

P.E.R.C. NO. 86-126

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PINE HILL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-85-139-76

PINE HILL EDUCATION ASSOCIATION
AND VANESSA CLAX,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Pine Hill Board of Education violated the New Jersey Employer-Employee Relations Act when it withheld Vanessa Clax's salary increment. The Commission, applying the governing tests of In re Bridgewater, 95 N.J. 236 (1984), finds that the increment was withheld in retaliation against Pine Hill Education Association's filing of a grievance on Clax's behalf. The Commission further holds, however, that the Board did not violate the Act when it ordered Clax to submit to a psychiatric exam and that it did not violate the Act when the superintendent notified the Board in a public session of the Association's grievance on Clax's behalf.

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PINE HILL BOARD OF EDUCATION,
Respondent,

-and-

Docket No. CO-85-139-76

PINE HILL EDUCATION ASSOCIATION
AND VANESSA CLAX,

Charging Party.

Appearances:

For the Respondent, Maressa, Goldstein, Birsner,
Patterson & Drinkwater, Esqs.
(Robert E. Birsner, of Counsel)

For the Charging Party, Selikoff & Cohen, Esqs.
(Steven R. Cohen, of Counsel)

On November 29, 1984, the Pine Hill Education Association ("Association") and Vanessa Clax filed an unfair practice charge against the Pine Hill Board of Education ("Board"). The charge alleges that the Board violated subsections 5.4(a)(1), (2), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (5) Refusing to negotiate in good faith with a majority

Act, N.J.S.A. 34:13A-1, et seq. Count one specifically alleges that the Board withheld Clax's increment and ordered her to undergo a psychiatric evaluation in retaliation for a grievance the Association filed on her behalf. Count II alleges that the superintendent circumvented the negotiated grievance procedure by submitting the grievance directly to the Board without first issuing a written decision.

On December 7, 1984, a Complaint and Notice of Hearing issued. The Board then filed an Answer. With respect to Count I, the Answer admitted that the Association had filed a grievance on Clax's behalf and that the Board had withheld Clax's increment and ordered a psychiatric evaluation, but denied that the former motivated the latter. The Board specifically denied that the superintendent told Clax that the matter was being reopened because the Association had filed a grievance on Clax's behalf and neither admitted nor denied that its president criticized the Association for bringing its grievance. With respect to Count II, the Board denied that it circumvented the grievance process or otherwise violated the Act when the superintendent informed it of the grievance.

1/ Footnote Continued From Previous Page

representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On March 13, 14, and 15, 1985, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but submitted post-hearing briefs by May 6, 1985.

On May 20, 1985, the Hearing Examiner issued his report and recommended decision. H.E. No. 85-44, 11 NJPER 400 (¶16141 1985). He found that the Board had retaliated against Clax because of the Association's grievance when it withheld her increment and ordered a psychiatric evaluation and that the Board had violated the negotiated grievance procedure. He recommended that we order the Board to restore Clax's increment, rescind its directive that Clax undergo a psychiatric evaluation, and post a notice of its violations and remedial actions taken.

On June 3, 1985, the Board filed exceptions. It asserted that the Hearing Examiner erred in refusing to read the journal entries (R-2) which precipitated this controversy or to permit testimony concerning which journal entries allegedly motivated the Board's actions. The Board also challenged certain findings of fact and all his conclusions of law.

On June 13, 1985, the Association filed a response supporting the Hearing Examiner's recommendations.

On July 1, 1985, we reopened the record and remanded the case for additional testimony concerning R-2 and a supplemental report. P.E.R.C. No. 86-14, 11 NJPER 462 (¶16165 1985).

On September 6, 1985, the Hearing Examiner conducted the remand hearing. The Board presented the testimony of its superintendent and president; the Association introduced one exhibit. The parties waived oral argument, but filed post-hearing briefs by November 15, 1985.

On December 4, 1985, the Hearing Examiner issued his supplemental report. H.E. No. 86-24, 12 NJPER 63 (¶17025 1985) (copy attached). After finding several supplemental facts, he again concluded that the October 15 grievance motivated the Board's October 22 decisions to withhold Clax's increment and to order a psychiatric evaluation and that the Board would not have so punished Clax absent that grievance. He also reaffirmed his earlier conclusion that the Board had illegally departed from the grievance procedure by considering the grievance at its October 22 meeting.

On December 17, 1985, the Board filed additional exceptions. On December 23, 1985, the Association responded.

We have reviewed the record. The Hearing Examiner's findings of fact and supplemental findings of fact are accurate.^{2/} We specifically adopt his credibility determinations. We adopt and incorporate these facts.

^{2/} We correct, however, his finding that the Answer admitted all material allegations in Count I except the last sentence in Paragraph 18 and paragraph 21; the Answer also denied the allegations (essentially conclusions of law) in paragraphs 28-31.

We add several facts, together with their context, which give a more complete picture of the journal entries and the reaction they engendered and the grievance filed and the reaction it engendered.

The superintendent testified that the Board members at the September 10 caucuses found certain journal entries objectionable. These entries were made in response to the entries of Clax's former students, at that time Mansika's students. These students had continued writing journals because they had developed a close relationship with Clax.

One entry stated one student was "dumb" and "I can't stand" another student. Another entry commented on a rumored relationship between two teachers; the entry stated that no one should say anything about someone else's life, but added that teachers and administrators were also talking about them. A third entry stated that a page had been ripped out so no one could read it. A fourth entry stated that Mr. Mansika had irritated her and her whole class knew she did not like him. A fifth entry stated, in response to a student's writing she did not like Mr. Mansika, "You aren't the only one" and "He can't be trusted by me anymore." A sixth entry repeated that he could not be trusted and added "He burned me once and I'm not gonna give him a second chance."^{3/} The Board members,

3/ We will not recount one entry since it might distress an innocent party.

as the Hearing Examiner found, were concerned that these entries had criticized students, had discussed the personal and professional lives of staff members and had perhaps affected the emotional and social growth of the fifth and sixth graders writing the journals.

On September 10, Clax presented Board members with a written apology. She explained that she had an especially close relationship with one former student and her family and that the family approved of the journal; that several entries were out of context and incomplete; that some of the handwriting -- for example profane language and slang -- was not hers; and that the materials were taken from student's desks, edited and abridged. An NJEA representative argued on Clax's behalf.

At the September 10 meeting, the Board considered four courses of action against Clax: (1) tenure charges, (2) increment withholding; (3) a reprimand and (4) a psychiatric evaluation. The superintendent recommended withholding her increments. The Board's solicitor, however, advised that pursuing tenure charges or withholding increments would be questionable since the documents had been obtained by questionable means and could not be used as evidence. The Board then voted to reprimand Clax and to require her to undergo a psychiatric evaluation. These measures were the extent of the action taken against Clax at this time.

A letter of reprimand was sent. On September 25, 1984, however, the Board reconsidered its decision to require Clax to submit to a psychiatric evaluation. At this time, the Board knew

that three grievances concerning the Clax incident had been informally presented to its superintendent. At the meeting seven teachers and three parents, including one whose child was involved, spoke on Clax's behalf. A former Board president spoke strongly on Clax's behalf and stated that she had worked for many years to resolve conflicts between administration and staff and did not want to see these conflicts recur. The Board then voted, 4-2 with one abstention, to: (1) reprimand Clax, but (2) not order her to undergo a psychiatric evaluation even though, as the motion stated, the Board still believed an evaluation would have been justified.

On September 27, the superintendent sent Clax a second letter of reprimand. This letter stated that the Board found Clax's journal responses "inappropriate and detrimental to the educational and emotional growth of the children involved" and directed her to refrain from critical commentary upon the professional or personal lives of staff members. The letter added that although a psychiatric evaluation would have been justified, the Board had decided not to order one in view of Clax's acknowledgement that she had erred, the speeches on her behalf of the September 25 meeting, and the Board's belief that Clax, with the Association's help, would seek counselling.

Clax objected to having a second letter of reprimand placed in her file and to some of the words used, especially the references to psychiatric evaluation and the statement that her responses had been inappropriate and detrimental. Clax presented these objections

to the Association and its Executive Board voted to file a grievance on her behalf.

On October 15, a Monday, Association representatives met with the superintendent to grieve the second reprimand. This meeting had been scheduled the previous Thursday or Friday. The superintendent was upset that a grievance had been filed.

On October 16, the superintendent met with the Board's president to discuss the agenda for the next meeting. He told her about Clax's grievance. She was also upset, although she soon became "very pleased" since the filing of the grievance reopened the matter. She had wanted this to happen because she felt so strongly that Clax deserved harsher discipline.^{4/} The superintendent and president then decided to put the Clax matter on the next agenda.^{5/}

That same day, the superintendent wrote Clax advising her that the Board would again consider her employment status at its next meeting.

4/ We agree with the Board that the superintendent and the president did not admit that the reopening of the Clax grievance motivated the October 22 discipline, but we also accept the Hearing Examiner's findings that they believed the October 15 grievance reopened the matter and that this belief led to placing it on the agenda of the next day's meeting.

5/ The Board contends that the superintendent had already decided to put the matter on the agenda before the grievance was filed, but the Hearing Examiner did not credit this testimony. Nor do we. But we do note, as we discuss later, that a former mayor and several parents and teachers had already questioned whether the Board had been too lenient at its September 25 meeting.

On October 17, the superintendent, the principal, Clax and a colleague met to discuss why the Clax matter was being placed on the next agenda. The superintendent asked Clax if she knew a grievance had been filed and stated that the grievance reopened the case. Clax referred to a September 14 conversation in which the superintendent told her the dispute would be all over as of the next Board meeting.^{6/} The superintendent, after acknowledging he said the matter would be dropped, repeated that the Association had filed a grievance and the matter was now reopened.

On October 18, the Association put in writing the grievance discussed three days earlier. The grievance asked that the Board place only one letter of reprimand in Clax's file, remove the language the Association found objectionable, and compensate Clax for her psychological and emotional stress.

During the month between the Board's September 25 and October 22 meeting, the superintendent received complaints about the Board's decision not to require a psychiatric evaluation. On September 26, a former mayor and Board president complained that this decision violated the Board's obligation to protect the students; he supported withholding Clax's increment. Four teachers and several

^{6/} The superintendent recollected telling Clax just after the September 25 meeting that he hoped that the meeting would be the end of it all. Regardless of whether this conversation occurred on September 14 or just after the meeting, the conversation signalled a recognition that the September 25 meeting was intended, at that time, to be final.

parents also complained. Both the superintendent and Board president discussed the issue with other Board members, some of whom expressed doubts about the September 25 decision.

On October 22, the Board met. The former mayor and president urged the Board to retain the reprimand letters in Clax's personnel file and take further unspecified action. He stated, in part:

I think the parents, the people in the community, and every staff member should read with their own eyes what's in these documents, not just selected people or people that some people show the documents to, or portions. I think if everyone read these documents, there would be no question that something has to happen here, and it should certainly not be covered, and I am not saying anybody was, I just mean to leave it lie and nothing should happen and, by the way, the final straw is the position, apparently taken that even the most minimal, absolutely minimal thing that was done by this Board of Education is now being questioned, and a demand, or request, being made that even that be thrown away, and everything about it erased, which is absolutely intolerable and not acceptable, something much more serious should have happened and just to ask to erase the whole thing and throw it away and pretend it didn't happen is beyond belief....

He added that he considered this problem incredibly important, superseding any other matters they would decide that night, and concluded:

I really commend you for your first vote, I commend you for putting the things in the file, I hope you maintain those things in the file and if you concede, in your wisdom, you look at the material again and contemplate a little further, in light of this demand and you even erase any reference to anything and go ahead and move and do something that warrants the problem that was occasioned here. Thank you.

The superintendent read a prepared statement recounting the nature and history of the dispute. He stated, in part:

At the September 25, 1984 Board of Education meetings, as a result of character reference statements made by her fellow staff members, the Board of Education withdrew their position on the psychiatric evaluation.

Unfortunately, anticipation by the Board of Education that the issue would die in the thought-to-be best interest of the District has not been the case. In fact the Board of Education is facing an additional grievance filed on behalf of Ms. Clax, calling for removal from a letter of September 27, 1984 which outlines the September 25, 1984 Board action to reverse the Board position on the psychiatric evaluation, to remove all references to the psychiatric evaluation, to remove reference to the journal correspondence as being "detrimental to the educational and emotional growth of the children" and finally that Ms. Clax receive "monetary compensation for the psychological and emotional stress placed upon (her)."^{7/}

He recommended withholding Clax's increment.

The Board president then spoke. She started by stating:

I feel like the Education Association is slapping the Board. We have tried to come to agreement on this issue. The entire Board, perhaps, did not agree on the steps we took. However, according to the vote that was taken at the last meeting as

^{7/} The superintendent had routinely informed the Board of the filing of grievances, regardless of whether he had yet formally responded to them. Ordinarily, he informed the Board in a caucus, but in this instance Clax had asked for public discussion of her case. We do not agree with the Hearing Examiner that the superintendent totally departed from his practice concerning the reporting of grievances. Indeed, the superintendent had informed the Board of the informal grievances presented just before the September 25 meeting.

Charles' statement indicated, it did not change our belief that what transpired is incorrect. The Board looked as we wanted to end what was happening, we wanted to get back on to educating the children, we wanted to do that which we felt was best for the District of Pine Hill. We tried it, it didn't work. We got another grievance, which reopened the issue we thought had died after our last decision to withdraw Miss Vanessa Clax having the psychiatric, that the issue would be settled. It didn't. They reopened the issue by instituting another grievance.

After endorsing the superintendent's recommendation and recommending a psychiatric evaluation as well, she concluded:

I think we need to stand firm. We, perhaps the Board, had frequently backed down because we thought what we were doing was the correct thing to do for the education of the children in Pine Hill, we thought it would make things go smoother, but we get blasted constantly with grievances, and I think it's time to say look, the Board is tired of having spent a lot of time on grievances, I think it's time we do this. We have to do what we feel, and I believe at this time not only is the withholding of the increments warranted, but I think the psychiatric evaluation should be done.

The Board then voted 6-1 to withhold Clax's increment and 7-0 to require her to submit to a psychiatric evaluation. Two Board members who before had voted against a psychiatric evaluation testified that they changed their votes because of the speeches and recommendations of the superintendent and former mayor; they denied that the grievance motivated this change although they remembered the former mayor and the current president referring to it. One of these two members voted against withholding Clax's increment; the other did not specifically say why she voted for that motion.

In re Bridgewater Twp., 95 N.J. 235 (1984), articulates the governing standards for considering allegations of discriminatory personnel actions. The charging party must first establish a prima facie case that his or her protected activity was a substantial or motivating factor in the disputed personnel decision. In some cases, that prima facie case may be made out by direct evidence of anti-union motivation; in other cases that case may be made out by circumstantial evidence that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the protected activity. Id. at 246. If the charging party establishes a prima facie case, the burden shifts to the employer to prove, as an affirmative defense and by a preponderance of the evidence, that the action would have occurred even absent the the protected activity. Ultimately, the factfinder must resolve any conflicting proofs.

Before applying Bridgewater to the facts of this case, we stress that it is not our task to determine what is or is not an appropriate response to Clax's misconduct. Our job is simply to determine whether the Board's October 22 personnel actions were illegally motivated and, if so, whether they would still have occurred absent that illegal motivation.

We first consider whether the Association has proved that protected activity was a substantial or motivating factor in the October 22 personnel actions. Filing a grievance is a fundamental example of protected activity. Dover Municipal Utilities Auth.,

P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984); Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (1978). At the October 22 meeting, the superintendent informed the Board that this grievance had been filed and that, "unfortunately," the Board's anticipation that the issue would die had not been the case. The superintendent and president admitted being upset that the grievance was filed and the filing of the grievance precipitated the placement of the Clax matter on the agenda. The president's speech just before the Board's vote heatedly remonstrates against the Association "slapping" the Board and constantly "blasting" it with grievances and calls for the Board to "stand firm" and not back down.^{8/} The speech of the former mayor and president also suggests that the grievance was the "final straw." Under all these circumstances, we conclude that the Board knew of and was hostile towards the protected activity of the Association and Clax and that this hostility motivated its personnel actions on October 22.^{9/}

^{8/} We reject the Board's contention that this diatribe was not a reaction to the October 15 grievance. Clearly it was. Normally, a dislike of a specific grievance is not a legal motivation for disciplining an employee. Grievance filing is one of the most important rights protected by our Act. Indeed, in our State, it is protected by our Constitution. N.J. Const., Art. I, Para. 19; Red Bank Regional Education Association v. Red Bank Regional High School Board of Ed., 78 N.J. 122, 137 (1978); Thomas A. Edison State College, P.E.R.C. No. 86-27, 11 NJPER 574, 578 (¶16201 1985).

^{9/} We disagree with the Board that its lack of hostility towards the informal grievances presented before the September 25 meeting proves its lack of hostility towards the formal grievance filed after. While this evidence is relevant, the evidence of hostility towards the formal grievance -- the "final straw" -- outweighs it.

We next consider whether the Board has proved that it would have withheld her increment and ordered a psychiatric evaluation even absent the grievance challenging the September 25 reprimand. There is evidence that the Board might have done so; the difficult question is whether the Board met its burden under Bridgewater of proving it would have done so.

Clax's misconduct, standing alone, was not the motivating factor in the Board's reconsideration and imposition of punishment beyond a reprimand. At its September 10 meeting, the Board fully knew of the particulars of Clax's errors and viewed them in the "worst possible light." Nevertheless, the Board voted not to withhold her increment and at the September 25 meeting it voted to limit discipline to a reprimand. Clax did not repeat her misconduct before the October meeting. Thus, Clax's misconduct before September 10, standing alone, does not explain why the Board in October withheld Clax's increment for the first time or why it reversed its decision not to order a psychiatric evaluation.

The Board argues, however, that community pressure in reaction to the misconduct and its earlier leniency motivated its personnel actions. The September 25 vote had left the Board president and superintendent unhappy. They were joined in their unhappiness by the former mayor and president, four teachers and several parents who were upset by Clax's responses to journal entries. This strong community reaction was known to the Board at its October 22 meeting. We agree it played some role in its actions.

The Hearing Examiner found, and we have agreed, that the filing of the grievance rather than community pressure precipitated placement of the Clax matter on the October 22 agenda. But this fact alone does not dispose of the Board's defense. The grievance asking that Clax's discipline be reconsidered and diminished opened up the possibility that her discipline would be reconsidered and increased if there was cause for doing so independent of that antagonism.^{10/}

The difficulty this case presents is in untangling the interwoven threads of illegal retaliation and community pressure to determine which thread is the dominant one.^{11/} Based on our review of the entire record, we find that the Board would not have withheld Clax's increment absent its illegal motivation, but it probably would have reinstated its original decision and ordered a psychiatric evaluation.

The October 22 decision to withhold Clax's increment escalated the level of punishment beyond that set in either of the

^{10/} A separate issue is whether the Board committed an unfair practice when its superintendent reported the grievance's filing at its October 22 meeting. We consider that issue later. Here we only consider the motivational issue. Again, while the nexus between the grievance and agenda placement certainly contributes to finding illegal motivation, it does not, standing alone, defeat the Board's defense.

^{11/} See, for example, the speeches of the Board president and the former mayor.

first two meetings. At its September 10 meeting, the Board's solicitor had advised the Board that it would be legally questionable to withhold Clax's increment since the journals were obtained by questionable means and could not be used as evidence. The Board therefore rejected the superintendent's recommendation and voted not to withhold Clax's increment. Nothing happened between September 10 and October 22 to change either this advice or the nature of Clax's misconduct.^{12/} Nevertheless, at its October 22 meeting, the Board, for the first time voted, 6-1, to withhold Clax's increment. It did so immediately after the former mayor said the grievance was "the final straw" and its president urged the Board to "stand firm" and "to say look, [we're] tired of having [to spend] a lot of time on grievances." Of the two Board members (besides the president) who testified, one voted against the withholding and the other did not specifically say why she voted for it. Under all these circumstances, the Board has not persuaded us that it would have withheld Clax's increment absent its already proved hostility towards the Association's grievance.

We view differently the reinstatement of the psychiatric exam. Unlike, the increment withholding, the exam cannot properly

^{12/} We reject the Board's contention that its attorney's advice is irrelevant. This advice is but one piece in the mosaic, but it is relevant to determining what the Board would have done later absent its illegal motivation. We also note that this advice appeared in the minutes of the September 10 meeting and there is no issue of attorney/client privilege.

be characterized as disciplinary or punitive. The Board has the statutory right to order such an exam, where circumstances warrant. N.J.S.A. 18A:16-2. As the Appellate Division said in Gish v. Bd. of Education of Paramus, 145 N.J. Super. 96 (App. Div. 1976):

A requirement that [a teacher] subject himself to a psychiatric exam can hardly be characterized as a penalty or a sanction. [A] psychiatric examination takes nothing from [a teacher] except his time. His status as a teacher continues with full rights under the law. Therefore, from the standpoint of his being deprived of a right or privilege, it is minimal....
Id. at 106-107 (citations omitted).

The foregoing is not meant to suggest that the ordering of a psychiatric exam may never violate subsection 5.4(a)(3). Rather, it is only that, in this case, we hold that the Board would have taken this action anyway, entirely apart from its illegal motivation. In particular, we note the following circumstances.

At its September 10 meeting, the Board voted to order a psychiatric evaluation. At its September 25 meeting it voted to rescind that directive after hearing community reaction favoring leniency, but the motion it adopted nevertheless reiterated its belief that such an evaluation was substantively justified. At its October 22 meeting, it voted to reorder the psychiatric evaluation after hearing community reaction opposing leniency. At that meeting, the former mayor stressed that the Board's September 10 decision was "correct, just and appropriate and if I might add extremely overly generous considering what had occurred here." The Board members (besides the president) who testified explained that

they voted to restore the psychiatric evaluation because the former mayor persuaded them they may have erred in taking away the examination and that the examination may have been of some help. We believe that the community reaction at and before the October 22 meeting counterbalanced the community reaction at or before the September 25 meeting and probably would have swung the pendulum back to the original decision even absent the manifested hostility towards the grievance. Accordingly, we hold that withholding Clax's increment violated subsections 5.4(a)(1) and (3), but ordering a psychiatric evaluation did not.

We next consider whether the Board violated subsections 5.4(a)(1) and (5) when its superintendent brought the Association's grievance to the Board's attention at its October 22 meeting. The Hearing Examiner found that the superintendent's deviation from the normal grievance procedures warranted finding an unfair practice. Under all the circumstances of this case, we disagree.

Ordinarily, when the superintendent received a written grievance he would notify the Board in a caucus of the grievance. Later he would issue a written response, and the Association would then determine whether to pursue the grievance before the Board. In the past, 10 or 11 grievances have been pursued from the superintendent to the Board; only one, however, involved a request to change a Board policy.

Here, the superintendent notified the Board in a public session of the Association's grievance. The session was public

because Clax had requested public discussion of her personnel status. Further, the Association's grievance chairperson admitted that the superintendent could not have responded to the Association's grievance without bringing that application to the Board to review and reverse or not reverse. That inability is particularly clear given that the Board had already considered the appropriate penalty twice in this very public and controversial dispute. Under all these circumstances, we are not persuaded by a preponderance of the evidence that the superintendent's informing the Board of the grievance rose to the level of an unfair practice.^{13/}

ORDER

The Pine Hill Board of Education is ordered to:

I. Cease and desist from:

A. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by withholding Vanessa Clax's increments in retaliation for the grievance the Pine Hill Education Association filed; and

B. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or

^{13/} We are not ruling out the possibility that a contractual violation may have occurred; we are only saying an unfair practice did not. Compare Human Services, P.E.R.C. No. 84-148, 10 NJPER 419 (¶15191 1984).

discourage employees in the exercise of the rights guaranteed to them by the Act, particularly, by withholding Vanessa Clax's increments in retaliation for the grievance the Pine Hill Education Association filed.

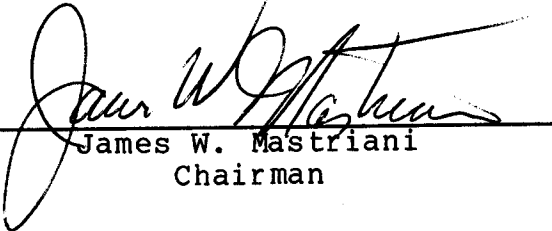
II. Take the following affirmative action:

A. Restore Vanessa Clax's withheld salary increments for the 1985-86 school year and make her whole for the loss of earnings incurred to date with simple interest at the rate of 12% per annum until January 1, 1986 and 9.5% thereafter.

B. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

The remaining allegations of the Complaint are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
May 21, 1986
ISSUED: May 22, 1986

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

In the Matter of

PINE HILL BOARD OF EDUCATION,

Respondent,

-and-

DOCKET NO. CO-85-139-76

PINE HILL EDUCATION ASSOCIATION AND
VANESSA CLAX,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends, following a remand for further hearing, that the Public Employment Relations Commission find that the Respondent Board violated §5.4(a)(1), (3) and (5) of the New Jersey Employer-Employee Relations Act by the action of the Board on October 22, 1984 when it voted to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directed her to undergo a psychiatric evaluation. The Hearing Examiner found that the Board was illegally motivated in its actions as to Clax since it acted in retaliation against the Association having filed a grievance on behalf of Clax several days prior to the October 22nd Board meeting. Additionally, the Hearing Examiner found that the Board also acted illegally when it departed from the normal grievance procedure by having its Superintendent present the Clax grievance to the Board directly on October 22nd without the Superintendent having made his response to the grievance under the grievance procedure.

By way of remedy, the Hearing Examiner directed that Clax's salary increment be restored and that she be made whole for any losses suffered since the withholding with interest at the rate of 12% per annum. Further, the Hearing Examiner directed that the requested psychiatric evaluation be rescinded.

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
BEFORE A HEARING EXAMINER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

PINE HILL BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-85-139-76

PINE HILL EDUCATION ASSOCIATION &
VANESSA CLAX

Charging Party.

Appearances:

For the Respondent

Maressa, Goldstein, Birsner, Patterson & Drinkwater, Esqs.
(Robert E. Birsner, Esq.)

For the Charging Party

Selikoff & Cohen, Esqs.
(Steven R. Cohen, Esq.)

HEARING EXAMINER'S SUPPLEMENTAL
RECOMMENDED REPORT AND DECISION ON REMAND

On May 20, 1985, the instant Hearing Examiner issued a Recommended Report and Decision (H.E. No. 85-44, 11 NJPER 400), in which he found that the Respondent violated N.J.S.A. 34:13A-5.4 (a)(1) and (3) when, on October 22, 1984, it voted to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directed her to undergo a psychiatric evaluation. The Hearing Examiner further found that the Respondent violated N.J.S.A. 34:13A-5.4(a)(1) and (5) when, on October 22, 1984, it circumvented the

negotiated grievance procedure in connection with the grievance filed by the Association on behalf of Vanessa Clax. No violation of N.J.S.A. 34:13A-5.4(a)(2) was found.

On June 3, 1985, the Board filed exceptions, asserting that the Hearing Examiner erred in several respects, including his refusal to read the journal entries (R-2) which precipitated the controversy or to permit testimony concerning which journal entries allegedly motivated the action of the Respondent with respect to Clax. Following receipt of a response by the Association on June 13, 1985, the Commission reviewed the entire record and on July 2, 1985, ordered the record reopened and remanded the matter to the Hearing Examiner for additional testimony and a supplemental report (P.E.R.C. No. 86-14, 11 NJPER 462).

By way of amplification on the scope of the remand, the Commission directed that the Hearing Examiner read Exhibit R-2 and take testimony concerning what portions of R-2 Clax had admitted in writing, what portions the Superintendent had discussed with the Board, and what portions the Board had found particularly objectionable. Also, the Commission requested that the Hearing Examiner in his supplemental report and decision clarify when the Superintendent decided to place the Clax matter before the Board at its October 22, 1984 meeting, i.e., reconcile the apparent inconsistency between Findings of Fact Nos. 21 and 25.^{1/}

^{1/} See Supplemental Finding of Fact No. 36, infra.

Pursuant to the remand, the Hearing Examiner scheduled and held a hearing on September 6, 1985, in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The Respondent presented Superintendent Charles M. Ivory and Board President Loraine Barnhart for further examination and rested. The Charging Party elected to present no further witnesses but did offer one additional exhibit (CP-24). Oral argument was waived and the parties filed post-hearing briefs by November 15, 1985.

The record on remand having been closed on September 6, 1985, a question concerning alleged violations of the Act, as amended, exists and, after the hearing on remand, and after consideration of the additional post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, including the record on remand, the Hearing Examiner makes the following:

SUPPLEMENTAL FINDINGS OF FACT

31. Pursuant to the remand, the Hearing Examiner has read Exhibit R-2.^{2/}

^{2/} The Commission, in its decision to remand, affirmed the Hearing Examiner's earlier ruling that R-2 was admissible for the purpose of showing what the Board's state of mind was when it disciplined Clax, but was not admissible to prove the truth of the journal entries in R-2 or that Clax had written them.

32. Prior to the September 10, 1984 Board meeting, the Board members were given copies of the complete journal entries (R-2) and there had been several small-group meetings of Board members to discuss the contents. Ivory participated in these meetings and responded to questions from Board members regarding R-2. Generally, the Board found most offensive the comments made by Clax that specifically dealt with criticisms of students, the comments made by Clax to students regarding the personal and professional lives of staff members and the effect that Clax's comments would have on the students. (4 Tr 7).

33. Ivory next testified to nine specific entries in R-2 which the Board found to be objectionable, beginning with page 8 and concluding with page 31 (4 Tr 8-22). No purpose would be served by setting forth the specific content of R-2 as to these nine areas of Board concern. All of these concerns were within the knowledge of the Board members prior to the Board meeting of September 10, 1984, and no other areas of concern were identified thereafter (4 Tr 25).

34. At the September 10, 1984 Board meeting, Clax submitted a written statement on the issue of R-2 to the Board (CP-24). Clax made certain admissions with respect to R-2 which were before the Board prior to the action which it took on September 10, 1984. Also, prior to Board action on September 10th, the Board had a clear impression of Ivory's position regarding R-2 and the Board viewed the contents of R-2 and Ivory's impressions in the "worst possible light" with respect to Clax (4 Tr 26). Finally,

Ivory acknowledged that Principal James H. Mundy reported to the Board at the caucus meeting on September 10th, that there seemed to be very little disruption in the school regarding the journal situation (4 Tr 31, 32; J-5).

35. Barnhart's testimony on remand (4 Tr 36-44) added nothing to her earlier testimony and this she freely acknowledged (4 Tr 41-43).

36. Pursuant to the remand by the Commission with respect to an apparent inconsistency between Finding of Fact No. 21 and Finding of Fact No. 25 regarding the date on which Ivory decided to place the Clax matter before the Board on October 22, 1984, the Hearing Examiner affirms Finding of Fact No. 25 as totally consistent with the record but modifies Finding of Fact No. 21 by deleting the fourth and last sentence therein and substituting the following:

Ivory decided to bring the Clax matter to the Board once again at its meeting on October 22, 1984. He acknowledged that he was aware that a grievance was being filed on behalf of Clax prior to the weekend of October 13 and October 14, 1984 when he commenced preparing a written statement in support of his decision. (3 Tr at 58, 59, 83; CP-15).

DISCUSSION AND ANALYSIS

The Respondent Violated §§(a)(1) And (3) Of the Act When, On October 22, 1984, It Voted To Withhold Clax's Salary Increment For The 1985-86 School Year And Directed Her To Undergo A Psychiatric Examination.

The Hearing Examiner, having considered Exhibit R-2, both as to the original purpose for which it was admitted and its content for the purpose of appraising the state of mind of the members of the Respondent's Board when they met on September 10, 1984, affirms his original conclusion that the Board failed to demonstrate a legitimate business justification or reason for its subsequent personnel actions as to Clax on October 22, 1984. It is recalled that the Board on September 25, 1984, rescinded its September 10th decision and withdrew the requirement that Clax submit to a psychiatric evaluation. Thus, the only disciplinary action taken against Clax as of September 25th was the placing of a reprimand in her personnel file.

Given the testimony of Ivory at the hearing on remand that the content of R-2 was viewed by Board members in the "worst possible light" prior to the Board meeting of September 10, 1984, and the Board's two-fold action on that date, as subsequently modified on September 25, 1984, there can be little doubt but that the effect of the content of R-2 was dissipating with the passage of time. Thus, the Hearing Examiner concludes that R-2 was not the objective basis upon which the Board acted when it decided on October 22, 1984 to withhold Clax's entire salary increment for the 1985-86 school year and to require once again that Clax submit to a psychiatric evaluation.

Relying upon the Findings of Fact previously made, in particular, the exercise of protected activity in the form of the Association's having filed grievances on behalf of Clax,^{3/} the Hearing Examiner finds and concludes that it was this grievance activity which reopened the matter of the discipline to be imposed upon Clax on October 22, 1984, where the Board reconsidered the severity of the previous discipline and took stronger action against Clax. This amounted to retaliation against the Association for pursuing grievances on behalf of Clax through the grievance procedure.

The Hearing Examiner here repeats the extensive discussion of Bridgewater Twp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) in H.E. No. 85-44, 11 NJPER at 403, 404. Suffice it to say, the Charging Party continues to have satisfied the first portion of the Bridgewater test and that the Respondent continues in its failure to have demonstrated a legitimate business justification for the two-fold personnel action taken against Clax at the Board meeting of October 22, 1984. Recapitulating, R-2 clearly afforded the Board with four alternatives for action against Clax, two of which the Board imposed at its meeting on September 10, 1984. The Board on September 25th elected to affirm the letter of reprimand but rescinded the request for a psychiatric evaluation.

^{3/} See Findings of Fact Nos. 22, 23, 24, 25, 27; & CP-12, supra.

When the Board reconsidered its earlier actions on October 22, 1984, it is clear that it was the Clax grievance of October 18, 1984 which had triggered reconsideration since Clax had engaged in no repetition of the objectionable conduct represented by R-2 since September 10th. The Hearing Examiner reiterates the reasoning set forth in connection with business justification at 11 NJPER 404, in particular, the fact that the Board on October 22nd imposed a penalty never adopted by the Board previously, the withholding of the increment, and that the attorney for the Respondent had on September 10, 1984, indicated to the Board that the withholding of Clax's increment would be "questionable." As noted by the Hearing Examiner previously, if the withholding of an increment was "questionable" in the opinion of the Board's attorney on September 10th, it strains credulity as to how it could have been less than questionable on October 22, 1984. Yet, the Board elected to proceed with that option and reinstate the requirement of a psychiatric evaluation.

The Hearing Examiner discounts outside pressure, which had occurred between the Board's meeting of September 25th and October 22nd, as the motivating factor in the Board's action of October 22, 1984. The Hearing Examiner is of the firm view that the Board did not capitulate to outside pressure in reaching its two-fold decision to discipline Clax on October 22nd but rather was motivated by the Clax grievance having re-opened the whole matter as Ivory and Barnhardt indicated (Finding of Fact No. 23, supra).

Thus, there appears to the Hearing Examiner to have been no legitimate basis for the re-opening of the Clax matter other than to punish her for having filed a grievance through the Association. The Respondent Board has failed to demonstrate by a preponderance of the evidence that it had a legitimate business justification for the actions that it took against Clax on October 22, 1984, and, thus, it violated §§ (a)(1) and (3) of the Act under the Bridgewater test and analysis supra.

The Respondent Board Violated
 §§ (a)(1) and (5) Of The Act When,
 On October 22, 1984, It Circumvented
 The Negotiated Grievance Procedure
In Connection With The Clax Grievance.

The Hearing Examiner here affirms his findings and conclusions with respect to the violations by the Respondent of §§ (a)(1) and (5) of the Act when the Board circumvented the negotiated grievance procedure in connection with the Clax grievance on October 22, 1984: 11 NJPER at 405.

* * * *

Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Board violated N.J.S.A. 34:13A-5.4 (a)(1) and (3) when, on October 22, 1984, it voted to withhold the entire salary increment of Vanessa Clax for the 1985-1986 school

year and directed her to undergo a psychiatric examination.

2. The Respondent Board violated N.J.S.A. 34:13A-5.4 (a)(1) and (5) when, on October 22, 1984, it circumvented the negotiated grievance procedure in connection with the grievance filed by the Association on behalf of Vanessa Clax.

3. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(2) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board 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 voting to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directing her to undergo a psychiatric evaluation and, additionally, circumventing the negotiated grievance procedure in connection with the grievance filed by the Association on behalf of Vanessa Clax.

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 voting to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directing her to undergo a psychiatric evaluation.

3. Refusing to negotiate in good faith with the Association by circumventing the negotiated grievance procedure in connection with the grievance filed by the Association on behalf of Vanessa Clax.

B. That the Respondent Board take the following affirmative action:

1. Forthwith restore the salary increment of Vanessa Clax for the 1985-86 school year and make her whole for the loss of earnings incurred to date with interest at the rate of 12% per annum on the monies calculated to be due.

2. Forthwith rescind the directive that Vanessa Clax undergo a psychiatric evaluation.

3. Post in all places where notices to employees are customarily posted, copies of the attached Notice marked as Appendix "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 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 what steps the Respondent Board has taken to comply herewith.

C. That the allegations that the Respondent Board violated N.J.S.A. 34:13A-5.4(a)(2) be dismissed in their entirety.



Alan R. Howe
Hearing Examiner

Dated: December 4, 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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by voting to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directing her to undergo a psychiatric evaluation and, additionally, circumventing the negotiated grievance procedure in connection with the grievance filed by the Association on behalf of Vanessa Clax.

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 the Act, particularly, by voting to withhold the entire salary increment of Vanessa Clax for the 1985-86 school year and directing her to undergo a psychiatric evaluation.

WE WILL NOT refuse to negotiate in good faith with the Association by circumventing the negotiated grievance procedure in connection with the grievance filed by the Association on behalf of Vanessa Clax.

WE WILL forthwith restore the salary increment of Vanessa Clax for the 1985-86 school year and make her whole for the loss of earnings incurred to date with interest at the rate of 12% per annum on the monies calculated to be due.

WE WILL forthwith rescind the directive that Vanessa Clax undergo a psychiatric evaluation.

PINE HILL 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 Comm. 495 W. State Street, Trenton, New Jersey 08618 (609) 292-6780