

P.E.R.C. NO. 94-124

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-92-282

ORANGE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Orange Board of Education violated the New Jersey Employer-Employee Relations Act when an acting high school principal criticized Association leaders in a faculty meeting and reprimanded employees for engaging in protected activity. The remaining allegations in the Complaint are dismissed.

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In the Matter of

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Docket No. CO-H-92-282

ORANGE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Schwartz Simon Edelstein Celso & Kessler, attorneys (Nicholas Celso III, of counsel)

For the Charging Party, Balk, Oxfeld, Mandell & Cohen, attorneys (Randi Doner, of counsel)

DECISION AND ORDER

On March 9 and 13, 1992, the Orange Education Association filed an unfair practice charge and amended charge against the Orange Board of Education. 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) and (3),^{1/} when, at a faculty meeting, the acting high school

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

principal criticized Association representatives who participated in a rally before the school day, reprimanded an Association committee chairperson for conducting Association business off school property, denied a New Jersey Education Association ("NJEA") representative access to an employee's disciplinary conference, and reprimanded certain teachers regarding their participation in an Association meeting.

On April 21, 1992, a Complaint and Notice of Hearing issued. The Board filed an Answer denying the allegation concerning the principal's comments; admitting that it sent a letter to the chairperson but denying the remaining aspects of that allegation; denying the allegation concerning the disciplinary conference; and admitting that certain individuals received letters from the Board but denying the remaining aspects of that allegation. As an affirmative defense, the Board claims that the Association's activities unlawfully disrupted proper operational procedures. It further claims that at the time of the disciplinary conference, the NJEA did not represent the employee unit in question.

On June 18, August 25 and October 9, 1992, Hearing Examiner Susan Wood Osborn conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs.

On June 14, 1993, the Hearing Examiner issued her report and recommendations. H.E. No. 93-30, 19 NJPER 364 (¶24164 1993). She found that the Board violated subsection 5.4(a)(1) when the

acting high school principal criticized the Association's leadership in an emergency faculty meeting; and the Board violated subsections 5.4(a)(1) and (3) when certain teachers were reprimanded for attempting to use the school cafeteria without permission and for participating in an Association assembly during their free time. The Hearing Examiner recommended dismissing the allegation concerning a teacher who was disciplined for distributing union materials when he should have been performing his professional responsibilities. She concluded that the Board would have disciplined the teacher even absent his protected conduct. She also recommended dismissing the allegation concerning the disciplinary conference because the principal permitted the employees to be represented in the interviews by a Custodial Association representative.

On June 28, 1993, the Board filed exceptions. It claims that its principal's comments at the emergency faculty meeting did not violate the Act. It also claims that the Hearing Examiner erred by finding that teachers were reprimanded for incidents that took place on duty-free time. On July 2, the Association filed an answering brief urging adoption of the Hearing Examiner's recommendations.

We have reviewed the record. The Hearing Examiner's finding of fact (H.E. at 3-25) are accurate. We incorporate them with this modification.

Finding no. 4 indicates that following the demonstration on September 24, all teachers signed in by 8:22 a.m. Association building representative Bauernhuber so testified and Board witnesses did not identify any teacher who was late. However, we note that Assistant Principal Johnson did not clearly corroborate Bauernhuber's testimony. When asked if teachers all signed in by 8:22, she responded, "I think they were. Some of them didn't make it exactly at 8:22" (3T11). We specifically adopt the Hearing Examiner's credibility determinations.

In the absence of Association exceptions, we adopt the Hearing Examiner's recommendations to dismiss the allegations concerning the teacher who was disciplined for distributing union materials on duty time and the custodians who were allegedly denied union representation at a disciplinary interview.

We next address the reprimands received by five teachers who tried to attend a meeting called by Association representatives to discuss the status of negotiations. The Association's representative council called a meeting at the high school for January 23, 1992 after a half day of classes had ended at 12:45 p.m. and before teacher workshops began at 1:30 p.m. The Association did not ask to use the high school pursuant to contract provisions permitting the use of school buildings with the approval of the principal or superintendent.

The principal learned of the meeting from an anonymous telephone call the night before. He did not speak to any

Association representatives, but told his administrators to be "on post" to identify teachers coming into the building. The principal went to the cafeteria at about 12:55 p.m. At 1:00 p.m., when a number of teachers had arrived, the principal announced that they were not to have a meeting in his building. The teachers left immediately. The principal told Bauernhuber that he could see she was up to her old tricks again, and that he would get her the next day. She told him that she had nothing to do with calling the meeting.

The teachers walked outside the school and congregated under the portico because it was raining heavily. The principal followed them out and told them that they could not meet on Board property. The teachers began to move across the street at about 1:15 p.m. Between 1:20 p.m. and 1:25 p.m., the teachers proceeded to their scheduled workshops.

As a result of the January 23 events, five teachers received nearly identical reprimands. They accused the teachers of:

1. Unauthorized use of the school facilities for union-related business;
2. Participation in non-school related activities during school hours;
3. Unlawful assembly on school property during school time;

The three high school teachers' reprimands also included:

4. Tardiness to scheduled workshop at High School;
5. Insubordination - Refusal to report to the 1:30 P.M. workshop per my administrative directive.

The two elementary school teachers' reprimands also included:

4. Did not sign in with security upon arrival to High School;
5. Did not apprise building administration of the purpose of your visit to the High School.

The reprimands also accused the teachers of attempting to "create tension, havoc and disharmony among the instructional and administrative staff," and warned them that "'failing to honor the terms of a contract' does constitute grounds to initiate tenure charges."

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation of subsections 5.4(a)(1) or (3) will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove,

by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

In its exceptions, the employer contends that the reprimands were issued for legitimate business reasons. The principal was allegedly concerned that teachers remain at their posts to ensure the safe departure of students at the end of the day. But the reasons stated in the reprimands themselves had nothing to do with ensuring student safety. Instead, those reasons allege "unauthorized" and "unlawful" meeting, a failure of teachers to sign in when entering the high school, and a failure of teachers to arrive at the 1:30 p.m. workshops on time. The record indicates that there was no unauthorized meeting since the principal refused to permit it to take place; teachers arrived at their workshops on time; and some of those reprimanded did not even know about the meeting and were simply arriving at the high school for their scheduled workshops. If the principal had legitimate concerns, he certainly did not express them through the reprimands. The reprimands served only to punish employees for infractions they did not commit. Accordingly, we find that the Board violated subsections 5.4(a)(1) and (3) when the acting principal reprimanded

employees to discourage them from exercising rights guaranteed by the Act.

We next address the acting principal's remarks to teachers at an emergency faculty meeting called in response to a protest organized by the Association to protest the lack of progress in negotiations. High school teachers rallied outside the school before their reporting time. At about 8:15 a.m., the teachers entered together and lined up outside the school office to sign in. By the sign-in deadline of 8:22 a.m., most, and perhaps all, teachers had signed in. That afternoon, the principal called an emergency faculty meeting. The principal expressed his objections to the morning demonstration and criticized the Association's leadership.

An employer independently violates subsection 5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Gorman, Basic Text on Labor Law, at 132-34 (1976). The charging party need not prove an illegal motive. Hardin, The Developing Labor Law, at 75-78 (1992). In its exceptions, the Board argues that the principal had a legitimate concern that teachers report on time and that the singing could have hurt staff morale and the public's perception. The principal's comments to teachers, however, did not address those concerns. He instead stated that Association leaders were manipulating them; that one leader took a

personal day but joined the rally anyway; and that the leader who was singing was a "master manipulator" and a "wannabe" with her own agenda. These comments were not made to Association representatives in a session where the Board and the Association were meeting as equals. See Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). Contrast Matawan-Aberdeen Reg. Sch. Dist. Bd. of Ed., P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989).

Instead, they were made at a required emergency faculty meeting where the principal was criticizing union activity as a supervisor to his subordinates. The statements tended to exercise undue influence on and coerce the employees and thus were not legitimate comments within the employer's right to engage in non-coercive speech. Under these circumstances, we find that the principal's conduct interfered with employees in the exercise of rights guaranteed them by the Act and therefore violated subsection 5.4(a)(1).

ORDER

The Orange Board of Education is 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 criticizing Association leaders in a faculty meeting and reprimanding employees for engaging in protected activity.

2. 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 the Act, particularly by issuing written reprimands to teachers for engaging in protected activity.

B. That this action:

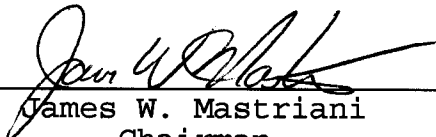
1. Rescind the reprimands given to Beth Sutton-Dircks, Margarie Neave, Nancy Grossbarth, Stan Lynn timer, and Patricia Bauernhuber as a result of the incidents occurring on January 23, 1992.

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

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

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Goetting, Klagholz, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

DATED: June 30, 1994
Trenton, New Jersey
ISSUED: June 30, 1994



NOTICE TO 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 our employees in the exercise of the rights guaranteed to them by the Act, particularly by criticizing Association leaders in a faculty meeting and reprimanding employees for engaging in protected activity.

WE WILL cease and desist from 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 the Act, particularly by issuing written reprimands to teachers for engaging in protected activity.

WE WILL rescind the reprimands given to Beth Sutton-Dircks, Margarie Neave, Nancy Grossbarth, Stan Lyynik, and Patricia Bauernhuber as a result of the incidents occurring on January 23, 1992.

Docket No. CO-H-92-282

ORANGE BOARD OF EDUCATION
(Public Employer)

Date: _____

By: _____

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 the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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

In the Matter of

ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-92-282

ORANGE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Orange Board of Education violated subsection 5.4(a)(1) of the Act when its high school principal made derogatory remarks about the Association's leadership in an emergency faculty meeting. The Hearing Examiner finds that the principal's remarks tended to interfere with the employees' statutory rights and lacked any legitimate business reason.

Further, the hearing examiner recommends that the Commission find the Board violated subsection 5.4(a)(1) and (3) of the Act by reprimanding certain teachers for attempting to use the school cafeteria without permission and participating in an Association assembly during their free time.

The Hearing Examiner recommends that the Commission find no violation on the Association's allegation that a teacher was disciplined for distributing union materials in front of the school at a time when he should have been performing his professional responsibilities. The Hearing Examiner finds that the Board, having both lawful and unlawful motives, would have disciplined the teacher even absent his protected activity.

Finally, the hearing examiner found that Board did not violate the Act by depriving employees of their Weingarten rights.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

STATE OF NEW JERSEY
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Appearances:

For the Respondent,
Schwartz, Simon & Edelstein, attorneys
(Nicholas Celso, of counsel)

For the Charging Party,
Balk, Oxfeld, Mandell & Cohen, attorneys
(Randi Doner, of counsel)

HEARING EXAMINER'S REPORT AND
RECOMMENDED DECISION

On March 9, 1992, and March 13, 1992, the Orange Education Association filed an unfair practice charge and an amendment with the Public Employment Relations Commission ("Commission") alleging that the Orange Board of Education violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., ("Act").^{1/} The OEA alleges that the Board's

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with,

high school principal made deleterious comments at a staff meeting about OEA representatives' participation in a rally before the school day, reprimanded an Association committee chairperson for conducting Association business off school property, reprimanded certain teachers for participating in an Association meeting, and denied a New Jersey Education Association representative access to an employee's disciplinary conference, and

On April 21, 1992 the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Board filed an Answer, admitting that it reprimanded certain employees, but denying the remaining allegations. The Board asserts that the Association's activities referred to in the charge were unlawful and disrupted school operations. It further asserts that, at the time, the NJEA was not the representative of the employees who were involved in the disciplinary conference.

I conducted a hearing on June 18, August 25, and October 9, 1992, at which the parties examined witnesses and presented evidence.^{2/} The parties filed briefs by January 20, and reply

1/ Footnote Continued From Previous Page

restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.

2/ Transcripts of the successive days of hearing are referred to as "1T- ", "2T- ", and "3T- "; jointly submitted exhibits are identified as "J- "; the charging party's exhibits are referred to as "CP- "; and the Board's exhibits are referred as to "R- ".

briefs on February 9, 1993. Based upon the entire record in this matter I make the following:

FINDINGS OF FACT

1. In 1991, the Board's employees were represented by four separate negotiations representatives: the OEA represented the teachers, the Custodial and Maintenance Association represented custodial and maintenance employees, and two other organizations represented the clerical staff the para-professionals respectively. All four organizations were affiliated with the New Jersey Education Association. At the time of the events here, teachers and other certificated personnel were covered by the terms of an agreement (J-1) that expired June 30, 1991 while negotiations for a successor were ongoing. The Board's custodial and maintenance employees were covered by the then-current contract between the Board and the Custodial and Maintenance Association for the period July 1, 1988 through June 30, 1992 (R-5).

Staff Meeting Comments

2. In September, 1991, the OEA Representative Council and its Action Committee voted to stage a series of before-school demonstrations to protest stalled contract negotiations. They agreed to line up in front of all 10 schools before school began and file in together to show unity. Acting High School Principal Sakaar Sabuur learned about the planned demonstrations and he addressed the issue at the September 23 faculty meeting. He told faculty he supported their efforts to secure a contract, but warned them to be

signed in and be on duty by 8:22 a.m..(1T96; 1T144; 2T35)

3. On September 24, teachers at the high school held one such demonstration before the beginning of school. On that day, teachers began arriving at the school before 8:00 a.m.. At 8:10, they lined up at the front of the building.^{3/} Patricia Bauernhuber, an Association building representative for 15 years, was informally leading the rally that morning. At 8:17, Assistant Principal Gayle Johnson came outside and warned Bauernhuber that teachers must sign the school's sign-in roster by 8:22 or be marked as late.^{4/} (1T97; 1T132; 2T47).

4. At about 8:15, the teachers began entering the building and lining up in the hallway outside the school office to sign in. At 8:20, Bauernhuber realized that with the number of people left to sign in, they may not get through in time. To encourage them to move through faster, she began to sing a verse from the theme song from a 1960's television show, Rawhide,

Rolling, rolling, rolling.
Keep those doggies rolling.
Rawhide. (1T98; 1T139).

^{3/} Students enter through other entrances beginning at 8:15. Teachers do not monitor students before the school day begins(1T172).

^{4/} Sabuur testified that teachers are required to be "on duty" by 8:22. Although the contract (J-1) and the Administrative Governance Manual (R-1) require teachers to be in the building 15 minutes before students, Bauernhuber credibly testified that Board has not enforced the policy since it changed students' arrival time (1T120; 2T39-2T41). The OEA objected to the proposed change in faculty arrival time, and the Board continued the practice that teachers sign in by 8:22 (1T171; 1T176).

Both Sabuur and Johnson, as well as secretaries, were in the main office, and heard Bauernhuber singing. Students in the area may also have heard her singing (1T141).^{5/} Some teachers giggled and laughed, some smiled. One staff member asked Bauernhuber, who was holding the office door open as teachers went inside, if she had signed in yet. When Bauernhuber said no, that teacher held the door while Bauernhuber signed in. By 8:22, all teachers in the line had signed in.^{6/} Bauernhuber then went to her classroom (1T98; 1T123-1T124; 1T128; 1T132; 1T176; 2T47; 3T11).

5. That afternoon, Sabuur called an emergency faculty meeting after school "to discuss what [he] was displeased with about the manner in which the job action was done." (2T112).

In the meeting, Sabuur told that staff that, although he supported their efforts to secure a contract, he felt that the Association leadership organizing the protest had done a number of things that he felt "staff members needed to be aware of." (1T99; 2T45). He told the staff that he felt certain Association leaders were manipulating them. He told the staff that one of the Action

^{5/} Sabuur testified that students and parents were in the main office that day (2T113; 2T116). However, Bauernhuber and Johnson testified that only secretaries and teachers were present. (1T142; 3T13) I credit their testimony, and specifically find that there were no parents or students in the office.

^{6/} Johnson corroborated Bauernhuber's testimony that all teachers signed in. Sabuur testified that a number of teachers signed in late (2T51). However, he did not identify any teacher who was part of the demonstration as signing in as late.

Committee leaders was outside directing teachers but then left on a personal day (2T112).^{7/} He relayed that another came to school early, signed in at 7:30, and then went out and joined the protest (2T45). Sabuur referred to another leader ushering in teachers by singing a song used to drive cattle to the marketplace for slaughter, in which she had referred to the staff members as cattle or "doggies;" which he felt was offensive (2T46; 2T113). He stated that that person was a "master manipulator" and a "wanna be" with her own agenda.^{8/} Sabuur also criticized Bauernhuber for "cutting in line" in front of other teachers instead of signing in last (3T12). Although Sabuur did not criticize individuals by name, the staff understood who he was referring to in each instance (1T99-1T100; 3T24). At that point, Bauernhuber raised her hand, called his name, and tried several times to get his attention. Sabuur initially refused to recognize her (1T148). When he criticized Bauernhuber's singing, she interrupted and said, "If you're referring to me..." and he replied, "If the shoe fits, wear it." (3T9-3T10; 3T20). She then denied calling his staff cattle or dogs, and publicly apologized to anyone who thought she had (1T101; 1T148).

^{7/} Action Committee member Tom Fox went to a workers' compensation doctor that day (1T100).

^{8/} I base this finding on Bauernhuber's testimony (1T100; 1T148). Sabuur did not recall referring to anyone as manipulator (2T116).

Although Sabuur started out the meeting in a calm tone of voice, when Bauernhuber sought to interrupt him, he raised his voice and, by the end of the meeting, was shouting. ^{9/}

After the direct exchange with Bauernhuber, Sabuur left the room. A member of the staff stood up and angrily said that people should not be talked to in that fashion (1T101). The meeting only lasted a few minutes (3T9). Bauernhuber did not receive a written reprimand (1T102).

5. The job action continued the next day without further incident with the administration (1T147). Bauernhuber was offended by Sabuur's remarks, which she felt were unfair (1T150).

^{9/} Assistant Principal Johnson's testimony supports this finding. Bauernhuber testified that during the exchange, Sabuur was "yelling at the room in general and then specifically at me." (1T101). Sabuur denied screaming or yelling. Johnson testified that Sabuur was initially "not shouting, just making statements in a calm and natural tone. He had his coat off, walking and talking (3T21). When Bauernhuber tried to interrupt him, Sabuur testified that Bauernhuber had take the conversation to a "personal level", and he acknowledged that he did then raise his voice because he wanted to respond to her in "a like manner"; he characterized her comments as abusive and disrespectful, and that she raised her voice at him first. However, when Johnson was asked if Bauernhuber raised her voice, Johnson said, "Bauernhuber never gets excited. She was always very methodical (3T9). This is consistent with Bauernhuber's manner at the hearing, and I credit Johnson's characterization. Further Johnson testified that when Bauernhuber apologized to the staff, Sabuur got "a little agitated." (3T22). While Sabuur testified that he had to raise his voice because Bauernhuber was seated in the back of the room (2T52-53) (3T52), Johnson testified that the meeting occurred in half of the cafeteria, and everyone could hear (3T21).

Tom Fox's Reprimand

6. Tom Fox, an english teacher at the High School, was the Action Committee Chairman during the 1991-92 school year. His role was to fulfill any requests from Association officers or the OEA Representative Council (1T13-1T14).

7. On October 2, 1991, at about 3:05, Fox left the high school building and went to his car, which was parked on the sidewalk near the school entrance.^{10/} He unloaded containers of union materials, including cardboard sun visors and baseball caps, inscribed with union slogans, from the trunk of his car and began to set up a display of the paraphernalia on the steps near the exit door of the high school building.^{11/} Fox had not obtained

^{10/} Fox believed this occurred at 3:07. Johnson testified that she observed him from the window about 3:00 or 3:05, but definitely "before he should have been out there." (3T15). Gardner, who was policing the outside of the building as students are dismissed, was certain that he saw Fox outside before the 2:55 student dismissal bell (3T34). In any event, all witnesses agree, and Fox admitted, that this occurred before the 3:15 teacher dismissal time. I do not credit Fox's testimony about these events. His answers to questions were evasive, defensive and unresponsive, and he exhibited a hostile attitude.

^{11/} Fox denied that he tried to set up a display. He acknowledged that he wanted to distribute the material to teachers as they left the building. Fox testified that he merely removed the materials from his trunk, transferred them to a teacher to another school, and asked that teacher to distribute them. Fox further testified that he leaned the sun visors up against the nearest telephone pole, which one could assume would be along the curb (1T16; 1T44). I credit the testimony of the three Board witnesses --Johnson, Sabuur and Assistant Principal Richard Gardner--who all testified that Fox set up the display on a landing of the steps near the school doors

permission from his department head or the school administration to go outside or to set up the display (3T17; 3T34). He had also failed to sign out in the office (2T63).

8. Sabuur, who was meeting with Assistant Principal Johnson, noticed Fox outside setting up the display from an office window (2T54).^{12/} A crowd of elementary teachers had gathered around Fox (3T17). Sabuur went outside and asked him why he was outside and what he was doing. Fox replied that he wanted to have the display ready so he could catch the teachers as they left the building (2T56-2T57; 2T60).^{13/} Sabuur told Fox to get the

11/ Footnote Continued From Previous Page

(3T15-3T16; 2T57; 3T34). Fox also denied that the materials also included hats, asserting that they were only sun visors, which the Association was distributing free (1T19). Sabuur described the display as sun visors, cardboard items that fit across a windshield, stacked up in a pile up against the wall, and he observed "a hat" that had "some type of union message" on it, and hats piled in a stack. Sabuur testified that, "one of the things that called my attention to the individual out in front of the building was the fact that the hat was being worn at that time." (2T59) Johnson testified that Fox had "posters" and hats and things of that nature, although she could not read the slogans from the window (3T14; 3T15). Gardner, who was outside and had the closest view of Fox's activities, specifically described Fox as handing out orange hats with "No contract" in black lettering to elementary teachers from a shopping bag (3T34; 3T36). Again, I credit Johnson, Sabuur and Gardner.

12/ Johnson testified that she and Sabuur were "flabbergasted" that Fox was outside distributing things rather than on his post at that time (3T15-3T17).

13/ Fox denied that this portion of the exchange occurred. Fox's account of the event was inconsistent. I do not credit his testimony. Sabuur also testified that Fox admitted he was setting up the display to sell hats (2T60). I discredit this as too unlikely an admission.

materials off school property. Fox then transferred the materials to an elementary teacher to distribute (1T20; 1T41; 1T17; 2T60-2T61).

Sabuur made no comment to any of the elementary teachers there (1T20).^{14/} Fox continued to stand outside on school grounds (1T17).

9. Teachers at the high school are required to remain "on duty" until 3:15 p.m. to assist in clearing the school building of students.^{15/} The high school's approximately 1,000 students are all dismissed at 2:55 (2T62). An attempted rape at the high school the previous school year precipitated a directive from the Superintendent to the high school principal to have teachers stay

^{14/} Fox testified that other teachers were also outside congregating at this time(1T50). To the extent that Fox may be implying that other high school teachers were also outside, this is uncorroborated, and I reject it. While Johnson testified that other teachers were milling around Fox, Sabuur and Gardner both testified that the only other teachers outside were elementary teachers, there for after-school sports programs (2T59-2T60).

^{15/} Fox asserted that he had done his professional duties. Fox asserted that teachers are permitted to leave the school without permission as long as they remain on school grounds (1T50). Fox testified, "I mean, I can walk to my car in the parking lot, I can come back. We never had any indication that you have to be inside the building....For years teachers have been checking the cars after school. (1T20-1T21)...a lot of teachers congregate outside, walk around, smoke, or get fresh air (1T17; 1T20). I do not Fox's account of the school's practice on teachers' after-school activities. It would appear unlikely that teachers would go outside to check their cars or congregate at 3:05 if they had be inside to sign out at 3:15. Additionally, if teachers were permitted to wander the school grounds freely between 2:55 and 3:15, there would be no purpose in requiring them to stay beyond the student dismissal time.

past student dismissal to make sure students left the building. The administration wanted a visible teacher presence after school to monitor student behavior and to prevent students from going into classrooms, breaking into lockers and starting physical confrontations (2T61-2T62). Administrators monitor outside the building and teachers remain inside, monitoring the area around their last period class (2T62).

10. The teachers' collective agreement (J-1) does not state a specific dismissal time. In September, 1991, the Superintendent established dismissal time for high school teachers at 3:15 and included the following policy in the administrative governance manual:

On signing, checking in and out are a mandatory responsibility. We expect all staff to adhere to this contractual agreement. All teachers are expected to sign out at 3:15 or after that time. The sign-out book will be placed on the counter at 3:15. Teachers leaving the building before that time or not checking out will be reprimanded."(R-1, p. 39).

The administrative governance manual was presented and reviewed with the staff at the September 4, 1991 staff meeting. Teachers were also apprised of the 3:15 dismissal time at that staff meeting (2T106). Fox acknowledged that he was aware of the manual's provisions.

11. On October 9, 1991, Sabuur sent Fox a letter of reprimand (CP-1), stating:

On Wednesday, October 2, 1991, you were observed at 3:07 pm in front of the High School building with a number of cardboard sunvisors as part of a job protest. When I approached you and asked whether you had received permission to set up this display, you stated that you "wanted to give them to the teachers when they left the building." I asked that you remove these items from the school grounds immediately.

The following items has(sic) caused some administrative concerns relative to the above incident.

1. Those items in your possession, ie., the sunvisors and hats, were being sold to teachers on school grounds during school hours. This is against Board Policy and you will refrain from further acts as such.

2. Your presence outside of the school building constitutes a neglect of your responsibilities as outlined in the Administrative Governance Manual. This responsibility states that "during after-school dismissal, teachers are to remain after the dismissal of their classes as the discharge of their professional responsibilities require and assist in clearing the building of students." (p. 38). You did not assist in clearing the school building since your presence was outside of the High School. Future acts of this nature will be considered as insubordination.

3. You are not to organize any job action, union activities or any other activity on school grounds without the knowledge, permission, and approval of the Principal or his designee.

4. Dismissal time has been established at 3:15 p.m. and not 3:07 p.m. Again, the administrative Governance Manual states that, "signing/checking in and out are a mandatory responsibility. We expect all staff to adhere to this contractual agreement. All teachers are expected to sign out at 3:15 p.m. or after that time." Whenever you leave the high school before that time, you are to sign out at the Main office and/or inform your immediate supervisor, E. Jarecki and the Principal that you are leaving the school building. You(sic) refusal to do the same is a violation of Board Policy.

This memo will be placed in your personnel file and reviewed during your annual performance evaluation...

12. Fox responded to CP-1 with a memo (CP-2), denying each allegation. Fox received no response to CP-2 (1T19).

13. The 1988-91 teachers contract provides at Article III,

C. Representatives of the Association, the New Jersey Education Association, and the National Education Association shall be permitted to transact official Association business on school property at all reasonable times, provided that this shall not interfere with or interrupt school operations.(J-1)

Sabuur routinely grants Association requests to conduct union business on school property "whenever and wherever they request" and has done so 30 to 40 times since he has been principal (2T65). Sabuur intends to continue to permit union business on school property in the future (2T65).

14. Sabuur testified that he had no objection to the union messages on the hats (2T64). When asked the purpose of Sabuur's interfering with Fox's exhibit of the union materials that day, he indicated that it was because Fox was not at his duty station as assigned, and he was concerned with how "this" might be interpreted by students and teachers leaving by the front entrance (2T64).^{16/}

^{16/} The record is not explicit concerning what Sabuur might have meant by "this." Given Sabuur's apparent desires, as a new administrator, to run a disciplined operation at the high school, I infer that he did not want other teachers and students to believe that Fox was "getting away" with something by setting up the display on work time.

15. Fox has conducted union business from the high school in the past without first asking permission. In September, 1991, he ordered 500 union hats and had them sent to him at the high school (1T37-1T38). While he partially placed the order from school, this did not interfere with school operations (1T51). When the hats arrived, Sabuur gave the invoice to the Association president. He did not address the issue with Fox, who had not asked permission to ship the hats (2T68). Fox has never asked permission nor been reprimanded for receiving Association materials at the school (1T52-1T53).

Workshop Day Reprimands

16. The teachers' contract provides at Article III,

D. The Association and its representatives shall have the right to use school buildings at all reasonable hours for meetings. The principal (or the person in charge) of the building in question shall be notified in advance of the time and place of all such meetings. Approval by the principal (or the person in charge) or Superintendent of Schools shall be required. (J-1).

17. Board policy requires the any request to use school facilities must be approved in advance by the Superintendent, school business administrator or building principal.^{17/} The Association normally seeks approval to use the school for its meetings by signing up at the beginning of each school year to cover the

^{17/} Sabuur believed he would have to clear any request that came to him through the superintendent's office (2T82).

scheduled meetings for the entire year. Procedurally, it must complete a form in the main office and submit a written request to the principal (2T19-2T20). Permission is never denied (1T153-1T154; 2T169-2T170).

18. The OEA's representative council consists of one representative for every ten members in each building. According to the OEA constitution, if four or more schools desire to meet, the council can call a meeting (1T159). The council called a meeting for January 23, 1992 (1T103; 1T115).^{18/}

Senior building representatives informed the other building representatives that a meeting was scheduled for January 23, at 1:00 at the high school cafeteria. That day was a scheduled teachers workshop and students were dismissed at 12:45. The Association representatives did not seek permission to use the high school on that day.^{19/} (1T67; 1T69; 1T80; 1T105; 1T111; 1T112; 1T156; 2T14; 2T18-2T19).

19. Sabuur learned the night before from an anonymous telephone call that a group of Association representatives planned to meet the next day in the high school teachers' cafeteria to

^{18/} High School Assistant Principal Curtis Richburg testified that only the Association President, not the council, can call a meeting (2T163-2T164). I give no weight to this testimony. Although Richburg was a one-time president of the OEA, as a member of the administration, he is not qualified to testify about the Association's procedures.

^{19/} Bauernhuber testified that she understood the Association was required to secure permission to hold a meeting, but was unaware permission had not been obtained.

discuss the union presidency and the stalled contract negotiations (2T91; 2T92; 2T121). He was told that the Association president had not called the meeting (2T82). The next morning, Sabuur asked some teachers if they were knew a meeting was planned, but did not speak to any of the building representatives about it (2T122-2T123). He told his administrative staff that he expected a large turnout of teachers at the high school and directed them to be "on post" to identify teachers coming into the building (2T91-2T92). Assistant Principal Richburg stood at the doorway outside the office and greeted teachers arriving for the meeting because some teachers did not know where to go (2T166; 2T172).

20. Sabuur went to the teachers' cafeteria at about 12:55. He sat down at a table with the few teachers already in the room. He did not ask any of them why they were there or if there was a meeting planned. He wanted to wait to see if there would be a meeting. At 1:00, many more teachers arrived. Sabuur told the assembled teachers that they were not to have a meeting in "his" building, that no permission was given, and that they were to leave. The teachers immediately left the cafeteria and walked towards the front of the building. No one argued with him about his directive or gave him a problem about leaving (1T104; 1T157; 2T14; 2T121; 2T123; 2T125).

As Bauernhuber was leaving the cafeteria, she gave him a quizzical look and Sabuur said to her, "So, I see you're up to your old tricks again, I will get you tomorrow." (1T105-1T106; 2T90).

Bauernhuber said, "I beg your pardon?", and Sabuur repeated, "I'll deal with you tomorrow." (1T106) Bauernhuber responded that she had nothing to do with calling the meeting.

21. The teachers walked outside and initially stood under the portico overhang. On the way outside, Bauernhuber again approached Sabuur and asked him what he meant by his remark. They had a short discussion over the fact that the OEA should have secured permission to use the school cafeteria. (1T106; 2T14).

After stopping to briefly talk to Bauernhuber, Sabuur went outside. Teachers and students crowded under the portico as it was raining heavily. By 1:10, there were about 50 to 70 teachers had assembled under the portico (2T96; 2T127). Sabuur told the assembled group that they could not meet on Board property (1T106). When they did not move immediately, Sabuur asked Richburg to come out and identify as many teachers as he could^{20/} and then go call the police (2T127-2T129). The teachers were discussing where to go (1T106-1T107). Marjorie Neave, an elementary teacher, asked Sabuur why, as a Board employee, she had to leave the Board's property (2T128). The teachers then began to move across the street at about 1:15 (2T15). Sabuur went back inside school. By 1:15 pm., there were about 90 to 110 people gathered across the street, including teachers who had come out of the school to see what was going on (1T107). They remained assembled across the street in the rain,

^{20/} As Sabuur was new to the district, he did not know the names of many of the teachers gathered outside (2T93).

discussing ongoing negotiations (2T15) and whether to try to find another place to meet. The assembly broke up between 1:20 and 1:25 (2T96), and the teachers arrived to their workshops on time.^{21/}

22. As a result of the January 23 events, five teachers were given written reprimands: Patricia Bauernhuber, Stan Lyynik, Beth Sutton-Dircks, Marjorie Neave, and Nancy Grossbarth. (CP-4, CP-7, CP-8, CP-9 and CP-10). The reprimands asserted those teachers committed the following infractions:

1. Unauthorized use of the school facilities for union-related business;
2. Participation in non-school related activities during school hours;
3. Unlawful assembly on school property during school time;

Additionally, Bauernhuber, Grossbarth and Sutton-Dircks were also reprimanded for "tardiness to scheduled workshop" and "insubordination - refusal to report to the 1:30 workshop per my administrative directive." (CP-7; CP-9, CP-10)

Stan Lyynik and Majorie Neave was also reprimanded for failure "to sign in with security upon arrival to high school", and failure "to apprise building administration of the purpose of [their] visit to the high school." (CP-4; CP-8).

^{21/} Sabuur admitted that did not know if teachers were late. The Association's witnesses all testified that they arrived on time. As the town is 2.2 square miles, it is logical that teachers leaving the high school between 1:20 and 1:25 would have been on time. Witnesses testified that one could get anywhere in town from the high school in less than 10 minutes, even in heavy traffic (1T159).

23. Sabuur called Bauernhuber to his office the next day to give her a written reprimand, CP-7 (1T110). Sabuur told her she was paranoid and in need of serious psychological counselling (1T166; 167). Bauernhuber denied conducting non-school business during school hours or discussing union business under the portico (1T112). While Bauernhuber agreed that teachers were assembled under the portico, but they left promptly when asked (1T113). She arrived at her workshop on time (1T114).

24. Sutton-Dircks, a 19-year OEA representative, was an OEA alternate representative at that time. Sutton-Dircks arrived at her workshop by 1:25 (2T25-2T26). When Sabuur gave Sutton-Dircks her reprimand (CP-10), he asked her if she was a union representative. She told him she was unsure, as she had just returned from a leave of absence (2T26-27).

25. Lynn timer was given his reprimand (CP-4) on February 4. Lynn timer never went the cafeteria meeting. When he arrived at the high school at about 1:15, the teachers were already outside. (1T72; 1T76). Lynn timer, who is also the high school bowling coach, turned in a bowling report in the office, then went outside to join other teachers (1T70). He arrived at his workshop on time (1T70).

Lynn timer did not sign in when he went to the high school that day nor did he apprise the administration of the purpose of visit. As the high school bowling coach, Lynn timer has always been permitted to enter the high school and perform business relating to bowling club. In the past ten years, Lynn timer has never apprised the high

school administration of his visits to the high school, either for bowling business or for Association business (1T88). Lynn timer has only signed at the high school in the evening. Lynn timer arrived at his workshop at approximately 1:30 and participated in the workshop (CP-6; 1T72-1T74). On February 5, Lynn timer sent a rebuttal letter (CP-5) to Sabuur concerning his reprimand. He did not receive a reply (1T72).

26. Marjorie Neave was given her reprimand letter (CP-9) on February 3. Unaware of the scheduled union meeting, Neave went to the high school to attend her scheduled workshop. When she arrived, teachers were gathered outside under the portico and Sabuur would not permit anyone back in the school. At 1:30, she went in for her scheduled workshop. Neave did not sign in with security, but signed in at the workshop, which has always been the procedure for attending workshops (2T9).

27. Nancy Grossbarth was in the cafeteria for the Association meeting at 12:45. When Sabuur ordered the teachers to leave, she stood outside with the other teachers, first under the portico, then across the street. She arrived to her workshop on time. (2T14-2T21)

28. Teachers was given a lunch period that day prior to the student dismissal at 12:45 (2T85). While the period between the students' 12:45 dismissal and the 1:30 workshop was intended to give teachers time to travel to their respective workshop sites, in past years, teachers did use the 45-minute break as free time, and

teachers could conduct union-school business during this time (1T112-1113; 1T156; 2T86; 2T133).

29. The Superintendent has directed Sabuur to require everyone coming into the school to sign in with security (2T175). Board policy requires visitors, defined as "anyone other than a pupil and staff member employed in that particular school," to sign in (R-7). However, this policy is not regularly practiced (2T137).

30. Sabuur is a member of the district's administrators union (2T98). When he was appointed acting high school principal, he sought to make teachers responsible to well-documented administrative procedures to create a safer environment for students and teachers. Because no clear policies outlining teachers responsibilities existed at the high school, Sabuur promulgated the administrative governance manual (2T102). According to Sabuur, his purpose for reprimanding the five teachers for the workshop-day incidents was to hold the teachers accountable for established policies, not to interfere with their Association business (2T96-2T97).

31. In addition to the teachers reprimanded, Sabuur recalled that he also saw Ms. Cottingham, and Tom Fox in the cafeteria (2T95).^{22/} Although Sabuur attempted to secure "as many teachers' names as he could" when they were leaving the portico

^{22/} Sabuur also testified that he saw Neave in the cafeteria. I do not credit this, but instead credit Neave's contrary testimony that she did not arrive at the high school until after the teachers had assembled on the portico (2T9).

area, he was only successful in obtaining six teachers' names, because they had their backs turned while crossing the street (2T143).

Weingarten Incident

32. It is commonly known in the district that each of the separate units were affiliated with the NJEA. Employees paid NJEA dues through payroll deductions, "for some time." NJEA Representative Allen Fox had contacted the Board Superintendent concerning custodial issues, he had never represented those employees in disciplinary hearings (1T65-1T66).

On October 1991, the OEA filed a representation petition seeking to replace the Custodians Association as the bargaining agent for custodial and maintenance employees. It also sought to replace the other two support associations, and consolidate all units together.^{23/} On November 20, 1991, the Director found the proposed consolidated unit to be appropriate in the face of disclaimers from the three respective support associations, and ordered an election among the employees. Orange Bd. of Ed., D.R. No. 92-6, 18 NJPER 2 (¶23001 1991). Following representation elections, the Director certified the OEA as the representative of the consolidated unit in December, 1991. However, Sabuur did not learn that the NJEA intended to take over representation of the

^{23/} At the hearing, I advised the parties that I would take administrative notice of certain documents in the Commission file on the representation matter, Docket No. RO-92-51.

custodians group until he was supplied with a notice of the December election.^{24/}

33. Sometime in early November, 1991, Assistant Principal Richard Gardner told Sabuur that an incident occurred with two high school custodians--Mr. Koonce and Mr. Martino--and that he intended to recommend their termination. Sabuur told Gardner to set up a meeting with the two custodians and to invite Robert Fields, the President of the Custodians Association, to the meeting as the employees' union representative. Koonce and Martino were notified orally that an investigatory meeting was going to take place (2T76). Fields was not available for the first scheduled meeting, and it had to be rescheduled (2T76). On November 19, Fields called Allen Fox, the NJEA UniServ Representative, told Fox that there was to be a discipline conference that morning for two custodial employees and asked Fox to come represent the custodians (1T56). Fox arrived at the high school and met with Martino to get some background information on the situation.

34. At the designated time, the employees appeared for the meeting with Fields and Fox. Fox told Sabuur that he was there to

^{24/} Sabuur testified that he was not given notice of the election until January, 1992. While I find that he mistaken about the timing, I do credit his testimony that he was unaware that OCMA was affiliated with the NJEA until the December consolidation election. There is no evidence that the Board attorney or higher levels of the Board administration advised the building principals that there was such an affiliation. Moreover, the record establishes that Sabuur was new to the district, making his explanation plausible.

represent the custodians (1T57).^{25/} Unaware that the Custodians Association was affiliated with NJEA,^{26/} Sabuur told Fox that he did not have "any place" in the meeting and would not permit Fox to attend. Fox then counselled Martino about his rights and Martino went in the meeting with Fields. Fox left. Fox later sent Sabuur a letter (CP-3) objecting to not being permitted to represent the employees.

35. Fields remained with the custodians for the entire interview. Neither Koonce nor Martino requested Fox's presence (2T78). At the meeting, Gardner presented an account the employees' offenses. Both Koonce and Martino were given an opportunity to explain their version of what happened (2T77). Sabuur left the meeting after 15 minutes, and Gardner continued the meeting. School Board Secretary/Business Administrator Ron Lee, together with Mr. Gatlin, the district-wide Custodial Supervisor, joined the meeting which lasted more than an hour and a half.(2T78)

At the conclusion of the meeting, it was decided that the custodians would be suspended with pay pending a meeting with the superintendent. Later, a second investigatory conference took place with the Superintendent and the employees. Fox was permitted to

^{25/} Fox only recollected being called to represent Martino. However, I credit Sabuur's testimony that two custodians were involved and that Fox told him he was there as a representative for both of them. This is corroborated by Fox's later letter to the Board, CP-3.

^{26/} Sabuur testified that he was then unaware of any relationship between the Custodians Association and the NJEA.

represent the employees at that meeting. The Superintendent decided not to terminate the employees, but decided that a professional improvement plan would be written for both employees (2T79; 1T58-60).

36. Sabuur acknowledges that since the consolidated bargaining units are now represented by the NJEA, he would not object to NJEA representation in an employee's investigatory interview (2T72-2T73).

ANALYSIS

The OEA contends that Sabuur's comments at the September 24 faculty meeting concerning the Association's pre-school rally violated 5.4(a)(1) of the Act.

A public employer independently violates subsection (a)(1) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification. Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); UMDNJ -- Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1957); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The charging party need not prove an illegal motive in order to establish an independent violation of subsection 5.4 (a)(1) of the Act.

In this matter, Sabuur's comments at the September 24, 1991 staff meeting following the Association demonstration tended to interfere with the employees' rights to engage in protected activity--specifically, the employees' right to select their

organization's leaders. His comments lacked a substantial, legitimate business justification.

In Black Horse Pike Regional Board of Education, P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission observed:

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

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible, criticism may be appropriate and even legal action...may be initiated to halt or remedy the other's actions. [Id. at 503.]

Here, the "parties" were not equals, in a position to criticize one another's behavior. This was a mandatory faculty meeting in which the supervisor was addressing his subordinates--the faculty members. This case is in contrast to Matawan-Aberdeen Reg. B/E, P.E.R.C. No. 89-130, 15 NJPER 411 (¶20168 1989), aff'g H.E. No. 89-41, 15 NJPER 356 (¶20159 1989), [app. dismissed App. Div. Dkt. No. A-6054-88T5 12/5/89], in which the Commission found that an assistant superintendent's criticism of the union president for delaying negotiations did not amount to undermining the certified representative. There, however, the criticism occurred in a meeting with Association officers, who were voluntarily participating in the

meeting. There, the hearing examiner found that the parties in that context were equals.

The facts presented here are quite different. Sabuur's criticism of the Association's leadership was made in a faculty meeting during school hours--a captive audience meeting. The nature of his comments did not relate to "attitudes inconsistent with good labor relations," or the "effective delivery of governmental services." Rather, the criticism concerned the way in which the Association leadership handled its own members in the pre-school demonstration. He criticized the leadership's interaction with its own members; that one leader took a personal day but joined the rally; that another signed in ahead of other teachers; and that she sang what Sabuur felt was an offensive song to her members. Sabuur's comments, in this case, tend to undermine the union's leadership.

Sabuur's staff meeting comments also lacked any legitimate management concern. They did not in any way relate to whether the teachers signed in on time nor any allegation that they failed to carry out their professional duties or appropriately handle students. His sole concern was that the OEA leadership was "manipulating the staff."

Accordingly, I conclude that Sabuur's comments at the September 24 staff meeting tended to interfere with employees' rights to select and show allegiance to the Association's leadership and therefore, violated subsection 5.4(a)(1) of the Act.

* * *

The OEA asserts that Fox's written reprimand violates subsections 5.4(a)(1) and (3) of the Act.

Under Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

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

This case presents a dual motive situation: Sabuur disciplined Fox for engaging in union activity and for doing it on

work time. Had Fox distributed the materials after 3:15, then Sabuur's disciplinary measures would have been illegal. However, an employee is not insulated from discipline for impermissible conduct just because the employee is engaged in union activity. Black Horse Pike, Trenton Board of Education, P.E.R.C. No. 80-130, 6 NJPER 216, 217 (¶111108 1980). Fox was undeniably not performing his professional responsibilities when he was outside the building setting up a display at before the teachers' workday ended at 3:15. He also failed to obtain permission to leave the building early and failed to sign out that day. These actions were in violation of the employer's policies and the OEA contract.

I find that the Board had a legitimate business justification for Fox's discipline--that he was distributing materials outside the school building before the end of the workday when he should have been upstairs handling his professional responsibilities. I am convinced that Sabuur would have disciplined Fox for distributing anything outside before the end of the school day. The Board proved that it would have disciplined Fox even in the absence of his protected activity.

I conclude that the Board's reprimand to Fox did not violate subsection 5.4 (a)(1) and (a)(3) of the Act.

* * *

The OEA alleges that the reprimand given to certain teachers over the workshop day events also violated 5.4(a)(1) and (3) of the Act because it was in retaliation for union activities. The standard for deciding whether this discipline violates the Act is set forth above (Bridgewater).

Here, I find that the OEA has proven that the employees' protected conduct was a substantial or motivating factor in the employer's decision to discipline the five teachers. The employees' attempt to hold an Association meeting and the members gathering outside the school are activities both protected by the Act and permitted by the OEA contract. The contract allows employees to engage in Association activities during the school day as long as those activities do not interfere with the performance of their professional responsibilities. Neither the attempted meeting in the cafeteria nor the gathering outside interfered with the teachers' professional responsibilities because they were on duty-free time (See finding of fact #28).

Therefore, absent a legitimate business justification, the discipline must be found to be unlawful. While the Board asserts that it had a legitimate business justification for issuing the discipline, the record does not establish that the employees failed to attend their scheduled workshops on time. Nor does the record establish that the Board had a legitimate business reason for prohibiting the employees from gathering outside the building to discuss union business. Further, the record shows that Lynnik and Neave's failure to sign in with security was not inconsistent with the school's practice. Therefore, a legitimate business justification could only exist with regard to the unauthorized use of the cafeteria. I reject this defense as pretextual.

First, the record establishes that Sabuur only "took down names" of the employees whom he eventually disciplined after the teachers assembled under the portico, which I have already found is protected activity. Once the teachers were outside, Sabuur gathered as many names as he could. (See finding of fact number 21.) If Sabuur believed that the unauthorized use of the cafeteria warranted discipline, he would have made a list of the teachers to be disciplined when they attempted to meet in the cafeteria. Second, only three of the five teachers disciplined were involved in the attempted use of the cafeteria, while inexplicably, the record does not demonstrate that other teachers Sabuur saw in the cafeteria received discipline. Finally, while the contract requires the Association to first secure permission to use school facilities, the record does not establish that the disciplined employees were acting as Association leaders in calling the meeting. Fulfillment of the contractual obligation to secure permission for the room can hardly be expected of every member of the Association who appeared for the meeting.^{27/}

I conclude that the discipline of the five teachers arising from the events on the workshop day was in retaliation for their protected activities and was not motivated by legitimate business

^{27/} If Sabuur were truly concerned with the Association's fulfillment of its contractual obligation to obtain permission to use the facilities, it might have made more sense to contact the Association leadership and advise those persons of the oversight rather than waiting to "snare" the employees who appeared for the meeting.

concern, in violation of subsections 5.4(a)(1) and (3) of the Act. Further, I conclude that Sabuur would not have disciplined the five employees in the absence of their protected conduct.

* * *

The OEA alleges that the Board violated subsections 5.4(a)(1) when the principal denied NJEA Representative Allen Fox permission to Act as the union representative in an investigatory interview for two custodians.

In East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part App. Div. Dkt. No. A-280-79 (6/18/80), the Commission adopted the federal model under NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975) ("Weingarten") to determine whether an employer has interfered with an employee's right to union representation during a disciplinary interview.

Under Weingarten, an individual employee has a right to union representation at any investigatory interview that the employee reasonably believes could lead to discipline. The employer's denial of that right violates subsection 5.4(a)(1) of the Act. To prove a Weingarten violation the charging party must show that (a) the employer conducted an investigatory interview (b) during which the employee reasonably believed that discipline might result; (c) the employee requested union representation; and (d) the employer denied the request for union representation and proceeded with the interview. See Tp. of Old Bridge, P.E.R.C. No. 90-102, 16

NJPER 307 (¶21127 1990), appl pending App. Div. Dkt. No. A-5353-89T2; State of N. J. (Dept. of Human Services), P.E.R.C. No. 89-16, 14 NJPER 563 (¶19236 1988); Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988); Dover Municipal Utilities Auth., P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); Stony Brook Sewage Authority, P.E.R.C. No. 83-138, 9 NJPER 280, 281 (¶14129 1983); East Brunswick Tp., P.E.R.C. No. 83-16, 8 NJPER 479 (¶13224 1982); Camden County Vo-Tech School, P.E.R.C. No. 82-16, 7 NJPER 466 (¶12206 1981); and Cape May County, P.E.R.C. No. 82-2, 7 NJPER 432 (¶12192 1981).

Here, I find no violation of the employees' Weingarten rights. First, Sabuur did permit the employees to have union representation during the investigatory interview. The record establishes that it was the Custodial Association, not the employees, who asked the NJEA Representative to join in representing the two employees. An employee has no right to two union representatives; the employer has a right to limit the employee to one. While it would have been preferable to permit the employee to choose his representative, instead of the principal making the choice for him, Sabuur was unaware that the NJEA was, in fact, the employees' union at that time. In any event, the employee was not denied representation, and I find no violation.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That the Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them under the Act by criticizing union leaders in captive audience faculty meetings and making derogatory comments about the way in which they chose to lead the OEA members in engaging in protected rights.

2. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them under the Act by disciplining employees for engaging in union business.

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 by issuing written reprimands to employees who engaged in union business.

B. That the Board take the following affirmative action:

1. Rescind the reprimands given to Sutton-Dircks, Neaves, Grossbarth, Lynnik, and Bauernhuber as a result of the incidents occurring on January 23, 1992.

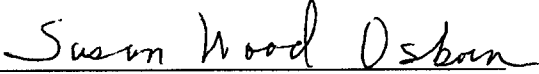
2. Post in all places where notices to employees are customarily posted copies of the attached notice marked as "Appendix A." Copies of such notice shall, after being signed by the Board's authorized representative, be posted immediately and be maintained by the Board for at least sixty (60) consecutive days. Reasonable

steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

C. That the Commission dismiss the allegations concerning Tom Fox's discipline.

D. That the Commission dismiss the allegations concerning the Board's failure to permit NJEA Representative Allen Fox to act as the custodians' union representative.


Susan Wood Osborn
Hearing Examiner

DATED: June 14, 1993
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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them under the Act by criticizing union leaders in captive audience faculty meetings and making derogatory comments about the way in which they choose to lead the OEA members in engaging in protected rights.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them under the Act by disciplining employees for engaging in union business.

WE WILL NOT discriminate 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 by issuing written reprimands to employees who engaged in union business.

WE WILL rescind the reprimands given to Sutton-Dircks, Neaves, Grossbarth, Lynnik, and Bauernhuber as a result of the incidents occurring on January 23, 1992.

Docket No. CO-H-92-282

Orange 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 the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.