P.E.R.C. NO. 87-1

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MATAWAN-ABERDEEN REGIONAL
BOARD OF EDUCATION

Respondent,

-and-

Docket No. CO-86-34-38

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission, dismisses a complaint based on an unfair practice charge filed by the Matawan Regional Teachers Association against the Matawan-Aberdeen Regional Board of Education. The charge alleged the Board violated the New Jersey Employer-Employee Relations Act when it docked the pay of Association members who testified against the Board in an unfair practice proceeding contrary to its practice and in retaliation for their adverse testimony. The Chairman, in agreement with a Commission Hearing Examiner and in the absence of exceptions, defers to an arbitrator's determination that the Board violated the parties' contract, but finds that the dockings were not retaliatory.

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Docket No. CO-86-34-38

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, DeMaio & DeMaio, Esqs.
(Vincent DeMaio, of Counsel)

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

DECISION AND ORDER

On August 5, 1985, the Matawan Regional Teachers Association ("Association") filed an unfair practice charge against the Matawan-Aberdeen Regional Board of Education ("Board"). The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1),(2),(3),(4),(5) and (7),[1/] when

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of

Footnote Continued on Next Page

it docked the pay of Association members who testified against the Board in an unfair practice proceeding. The charge further alleged that the Board docked the employees' pay in retaliation for their adverse testimony and in violation of the parties' longstanding practice and contractual provisions requiring payment for attendance at Commission proceedings.

On August 30, 1985, a Complaint and Notice of Hearing issued. On September 10, 1985, the Board filed an Answer admitting that it docked the employees' pay, but denying that it had retaliated for their adverse testimony or violated the parties' past practice or contract.

On October 29, 1985, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. Shortly after the Board filed its post-hearing brief, the Association asked the Hearing Examiner to hold this matter in abeyance pending the outcome of an arbitration hearing.

1/ Footnote Continued From Previous Page

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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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; and (7) Violating any of the rules and regulations established by the commission."

On December 18, 1985, Barbara Zausner Tener issued an award finding that the Board had breached a contractual provision and longstanding past practice requiring it to pay all employees testifying at Commission hearings. She ordered the Board to reimburse employees whose pay had been docked, together with interest at 1% per month. She denied the Association's request for punitive damages, stating that it was not clear that the dockings were retaliatory.

The Board then sought to vacate the award by filing a Complaint in the Law Division of the Superior Court. The Association filed a counterclaim for confirmation and enforcement. On April 10, 1986, the Honorable Patrick J. McGaron confirmed and enforced the award and dismissed the Board's Complaint.

On June 4, the Hearing Examiner recommended dismissal of the Complaint. H.E. No. 86-61, __ NJPER ___ (¶_____ 1986) (copy attached). With respect to the alleged violation of subsection 5.4(a)(5), he deferred to the arbitrator's determination that the Board had violated the contract and her remedy. With respect to the alleged violations of subsections 5.4(a)(1)(3) and (4), he found the dockings were not retaliatory. With respect to the alleged violations of subsections 5.4(a)(2) and (7), he found that the Association had not proved these allegations by a preponderance of the evidence.

The Hearing Examiner served his report on the parties and informed them that exceptions, if any, were due on or before June

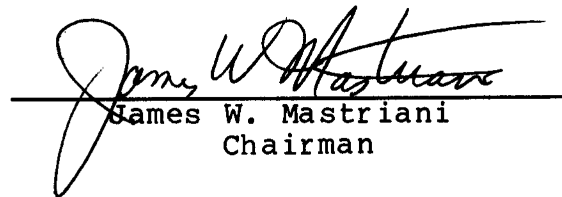
17. Neither party filed exceptions or requested an extension of time.

I have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-15) are accurate and are adopted and incorporated herein. Under all the circumstances of this case, and in the absence of exceptions, I adopt his conclusions of law acting under authority delegated to the Chairman by the full Commission.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
July 3, 1986
ISSUED: July 3, 1986

H.E. NO. 86-61

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

In the Matter of

MATAWAN-ABERDEEN REGIONAL
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-86-34-38

MATAWAN REGIONAL TEACHERS
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss the allegation that the Respondent repudiated the collective agreement in violation of §§5.4(a)(5) of the Act when it docked the pay of teachers who attended a Commission unfair practice hearing. The Hearing Examiner found that the issue of whether the Respondent had the right under the agreement to dock such teachers was the subject of a grievance which proceeded to binding arbitration and, consequently, recommends that the Commission defer to the arbitrator's decision and dismiss the §§5.4(a)(5) charge.

Finding that In re Bridgewater Twp., 95 NJ 235 (1984) sets forth the proper legal standard applicable to alleged violations of §5.4(a)(4) as well as §5.4(a)(3), the Hearing Examiner recommends that under Bridgewater the Commission find that the Respondent did not discriminate or retaliate against teachers who attended a Commission unfair practice hearing.

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. 86-61

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

In the Matter of

MATAWAN-ABERDEEN REGIONAL
BOARD OF EDUCATION

Respondent,

-and-

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Appearances:

For the Respondent
DeMaio & DeMaio, Esqs.
(Vincent DeMaio, Esq.)

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

HEARING EXAMINER'S RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on August 5, 1985, by the Matawan Regional Teachers Association ("Association") alleging that the Matawan-Aberdeen Regional Board of Education ("Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Association alleges that on or about June 24, 1985, the Board docked the pay of certain Association members who testified against

the Board in a prior unfair practice proceeding (Docket No. CO-85-182). The Association contends that by reducing such employees' salaries, the Board discriminated against the employees because they signed an unfair practice charge and gave information and testimony regarding such charge. The Association asserts that the Board's reduction of the employees' salaries was in direct retaliation for their testimony and their exercise of protected rights in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3), (4), (5), and (7) of the Act.[1/]

The Association also alleged that the Board violated certain provisions of the parties' collective agreement, and past practice, by unilaterally docking the salary of those employees who testified against the Board in Docket No. CO-85-182.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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; and (7) Violating any of the rules and regulations established by the commission."

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute an unfair practice within the meaning of the Act, a Complaint and Notice of Hearing was issued on August 30, 1985 setting a hearing for October 29 and 30, 1985. On September 10, 1985, the Board filed its answer denying, in general terms, the material allegations contained in the charge.

On October 29, 1985 I conducted a hearing in Trenton. The parties examined witnesses and presented evidence. At the conclusion of the Association's case, the Board made a motion to dismiss. I denied the motion (T 146[2/]).

At the close of the hearing I established a briefing schedule whereby the parties would simultaneously submit briefs on or before December 13, 1985 and reply brief due two weeks thereafter. On December 13, 1985, I received the Board's post-hearing brief. Shortly thereafter the Association requested that I hold this matter in abeyance pending the outcome of an arbitration hearing concerning some of the same issues raised in this matter. In a letter dated April 8, 1986, the Association advised me of their position that although an arbitration award was issued, the pending unfair practice charge was not resolved. The Association advised that it was not withdrawing its charge and requested that I proceed with the issuance of this report and recommendation. The Association did not file a brief.

2/ T 1 refers to Transcript p. 1.

Having considered all of the testimony and evidence I make the following:

FINDINGS OF FACT

The Matawan-Aberdeen Regional Board of Education is a public employer within the meaning of the Act and is subject to its provisions. The Matawan Regional Teachers Association is a public employee representative within the meaning of the Act and is also subject to its provisions (T 8-9).

The parties entered into additional stipulations of fact as follows. The following individuals are employed as teaching staff members by the Board: Marie Panos, Carl Kosmyna, Joan Soderlund, Richard Valanzola and Janet Schwartz. Additionally, Ms. Panos is president of the Association, and Mr. Kosmyna is Vice President. Ms. Soderlund and Mr. Valanzola are building representatives and members of the Association's executive committee and Ms. Schwartz is a member of the Association (T 10-11).

The Association and the Board are parties to an unfair practice proceeding before this Commission bearing Docket No. CO-85-182. Hearings concerning CO-85-182 were conducted on May 22, May 23, May 24, June 5, June 11 and June 14, 1985. During the course of those hearings, each of the employees identified above testified on behalf of the Association in support of an unfair practice charge filed by the Association against the Board.

On May 6, 1985, a prehearing conference was conducted in regard to Docket No. CO-85-182. In attendance were Vincent C.

DeMaio, counsel for the Board, and Mark J. Blunda, counsel for the Association. It was stipulated at the prehearing conference that subpoenas would not be necessary in order for the Association witnesses to be released for attendance at the hearing. The parties stipulated that the instant case will be tried as if subpoenas for the Association's witnesses in CO-85-182 had actually been issued (T 11-12).

On or about June 24, 1985, the Board issued paychecks to its teaching staff members. The paychecks of the employees identified above were docked for those days that they attended and testified in Unfair Practice Charge CO-85-182 (T 12). The witnesses which the Board presented at CO-85-182, namely Joan Maxwell, Barbara Cholewa and Marie Fankhauser did not have their pay docked for attendance and testimony at the unfair practice proceeding. Maxwell, Cholewa and Fankhauser are, or were, members of the negotiations unit represented by the Association and were called to testify by the Board in its behalf (T 13).

In a prior unfair practice proceeding filed by the Association against the Board bearing Commission Docket No. CO-84-316 (hereinafter referred to as the "Kidzus" matter) the witnesses who testified on behalf of the Association were not docked by the Board for their appearance and testimony (T 13-14)

In addition to the stipulations, the other facts in this case are mostly uncontested. In fact, the Association called the Superintendent, Deputy Superintendent and Business Administrator/

Board Secretary as its own witnesses. What occurred is the following.

As noted above, on several dates in May and June 1985, a Commission Hearing Examiner conducted a hearing in CO-85-182, an unfair practice charge filed by the Association against the Board (T 11). During the course of the hearing, the Association called numerous witnesses to give testimony against the Board. Among those witnesses were Marie Panos, Richard Valanzola, Janet Schwartz, Carl Kosmyna and Susan Quinn. All of the Association's witnesses had their pay docked for the days they attended the hearing (T 23-24; T 26; T 28-29; T 117-118).

All of the Association's witnesses followed the same procedure in order to arrange their release from school for the hearing. Each witness called the substitute placement service, a district-wide clearinghouse used by all teachers to report their intention to be absent from school and the reason therefor. The stated reason provided to the substitute placement service secretary by the witnesses was "school business." (T 24; T 27; T 29-30; T 109). Messrs. Valanzola and Kosmyna stated that they were apprised of the release procedure for the hearing by Ms. Panos (T 24; T 30). Ms. Schwartz was informed of the release procedure by Mr. Kosmyna (T 27).

Ms. Panos testified regarding the occasions in which she was excused from school for "school business." Panos explained that shortly after Dr. Kenneth Hall became Superintendent of Schools for

the district in 1978, Association members began attending such activities more frequently. Consequently, Hall told Panos that there would be no need to obtain subpoenas or bother with other formalized release procedures. Panos stated that Hall told her to simply call the substitute placement service and report the absence as "school business." (T 97). Thus, since 1979, Panos, charged various absences, such as court appearances, PERC hearings, meetings with the Commissioner of Education or his staff regarding the school budget, workshops, conferences and a variety of other functions to "school business" and received pay for each of those days, with the only exception being those days relating to the litigation conducted in CO-85-182 (T 96; T 103-107; CP-4; CP-5 and CP-7[3/]). Panos' testimony indicates that previously the Board has never docked teachers who have attended PERC hearings (T 98).

Bruce Quinn, Business Administrator/Board Secretary, also testified regarding the issue of pay for teachers reporting absences as "school business." Mr. Quinn stated that he was not aware of any circumstance where teachers who attended a PERC hearing and reported their absences as "school business" were not paid for the day (T 64; T 74).

Dr. Hall testified that he cannot recall any instance prior to CO-85-182 where teachers were docked for attending a PERC hearing

3/ "CP" refers to documents offered by the Association and admitted into evidence; "J" refers to documents offered and admitted into evidence as joint exhibits.

(T 35-36). However, his understanding of the use of "school business" is somewhat different than that expressed by Ms. Panos. Dr. Hall's understanding of the proper circumstance when "school business" should be reported as the reason for an absence is when a teacher attends activities that are connected with the duties of being a teacher or when a teacher testifies at a hearing on behalf of the Board or otherwise represents the Board (T 36; T 147). Dr. Hall interprets the collective agreement to provide for only those teachers serving as the Board's witnesses to be paid their regular day's pay. Teachers testifying against the Board are not performing "school business" and, pursuant to the agreement, are not entitled to paid release time under a "school business" justification (T 36-37). Dr. Hall stated that he never had any discussions with Ms. Panos to the effect that teachers attending administrative hearings or legal matters may simply report such absences as "school business" and be paid for the day. Dr. Hall also denied telling Ms. Panos that teachers did not need to obtain subpoenas (T 147). However, Dr. Hall does not recall ever having an in depth discussion with Ms. Panos regarding the matter (T 44).

The issue concerning the docking of the salaries of the Association's witnesses who attended CO-85-182 arose in the following manner. Bruce Quinn attended a County School Board Association meeting (T 63). During a discussion between Quinn and other members at the meeting, Quinn learned that other school districts did not pay teachers who attended hearings as witnesses in

support of the employee organization (T 63-64). Subsequently, Quinn raised the issue of whether the Board should be paying Association witnesses with Board attorney DeMaio (T 64). Quinn told DeMaio that he was unaware of any time when Association witnesses were not paid for their appearance at a hearing. Quinn specifically remembered paying Association witnesses who attended the Kidzus case (T 64). DeMaio said he would research the question in order to determine whether the Board was required to pay witnesses who appeared at hearings on behalf of the Association (T 64). Later, Quinn advised Hall that DeMaio was checking into this issue (T 65).

Dr. Hall testified that the issue of whether Association witnesses should be paid by the Board initially arose in a discussion between him and attorney DeMaio. The discussion took place during the course of the hearing in CO-85-182 (T 41; T 45). It was during CO-85-182 that Hall first became aware that Association witnesses were being paid when they testified against the Board (T 41). During his investigation into this issue, he discovered that Association witnesses in the Kidzus case were, in fact, paid for the days they attended that hearing (T 41). Subsequently, Hall and DeMaio advised the Board of Education that they believed that the collective agreement did not provide for paying teachers who were released for the purpose of attending administrative hearings as Association witnesses (T 43). Hall said that he did not believe that a past practice requiring payment to Association witnesses had been established. Furthermore, on the

basis of his own reading of the agreement and advice received from the Board's attorney, Hall stated that he believed that the agreement did not provide for paying Association witnesses because they were not really on "school business" (T 36-37; T 44; T 49).

The testimony of Bruce Quinn sheds some light on the Board's position regarding contract interpretation. Quinn testified that between the 1980-1983 agreement (J-2) and the 1983-1986 agreement (J-3) there had been language changes in the agreement regarding pay for attendance at court proceedings and administrative hearings. Quinn said that the 1980-1983 agreement provided for designated and undesignated personal days (T 66-67). One of the designated personal days allowed was for the purpose of appearing before a State administrative body (J-2). A designated personal day is an excused leave day with pay for one of the reasons enumerated in the agreement (J-2). The 1983-1986 agreement provides for only undesignated personal days. An undesignated personal day is an excused leave day with pay for any reason whatsoever (J-3). Since the 1983-1986 agreement contains no designated leave days, it no longer lists appearances before a State administrative agency as an excused day with pay. Consequently, the only other type of paid leave day available under the terms of the 1983-1986 agreement was pursuant to a provision for "Absence by Reason of Quarantine or Court Order." That provision of the agreement states, in relevant part:

> A teacher absent from school by reason of quarantine by the Board of Health, or in

> compliance with the requirements of a court subpoena shall not suffer deductions in pay for such absence. The [Association] agrees that this rule does not apply to subpoenas for attendance at arbitration proceedings. (J-3; emphasis deleted from original).

Thus, according to Mr. DeMaio, the Board took the position that the issuance of a subpoena requiring attendance at a Commission hearing does not fall within the meaning of "court subpoena" in the 1983-1986 agreement (T 67).

Ms. Panos testified that the language contained in the sections dealing with "Absence by Reason of Quarantine or Court Order" in the 1980-1983 and the 1983-1986 agreements are identical. Moreover, she points out that there was no discussion during the negotiations for the 1983-1986 successor agreement regarding any change in the manner in which witnesses called by the Association to attend administrative agency hearings would be treated (T 110). Panos stated that prior to the hearing in this matter she was never advised by either the Board or the administrators that the teachers were being docked on the basis of the Board's interpretation of the agreement. She said the only reason ever provided to her for the docking was that the witnesses were not subpoenaed to attend the hearing (T 120).

A good deal of testimony was given concerning the Kidzus matter. Mr. Kidzus, a member of the Board, spoke directly to a few teachers regarding the effect that certain actions taken by the Board might have on them. As the result of these discussions, the Association filed an unfair practice charge against him. While the

Board viewed Kidzus' actions as that of an individual and outside of his role as a Board member, it nonetheless decided to lend unenthusiastic support to Kidzus in the defense of the charge filed by the Association (T 39-40; T 72).

The Board's apparent lack of support for Mr. Kidzus was shared by the Administration. Bruce Quinn testified that the Administration had difficulty with Kidzus in the past (T 72). Dr. Hall stated that he did not discourage or oppose the Association's charge against Kidzus (T 40). Ms. Panos testified that Dr. Hall and Mr. Quinn actually encouraged the Association to file a charge against Mr. Kidzus (T 108).

The testimony indicates that while Dr. Hall was not unhappy about the filing of the charge, the Board's decision regarding whether or not to pay Association witnesses was not influenced by circumstances surrounding the Kidzus matter. Dr. Hall testified that he was not even aware that the Association's witnesses were paid for their attendance at the Kidzus hearing until he undertook a study of the issue when it arose during the litigation of CO-85-182 (T 41; T 50; T 76). As the result of the study, Hall realized that teachers providing testimony on behalf of the Association were not on "school business" as he understood the term, and, consequently, should not be paid on that basis (T 36). It was also at this time that Hall concluded that those employees who testified for the Association in the Kidzus case should not have been paid (T 38). Bruce Hall testified that Board attorney DeMaio also felt that it

was a mistake to have paid the Association's witnesses in the Kidzus case (T 76).

Michael Klavon, Deputy Superintendent, testified with regard to his role in the docking of the Association's witnesses. On June 21, 1985, the day before school closed for the summer, Klavon went to the Association's office to meet with Marie Panos (T 81). Klavon told Panos that the teachers who testified on behalf of the Association in CO-85-182 would be docked for the days that they attended the hearing (T 81). Klavon also said that while he was not certain of all of the reasons for the docking of the Association's witnesses, he did know that it was being done upon the recommendation of the Board attorney (T 80; T 85-86). Panos then showed Klavon her personal record of absences which indicated the date and nature of each event that she reported and was paid for as "school business" (T 82). After reviewing the list, Klavon said that Panos' list might substantiate a claim that pay for attendance at such activities might constitute a past practice (T 82). Klavon then called Quinn and advised him of Panos' list. Klavon and Quinn mutually agreed to place a hold on the docking process (T 83). The meeting concluded with Klavon indicating to Panos and Soderlund, who had in the meantime arrived at the Association's office, that none of the witnesses' pay would be docked (T 84; T 88-89).

On June 24, 1985, the last day of the school year, Klavon told Hall what had transpired in his June 21 meeting with Panos, and that he and Quinn decided not to proceed with the docking of the

Association's witnesses (T 89-90). Klavon testified that Hall became upset with this decision and informed Klavon that Mr. DeMaio's interpretation of the agreement requires that the Board refrain from paying Association witnesses who charged the day to "school business" (T 90). It was not until the paychecks were issued on June 24 that the teachers who served as Association witnesses in CO-85-182 discovered that they had been docked for the time that they had attended the hearing (T 31; T 117).

Panos and Soderlund testified that Klavon said that the issue of docking the Association's witnesses was raised by the Board's attorney (T 53; T 114). Panos stated that Klavon told her the docking question arose during a discussion which took place in a car after the end of the last day of hearing in CO-85-182 between him, Quinn and DeMaio (T 114).

Panos stated that during the June 21, 1985 meeting with Klavon, they discussed the Kidzus case. Panos testified that Klavon told her that while the Association was allowed, in fact, encouraged to testify against Mr. Kidzus, testimony proffered against Dr. Hall might not be allowed (T 114).

Quinn testified that in all of the discussions of the docking issue in which he participated the only reason ever mentioned for docking the Association's witnesses was that the Board attorney interpreted the collective agreement as requiring such action (T 75). Quinn and Klavon testified that no one ever said that the Association's witnesses should be docked as a means to

retaliate or discriminate against them for testifying against the Board (T 75; T 93-94).

Marie Panos testified that prior to the date of the hearing in this matter, the only reason ever expressed by the Board to her for the dockings was that the Association had not obtained subpoenas for its witnesses (T 120). Panos stated that no one from the Board or administration ever indicated that the reason for the dockings was due to the Board's interpretation of the collective agreement (T 120). Dr. Hall's testimony lends support to Panos' statements by his admission that the fact that the Association did not obtain subpoenas had some influence on the decision to dock the Association's witnesses (T 42).

I take administrative notice of the arbitration decision and award[4/] rendered in regard to the issue of whether the collective agreement authorized the Board to dock teachers who attended Commission hearings on behalf of the Association, and a judicial order [5/] confirming and enforcing the arbitration award.

Analysis

One of the Association's allegations is that the docking of the Association's witnesses constitutes a unilateral change in terms

4/ Matawan-Aberdeen Reg. School District v. Matawan-Reg. Teachers Association, PERC Docket No. AR-86-124, issued December 18, 1985, Barbara Z. Tener, Arbitrator.

5/ Matawan-Aberdeen Reg. School District v. Matawan Reg. Teachers Association, Docket No. L-28611-86E (Law Division, April 10, 1986).

and conditions of employment without negotiations in violation of §5.4(a)(5) of the Act. The Association argues that the Board has repudiated the collective agreement when it refused to pay the teachers who testified on behalf of the Association in CO-85-182.

The Board contends that under the agreement, it may legitimately refuse to pay employees who attend administrative hearings for the purpose of testifying against the Board. The Board argues that such activity on the part of employeyes constitutes "personal business" rather than "school business" and, consequently, employees are entitled to pay only if the time is charged against personal time as provided by the agreement. In regard to CO-85-182, employees improperly charged the time spent at the hearing to "school business" and, therefore, are not entitled to pay for those days.

The gravamen of the Association's §5.4(a)(5) charge really amounts to a dispute between the parties over the interpretation of the collective agreement. In recognition of this fact, the parties sought a determination as to whether the salary dockings were proper under the collective agreement by proceeding under the negotiated grievance mechanism to binding arbitration. The arbitrator found that there existed "a clear, consistent, long term and mutual practice under [the agreement] of paying teachers who are absent because of appearances before PERC whether they are there to testify against the Board or not." _In re Matawan-Aberdeen Reg. Bd. of Ed. v Matawan Reg. Teachers Assn._, AR-86-124, _supra_, slip op. p. 8. No

claim has been made that (1) the dispute was not promptly submitted to arbitration and resolved, (2) the arbitration procedures were not fair and regular or (3) the arbitration proceeding reached a result that is repugnant to the Act. See, In re Brookdale Community College, P.E.R.C. No. 83-131, 9 NJPER 266 (¶14122 1983). Consequently, in light of the longstanding Commission policy in favor of deferring disputes over the terms contained in a collective agreement to the parties' negotiated grievance procedure, and the fact that the identical issue raised in this case was presented to an arbitrator who issued an award and remedy, I hereby defer to the arbitrator with respect to the Association's §5.4(a)(5) charge. See, State of N.J. v. Council of State College Locals, 153 N.J. Super. 91 (App. Div. 1977); In re Brookdale Community College, supra; In re Twp. of Springfield, D.U.P. No. 79-13, 5 NJPER 15 (¶10008 1979); In re East Windsor Bd. of Ed., E.D. No. 76-6, 1 NJPER 59 (1975). Accordingly, I recommend that the Commission dismiss the Association's §5.4(a)(5) charge. In re State of N.J. (Human Services), P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

The next issue to be addressed is whether the Board retaliated or discriminated against employees by docking their salary for the days that they appeared at a Commission hearing to give testimony in support of the Association. I find, under the particular facts of this case, that the Board did not retaliate against the teachers who testified on behalf of the Association.

While there are an abundance of cases setting forth the appropriate legal standard applicable to the analysis of cases alleging violations of §5.4(a)(3), there are no Commission cases stating the test to be applied in §5.4(a)(4) cases. Accordingly, before I may begin an analysis of facts and law with respect to the §5.4(a)(4) allegation, I must first identify the applicable legal standard. In such circumstances, it is customary to refer to the private section for guidance. Galloway Tp. Bd. of Ed. v. Galloway Tp. Ass'n. of Ed. Sect'y., 78 N.J. 1 (1978); Lullo v. Internat'l Ass'n. of Firefighters, 55 N.J. 409 (1970).

It is well settled that in private sector cases involving alleged violations of §8(a)(3)[6/] of the National Labor Relations Act, the National Labor Relations Board ("N.L.R.B.") has adopted the Wright Line[7/] test. It is equally well settled in New Jersey public sector cases that the New Jersey Supreme Court has approved the Commission's adoption of the Wright Line test for §5.4(a)(3) cases. In re Bridgewater Tp., 95 N.J. 235 (1984) ("Bridgewater"). The NLRB also applies the Wright Line analysis in §8(a)(4)[8/] cases. See, Airborne Freight Corp. v. NLRB, 115 LRRM 3214 (6th Cir. 1984); In re Montag Oil, Inc., 271 NLRB No. 105, 116 LRRM 1452

6/ 29 U.S.C.A. 158(a)(3). This provision is analogous to §5.4(a)(3) of the Act.

7/ Wright Line, 251 NLRB 1083, 105 LRRM 1169 (1980).

8/ 29 USCA §158(a)(4). This provision is analogous to §5.4(a)(4) of the Act.

(1984). Likewise, it is appropriate to use the Bridgewater analysis in order to determine whether there is a violation of §5.4(a)(4) of the Act.

In order to determine whether an employer has illegally discriminated against employees in retaliation for participation in protected activity:

> ...the employee must make a prima facie showing sufficient to support the inference that the protected union conduct was a motivating factor or a substantial factor in the employer's decision. Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action. Transportation Management, supra, __ U.S. __, 103 S. Ct. at 2474, 76 L. Ed. 2d at 675. Once that prima facie case is established, however, the burden shifts to the employer to demonstrate by a preponderance of evidence that the same action would have taken place even in the absence of the protected activity. [Bridgewater at] 224.

To establish a prima facie case, the charging party must show (1) that the employee engaged in protected activity;[9/] (2) that the employer had knowledge of this activity; and (3) that the employer was hostile toward the exercise of protected activity. Bridgewater, supra at 246. See also, Dennis Tp. Bd. of Ed., H.E. No. 86-6, 11

9/ Of course, in applying Bridgewater in §5.4(a)(4) cases, it is not enough to merely find that an employee engaged in any type of protected activity; the employee must have signed or filed an affidavit, petition or complaint or given information or testimony under the Act.

NJPER 549 (¶16192 1985), aff'd. P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985).

It is undisputed that the employees involved were engaging in protected activity and that the Board had knowledge of the activity. The Board and the Association had just completed the litigation of an unfair practice charge, CO-85-182. It is also clear that the Association's witnesses, having given testimony in a hearing conducted pursuant to the Act, engaged in the type of activity which §5.4(a)(4) was specifically designed to protect.

I now address the issue of whether the Association established that the employer was hostile toward the exercise of protected activity. It is important to note the context in which this charge arose: the recent completion of litigation by the parties in another unfair practice charge filed against the Board by the Association. I am not suggesting that the existence of other unfair practice charges establishes that the employer is hostile toward the exercise of protected activity. However, it is fair to infer that the existence of another unfair practice charge generally tends to have a straining affect upon the parties' relationship and, in deed, there is some evidence in the record to that effect (T 114). Moreover, the fact that the Board decided to dock the Association's witnesses immediately after the completion of litigation in CO-85-182 makes the timing of the Board's action suspect. See, Dennis Tp. Bd. of Ed., supra. Therefore, given the background of a somewhat strained relationship between the Parties

and the timing of the Board's decision to dock the Association's witnesses, I find sufficient evidence of hostility.[10/]

Upon a finding that the charging party has established a *prima facie* case, the burden shifts to the employer to establish by a preponderance of the evidence that it had a business justification for the action taken -- i.e., it would have taken the same action, even absent the protected activity. *Bridgewater* at 244. The Board takes the position that it committed no unfair practice because the docking of the Association's witnesses was the result of its good faith interpretation of the collective agreement. I find that under the particular facts present in this matter, the Board has established by a preponderance of the evidence that it had a business justification for the action it took.

The facts in this case clearly demonstrate that the issue of whether to dock Association witnesses arose completely independently from the ongoing unfair practice litigation in CO-85-182. It was the happenstance of Bruce Quinn's attendance at a County School Boards Association meeting and his discussion of witness pay practices with other attendees at the meeting which

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10/ I am not unmindful of an additional possible indication of hostility--the Board's shifting of reasons for the dockings from lack of subpoenas to a contract interpretation justification. See, *Dennis Twp. B/E.*, *supra*. However, I believe that the facts in this case show that the contract interpretation rationale was present in the decision to dock Association witnesses from the inception of the Board's consideration of the matter.

brought this question to the fore. It was not even Quinn who initially raised the issue at the meeting. Quinn then raised the issue with Board Attorney DeMaio and Superintendent Hall. DeMaio proceeded to research the question in terms of what was allowable under the agreement. On the basis of his research, DeMaio identified a recent change in contract language which he interpreted to preclude payment of regular salaries to witnessses who appeared at administrative hearings on behalf of the Association. DeMaio concluded that it was improper for employees attending such hearings on behalf of the Association to charge such time to "school business" and be paid for the day on that basis. DeMaio advised the Board that Association witnesses should charge such time to their two annual undesignated days or, alternatively, go without pay. While, as discussed above, DeMaio's interpretation of the agreement turned out to be wrong, the evidence shows that the issue of pay for Association witnesses arose despite unfair practice CO-85-182, not because of it, or because various employees gave testimony during the course of the litigation in that matter. While the Board may have misinterpreted the agreement, I believe the evidence shows that it was done in good faith. I find that the Board's contract interpretation, albeit improper, constitutes the business justification for its docking decision. The Board should not be found to have violated §5.4(a)(3) and/or (4) merely because it has wrongly interpreted the agreement; unless more can be shown. I do not believe there is more than that in this case.

Upon the entire record in this case, I make the following

CONCLUSIONS OF LAW

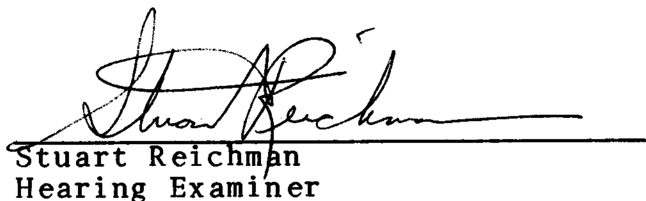
1. The Matawan-Aberdeen Regional Board of Education did not violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (4) when it docked the pay of certain employees who gave testimony at a Commission unfair practice hearing on behalf of the Matawan Regional Teachers Association.

2. The allegation that the Matawan-Aberdeen Regional Board of Education violated N.J.S.A. 34:13A-5.4(a)(5) be dismissed pursuant to the Commission's policy of deferral to arbitration awards.

3. The Matawan Regional Teachers Association did not prove, by a preponderance of the evidence, the remaining allegations contained in its charge.

RECOMMENDED ORDER

I recommend that the Commission ORDER that the Complaint be dismissed in its entirety.



Stuart Reichman
Hearing Examiner

DATED: June 4, 1986
Trenton, New Jersey