsbeck scheduled Marcelli for cafeteria duty for 1984-85. It is unclear whether Gernsbeck had tentatively scheduled Marcelli as his office assistant. Taylor directed Gernsbeck to reassign cluster teachers to free their 4th and 5th periods. Marcelli was not, however, a cluster teacher. The record does not reveal that Taylor told Gernsbeck to change Marcelli's assignment. The record does demonstrate that duty assignments are rotated and that Marcelli had not been assigned to cafeteria duty in the preceding three or four school years. The assignment was made before the effective date for the statute of limitations.

Marcelli and another building representative, Roberta Gauvreau, "just when do we waive contract? Are you aware that...liaison is only supposed to meet three times a year?" (TE 18). At another meeting, McKenna asked the teachers present if they were aware of the fact that, despite the accomplishments of the committee, the building representatives intended to meet with the Superintendent. Gauvreau replied that the teachers were aware of their building representatives' intentions because the Association kept its members well informed.<sup>5/</sup>

The Association refers to three episodes as examples of the Board's retaliation to or interference with Marcelli's participation in protected activities. When Marcelli woke up on September 24, 1984, she discovered that her dog was very sick. She called the school and reported that she would be taking a family illness day. The next day McKenna overheard a conversation between Marcelli and a colleague about Marcelli's dog. McKenna arranged a meeting with Marcelli and they discussed the appropriateness of using a family

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<sup>5/</sup> At hearing Gauvreau testified about an incident between a secretary, Penny Divis, and Taylor. Gauvreau said that Divis, an Association member, complained to her about Taylor's conduct at a meeting which occurred shortly after Divis participated in an Association meeting, at which the issues of staff morale, student discipline and building maintenance were discussed. Divis allegedly told Gauvreau that Taylor accused her of being disloyal. While I find Gauvreau to be a credible witness, I can make no affirmative finding about a meeting between Taylor and Divis. The residuum rule prohibits such a finding: the testimony about the alleged meeting was entirely uncorroborated hearsay.

illness day under the circumstances. Both agreed that Marcelli should credit her absence to a personal day due to the illness of a family pet. Marcelli insists that, but for her Association activities, McKenna would not have said anything about the incident.

On December 10, 1984, Marcelli was absent, having taken a personal day. On December 11, 1984, McKenna conducted a classroom observation of Marcelli. During the class, Marcelli was interrupted several times: once by a guidance counselor, once by the hall attendant and once about a cheating incident. McKenna commented to her that she, "wears many hats." The record reveals that McKenna's remark related to the several interruptions, not to Marcelli's Association activity.

Marcelli commented that she was put on the defensive by McKenna during their post-observation interview. Marcelli said it was the first time she became upset over an observation. McKenna completed the evaluation, rating Marcelli satisfactory in all categories. McKenna made several complimentary remarks on the evaluation about Marcelli's teaching methods and her good rapport with the class. McKenna noted that the final ten minutes of the class was spent reviewing equations, a topic covered the day before by a substitute, and that the whole class became involved in the discussion (R-20). On this point Marcelli disagreed, gleaning some inference that McKenna was giving undue credit to the substitute. She wrote a rebuttal to the evaluation. Marcelli considers the evaluation a response to her Association activity.

On January 7, 1985, at approximately 6:05 a.m., Marcelli called in sick. She had her substitute file, containing emergency lesson plans, at home. After calling in, Marcelli gave the plan book to another teacher to deliver to the substitute. At approximately 7:45 a.m., McKenna called Marcelli at home and inquired about the emergency lesson plans. She asked Marcelli to talk to the substitute. During this conversation Marcelli's lesson plans were delivered and given to the substitute. Marcelli was "mortified" at being called and having to talk to the substitute. (TE 29). She feels that, but for her Association involvement, McKenna would not have called her. She told McKenna the next day that the call was uncalled for.

Marcelli was present at the faculty luncheon meeting with the Superintendent on February 1, 1985. She was also present at the February 8, 1985 faculty meeting where Taylor spoke about the climate survey. Marcelli remembers Taylor making a reference to union activism as a symptom of teacher "burn out." She also remembers Taylor suggesting that, if the teachers needed a subject of protest, substitutes' pay was a good one.

A few days later, Marcelli and Carol Jameson met with Taylor in her office, seeking permission to use the school cafeteria for an Association meeting. Marcelli (and Jameson) testified that Taylor said that she had heard that the faculty was an unruly mob at its meeting with the Superintendent. Marcelli could not recall the specifics of their conversation. Taylor gave Marcelli and Jameson permission to use the cafeteria for the Association meeting.

Approximately one week later, Marcelli met again with Taylor and told her that many of the faculty were uncomfortable with Taylor's presence at their lunches. Taylor asked if Marcelli was truly representing the desires of the majority of the faculty. Marcelli asked Taylor to stop eating lunch with the faculty. The Association later filed a related grievance which was resolved by Taylor discontinuing her lunch visits. Marcelli testified that Taylor and McKenna commented to her that the Association was stirring things up in the building and making big issues out of small ones.

9. Carol Jameson has been a math teacher at Thompson for 15 years. Before assuming the Association vice-presidency, she was a building representative.

Jameson attended the May 17, 1984 meeting between the building representatives, Association officers and Board members. She was present in Taylor's office on the morning of May 17 for the meeting between Taylor, McKenna, Gernsbeck and the building representatives. Corroborating Graham, she described that meeting as very tense. Taylor asked the representatives what was going on in the building and she accused them of failing to speak to her about their concerns.

Taylor assigned Jameson to the committee she had created to deal with building maintenance. Jameson attended the committee's first meeting and read a prepared statement criticizing the formation of the committee as a contract violation. Taylor told

Jameson that, if she did not wish to participate, she could leave. Jameson left.

Early in the 1984-85 school year, Jameson was standing outside her classroom, speaking with another teacher. McKenna approached Jameson and asked why she had a piece of construction paper covering the window in her classroom door. Jameson explained that she was showing a film strip to her computer competency class. McKenna asked her to remove the construction paper from the window. Jameson complied. There were fifteen new computers in the classroom and McKenna was concerned about the possibility of vandalism. Jameson characterized McKenna's request as harassment for her Association activities.

McKenna evaluated Jameson during the 1984-85 school year. Like Marcelli, Jameson felt that she was put on the defensive by McKenna in their post-observation interview. Jameson described the interview as an interrogation: she thought McKenna asked her questions designed to trap her. Like Marcelli, Jameson received a satisfactory evaluation from McKenna accompanied by complimentary remarks about her teaching performance. Jameson signed the evaluation without rebuttal.

Jameson attended the February 1, 1985 faculty meeting with the Superintendent and the February 8, 1985 meeting at which Taylor spoke about the climate survey. She corroborated much of the testimony already discussed about Taylor's presentation at that meeting. She added that Taylor remarked that the public perceived

teachers as union agitators rather than professionals. Jameson testified that, through discussion with other Thompson teachers, she discovered that Taylor had approached several teachers in an attempt to find out who said what at the February 1, 1985 faculty meeting with the Superintendent. This testimony was not substantiated. Taylor did admit, however, that she sometimes heard from Thompson employees about what occurred at Association meetings.

Jameson asserts that the Thompson administration attempted to transfer her at the end of the 1984-85 school year. The record does not support the assertion. Jameson was asked if she was interested in filling a vacancy at the high school in order to avoid the elimination of a teaching spot at Thompson. Jameson had earlier made it known that she wanted to transfer to the high school when the transition of Thompson from a junior high school to a middle school was completed. (She wanted to teach ninth-grade). She told Gernsbeck that she did not want to transfer before the transition was completed, however, and eventually obtained a ninth grade assignment at Thompson by agreeing to switch an eighth grade cluster assignment with another teacher. Taylor approved the switch.

#### ANALYSIS

The thrust of the Association's charge is that McKenna and Taylor retaliated against several Thompson teachers in violation of

sections 5.4(a)(3) and, derivatively, (a)(1), because the teachers participated in activity protected by the Act.

Analysis of the retaliation question requires an application of the standards set forth in In re Tp. of Bridgewater, 95 N.J. 235 (1984). ("Bridgewater").

Under Bridgewater, no violation will be found unless the charging party proves, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in an action adverse to an employee's terms and conditions of employment. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Such a showing constitutes proof of a prima facie violation. Id. at 246.

If the employer did not present evidence to rebut, or if the reasons an employer proffered to explain an adverse action are rejected as pretextual, the prima facie case is a sufficient basis for finding a violation without further analysis. Where the record demonstrates that both motives unlawful under the Act and other motives contributed to a personnel action, the employer will not have violated the Act if it can prove, as an affirmative defense, that the adverse action would have taken place even absent the protected conduct. Id. at 242.



This affirmative defense, however, need not be considered unless the charging party has shown a prima facie violation: that, based on the record as a whole, anti-union animus was a motivating or substantial reason for an adverse action.<sup>6/</sup>

I conclude that the Association has failed in its initial burden, under Bridgewater, to prove a prima facie violation.<sup>7/</sup>

Most of the evidence about Webb's protected conduct and his experiences with Thompson administrators related to events that occurred prior to the limitations period. The lesson plan

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<sup>6/</sup> See Bridgewater; NLRB v. Transportation Management Corp., \_\_\_ U.S. \_\_\_, 103 S.Ct. 2469, 76 L.Ed. 2d 667 (1983); In re Wright Line, 251 NLRB No. 150, 105 LRRM 1169 (1980); In re Ocean Cty. College, 204 N.J. Super. 24 (App. Div. 1985); East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981); Bergen Community College, P.E.R.C. NO 87-99, 12 NJPER \_\_\_ (¶\_\_\_ 1987); UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 12 NJPER \_\_\_ (¶\_\_\_ 1987); Morris, The Developing Labor Law, (2d ed. 1983) at 191-92; and Bartosic and Hartley, Labor Relations Law in the Private Sector (2d ed. 1986) at 115-16.

<sup>7/</sup> This initial standard of proof under Bridgewater is different than the standard applicable to a respondent's motion to dismiss. When a respondent moves for dismissal at the conclusion of the charging party's case, the trier of fact must accept as true all evidence supporting the charging party's position and must give the charging party the benefit of all reasonable inferences. The motion must be denied if there is a scintilla of evidence to prove a violation. See UMDNJ--Rutgers Medical School, slip op. at 7,8, and cases cited therein. I reserved ruling on the Board's motion to dismiss at the conclusion of the Association's case. In light of my ruling on the entire record, it is unnecessary to rule on that motion.

grievance, the student testing grievance,<sup>8/</sup> Webb's "needs improvement" evaluation, McKenna and Taylor's visits to the library, and McKenna's comment about the ramifications of filing grievances, all occurred during the 1983-84 school year. While McKenna's comment is relevant to the issue of animus, it was remote in time to events occurring within the limitations period.

The incident of Webb's overcrowded classroom also occurred prior to the limitations period. The operative date for the statute of limitations is September 18, 1984 and the incident occurred at the beginning of classes for the 1984-85 school year. Even if this aspect of the charge was timely, I would find no violation. Whether Webb should have sent the pupils to the guidance office is irrelevant. Taylor simply told Webb that she was disappointed in him for sending them and for making a student feel rejected. No discipline or adverse action was taken against Webb. I perceive no connection between Taylor's expression of disappointment and Webb's exercise of protected rights.

There is little evidence of Fedak's involvement in protected activity prior to the events surrounding the curriculum problem in his gifted and talented class. There are references to a discussion Fedak had with Taylor about Fedak's role in a "faculty

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<sup>8/</sup> In its charge the Association seemingly alleges that the change in lesson plan format and directive to supervise student testing are bases for finding a 5.4 (a)(5) violation. The statute of limitations prohibits such a finding.

movement" against Taylor. Taylor mentioned that she heard Fedak was involved in such a movement. Fedak said that he had nothing to do with it and Taylor responded that she was glad to hear that. There is also the remark Fedak made to Taylor at the December 5, 1984 meeting, in response to Taylor's comment that Fedak would not have a building representative (Marcelli) present at his meeting with a disgruntled parent. Fedak, in a heated retort, challenged Taylor to acknowledge in Gernsbeck's presence that she had called Fedak, among other things, a union follower. There is no evidence in the record about when or in what context Taylor may have made such a remark. Based on the record, I cannot find that she ever made it.

Fedak was teaching a course for which there was no written curriculum. He was undoubtedly teaching the class the way he felt best suited the needs of his students. His concern for students and his professional pride is demonstrated by his performance evaluations and by his testimony in this case. Taylor, however, had a legitimate concern as a administrator to see that State regulations were followed. She and Fedak discussed the need for a written curriculum. Despite Taylor's invitation to prepare the curriculum on the school's time, Fedak declined, offering instead to do it on his own time. He never wrote the curriculum. He was not offered the class the following year but was offered to teach an eighth-grade honors class. There is nothing in the record to suggest that Fedak was unhappy with the teaching assignment he ultimately received for the following school year. There is no

evidence to suggest that Fedak suffered from some form of retaliation because he exercised protected rights.

Following the curriculum incident, Fedak met with the Superintendent to express his displeasure at the way he was being treated. He was also present at the February 1, 1985 meeting with the Superintendent and at the February 8, 1985 faculty meeting with Thompson administrators.

The Association claims that Fedak's assignment to the detached classroom was retaliatory. The record does not support the claim. The detached building had always been used as a classroom. The assignment provided Fedak with the benefit of having his own classroom, rather than moving from one room to another as in the past, and permitted him to teach in his energetic style without being overheard by teachers and students in adjoining classrooms. There is no evidence in the record remotely suggesting that Fedak's assignment to the modular classroom was in response to his protected conduct.

Patricia Gage attended the February 1, 1985 meeting with the Superintendent and complained about the lack of equipment in her home economics classroom. The Superintendent told Taylor that Gage was dissatisfied with the condition of her classroom. Taylor asked Gage why she did not come to her with the problem. Gage became upset and the Association filed a related grievance that it ultimately chose not to pursue to arbitration. Gage was not disciplined or reprimanded. None of her terms and conditions of

employment were altered. The Association has failed to show that the Board took any action adverse to Gage in response to her protected conduct.

Most of the evidence about Kevin Graham also concerns events occurring outside the limitations period: the 1983 grievance about coordinators' after-school hours; Graham's participation in Association meetings about student discipline, maintenance, and staff morale; the May 17, 1984 meetings between the building representatives and administrators, and the building representatives, Association officers and Board members; the grievance resulting in the dissolution of the committees formed by Taylor; and the hiring of the new social studies teacher at the beginning of the 1984-85 school year.

The only incident occurring within the limitations period involved the transition committee. The record suggests that the history of this committee was less than auspicious. The seven department coordinators were asked to find volunteers for the committee. Only two coordinators did this; Graham did not. The first committee meeting was scheduled to begin while Graham was teaching a class. Graham was not the only coordinator not to receive an invitation. The committee met a couple of times and was disbanded. The record contains no evidence suggesting that Graham's involvement in protected activity had any connection to his lack of participation on the committee.

Lenora Marcelli was involved in the processing of the grievances discussed above, in circulating the petition criticizing the condition of the Thompson building and in the meetings arranged by the Association with the Board and Superintendent.

The evidence offered by the Association simply does not reveal that the Board's agents took any action adverse to Marcelli in response to her protected conduct. McKenna did not discuss with Marcelli the validity of using a family illness day to care for a sick pet because Marcelli was an active Association member. The fact that Marcelli agreed with McKenna about the proper way to credit her absence belies the claim that McKenna was motivated by anti-union animus rather than a legitimate administrative concern over the appropriate use of leave time.

The testimony about McKenna's observation and evaluation of Marcelli also fails to prove an adverse action. I attribute Marcelli's uneasiness during her post-observation interview with McKenna to McKenna's professional demeanor, her sometimes abrupt manner of dealing with people, not to anti-union animus. McKenna gave Marcelli a satisfactory rating and complimented her teaching style. A good evaluation is not convincing evidence of hostility.

Little need be said of McKenna's phone call to Marcelli on January 7, 1985. There is nothing on the record, aside from Marcelli's opinion, suggesting that McKenna made the call because Marcelli exercised protected rights. Marcelli had left no emergency lesson plans on file. The substitute did not know what to do with

Marcelli's classes. Marcelli was not reprimanded or disciplined and her terms and conditions of employment were not affected by the call.

Carol Jameson was very active in the Association. She attended the May 17, 1984 meetings and was involved in the grievance protesting the three committees formed by Taylor.

The Association claims that the "construction paper" incident, her observation and evaluation by McKenna, and an attempted transfer were forms of retaliation for her exercise of protected rights. I disagree. I cannot perceive how a directive to remove a piece of construction paper from her classroom door rises to the level of an adverse action affecting Jameson's terms and conditions of employment. Nor do I consider it an attempt to interfere with her exercise of protected rights.

The testimony concerning her evaluation by McKenna mirrors that of Marcelli's. She did not like the way McKenna conducted the post-observation interview. As with Marcelli, I attribute this to McKenna's brusque manner, not hostility. Like Marcelli, Jameson received a favorable evaluation from McKenna.

On the alleged attempt to transfer Jameson, the Association has failed to demonstrate that the Board took any adverse action against her. Jameson was asked if she was interested in a teaching post at the high school. She was not interested. She was not involuntarily transferred and she obtained an assignment, by switching with another teacher (with Taylor's approval) that she was happy with.

There is little support in the record for the Association's claims that its members suffered as a result of their protected conduct: Webb was told by Taylor that she was disappointed in him; Fedak was assigned to a detached classroom; Graham was not invited to participate on a short-lived committee; Marcelli (in agreement with McKenna) changed a family illness day to a personal day, she had a phone conversation about missing lesson plans, and received a favorable evaluation after an uncomfortable observation interview; Jameson was asked to remove a piece of paper from a door, also received a favorable evaluation after an uncomfortable interview, and was asked if she wanted to transfer. On the evidence pertaining to terms and conditions of employment (for example, on the issues of leave time, the evaluation and transfer processes and participation on committees) the Association did not prove that any related Board action was adverse or connected to the affected employee's exercise of protected rights.

In light of the above, I conclude that the Association has failed to prove, by a preponderance of the evidence, that the Board violated sections 5.4(a)(3) and, derivatively, (a)(1), and I recommend that those portions of the charge be dismissed.

Bridgewater.

The Association also alleged that the Board violated section 5.4(a)(1), independently, and sections 5.4(a)(2), (5) and (7) of the Act. The Association offered no evidence to show that the Board or its agents even attempted to dominate or interfere with



the existence or administration of the Association. Nor did the Association present any evidence of a violation of Commission rules and regulations. Accordingly, I recommend that the Commission dismiss the 5.4(a)(2) and (7) portions of the complaint.

The only evidence relating to a 5.4(a)(5) violation concerned events about which the Association filed and resolved grievances--lesson plan changes, evaluation procedures, committee formations--and all of these incidents occurred before the effective date of the statute of limitations. Thus, I recommend dismissal of the 5.4(a)(5) portions of the complaint.

The remaining issue is whether the Board, through the conduct of its administrators, violated section 5.4(a)(1) of the Act. The standard to determine whether an independent 5.4(a)(1) violation has been committed is set forth in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979):

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 an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. [Id. at 551 n. 1]

It is immaterial that an employer's allegedly illegal conduct did not actually coerce an employee or was not illegally motivated. It is the tendency of the employer's conduct, not its result or motivation which is at issue. In re Commercial Township

Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), affirmed App. Div. Docket No. A-1642-82T2; Middletown Township, P.E.R.C. No. 84-100, 10 NJPER 173 (¶15085 1984).

In analyzing an independent 5.4(a)(1) violation, however, it must be recognized that the Act grants to public employers the right to express opinions about unionism provided such statements are noncoercive. Thus in Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981), the Commission stated:

A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal.  
[Id. at 503]

Analyzing 5.4(a)(1) cases is difficult because a balance must be struck between two equally important, but conflicting rights: the employer's right of free speech and the rights of employees to be free from coercion, restraint or interference in their exercise of protected activities. See generally Cty. of Mercer, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985)

The standard adopted by the Commission in these cases mirrors that developed under the Labor Management Relations Act. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Ed. Sec., 78 N.J. 1, 9 (1978). The leading federal case addressing

the issue is NLRB v. Gissel Packing Co., 395 U.S. 575, 71 LRRM 2481 (1969). There, the Supreme Court, in setting forth the balance required in these cases, said:

Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely...and any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a non-permanent, limited relationship between the employer, his economically dependent employee and his union agent...Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit."...If there is any implication that an employer may or may not take action solely on his own initiative for reasons unrelated to economic necessities and known only to him, the statement is no longer a reasonable prediction based on available facts but a threat of retaliation based on misrepresentation and coercion, and as such, without the protection of the First Amendment.

[71 LRRM at 2497-98; citations omitted]

In determining whether a statement is coercive, the NLRB considers the "total context" of the situation and is justified in determining the question from the standpoint of employees over whom the employer has a measure of economic power. See NLRB v. E.I. DuPont de Nemours, \_\_\_\_\_ F.2d \_\_\_\_\_, 118 LRRM 2014, 2016 (6th Cir. 1984).

Analysis of an (a)(1) issue requires a close examination of the facts in each case:

Each case requires a fine assessment of the record, with no case serving as much of a precedent for others because of different combinations of facts, such as...the identity of the speaker, the subject matter of the conversation [and] the exact language employed. [Gorman at 151].

The Association argues that the following conduct was coercive or threatening to its members' exercise of protected rights, in violation of section 5.4(a)(1): "private meetings" with Webb and warnings of the ramifications of filing grievances; "private meetings" with Webb about guidance procedures; surveillance of Webb's teaching performance; ejection of Jameson from a committee meeting; comments about insubordination and increment loss to Fedak; Taylor's "private meeting" with Gage; surveillance of Jameson and attempts to transfer her; Taylor's comments at the February 8, 1985 faculty meeting; surveillance of internal union meetings; and Taylor's lunch visits.<sup>9/</sup> (See Association's brief at pp. 28-29).

Some of the incidents referred to by the Association involve statements by Thompson administrators; others do not

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<sup>9/</sup> The Association refers to "private meetings" between Mckenna and Webb and Taylor and Gage as attempts to bypass the Association and deal directly with employees about their terms and conditions of employment. The record does not support the claim. I recommend that the Commission dismiss those portions of the complaint.

involve employer speech, per se, but its conduct. Those incidents involving employer statements must be analyzed by balancing the employees' rights to engage in protected activity against the Board's free speech rights. Those incidents involving employer conduct (other than speech) must be analyzed in the context in which they took place to determine whether reasonable employees would be threatened or coerced in the exercise of protected rights. My findings must turn on the question of whether the speech or actions, regardless of motive or result, would tend to interfere with employees' participation in protected activity. New Jersey Sports and Exposition Authority.

The events about Webb referred to by the Association all occurred outside the limitations period. I note that McKenna's comment to Webb about the ramifications of filing grievances, made shortly after the Association had filed one on his behalf, is the type of conduct implicating an independent 5.4(a)(1) violation. Mercer Cty. The timing of the conduct, however, prohibits such a finding here. N.J.S.A. 34:13A-5.4(c). This testimony, as well as the balance of the testimony concerning events occurring during the 1983-84 school year and the first few weeks of the 1984-85 school year, is relevant to the extent that it adds to the context of events occurring within the limitations period. NLRB v. DuPont de Nemours.

As with Webb, the Association's evidence concerning the Board's alleged interference with Jameson's right to engage in protected activity by ejecting her from a committee meeting, occurred outside the limitations period. Notwithstanding the timing of the meeting, I find nothing inherently coercive or threatening in Taylor's conduct.

Taylor's comments to Fedak at their meeting to discuss his curriculum lack a connection to Fedak's protected activity. Taylor told Fedak that his failure to write a curriculum for a course he was teaching could be considered grounds for insubordination. She also said that she was not suggesting that he might lose an increment. If Taylor's remarks can be characterized as a threat, that threat cannot be characterized as interfering with protected conduct. I construe Taylor's remarks as a reasonable prediction of what would happen if Fedak failed to do his job.

Taylor asked Gage why she did not come to Taylor with her complaints about the condition of the home economics classroom. Taylor put the question to Gage shortly after Gage complained to the Superintendent. While this exchange upset Gage, I perceive nothing coercive or threatening in it that would tend to interfere with the Gage's exercise of protected rights.

There is no evidence in the record showing that the Board or its agents conducted any type of surveillance of

Jameson or the Association. Taylor did state that she sometimes heard from Thompson employees about what occurred at Association meetings. This should not surprise, coerce or threaten anyone, nor is it evidence of surveillance.

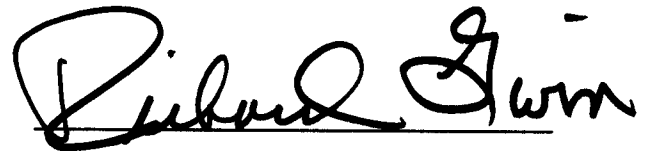
The Thompson administration did not try to transfer Jameson. She was asked if she wanted to transfer before the transition of Thompson from a junior high school to a middle school and she declined. There is no evidence of coercive or threatening conduct.

I also conclude that neither Taylor's remarks at the February 8, 1985 faculty meeting nor her lunch visits with the faculty violated section 5.4(a)(1). Her remarks about the public's perception of teachers, about union activism, and about subjects of protest fall within the speech protected by Black Horse Pike. While Taylor's lunch visits were not appreciated by some of the faculty, there is no related evidence of coercion or threats.

I have considered the Association's proffers about each of the events it claims constituted independent 5.4(a)(1) violations. I concluded that the Association failed to prove that any of the isolated incidents that occurred within the limitations period involved Board conduct that would tend to interfere with employees' exercise of protected activity. I further conclude that the Association has failed to demonstrate a pattern of coercive or threatening Board activity interfering

with employee rights. Under the circumstances of this case, the whole of the Board's conduct is no greater (or more coercive) than the sum of its parts. See Wharton Bd. of Ed., P.E.R.C. No. 87-10, 11 NJPER 609 (¶17231 1986).

For the reasons discussed above, I recommend that the Commission dismiss the Complaint in its entirety.

A handwritten signature in black ink that reads "Richard C. Gwin". The signature is written in a cursive style with a horizontal line underneath the name.

Richard C. Gwin,  
Hearing Examiner

Dated: February 24, 1987  
Trenton, New Jersey