P.E.R.C. NO. 86-142

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION

Respondent,

-and- Docket No. CO-83-182-26

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION

Charging Party.

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 it transferred four teachers, allegedly in retaliation against their protected activity. The Commission, however, applying the governing tests of In re Bridgewater, 95 N.J. 235 (1984), finds that the Association did not prove that the Board was hostile towards the teachers' protected activity.

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Charging Party.

Appearances:

For the Respondent, Kalac, Newman & Griffin
(Peter P. Kalac, Esq.)

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

DECISION AND ORDER

On January 19 and June 17, 1983, the Middletown Township Education Association ("Association") filed an unfair practice charge and amended charge against the Middletown Township Board of Education ("Board"). The charge, as amended, alleges that 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),(4) and (7),[1/] when it transferred four teachers from the Fairview

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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 any employee organization; (3) Discriminating in regard to

Footnote Continued on Next Page

Elementary School allegedly in retaliation for their union activities. It further alleges that the transfers were acts of sexual discrimination.

On August 1, 1983, a Complaint and Notice of Hearing issued. The Board then filed an Answer. It admits it transferred four teachers, but denies the transfers were motivated by an unlawful reason.

On September 22 and 23 and October 11 and 13, 1983, Hearing Examiner Edmund G. Gerber conducted hearings. The parties examined witnesses and introduced exhibits. At the conclusion of the Association's case, the Board moved to dismiss the entire Complaint. The Hearing Examiner granted the motion with respect to the allegations that the Board violated subsections 5.4 (a)(4) and (7). At the conclusion of the hearing both parties waived oral argument. They filed post-hearing briefs by November 29, 1983.

On September 19, 1985, the Hearing Examiner issued his report and recommended decision, H.E. No. 86-15, 11 NJPER 669 (¶16230 1985)(copy attached). He concluded that the transfers were

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1/ Footnote Continued From Previous Page

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; (7) Violating any of the rules and regulations established by the commission."

motivated by hostility to protected activity, and that they would not have occurred absent that activity. He recommended the Commission find that the Board violated subsections 5.4 (a)(1) and (3). He further concluded that the Association did not establish a violation of subsections 5.4 (a)(2), (4) and (7) and recommended dismissal of those portions of the Complaint.

On October 11, 1985, the Board filed exceptions. It contends that the Association failed to prove that protected union conduct was a motivating or substantial factor in the transfers. In addition, it asserts that the same action would have taken place in any event to improve the educational program at the Fairview School.

On November 4, 1985, the Association filed a reply to the Board's exceptions. It argues that the transfers were motivated by protected activity and that the Board's justification is pretextual.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 4-22) are accurate. We adopt and incorporate them here with the following additions and modifications.

Stoble testified that after the discussion with Falvo concerning the chart, Falvo was less friendly to her.

Roberts testified that when she met with Falvo after her leave was extended, he scared her when he banged on his file cabinet in anger. Falvo admitted that he might have hit the cabinet.

Richard testified that the principal of the school she was transferred to told her that he had heard she was very strong in the Association.

The notice of transfer issued to the four teachers was drafted specifically for them, although there were approximately 20 transfers made. Ball stated he did not want to convey that their records were negative because in fact they were positive.

In the spring of 1981, Comeau was active in a campaign to oppose an Association bylaws and constitution change. That change eliminated the representative of special services, a position Comeau had held. After the transfers, Comeau ran for the position of Fairview School building representative. She was defeated.

Two of the three elementary building level grievances in 1981-82 were from Fairview. One of the two consolidated four separate complaints. Prior to that year there were no grievances from Fairview.

Falvo testified that when Richard challenged him not to get reports about Association meetings, he just looked at her.

We modify the findings of fact to state that Falvo opposed transferring a teacher because she wanted to adopt a child. Falvo did not supply a reason why a transfer would inhibit her adoption.

This case requires us to decide whether the Board illegally transferred the teachers in retaliation for their protected activity. Such transfers involve exercises of the Board's managerial prerogative, Ridgefield Park Ed Ass'n v. Ridgefield Park Bd. of Ed. 78 N.J. 144 (1978) and are only subject to review to determine whether the transfer decision was illegally motivated. See Dennis Twp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005

1985). In In re Bridgewater Tp., 95 N.J. 235 (1984), the Supreme Court set forth the two-part test we must apply:

> ...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. 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. [Id at 242].

In this case, there is no direct evidence of anti-union motivation for the transfers. The Supreme Court has recognized, however, and we have not hesitated to find under appropriate circumstances, that anti-union motivation can be inferred from certain employer conduct. Bridgewater, supra at 247; Borough of Glassboro, P.E.R.C. No. _____, 12 NJPER ___ (¶_____ 1986) (decided today); University of Medicine & Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447 (¶16156 1985); New Jersey Department of Higher Education, P.E.R.C. No. 85-77, 11 NJPER 75, 81 (¶16036 1985), aff'd App. Div. Docket No. A-3124-84T7 (1986); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); In re Gattoni, P.E.R.C. No. 81-32, 6 NJPER 443 (¶11227 1980); Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (¶4123 1978), aff'd App. Div. Dkt. No. A-4824-77 (1980). In Bridgewater, supra, the Court affirmed our analysis that "in the absence of any direct evidence of anti-union motivation for disciplinary action, a

prima facie case must be established by showing that the employee engaged in protected activity, that the employer knew of this activity and that the employer was hostile toward the exercise of protected rights." Id. at 246. Here, the four teachers had engaged in some form of protected activity. They were all members of the Association. Richard was the building representative for the Association. Stoble was the alternate building representative and processed grievances. Roberts requested personal leave under the contract. Reid was the Association liaison to the teacher-administration committee. The employer, through Falvo, was aware of this activity.

Proving that one engaged in protected activity and that the employer was aware of it does not, of course, establish a violation. The critical element is the requirement that the employer was hostile towards the protected activity. While that may be established by inference, it is not sufficient merely to establish "the presence of anti-union animus." That, in the words of our Supreme Court, is "not enough." Indeed, it is not sufficient to find that animus played a part in the decision. Compare, Haddonfield Borough Board of Education, P.E.R.C. No. 77-36, 3 NJPER 71 (1977). Rather, the test requires that such animus was a "motivating force or a substantial reason for the employer's action." Bridgewater at 242. We have carefully reviewed the record in light of these principles. We agree that some of the evidence could support a finding of hostility. However, considering the

record as a whole, we conclude that the Association failed to prove that the protected activity was a motivating factor in the transfer decision. We believe that the evidence relied upon by the Hearing Examiner, under the circumstances of this case, falls short of that required to establish a violation.

Falvo was upset that Roberts' leave extension had been approved (see H.E. report at 23). But it was not because of his hostility toward her protected activity. Rather, it was because the superintendent granted the request without consulting Falvo.

Falvo's knowledge of what happened at Association meetings (H.E report at 23) does not, in itself, establish hostility. There is no evidence of a preconceived surveillance plot and the Hearing Examiner found that Comeau and Falvo did not perceive of themselves as spying. The mere fact that a new principal spends more time with one teacher, transferred with him from the same school, than with other teachers does not prove unlawful conduct.

The Hearing Examiner also found that the principal's different reasons and "inconsistent and hesitant" testimony warranted a finding of hostility. We agree that such factors are evidence that can support a finding of animus. Further, the "lack of cooperation" justification is often a pretext for anti-union discrimination. But here, we do not believe such findings, in themselves and considered in light of the entire record, are sufficient to establish that union activity was a motivating factor in the transfers. Rather, Falvo as a new principal was motivated by

his desire to make changes in the school that would, in his view, improve the school. He was meeting resistance from a staff which was set in its ways. Thus, the "uncooperative attitude" had nothing to do with protected activity. Falvo believed, rightly or not, that there were good things happening in other elementary schools that were not happening at Fairview, but that the teaching staff was set in its ways after 20-25 years with the same principal. He felt Fairview students were not receiving the same benefits as students at other elementary schools.

For example, Fairview students were not being taken on the number of class trips that other students were, and when he asked for recommendations for more trips, he did not receive a response. After he obtained $1500 for new playground equipment, he asked the teachers what equipment they wanted purchased. All they requested was a sandbox and bench -- total cost, about $100. In addition, the students did not have a yearbook or a school bookstore, spelling bees were not held, and the all-purpose room was not being used for programs as in other schools.

In the school year after the transfers, the playground received new equipment; with the exception of the kindergarten, every student went on a field trip; a field day was conducted; a yearbook was started and a school store was opened.

In addition, the Board offered a rationale for why these particular teachers were chosen for transfer. Falvo's criteria may not have been the only possible ones, or even the best. They did,

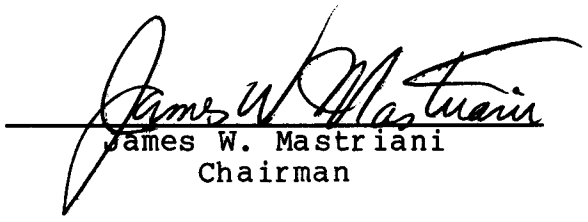
however, provide him with four teachers while at the same time meet his need for continuity in each grade and his notions of fairness. His decision may have been harsh and may have even been educationally debatable. But that does not make it an unfair practice.

We therefore find that the Association failed to prove that protected activity was a substantial or motivating factor in the Board's decision to transfer more teachers than the one required by the reduction in force.2/

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson and Wenzler voted in favor of this decision. Commissioner Smith was opposed. Commissioners Hipp and Reid abstained. Commissioner Horan was not present.

DATED: Trenton, New Jersey
June 25, 1986
ISSUED: June 26, 1986

2/ The Hearing Examiner concluded that the Association failed to establish that the Board violated subsections 5.4(a)(2), (4) and (7). No exceptions to these findings were filed. We adopt these conclusions.

H.E. NO. 86-15

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

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Respondent,

-and-

Docket No. CO-83-182-26

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Middletown Township Board of Education committed an unfair practice when it transferred four teachers from its Fairview school. The Hearing Examiner did not credit testimony of the principal of the Fairview school as to the reasons for the transfer, rather he found that the real reason for the transfer was that the transferees exercised protected rights under the Act.

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. 86-15

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Appearances:

For the Respondent
Kalac, Newman & Griffin
(Peter P. Kalac, Esq.)

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

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

On January 19, 1983, the Middletown Township Education Association ("Association") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission"). The Association alleged that the Middletown Township Board of Education ("Board") violated N.J.S.A. 34:13-5.4(a)(1), (2), (3), (4) and (7)

of the New Jersey Employer-Employee Relations Act,[1/] N.J.S.A. 34:13A-1 et seq. ("Act"), when it transferred four teachers from the Fairview Elementary School in retaliation for their union activities in order to discourage and interfere with the free exercise of their rights under the Act. The Association also alleged that the transfers were made on the basis of sexual discrimination. On June 17, 1983, the Association amended the charge to provide a clear statement of facts constituting the alleged unfair practices. It specifically alleged that Anthony Falvo, Principal of Fairview Elementary School during the 1981-82 school term:

1) was displeased with Petitioner Jean Richard, building representative for the Association, because she filed contractual grievances on behalf of the Fairview Elementlary School teachers;

1/ These subsections prohibits public employers, their representatives and 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 condition of employment 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. (7) Violating any of the rules and regulations established by the Commission.

2) arranged to have a person attend monthly Association meetings at the school and report the goings-on to him and had an argument with Jean Richard concerning the alleged surveillance.

3) was upset with Petitioner Adrienne Stoble, the alternate building representative, because he saw a sign-up chart setting forth the various provisions of the collective negotiations agreement she placed on a wall in the Faculty Lounge and later had a discussion with her concerning it.

4) was angry with Dorothy Roberts when, after denying her request for an extended leave of absence, he discovered that she successfully appealed his decision to the Assistant Superintendent and Superintendent of the Board; and

5) retaliated against the four teachers for their exercise of protected activity by effectively recommending their transfers to other elementary schools in the District.

The Board, in its answer, admitted that four teachers were transferred but denied that the transfers were motivated for any unlawful reason or purpose.

It appearing that the allegations of the charge, if true, might constitute an unfair practice, a Complaint and Notice of Hearing was issued on August 1, 1983. A Hearing was held on September 22 and 23, 1983 and October 11 and 13, 1983, at which time the parties examined witnesses, presented evidence and argued orally.

At the hearing and upon conclusiion of the Association's presentation of its case, the Board moved to dismiss the entire charge. I granted the motion with respect to the allegations that the Board violated subsections 5.4(a)(4) and (a)(7) of the Act and denied the motion with respect to the allegations that the Board violated subsections 5.4(a)(1), (2) and (3) of the Act. Both parties filed post-hearing briefs by November 29, 1983.

Middletown Township operates seventeen public schools and employs about 700 teachers. In any given year shifts in population require a reduction or increase in the size of the teaching staff at one or more schools. In the 1981-82 academic year the Board employed sixteen teachers at Fairview Elementary School: one kindergarten teacher, two teachers each for the first, second, third, fourth, fifth and sixth grades, a fourth/fifth combination grade teacher, a fifth/sixth combination grade teacher and a Communications Special Education teacher.

The Association is the designated majority representative of all teachers employed by the Board.

The Association and the Board were parties to a collective negotiations agreement (contract) for September 198 through 198 .

Adrienne Stoble, Dorothy Roberts, Patricia Jean Richard and Margaret Reid are career elementary school teachers who have all

taught at Fairview School for at least thirteen years. In the summer of 1982, each was transferred by the Board from Fairview School to four other district schools. All four teachers are members of the Association.

Stoble is certified to teach first through eighth grade classes and taught at Fairview from 1969 until 1982. In the 1981-82 academic year Stoble taught the third grade class and was the alternate building representative on behalf of the Association. In that capacity she assisted the building representative in administering the collective negotiations agreement, particularly with respect to processing informal grievances of the sixteen teachers employed at the school. Stoble did not attend Association representative council meetings at Fairview regularly until January.

Roberts is certified to teach first through eighth grade classes and taught at Fairview from 1969 to 1982. In 1981-1982, she taught the only fourth/fifth combination grade class. She regularly attended Association meetings.

Reid is certified to teach kindergarten through eighth grade classes and was steadily employed at Fairview Elementary School from 1960 until August, 1982. At the time of her transfer she was active in the teacher-administration liaison on behalf of the Association.

Richard is also certified to teach kindergarten through eighth grade classes and has taught in the district for twenty-seven

years. She taught at Fairview for nineteen years and was the Association's building representative there from 1967 until 1982.

Anthony Falvo became the principal of Fairview School in August 1981. He was first employed by the Board in 1963 and has been a school principal since 1966 and from 1970-1981 he was principal of Navisink Elementary School.

In early September, 1981, Falvo asked Richard to keep him abreast of any matters discussed at Association meetings which directly affected Fairview School (T. Vol. III p. 130). He also requested and received from her copies of printed Association literature (T. Vol. III pp. 60-61). Richard invited him to attend the Association's monthly building meetings.2/

In early September, 1981, the Board issued a booklet to teachers at Fairview containing various notices and forms. (Booklet: R-1). The teachers were required to fill out and file the forms with the principal during the course of the academic year. In her capacity as Association building representative, Richard communicated her concern about the impact of the requirement to

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2/ Although Richard denied inviting Falvo, she testified that he jokingly requested to attend the meetings and she jokingly refused (T. III pp. 59-60). She also testified that when she jokingly refused this request, she really meant that he was welcome to attend the meetings (T. III p. 70).

Association President, Frank K. D'Alessandro. He recommended that she resolve the matter informally. He specifically recommended that she ascertain from Falvo the number of forms to be completed and the amount of detail he expected in the teachers' responses (T. II p. 55).

In September or October 1981, Richard spoke with Principal Falvo about the forms. She asked him to provide teachers time on the last Friday of each month to complete a monthly data sheet. She suggested that completed parent conference forms[3/] be kept separate from students' permanent records since the forms require teachers to document parent attitudes.

Falvo told Richard that the parent conference forms were necessary to document the conferences and the written requests for special janitorial services were necessary to keep him apprised of the distribution of jobs to janitors (T. Vol. III, pp. 181-2).

In September or October, 1981, Reid asked Falvo why he required teachers to complete field trip evaluation forms. Although Falvo testified that the completed forms were forwarded to the Board to help assure continued funding of a particular class trip, Falvo did not testify that he said this to Reid. Rather, Falvo insisted

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3/ (also known as "J. L. Hammet" forms.)

that the form be completed. Falvo's insistence here is inferred, for Reid filled one out and protested that incident to Association representative, Richard.

On November 6, 1981, the Association filed a grievance on behalf of Reid and the other building teachers with Falvo protesting the imposition of the above-referred forms (CP-6). On November 23, 1981, Falvo issued a formal denial of the grievance (CP-7). On December 17, 1981, the Board sustained Falvo's denial of the grievance (CP-8). The Association filed for arbitration on the Board's imposition of these forms, as well as three other items not in issue here. An arbitration hearing was held and the arbitrator denied the Association's grievance and found the Board did not violate the agreement when it required the completion of the parent-teacher conference form.4/

Richard also asked Falvo about the necessity of a rule requiring teachers to submit written requests for special janitorial service although no grievances were ever filed on this matter (T. Vol. III pp. 8-14).

The only other grievance filed by the Association in 1981-1982 concerning the Fairview School contested Falvo's directive

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4/ The arbitrator sustained the arbitration on another grievance and the parties settled the other two.

that the music teacher perform at an evening school program. Although the grievance was not resolved, the parties agreed to take up the issue in upcoming contract negotiations.

Article 10.6 of the contract provides that a total of five work days for personal business shall be considered for approval without pay one time in the school year and Article 10.7 provides that personal days with pay and personal business days without pay may be combined and used consecutively to a maximum of five days. Article 12.11 of the Agreement provides that "Other leaves of absence without pay may be granted by the Board for good reasons." (R-4,5).

In October, 1981, Roberts asked Falvo for a five-day unpaid leave of absence to accompany her husband on a business trip scheduled for the following February. She testified that Falvo answered that "he would see what he could do." In November, 1981, Falvo granted her request. Roberts stated to him at about that time that she needed an extension of the leave. However, she did not formally request an extension. In December, 1981, Roberts' husband telephoned Superintendent Schneider and requested an extension of the leave. (Under Board policy, requests for leaves of absence for more than five days could be granted only with the Board's approval). Schneider asked that Roberts come to his office. At their meeting on or about December 20, 1981, Schneider referred

Roberts to the Assistant Superintendent, Dr. Ball, who in turn asked her to draft a letter requesting the extended leave. Roberts wrote the letter immediately.

Roberts testified that on the following day Falvo called her into his office, asked her about her conversation with Schneider and was visibly upset over the incident. She admitted that he did not refer to her union activities or membership with the Association and was not angry with her (V. II p.8). Falvo admitted that he was upset but not with Roberts.

Ball presented Roberts' written request to the Board in January or February, 1982. The Board approved the request and Roberts learned of the approval through Ball.

At the time of the Hearing, Dorothy Comeau had been employed by the Board for seventeen years. From 1966 to 1976 she was a classroom teacher. From 1976-1981 she was a learning disability teacher at Navisink School, where Falvo was principal. In the fall of 1981 she was transferred to Fairview as a learning specialist. Comeau testified that she has great respect for Falvo's professional ability and was pleased to continue their association at Fairview.

A learning specialist is required to provide preventive measures for students with potential educational deficiencies, assist staff in the identification and remediation of children with

special needs and serve as an advocate for the child. Further, the specialist's functions include working with all resource personnel and acting as an educational consultant to students, parents and administration in the implementation and evaluation of educational data and progress.

Comeau has also been a member of the Association for seventeen years. She was a representative at the county level and served on the negotiations team and Election and Philanthropic Committees. More recently she instructed Fairview teachers on submitting vouchers to the Board for gasoline/mileage expenses incurred enroute to and from an Association meeting. In the spring of 1981, she ran unsuccessfully for the position of Association Building representative. She frequently attends Association representation council meetings at Fairview.

Stoble testified that she believed that Comeau was spying on her for Falvo. In September and October, 1981, Comeau visited Stoble's classroom once or twice each day for about five minutes but only some of these visits concerned students in Stoble's class (T. I p. 79). Stoble complained to Richard about Comeau on three separate occasions. Two incidents were based on Comeau walking into Stoble's classroom and demanding an immediate consultation about students Stoble had recommended for special assistance. The third incident was a verbal confrontation between them about a matter which Stoble could not recall.

Comeau admitted knowing that Richard was the Association's building representative and that Stoble was the alternate representative. Comeau denied spying on Stoble and stated that she visited Stoble's classroom because she needed to check on two "problem" students (T. IV p. 13).

On October 22, 1981, Richard spoke with Comeau about her behavior at parent conferences and about her authoritarian demeanor with Fairview teachers. At their meeting Comeau denied both allegations.

Stoble also spoke with Falvo about her problems with Comeau.

In January, 1982, Stoble placed a chart on a wall in the teachers' room which listed provisions of the collective negotiations agreement. A sign-up sheet was placed adjacent to it. Stoble wanted each teacher to select three or four Articles, sign their names on the sign-up sheet and become experts concerning them.

Roberts testified that very shortly after Stoble posted the chart, she was in the teachers' room during the first period preparing for a class. She spoke with Comeau about the chart, among other things. Comeau walked out of the room and a few minutes later Falvo walked into the teachers' room. He asked Roberts first about an unrelated matter and then the wall chart (T. Vol. II p. 34). Roberts explained to him the Association's goal in placing the chart on the wall. He then walked out of the room.

Stoble testified that on the morning she posted the chart, Barbara Brolley, another teacher, told her that Falvo saw the chart on the wall in the teachers' room. Stoble walked into Falvo's office, identified herself as the alternate representative, assured him that she meant no harm in posting the chart and explained that her purpose was to distribute responsibility for contract administration equally among Association members. She also asked him if he wanted her to remove the chart. Falvo responded that he was not angry about the chart and that there was no need to remove it from the wall.

Falvo denied that they conversed in his office. He testified that he entered the teachers' room because he was looking for someone. He saw the chart and Stoble, who commented to him about it. He had no objections. Falvo also denied that Stoble identified herself as the alternate representative (T. III p. 133).

Stoble and Richards testified that in the fall and winter of the 1981-82 academic year, the Association held several building meetings when, shortly thereafter, Falvo issued notices to the faculty concerning matters discussed at the Association meetings even though Falvo never attended Association meetings. For example, at one meeting Association members discussed the propriety of placing "conference slips" in a student's permanent record files. The following day Falvo issued a notice reminding teachers to insert

the conference slips into the respective students' permanent record files.

Stoble and Richard strongly suspected that Comeau told Falvo about the meetings. They also believed that, as the year progressed, Association members felt increasingly inhibited about discussing contract administration issues at the meetings for fear that Comeau reported their discussions to the principal.

With respect to this alleged surveillance, Roberts testified that Comeau took notes at the building meetings. At the conclusion of one meeting in the fall or winter Richards observed Comeau return to her office. Moments later Falvo entered Comeau's office. They stepped out of her office, walked down the hall and entered Falvo's office. Richards returned to her classroom. Some minutes later Richards walked down the hall and observed Falvo alone in the nurse's office. In an angry tone, she challenged him not to get reports about the meetings and instead ask her directly for information. Richards testified that Falvo retorted: "Wouldn't you want to know what was going on in your building?" (T. III p. 49). Richard, Stoble and Reid admitted that they had no direct knowledge of Comeau's alleged surveillance.

Comeau testified that she kept notes of Association building meetings when she was a learning disability teacher at Navisink and continued the practice at Fairview. She denied that

she reported the goings-on of any meetings to Falvo. On an average business day she entered the principal's office three times. She made additional visits to check on correspondence concerning students assigned to her.

Similarly, Falvo denied that he received reports from Comeau about the meetings and specifically denied making any comment to Richards when she confronted him in the nurse's office.

On an unspecified date in the 1981-82 term, Falvo and Roberts discussed the limited number of recreational activities available to students using the school playground. Roberts testified that Falvo commented: "What this building needs is more men." (T. II p. 21). Falvo admitted that he made the comment and believed it was true (T. III, p. 125). He testified that in light of a survey he conducted in the District in 1966 indicating a relatively high percentage of single-parent families headed by females, male role models were important for the students. In the 1981-82 term, only one of sixteen teachers at Fairview as male.

In the spring of 1982, Falvo spoke with Assistant Superintendent of Personnel Ball about changing the faculty at Fairview because some teachers were not cooperating with him. Falvo testified that during the term he asked teachers to suggest class trips and recommend substantial purchases of playground equipment. He felt that they failed to comply with his requests. He noted that

the staff did not organize students to establish a school play, bookstore or yearbook.

A teacher who previously worked at Navisink School when Falvo was principal there and who was transferred to Fairview in August 1982, organized students to issue a yearbook during the 1982-83 term.

Ball recollected that Falvo mentioned several reasons for seeking transfers and two in particular: the teacher's failure to request class trips and their failure to recommend significant purchases of playground equipment.

With respect to the failure to request trips Falvo testified that the Parent Teachers Organization had raised money for outings and he reminded the teachers in an unspecified number of weekly written notices to propose class trips. He received no suggestions. Falvo testified that no teachers at Fairview requested trips in the 1981-82 academic year and he could not recall if any of the four alleged discriminatees refused to participate in a trip (T. III pp. 170,171). However, Jean Richard was among three teachers who escorted the sixth grade class to Holmdel Park at the end of the term. Teachers also escorted students to Poricy Park on another trip that year.

With respect to the teachers' failing to recommend purchases of equipment, the PTO allocated $1500 to buy recreational

equipment in the 1981-82 academic year. Falvo testified that he sought the teacheres' suggestions about what equipment to buy. The staff suggested only two items: a bench and a sandbox. Falvo testified that they cost about $100. The teachers expressed their concern in a letter to Falvo that children who used any newly acquired equipment could be injured and subject the school and/or them to lawsuits. Falvo passed the teachers' recommendations to the PTO. Near the end of the year a balance beam and two gymnastic horses were purchased for the school.

On an unspecified date after Falvo's and Ball's discussion and before June 28, 1982, the Board ordered a reduction of force of one teacher at Fairview. The Board's order was based upon Ball's review of and recommendations concerning registrations of students in the district for the succeeding academic year. Falvo asked the sixteen teachers at least once if anyone wanted to be transferred to another district school. No one volunteered. Falvo testified that the r.i.f. was necessary in the fourth/fifth combination grade class, which was taught by Roberts (T. III p. 116). On cross examination, he testified that the r.i.f. was necessary at one of the two combination grade classes (T. III p. 143).

Falvo also testified that he did not want to transfer more than one teacher at any grade level because he wished to preserve some continuity at each grade. He did not recommend the transfers

of any teacheres recently hired at or transferred to Fairview because such transfers were unfair. For the same reason he did not recommend the transfers of teachers who would retire at the conclusion of the 1982-83 school year. He did not want to transfer the one male teacher. He also was opposed to transferring a teacher who was in the process of adopting a child.

With these criteria applied to the sixteen teachers at Fairview, only one fifth grade teacher, the Communication Special Education teacher and the four alleged discriminatees were eligible for transfers to other district schools. Falvo did not specifically state why the Special Education teacher was not eligible for transfer. He did not explain why he chose to transfer Margaret Reid over the other fifth grade teacher when both had been employed at Fairview for roughly the same number of years.

In June, 1982, Falvo spoke with Ball and Superintendent Schneider to confirm that the proposed transfers were necessary. Ball testified that Schneider reported to him that Falvo sought to transfer four teachers. Falvo testified that Schneider said that the matter should be taken to the Board.

On June 28, 1982, Falvo appeared briefly before the Board at a pre-meeting workshop. Board member Ellen Christin attended the workshop and testified that Falvo praised the quality of all teachers at Fairview. He requested that four teachers be

transferred because they were uncooperative. Ball, Schneider and Falvo did not refer to the transferees by name. After Falvo left the room, the Board voted to tentatively support the request (CP-28). Christin testified that Falvo was an experienced principal whom the Board respected.

A few days after the workshop Ball notified Falvo that the Board tentatively approved the request. He also requested and received from Falvo the names of the four transferees. Ball set July 26 or August 2, 1982 as possible dates when the Board would formally act on Falvo's request.

Ball testified that his next responsibility was to select the schools and grades in which Stoble, Reid, Roberts and Richard would be placed. By June, 1982, Schneider and Ball were apprised of which teachers were and were not returning to the District in the fall. Ball notified the principals of any reductions in force at their schools. The principals then forwarded to Ball their estimates of the number of teachers needed for each grade. Based on these statistics and an unspecified number of requests from teachers to be transferred, Ball and Schneider proposed the transfers of about twenty teachers including the alleged discriminates, from and to district schools at the end of 1981-82 term (T IV. p. 130, CP-11).

With respect to the charging parties, Ball testified that he wished to transfer them to the same or nearly the same grade

level they had taught at Fairview. On or about July 23, 1983, Ball issued notices to each of the four teachers stating that they might be transferred to different district schools for the 1982-83 term. His letters also stated that the teachers' skills will be considered by the Board in making the transfers (See CP-1, CP-3). The statement implied that the teachers' special skills may be needed in other district schools. On direct examination, Ball admitted that the "skills" of the teachers had no bearing on the decision to transfer. He testified that the real reasons for the transfers were the reduction of force and lack of cooperation (T. IV, p. 95). Ball stated that he did not want to convey to the teachers that their records were in any way negative.

Dorothy Roberts received her letter and phoned Falvo and asked him about its ramifications. Falvo denied knowing about the Board's act and insisted that he was not involved. Falvo testified that he was unaware of the Board's decision before Roberts called him.

On August 1, 1982, the Board formally approved the transfer as well as sixteen other teachers employed by the District (See CP-10).

The Board originally approved the transfers of two female teachers and one male teacher from other district schools to Fairview. After the approval, and before the 1981-82 term began,

one female teacher was appointed as a vice-principal to a district school. A male teacher replaced her at Fairview. One teacher, Fred Gruber, previously worked under Falvo at Navisink and requested the transfer to Fairview on or about August 2, 1981. On August 3, 1982, the Board sent notices of the transfers to the alleged discriminatees (See CP-2, 4).

On December 1, 1982, Association President Frank D'Alessandro sent a letter to Schneider requesting a meeting concerning the transfers. On December 17, 1982, Schneider sent a letter to D'Alessandro stating that a meeting could be arranged with Ball and requesting that the Association submit written questions to him. On or about January 5, 1983, the Association submitted questions concerning the Board's justifications for the transfers to Ball.

On January 11, 1983, Schneider and Ball met with the Association representatives and presented them with a single paragraph written statement (CP-5). The gist of the statement was that the Board approved a recommendation that the teachers should be transferred.

On January 12, 1983, the Association filed a contractual grievance concerning the transfers. Ball convened a second meeting with the Association on or about February 1, 1983. He told the representatives that Falvo recommended the transfers, the

Superintendent presented Falvo's request to the Board and the Board approved the transfers (T. IV p. 104). He denied that the Board was aware of the teachers' union activities and did not elaborate on the transferees' "special skills." (T. II pp. 89-90). The Association apparently did not pursue the grievance.

In In re Twp. of Bridgewater and Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court articulated the following legal standards for analyzing allegations that an employer has discriminated against an employee in order to discourage protected activity:

> ...Under the test, 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 factor or a substantial reason for the employer's action. [NLRB v. Transportation Management, ___ U.S. at _____, 113 LRRM 2851 (1983)]. 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 in the absence of the protected activity. Id. This shifting of proof does not relieve the charging party of proving the elements of the violation but merely requires the employer to prove an affirmative defense.

The Board transferred the four teachers in question clearly upon Falvo's recommendation. Therefore, Falvo's motivations must be imputed to the Board's actions.

Falvo's testimony was inconsistent and hesitant, particularly as to his motivations. He kept citing different reasons for the transfers. This inconsistency coupled with his demeanor, he seemed uncomfortable and on edge, leads me to question Falvo's credibility.

It is likely that Comeau and Falvo did not perceive of themselves as spying on the Association, yet Falvo knew what was happening at Association meetings. Here I specifically credit the testimony of Richard that Falvo issued memos which tracked the issues discussed at Association meetings and that when she confronted Falvo in the nurse's office he replied, "wouldn't you want to know what was going on in your school?" I find that Comeau did, at least on occasion, tell Falvo what the Association was doing. Falvo did act on the basis of that information and such activity on the part of Falvo demonstrated his hostility toward the Association and to the exercise of protected rights.

Moreover, Falvo admitted he became upset when the Board approved Roberts' request for additional time off. He testified that he was not upset at Roberts but rather was upset at the administration. Although I can accept this to some degree, Roberts did go over Falvo's head and I cannot accept the contention that Falvo had no resentment at all towards Roberts. Roberts had the right under the contract to request leave time; therefore, Falvo's resentment went to the exercise of protected rights.

This hostility raises questions about Falvo's reasons for the transfer, i.e. the faculty's lack of cooperation. No doubt lack of cooperation is the motivation here but I do not believe the faculty's failure to recommend playground equipment and its supposed failure to conduct class trips were the true measures of this lack of cooperation. No doubt these two things annoyed Falvo, but he cured one of these problems on his own by ordering more equipment, and there is credible evidence that the teachers did schedule class trips. If Falvo believed more were necessary, why not simply order teachers to schedule more class trips. Moreover, why single out these four teachers.

It is not necessary to decide here the educational validity of transferring women teachers to get male teachers. What is significent is that Falvo transferred four women teachers to get one additional male teacher.

I am satisfied that Roberts, Reid, Richard and Stoble were "uncooperative" and were transferred because of their exercise of protected rights. Moreover, I find that if they had not engaged in protected rights only the one transfer for the r.i.f. would have taken place. The unlawful reasons for the transfers were such a significant portion of Falvo's motivation that the transfers would not have occurred had the teachers not engaged in protected activity.[5/] The overall mix of motivations testified to by Falvo

5/ It is now impossible to pick out the one valid transfer.

does not convince me that the transfers would have occurred absent the exercise of protected activity. It strains credulity to believe that Falvo picked out these four teachers for transfer in a totally accidential way. Accordingly, for the reasons set forth above, it is hereby recommended that the Commission find that the Middletown Board of Education violated §5.4(a)(1) and (3) when it transferred Stoble, Reid, Roberts and Richard from the Navisink school.

The Association did not introduce any evidence to establish the findings of a violation of §5.4(a)(2), (4) or (7). It is therefore recommended that the allegations of these subsections be dismissed.

Therefore, it is recommended that the Commission issue the following:

ORDER

The Respondent, Middletown Township Board of Education is hereby ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by transferring its employees because they exercised protected rights by filing grievances and otherwise participated in the Association and they exercised rights provided for in the collective negotiations agreement.

2. Discriminating in regard to a term or condition of employment to discourage employees in the exercise of rights

guaranteed to them by the Act, particularly by transferring its employees because they exercised protected rights by filing grievances and otherwise participated in the Association and they exercised rights provided for in the collective negotiations agreement.

B. Take the following affirmative action:

1. Forthwith offer to Jean Richard, Dorothy Roberts, Adrienne Stoble and Margaret Reid the opportunity to transfer back to the Navisink School.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Aplpendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained for a period of at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other material.

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

Edmund G. Gerber
Hearing Examiner

Dated: September 19, 1985
Trenton, New Jersey

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by transfering employees because they exercised protected rights by filing grievances and otherwise participated in the Association and they exercised rights provided for in the Collective Negotiations Agreement.

WE WILL cease and desist from discriminating in regard to a term or condition of employment to discourage employees in the exercise of rights guaranteed to them by the Act, particularly by transfering employees because they exercised protected rights by filing grievances and otherwise participated in the Association and they exercised rights provided for in the Collective Negotiations Agreement.

WE WILL forthwith take the following affirmative action and offer to Jean Richard, Dorothy Roberts, Adrienne Stoble and Margaret Reid the opportunity to transfer back to the Navisink School.

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 495 W. State Street, Trenton, New Jersey 08618 Telephone: (609)292-9830.