

P.E.R.C. NO. 2001-78

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TINTON FALLS BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-2000-137

TINTON FALLS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Tinton Falls Board of Education. The Complaint was based on an unfair practice charge filed by the Tinton Falls Education Association. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act by terminating a library clerk in retaliation for her pursuing a grievance contesting a disciplinary letter placed in her personnel file. The Commission finds that the Association has not proved that it was the grievance, rather than the clerk's attendance and her unwillingness to work the last five days of the school year, that prompted the termination. Under all the circumstances, the Commission concludes that the termination was not motivated by protected activity and dismisses the Complaint.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Charging Party.

Appearances:

For the Respondent, Reussille, Mausner, Carotenuto,
Barger & Steel, attorneys (Martin M. Barger, of counsel)

For the Charging Party, Oxfeld Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

DECISION

On December 2, 1999, the Tinton Falls Education Association filed an unfair practice charge against the Tinton Falls Board of Education. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1) and (3),^{1/} by terminating library clerk Joy Rizzo in retaliation for her pursuing a grievance contesting a disciplinary letter placed in her personnel file.

^{1/} These provisions 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."

On March 6, 2000, a Complaint and Notice of Hearing issued. On March 14, the employer filed an Answer admitting some allegations, denying others and asserting that Rizzo's termination did not violate public policy.

On September 11, 2000, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On February 22, 2001, the Hearing Examiner issued his report and recommendations. H.E. No. 2001-16, 27 NJPER 144 (132052 2001). He found that the Board's asserted reason for the discharge, that the employee was "non-renewed" for legitimate reasons as her tenure date approached, was pretextual and that the Board would not have fired the employee in the absence of her grievance.

On March 6, 2001, the employer filed exceptions. It asserts that the Hearing Examiner never focused on the fact that Rizzo made it clear that she would not comply with the contractual requirement that she work five days after the end of the school year. It further asserts that it was not going to give tenure to an employee who refused to comply with that requirement. According to the employer, nothing in the record supports a conclusion that Superintendent Carol Moldan would have recommended continued employment and therefore tenure if Rizzo's grievance had been withdrawn. The Board also asserts that the Hearing Examiner did not adequately consider its concerns with Rizzo's attendance

problems. Finally, the Board argues that the Hearing Examiner erred in questioning the timing of the termination. According to the Board, whether 60 days' notice was required is irrelevant because the Superintendent was relying on advice of counsel. The Board also relies on its post-hearing brief.^{2/}

The charging party did not file an answering brief. But on March 9, 2001, it filed exceptions seeking punitive damages under Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 59 (1980).

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 2-30).

Joy Rizzo began her employment as a ten-month library clerk on March 3, 1997. She was informed that she would have to work five days before and five days after each school year. Article 6 of the parties' collective negotiations agreement includes those ten workdays.

Rizzo worked the five days after the school year ended in June 1997 and the five days before the school year began the next fall. Her principal, John Lichtenberg, commended her work. In May 1998, she was renewed for the next school year.

Rizzo did not work all five contractually required days in June 1998. She was absent three days before Lichtenberg telephoned her and told her that she was being paid for the days

^{2/} We deny the Board's request for oral argument. The issues have been adequately addressed in the parties' briefs.

and was needed at school. Rizzo responded that she was taking a sick day and two personal days, and that she was planning to take sick leave for at least the next day to take her children to the doctor. Lichtenberg responded that sick leave was inappropriate for taking children to the doctor and that personal or family illness leave had to be taken. Rizzo answered that she had exhausted those leaves. Lichtenberg advised that he would "work with her," allowing Rizzo to bring her children to work. She reported to work the next two days. In 1997-98, Rizzo used ten sick days, all three family illness days, and all three personal days.

Rizzo worked all five contractually required days preceding the 1998-99 school year. In December 1997, she received the highest ratings on her performance evaluation.

On March 13, 1999, Lichtenberg selected Rizzo to be the middle school substitute librarian after the certificated librarian left the district. A library clerk was hired to assist Rizzo.

On June 7, 1999, Moldan wrote to Rizzo advising her that the Board had approved her reappointment as a ten-month library clerk for the 1999-2000 school year. On June 22, the last work day for certificated staff, Rizzo received a secretarial evaluation form giving her the highest ratings and praising her performance as substitute librarian.

Rizzo reported to the middle school on June 23, 1999 to mail student report cards. She did not report on any of the four succeeding days, but telephoned the school office advising of family illness, sick and personal days. She was not sure of her status (substitute librarian or clerk).

On July 8, 1999, Lichtenberg wrote a memorandum to Rizzo advising of his continuing concern about her "significant absences." He noted both her missing the days at the end of the school year and her absences during the school year. He wrote that corrective measures were needed and asked Rizzo to meet with him. He admonished that if her attendance did not improve, he would be forced to take action that could include requests for doctors' notes and an increment withholding.

Rizzo replied that her sick leave did not compromise the children's education and that the absences were not excessive. She also wrote that personal days can be taken anytime without being questioned. She expressed sadness that Lichtenberg did not recognize all she had done for the school and requested a meeting. She sent copies of her letter to Moldan and the Association president, Claire Garland.

Garland demanded that Lichtenberg's July 8 letter be removed from Rizzo's personnel file. On July 14, 1999, a grievance meeting was held. At the meeting, Lichtenberg asserted that Rizzo was contractually obligated to work the five days after the year ended. He also said that her second year of failing to

work the five days caused him to look at her attendance in general. NJEA representative Ronald Villano attended the meeting and asked Lichtenberg to reconsider and discuss the matter with Moldan. Lichtenberg agreed.

After Lichtenberg and Moldan talked, Lichtenberg sent a memorandum to Rizzo stating that they had decided to keep the letter in her file. He also wrote that they would review her attendance at the end of the next school year and would entertain removal at that time.

Rizzo asked Garland to continue processing the grievance. On August 10, 1999, Garland asked the Board president for a meeting. The Association claimed that Rizzo was working under the teacher's contract in June 1999 and that her last day of school was therefore June 22.

On August 25, 1999, Moldan met with Garland, Villano and Rizzo to discuss the grievance. The Association asked that the reprimand be removed or reduced. Moldan did not decide the grievance because of "conflicting facts." There apparently was a dispute over whether Rizzo was tenured. Rizzo testified that Moldan said that she was not tenured and that "it all depended how much I wanted to keep my job, as to how the outcome of this would turn out." The Hearing Examiner did not find that a threat was made at this point in time. Moldan later established that Rizzo did not have tenure.

Between July 14 and September 21, 1999, Lichtenberg and Garland discussed the Rizzo grievance informally a few times. Lichtenberg once remarked that Rizzo "doesn't respect me." The Hearing Examiner found that this statement referred to Rizzo's not coming to work at the end of the school year rather than to Rizzo's filing a grievance.

On September 14, 1999, Moldan requested another meeting. She noted that Rizzo had been hired on February 24, 1997 and did not yet have tenure; Lichtenberg would issue a memorandum to Rizzo reflecting the importance of attendance; the August 25 meeting had emphasized that improving attendance and meeting contract obligations were central to the dispute; and the parties had discussed future cooperation between Rizzo and Lichtenberg and a possible transfer. The Hearing Examiner found that Moldan was postponing her decision so that the grievance might be resolved and so that Lichtenberg and Rizzo would arrive at a satisfactory understanding.

At about that time, Moldan asked Lichtenberg if she really thought Rizzo was a superior employee because Moldan believed that attendance was an indicator of performance. Lichtenberg responded that he did not check on the attendance of every clerk and aide, but he regarded Rizzo's performance as outstanding.

On September 21, 1999, Rizzo, Garland and Villano met with Moldan to discuss the grievance. Moldan began by explaining

that Rizzo did not have tenure. The main topic of the meeting was then Rizzo's attendance, including the issue of the five days at the end of the school year. Moldan said that she thought that Lichtenberg's and Rizzo's relationship was not going to improve.

Moldan threatened that Rizzo's employment would be jeopardized if she continued to pursue the matter and not accept the reprimand. Villano argued that attendance issues were arbitrable, an increment withholding was unfair punishment for unsatisfactory attendance, and the letter should be removed from Rizzo's file because she was just made aware of the attendance concern. By the end of the meeting, Moldan suggested that Lichtenberg write another memorandum to clarify his intention to remove the reprimand from Rizzo's personnel file if she improved her attendance, including the ten-day service requirement.

After the meeting, Lichtenberg and Garland met and agreed that they thought they could work it out. One proposal at their meeting was to move the five days at the end of the school year to other dates during the summer.

On September 22, 1999, Moldan sent a memorandum to Garland summarizing the Board's position. She asserted that the reprimand would stay in Rizzo's file until there was improvement in attendance, including the ten-day service requirement.

Rizzo was dissatisfied with the proposal. On September 23 or 24, 1999, Lichtenberg, assistant principal Sica, Garland and Rizzo met. Attendance continued to be Lichtenberg's concern.

Rizzo said that she did not want to work the five days after the school year ended. Garland hoped to move the five days to other days during the summer and Lichtenberg agreed to move them, provided the two other principals agreed. In response to Association pressing, Lichtenberg stated that he was looking for "maybe 50% to 60%" improvement in attendance. Rizzo said that she sometimes must care for a sick child and attend to family responsibilities. Lichtenberg also told Rizzo that she had left early without permission on the last day of school (June 22, 1999). Lichtenberg was hoping to settle the matter, but believed that Rizzo could be dismissed if her attendance did not improve.

One or two days later, Garland told Lichtenberg that Rizzo wanted to take the matter further. Lichtenberg was exasperated about Rizzo's prospects as an employee because she was not attending and because she had misrepresented time. Lichtenberg did not distinguish Rizzo's not wanting to settle the grievance from her refusal to acknowledge either an attendance problem or a need to improve her attendance. Lichtenberg also told Moldan that he was concerned about granting tenure if these kinds of contract violations were occurring then. Moldan suggested that they consult Board labor counsel.

Lichtenberg testified that as a result of the meeting with counsel, he recommended to Moldan that Rizzo not be retained. Lichtenberg testified that Rizzo did not follow the

contract for the five days two years in a row, called in a misrepresentation of ill days and personal leave, and had an overabundance of absences.

The Hearing Examiner did not credit Lichtenberg's testimony that he recommended Rizzo's termination. On October 18, 1999, two days before Moldan wrote a letter to Rizzo advising that the Board would discuss her employment status on October 25, Lichtenberg wrote a letter to Garland seeking Rizzo's input and offering to reword the reprimand. Nothing in Lichtenberg's letter suggests that termination was possible or imminent. The Hearing Examiner could not reconcile Lichtenberg's recommending termination and his soliciting input from Rizzo with an eye toward removing the reprimand from her personnel file at the end of the school year. The Hearing Examiner concluded that, at most, Lichtenberg knew or was convinced that Moldan intended to fire Rizzo. The Hearing Examiner inferred that Lichtenberg wrote his October 18 letter either without knowing that Moldan was imminently intending to recommend termination or with the intention of reaching a prompt resolution to preempt Moldan's decision to fire Rizzo.

By October 18, 1999, Rizzo understood that she would be required to work the five days after the school year ended, but she never articulated that understanding to Board representatives. At her last meeting with Lichtenberg, Rizzo

stated that she did not want to work the five days. Nor did she promise to work those days even if they were moved to other dates in the summer. She also refused to commit to any improvement in her attendance, citing family responsibilities.

On October 20, 1999, Moldan advised Rizzo that her employment status would be discussed by the Board on October 25. At that meeting, Moldan recommended Rizzo's termination because of her attendance. The Board approved the recommendation.

On November 5, 1999, Moldan sent Rizzo a letter advising that the Board had voted to terminate her employment as of December 31, 1999. The grievance was not mentioned in the Board meeting.

Allegations of retaliation for the exercise of protected rights are governed by the standards set out in In re Bridgewater Tp., 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 unlawful motives 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.

The Association alleges that Rizzo's protected conduct - pursuing a grievance contesting a letter of reprimand - motivated the Board's decision to terminate her employment. Based on the entire record, we disagree.

Rizzo was engaged in protected activity and the Board was aware of it. We nevertheless conclude that Rizzo was terminated because of her attendance and her resistance to working the five contractually-required days after each school year. Her grievance protest was intertwined with her refusal to acknowledge her employee obligations. But we cannot find that the grievance protest was a substantial or motivating cause of that termination.

The Hearing Examiner found that Moldan, the Board's agent, was hostile toward Rizzo's pursuing her grievance. According to Garland, on September 21, Moldan said "if Joy [Rizzo]

continued to fight the letter and not accept the reprimand, she would be jeopardizing her employment." According to Villano, Moldan said, "if she [Rizzo] continues to pursue this matter, she is jeopardizing her employment with the district." Garland's notes, which the Hearing Examiner also relied on in deciding what Moldan said, mention "jeopardizing employment," but do not mention the grievance or the reprimand.

The Hearing Examiner concluded that Moldan was threatening to fire Rizzo if the grievance was not withdrawn or settled. We recognize that the grievance, reprimand and alleged attendance problems were related. We are not convinced, however, that it was Rizzo's pursuing her grievance, rather than her refusal to acknowledge the Board's attendance concerns and her obligation to work the five days at the end of the school year, that motivated the termination decision. We accept the Hearing Examiner's findings about what was said, but we draw a different inference about Moldan's motivation. We note that the Hearing Examiner credited two somewhat different accounts, one referring to Rizzo's refusal to accept the reprimand and the other to her continuing to pursue the matter. Neither account proves that Moldan was focused on Rizzo's grievance.

In assessing Moldan's motivation, we ask whether she would have acted any differently had Rizzo withdrawn her grievance and accepted the reprimand, but continued to resist improving her

attendance or working the five days. We believe that Moldan would have taken the same action, which supports our conclusion that her motivation was attendance, not the grievance.

Similarly, we ask whether Moldan would have acted any differently had Rizzo acknowledged her obligation to work the five days and promised to improve her attendance, but continued her quest to have the reprimand removed from her personnel file. We believe that Moldan would have acted differently, which also supports our conclusion that her motivation was overall attendance and Rizzo's unwillingness to work the five days, not the grievance.

We reach these conclusions, which we recognize involve necessary speculation as to what might have happened had Rizzo had acted differently, because the record shows that Moldan's motivation was her unwillingness to give tenure to an employee with an attendance problem who refused to acknowledge her obligation to work at the end of the school year and to improve her attendance. That Rizzo's continuing refusal came to light at meetings prompted by her filing a grievance contesting a reprimand does not insulate her from the obligation to perform her duties during the pendency of any grievance proceeding. We note that as late as September 23 or 24, Rizzo told Lichtenberg that she did not want to work the five days after the school year ended, had not promised to work those five days even if they were moved to other dates during the summer, and refused to commit to any improvement in her attendance. Lichtenberg was exasperated with Rizzo.

The Hearing Examiner found that Lichtenberg did not recommend Rizzo's termination and that the timing of Moldan's recommendation to fire Rizzo was intended to thwart Lichtenberg's efforts to resolve the grievance. We accept those findings. But the Hearing Examiner also found that Lichtenberg told Moldan he was concerned about granting tenure given Rizzo's violations of her end-of-year work obligation. Moldan had consistently believed that poor attendance evidenced poor performance and therefore disagreed with Lichtenberg's giving Rizzo such positive evaluations. Rizzo's mid-year hiring meant that the Board had to make a mid-year tenure decision. Had Rizzo been hired in September, perhaps they would have let Rizzo complete the year to see if her attendance would improve and if she would work the five days at the end of the year. But those were not the circumstances and Moldan had to make a mid-year determination. That she chose to do it when she became aware of the controversy with Rizzo rather than two months later is of little consequence. We do not believe that the earlier treatment was triggered by hostility to Rizzo's grievance. At most it reflected Moldan's belief that Rizzo's attendance would not improve and perhaps her desire to shortcircuit Lichtenberg's attempts to engineer a compromise.

The Hearing Examiner surmised that if Rizzo had not filed a grievance and had persisted in refusing to commit to improving her attendance, Lichtenberg would have recommended an increment

withholding and requests for doctors' notes. The Hearing Examiner based this conclusion on Lichtenberg's July 8 letter threatening that action. But the Hearing Examiner also noted that, at that time, Lichtenberg was not aware of Rizzo's unusual mid-year tenure date.

The Hearing Examiner surmised that had Rizzo been on a regular tenure cycle and had she improved her general attendance throughout the year, Lichtenberg would have assumed her willingness to work the last five days, or he would have substituted other days later in the summer. The Hearing Examiner also surmised that without Rizzo's grievance, Lichtenberg would have recommended Rizzo for tenure around December 31, 1999 because of an improvement in her attendance. Finally, the Hearing Examiner surmised that, absent her grievance, Rizzo's attendance would not have prompted Moldan to recommend non-renewal.


We agree that Lichtenberg was more likely than Moldan to have tried to accommodate Rizzo. He might even have recommended her for tenure had her attendance improved and had they been able to work out the after-school days. But Lichtenberg was not the superintendent. Moldan was, and she had a different view of Rizzo's overall evaluation, given the problems with her attendance. It may be that the grievance procedure brought to light Rizzo's refusal to accept the view that she had an attendance problem. But that refusal was nonetheless present. Rizzo continued to resist working the five days at the end of the

year. It may be that Rizzo's grievance brought the disagreement to a head sooner than if she had accepted the reprimand. But as we stated earlier, the Association has not proven that it was the grievance, rather than Rizzo's position on when she had to work, that prompted Moldan to recommend her termination. Had she given some indication that she would improve her attendance and that she would work those five days, and had Moldan then recommended termination, we might have been able to infer hostility to the grievance. But those are not the facts. Under all these circumstances, we conclude that Rizzo's termination was not motivated by her protected activity and dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners McGlynn, Muscato, Ricci and Sandman voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioner Madonna abstained from consideration.

DATED: June 28, 2001
Trenton, New Jersey
ISSUED: June 29, 2001

H.E. NO. 2001-16

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

In the Matter of

TINTON FALLS BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-2000-137

TINTON FALLS EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that Tinton Falls Education Association has proved by a preponderance of evidence that the Tinton Falls Board of Education violated section 5.4a(3) and (1) of the Act by firing a library clerk for pursuing a grievance contesting a letter of reprimand placed in her personnel file. The Hearing Examiner finds that the Board's asserted reason for the discharge, that the employee was "non-renewed" for legitimate reasons as the tenure date approached, was pretextual and that the Board would not have fired the employee in the absence of protected conduct.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Reussille, Mausner, Carotenuto, Bruno
& Barger, attorneys
(Martin M. Barger, of counsel)

For the Charging Party, Oxfeld Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

**HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION**

On December 2, 1999, the Tinton Falls Education Association filed an unfair practice charge against the Tinton Falls Board of Education. The charge alleges that on October 25, 1999, the Board terminated library clerk Joy Rizzo in retaliation for pursuing a grievance contesting a disciplinary letter placed in her personnel file by the school principal. The charge alleges that the Board's action violates section 5.4a(1) and (3)^{1/} of

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On March 6, 2000, a Complaint and Notice of Hearing issued. On March 14, 2000, the Board filed an Answer, admitting some allegations, denying others and asserting that Rizzo's termination "did not violate public policy."

On September 11, 2000, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by November 17, 2000.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. Joy Rizzo began her employment as a 10-month library clerk on March 3, 1997 (CP-3; T19).^{2/} She was also a certificated substitute teacher in Monmouth County from March 1997 to July 2000 (CP-2). Rizzo was one of three clerks each assigned to one of three district schools (T284). A secretary informed Rizzo that she would have to work five days before and five days after each school year (T19).

1/ Footnote Continued From Previous Page

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/ "C" represents Commission exhibits; "CP" represents Charging Party exhibits; and "R" represents Respondent exhibits. "T" represents the transcript of the hearing, followed by the page number(s).

Article 6 ("School Work Year"), A ("Length of Work Year")³ of the 1999-2002 collective agreement provides:

Library clerks - all library clerks shall be hired for ten (10) month positions and shall work one hundred ninety five (195) days including five (5) days prior to Category A members' work schedule and five (5) days after Category A members' work schedule. [C-3]

Category A personnel include "certified personnel, including teachers, social workers, nurses, librarians, psychologists and learning disabilities teacher-consultants, guidance counselors" (Article 1; C-3).

Article 3 ("Grievance Procedure") B ("Procedure") permits the filing of a "complaint" which "...does not involve the retention of a nontenure employee." Grievances are first discussed with the employee's "immediate Supervisor," followed by appeals to the "principal/supervisor," the "Superintendent of Schools," the "Board of Education" and finally, binding arbitration (C-3).

2. Rizzo worked the five days "after" the school year in June 1997 and the five days "prior to" the 1997-98 term in August/September 1997 (T20). On October 20, 1997, school principal John Lichtenberg commended Rizzo "for going above and beyond [her] responsibilities" (CP-4). On May 5, 1998, Superintendent Carol Moldan wrote a letter to Rizzo, advising that the Board approved her "reemployment for the 1998-99 school year at a salary of \$15,951, based on step 2 of the salary guide" (CP-5).

3. Rizzo did not work all five contractually required days in June 1998. She testified that she was absent the first two days,

taking either "sick" or "personal" time (T26; T27). Citing the specific absences on Rizzo's 1997-98 "attendance date report," school principal Lichtenberg testified that Rizzo was absent three of the five days in June 1998 (CP-6; T175-T176). I credit the report and Lichtenberg's testimony. On the third day of Rizzo's absence, a secretary informed Lichtenberg that the library clerk was absent and had not telephoned the office (T175).

Sometime later that day, June 23, 1998, Lichtenberg phoned Rizzo at home and asked her why she was not working (T26; T176; T180). Rizzo replied that she preferred not to work and was having child care responsibilities at home. Lichtenberg advised that she was being paid for the five days and was needed at the school. She answered that she was taking a sick day and two personal days for the absences. He asked about the next two days and Rizzo replied that she intended to take sick leave for at least the next day in order to take her children to the doctor (T26; T176). Lichtenberg replied that sick leave was an inappropriate use of leave when taking children to a doctor and that personal or family illness leaves were appropriate for that circumstance. Rizzo answered that she had exhausted those leaves. Lichtenberg advised that he would "work with her" on the matter, allowing her to bring her children to work. Rizzo reported to work on June 24 and 25, 1998 (T177; T180).

4. In 1997-98, Rizzo used ten sick days, all three family illness days and all three personal days. In that year she was allotted thirteen sick days and had "carried over" three and

one-half such days from the preceding school term (CP-6; T29-T31). Rizzo had six and one-half sick days to "carry over" to the 1998-99 school year (CP-6; T30).

5. Rizzo worked all five contractually required days immediately preceding the 1998-99 school year (T32). On December 21, 1998, Rizzo received the highest ratings - "5 (superior)" - on all seven enumerated categories of the "secretarial/clerical personnel evaluation form," including "dependability." Principal Lichtenberg also wrote a brief paragraph on the form complimenting Rizzo's contributions to the school and district. Superintendent Carol Moldan wrote her initials on the completed form (CP-7; T34).

6. On March 13, 1999, Lichtenberg selected Rizzo to be the middle school substitute librarian, following the certificated librarian's departure from the district (T36). The parties stipulated that Rizzo was paid "the substitute librarian rate" from March 16 to June 22, 1999 (T38-T40). During those three months, Rizzo taught classes, graded papers and projects, and submitted students' grades (T45-T46). A library clerk was hired to assist Rizzo (T44; T245-T246).

7. On June 7, 1999, Moldan wrote a letter to Rizzo, advising that the Board approved her "re-employment as a 10-month library clerk...for the 1999-2000 school year..." (CP-8). On June 22, 1999, the final workday for certificated staff, assistant principal Olga Sica gave Rizzo a completed "secretarial evaluation form" for the position "library clerk" (CP-9; T49). Rizzo again

received the highest ratings possible in all seven "areas" and was praised for her performance as substitute librarian (CP-9).

Rizzo reported to the middle school on June 23rd to mail student report cards (T49; T52). She did not report to school on any of the four succeeding work days (T50). On direct examination, Rizzo testified that she was not advised of having "reverted back" to the library clerk "category" so as to command her attendance for the five days "after" the 1998-99 school year (T49). On cross-examination, she conceded that she was not sure what her "status" was and telephoned the school office, advising of family illness, sick and personal days (T92; CP-10).

8. On July 8, 1999, Lichtenberg wrote a memorandum to Rizzo (mistakenly dated July 10), advising of his continuing concern about her "significant absences." Lichtenberg wrote that he had spoken to her last year about her absences "during the week following the closing of school" and that she is again taking sick and personal leave during that "contractual" period. He also wrote of her accumulated absences over the year, noting her seven sick days, five one-half sick days, three family illness days, two personal days and two one-half personal days. Lichtenberg wrote that "corrective measures" were needed and asked Rizzo to meet with him. Finally, he admonished that if her attendance did not improve, "I will be forced to take administrative action that could include requests for doctor's notes and increment withholding" (CP-10; T53; T189). Attached to the memorandum was Lichtenberg's compilation of Rizzo's absences for the 1998-99 school year (CP-10; T232).

9. Later that day, Rizzo arrived at the school office to pick up her paycheck and found Lichtenberg's memorandum in the same envelope with her check (T54). She promptly wrote a reply to the principal, advising that the sick leave taken did not compromise the "children's education or the operation of the school" and that the absences were neither "excessive nor consecutive." She wrote that she worked on June 23rd; was ill on June 24th; and cared for her ill son on June 25th. She also wrote of her belief that "our personal days can be taken anytime we like without being questioned."

Rizzo also wrote that she had performed "over and above what is expected of me," noting that she taught students and "ran the library...at times on my own, since [there was] a lack of substitute [clerks]." She wrote about several other ways she contributed to the school, basically performing "...whatever else you or any other administrator has asked me to do." She was "saddened to think [that Lichtenberg did] not see all I have done to help our school be the best...." She requested to discuss the matter with him. Rizzo sent copies of her letter to the superintendent and to Association president, Claire Garland (CP-11).

10. On July 14, 1999, a grievance meeting was convened, pursuant to Garland's demand that Lichtenberg's July 8 letter be removed from Rizzo's personnel file (T189). Garland, Rizzo, and NJEA representative Ronald Villano met with Lichtenberg in his office (T64; T189-T190). The circumstances prompting the July 8

letter were discussed, Lichtenberg advising that Rizzo was "contractually obligated" to work the five days after the year ended. Rizzo mentioned that she had completed her duties, to which Lichtenberg replied that many other clerk duties existed besides returning books to the library shelves (T190; T191). Lichtenberg said that the second year of Rizzo's failure to work the five days after the term ended caused him to "look at her attendance," to which Villano commented that Lichtenberg was "putting a pattern together" (T191). Lichtenberg mentioned that,

Five days constituted a pattern; each year the same exact days being taken, whether personal, whatever, develop a pattern in my mind, especially after being told, 'I don't want to work those days.' [T192]

Lichtenberg testified that he "looked at some of the other patterns for that year and noted that some [absences] were near a weekend or holiday" (T192). Lichtenberg's testimony does not clarify if "looking" at other "patterns" means that he spoke of them at the July 14 meeting; I do not infer such meaning. Rizzo conceded that Lichtenberg mentioned his concern for the number of days she was absent in the 1998-99 school year (T96).

Lichtenberg was asked to remove his letter from Rizzo's file and he refused. Villano asked him to reconsider and think about "anything you would change or move, if you don't change it, move the letter or would it stay in the file" (T192). Villano asked Lichtenberg to discuss the matter with Superintendent Moldan and the principal agreed (T64; T192).

11. Lichtenberg discussed Villano's request with Moldan later that day (T193). He promptly wrote a memorandum to Rizzo (with copies to Garland and Villano), advising that he and Moldan "came to the conclusion that the letter in question will remain in your file" (CP-13; T65). He also wrote, "We have agreed to review your attendance at this time next year and will entertain removal of the letter at that time" (CP-13). Copies of the memorandum were sent to Garland, Villano and Moldan.

Rizzo asked Garland to continue processing the grievance (T67).

12. On August 10, 1999, Garland wrote a letter to the Board president requesting a meeting "to discuss a letter of reprimand received by a member for using contractual sick and personal days" (CP-14). Garland wrote that the Association was "moving the grievance to the Board level" because the superintendent and principal had "agreed" on the letter of reprimand. Finally, Garland wrote that the Association contended that Rizzo was "working on the teacher's contract and the last day of school was on June 22, 1999" (CP-14).

13. On August 25, 1999, Superintendent Moldan met with Garland, Villano and Rizzo to discuss the grievance (T270). The Association again asked that the reprimand be removed from Rizzo's personnel file (T270). Villano contended that the reprimand was unwarranted, in light of the fact that Rizzo was only recently advised of the "attendance concern" (T141). In his view, "it should have been an oral warning at least" (T141).

Moldan did not decide the grievance at the meeting, owing to "conflicting facts" (T71; T271; CP-15). Rizzo testified that Moldan said that she was not tenured and that "it all depended how much I wanted to keep my job, as to how the outcome of this would turn out" (T71-T72). Rizzo was unsure of Moldan's meaning (T72). Neither Villano nor Garland corroborated Moldan's alleged threat at this meeting. If Moldan threatened Rizzo, I would have expected one or both Association representatives to testify about it; since neither did, I infer Rizzo was mistaken about the date of such a threat, if one was issued. I find that the comment, as Rizzo testified, is unclear about the meaning of "this," which could refer to the grievance or to the issue of Rizzo's attitude about attendance, in general.

Rizzo said that she was tenured, which was one of the "conflicting facts" requiring Moldan's "investigation" (T271).
Moldan testified:

[Rizzo] claimed she had tenure, the principal claiming that she - she did not have tenure, which would require me to go back and see the Board minutes because her tenure is determined upon the date of hire. [T271]

Lichtenberg was away on vacation the week of August 25 (T193). I infer from Moldan's testimony that before the August 25th meeting Lichtenberg told Moldan that Rizzo was not tenured. Another unanswered question was whether Rizzo had "taken one day [absence] more than was allowable," though Rizzo's overall attendance was reviewed (T271; CP-15). Moldan told the group that she would decide the grievance in a "very short period of time" (T271).

Moldan reviewed Rizzo's personnel file after the meeting, and locating the hiring date, "established that she did not have tenure as she believed she did" (T272).

14. Between July 14 and September 21, 1999, Lichtenberg and Garland informally discussed the Rizzo grievance a few times in the school hallways (T195). He once remarked to Garland, "She [Rizzo] doesn't respect me" (T114-T115). Garland believed that Lichtenberg meant that Rizzo did not respect him because she refused to report to school on the five days after the year ended (T104). I credit that interpretation.

15. On September 14, 1999, Moldan sent her "decision" to local president Garland and to the Association grievance chairperson concerning the "grievance-98/99-Joy Rizzo reprimand letter" (CP-15). Moldan again did not decide the grievance, writing, "Due to the conflicting facts presented to the superintendent at meetings on August 25 and August 30th, a meeting with all parties is requested prior to September 22, 1999, if possible."

Moldan also wrote that Rizzo's employment was approved February 24, 1997, making her a "non-tenured library clerk, at this time." She also wrote that Lichtenberg will issue a memorandum to Rizzo, "reflecting the importance of attendance for regular support staff" and that the August 25 meeting "emphasized that improved attendance and meeting contract obligations were central to the dispute with Mr. Lichtenberg." Moldan also wrote that the participants discussed "future cooperation between Mrs. Rizzo and

her principal" and a possible "transfer" to strengthen the "library/media program" (CP-15).

I do not credit the literal meaning of the sentence in the memorandum regarding "conflicting facts." Moldan already knew that Rizzo was not tenured and so advised in the memorandum. Nor does the record reveal any other evidence of the second "conflicting fact," specifically, whether Rizzo took one more day than was "allowable." Even if that remained unresolved in Moldan's view, I do not ascribe such significance to that uncertainty as to cause or justify another postponement of her decision. I infer that Moldan was really postponing her decision so that the grievance might be resolved, or more precisely, so that Lichtenberg and Rizzo would arrive at some mutually satisfactory understanding. I otherwise credit her letter's description of what transpired at the August 25th meeting.

16. Moldan spoke with Lichtenberg in preparation for a September 21 meeting with the grievant and Association representatives. She asked if he really regarded Rizzo as "superior" because she did not, inasmuch as she believed that attendance was an "indicator of performance" (T275-T276). She questioned Rizzo's "dependability" [as that word is used in an employee's evaluation form] (T277). Lichtenberg responded that he does not check on the attendance of every clerk and instructional aide (T276). He nevertheless regarded Rizzo's performance as "outstanding" (T174). So far as their differing views of Rizzo's performance were concerned, Moldan testified:

...that I don't know that I would have ranked in a similar situation and that was for the purpose of making sure, you know, he and I were clear, you know, when we rarely dispute performance, here there was, you know a dispute.

I would not say someone with that kind of absentee rate would necessarily be dependable, but it's his call. He is the frontline administrator and he was satisfied with her performance, her overall performance. [T276-T277]

I infer from this testimony that Moldan yielded her assessment of Rizzo's performance to Lichtenberg's "satisf[action] with her overall performance."

17. On September 21, 1999, Rizzo, Garland and Villano met with Moldan and Lichtenberg to discuss the grievance (T74; T76; T195). Garland wrote notes during the meeting, a copy of which is an exhibit in the record (CP-21; T107). The notes are seven mostly legible handwritten pages of attributed and unattributed phrases.

Lichtenberg testified that "the first thing discussed in the meeting was tenure - Mrs. Moldan opened the meeting with saying 'we don't have tenure, we're - Ms. Rizzo, you don't have tenure and here are the dates you were hired'" (T196). "Tenure" does not appear in Garland's notes and no other witness corroborated Lichtenberg's testimony. No witness denied Lichtenberg's description of how the meeting began - I credit his testimony.

Witness testimony and Garland's notes corroborate that the predominant topic of the meeting was Rizzo's attendance (T116-T121; T142; T198-T199; T273-T275). Topical variations discussed included a "pattern" of not working the last five days; too many absences -

the consequence of which is that the childrens' education is "diminished"; Rizzo's knowledge of the contractual (days) requirement; inappropriate leave taking (i.e., Rizzo needed "personal" leave for her daughter's graduation and took another form of leave time), which also indicated a "pattern" of conduct (T116-T120; CP-21).

Notes on Garland's fourth page attributed to Moldan state:

relationship - not going to improve
what is your intent?
too flexible - bring son
no dialogue - come in
decision to leave letter
jeopardizing employment
not [em] exempt [] attendance +95
[CP-21]

Moldan said that she thought that Lichtenberg's and Rizzo's relationship was not going to improve (T108). I infer that "what is your intent?" was Moldan's rhetorical or actual question to Rizzo about her current state of mind or plans regarding future attendance. The next two lines of phrases report both criticism of Rizzo's conduct and directives for appropriate behavior in the future. Garland testified that Moldan also said, "if Joy [Rizzo] continued to fight the letter and not accept the reprimand, she would be jeopardizing her employment" (T107; T109-T110). Villano testified that Moldan said, "if she [Rizzo] continues to pursue this matter, she is jeopardizing her employment with the district" (T126).

Moldan denied that Rizzo was terminated because she failed to settle the grievance (T282). She did not specifically deny

stating what Garland and Villano attributed to her. Nor did she testify about an alternate meaning of the purported statement. She testified:

My observation was that we had someone in the district for two years who had excessive absences, as set by the standard of the employees of the school district. We do not have individuals with that kind of absentee rate.... Our school report card does indicate approximately 95%, the State Department of New Jersey monitors school districts, and it expects the district to stay above 85%. We fortunately have a report that is above that, does not mean the every employee is, but it is the overwhelming minority of employees that exceed a 95% absence per year. [T275]

Rizzo exceeded that percentage, or in other words, had worse than a 95% attendance rate, in both 1997-98 and 1998-99 (T275). Moldan's testimony is corroborated by Garland's note, "not exempt [] attendance +95" (CP-21).

Moldan continued her testimony:

I raised the issue with the attendance, that it was an indicator of performance. And at no time did it come into play that, you know, that - that - that the grievance really in my mind, as superintendent, was separate from the performance evaluation.... So I did raise the issue of the statement of dependability with Ms. Rizzo in the meeting and with her representation, I raised the question of attendance, only as it related to Lichtenberg's right to take an action like putting a letter into the personnel file.... [T277]

I infer from this testimony that the "issue with the attendance" was distinguished from Rizzo's consecutive non-appearances the five days "after" the school years ended. On August 25, Villano had argued that Rizzo had only recently been apprised of the "attendance

concern," contrasted from her absences "after" the 1997-98 and 1998-99 school years ended. Villano had asked Moldan to reduce the reprimand to an "oral warning" (see finding #13).

Lichtenberg denied that Moldan stated that if Rizzo did not drop the grievance, her employment would be jeopardized (T198; T199). He testified:

What I did hear was that I recall a discussion about if - where would this go or what could happen with this type of thing being in the file, what type - could happen with this type of attendance problems. The answers were they could lead to jeopardizing your job. [T198]

I find that Moldan made the threat attributed to her by Garland and Villano, and corroborated by Garland's notes. Moldan's general denial that Rizzo was terminated because she failed to settle the grievance is imprecise rebuttal. I do not credit Lichtenberg's testimony as accurate reportage of Moldan's threat; it sounds suspiciously like his statements to Garland (see finding #21). I also infer that Rizzo's testimony of Moldan's comment is generally consistent with Garland's and Villano's versions, notwithstanding her belief that Moldan made the remark on August 25, 1999 (see finding #13). Rizzo did not testify about a second alleged threat, and I inferred that she was mistaken about the date Moldan spoke it.

18. During the meeting, Lichtenberg said that the issue is Rizzo's "total attendance over the whole year and because it was too high he refused to take the letter out [of her personnel file]" (T119). He defined Rizzo's "attendance problems" as "poor

attendance, not showing up for work, not calling in when you're due and taking misrepresented days" (T198).

Villano testified that he and Moldan had a "heated exchange" when she mentioned that she knew NJEA representative John Molloy, who "had ethics" (T130; T148). Lichtenberg did not recall any "accusation" directed at Villano but did remember a "heated discussion" he had with Villano (T196). Lichtenberg testified that after asking Villano about some "facts" elicited at their July 14 meeting, he said, "In the future, I will have to take better notes, especially after working with a new representative" (T197). Villano became angry, slammed his hand on the table and countered, "You're saying I'm a liar." Assuming that any or all such exchanges ensued between Board and Association representatives, I attach little probative value to them. At most, they confirm that occasional strong sentiment lay behind arguments that day over the grievance.

Villano argued that "attendance" issues were arbitrable and unrelated to "performance" (T127). He also argued that a withheld increment was an unfair punishment for unsatisfactory attendance and that Rizzo's absences should be considered separately under their designated categories (T119; T142). He again argued that the letter be removed from Rizzo's personnel file because she was "just made aware of her attendance concern" (T141).

By the end of the meeting, Moldan suggested that Lichtenberg write another memorandum to clarify his intention to remove the reprimand from Rizzo's personnel file if she improves her

attendance in the 1999-2000 school year, including the ten-day "service requirement" for library clerks (T160; CP-16).

Lichtenberg did not consider the meeting successful (T202). Soon after the meeting ended, Garland returned to the office and said to Lichtenberg, "John, I think you and I can work this out." Lichtenberg answered, "I agree. I don't see any reason the request at the table to change the wording to in fact, move those five days; I do agree that was a simple solution" (T202-T203). One proposal at the meeting was to "move" the five service days after the school term to other dates during the summer (CP-21; T200).

19. On September 22, Moldan sent a memorandum to Garland (and copies to Lichtenberg, Villano, Rizzo and Board counsel) regarding the "Joy Rizzo reprimand letter." It summarized the "relief offered" at the previous day's meeting; 1) the reprimand letter [July 8] will remain in Rizzo's personnel file "until improvement in attendance in accordance with the contract, employment position and district standards is validated," and 2) Lichtenberg will provide "an additional memorandum to clarify his original intention to remove the personnel file reprimand if improvement is noted during the 1999-2000 school year. This includes the ten-day service requirement for all library clerks beyond the school year" (CP-16; T159).

20. Rizzo was dissatisfied with the proposal, which did not resolve the grievance, in her view (T77; T81). On September 23

or 24, 1999, Lichtenberg, assistant principal Sica, Garland and Rizzo met, pursuant to Garland's request. I infer that Garland hoped to build a resolution of the grievance upon the prospect of moving the five days "after" the school year ended to other dates in the summer. Lichtenberg testified that the purpose of the meeting was "to solve the problem" (T203-T204; T262). In cross-examination, Lichtenberg was asked to define the "problem" which prompted the meeting. His unrebutted testimony was that "the specific problem was not honestly the wording [of the reprimand] but exactly what amount of days would need to be recognized as improvement" (T262). No facts suggest that Lichtenberg had mentioned to Garland or anyone before the meeting that its purpose was to quantify Rizzo's "improved" attendance. Lichtenberg had articulated concern for her overall attendance in his July 8 letter, and at the July 14 and September 21 grievance meetings. I infer that "attendance" continued to be his concern in the meeting on September 23 or 24.

Rizzo said that she did not want to work the five days after the teaching year ended. Lichtenberg agreed to "move them," provided that the two other district school principals agreed. Rizzo asked how much her attendance was expected to improve. Lichtenberg did not wish to give her "a number" and said, "I'm looking for improvement" and, turning to Garland, said, "Any time is an improvement." Garland and Rizzo pressed for a "specific number," to which Lichtenberg relented and said, "maybe 50% to 60%" (T204-T205).

Rizzo said that she sometimes must care for a sick child and tend to family responsibilities, which place undue pressure upon her to report to school. Lichtenberg answered that her wishes were "noble," but her "primary responsibility was supervising the library" and she must "attend to the contract and take appropriate days when necessary" (T205).

Lichtenberg also said to Rizzo that he had looked for her on the last day of school (June 22, 1999) and had not seen her. Rizzo said she left school at 2 p.m. that day. Lichtenberg responded that she was not supposed to leave until 3:30 or 4 p.m. and had left the building without permission or justifiable reason, and without having signed out (T209).

Lichtenberg and Garland ended the meeting by shaking hands and expressing a hope that "we could work out something to change the language" (T206).

21. Lichtenberg was asked on direct examination whether he or Moldan informed Rizzo or her representative that her attendance problems would jeopardize her employment. Lichtenberg testified:

I spoke to Claire [Garland] a couple times about that specifically.... I spoke to her after the meeting with Moldan and times before, we met as a group, in fact, I said to Claire - let me just my - my words, right, that we need to work in settling this and move it through, because these type of issues, if we don't improve, could lead to a dismissal; whatever else, attendance is a important fact. I've got to have her - her five days. You have got to work the five days.
[T200-T201]

By consciously remembering his words, Lichtenberg revealed that his goal at that time was "to work in settling this and move it through." One could infer from this testimony and from the fact that he was repeating under oath his remarks to the Association president, that Lichtenberg was referring to the grievance. The question asked of Lichtenberg however, concerned Rizzo's attendance "problems." Lichtenberg's use or merging of language typically associated with a grievance, i.e., "settling it," with responses to questions or perceived questions about attendance "problems" occurs several times in his direct and cross-examinations. I do not draw a negative inference from his propensity - it is not a prevarication in his answers. I infer from the testimony, "...because these type of issues, if we don't improve, could lead to a dismissal," that Lichtenberg was referring to Rizzo's attendance and to her intentions or commitment to improve.

Lichtenberg was asked the follow-up question:

Q: When you say 'these problems' or 'this problem,' you are talking about the grievance or are you talking about the attendance?

A: No, specifically, the five days and the poor attendance that were - and the misrepresentation of days. [T201]

The question was in error because Lichtenberg did not say "problem" in his previous response; he said, "settle this" and "these type of issues." I infer that the question called for Lichtenberg to define his terms and that "settle this" means Rizzo's attendance failures (as Lichtenberg saw them) rather than the grievance.

Corroboration of both inferences (i.e., that Lichtenberg was referring to Rizzo's grievance and to her attendance problems) can be gleaned from Lichtenberg's cross-examination. He was asked:

Q: If you had worked out the grievance and they had accepted a revised letter for another year and then if things were okay as it came out, would your recommendation to the superintendent have been the same?

A: Probably not.

Q: What would it have been?

A: That the improvement needed to be proven and shown before tenure or at least within that year. [T214]

The first question is compound; it asks about both the consequence of Rizzo agreeing to a reprimand for one year and a vague "things [being] okay as it came out," which suggests a question about improvement in Rizzo's attendance. Considering Lichtenberg's proclivity for merging language or concepts associated with the grievance with responses describing Rizzo's attendance "problems," I cannot discern which portion(s) of the question Lichtenberg answered. Even if Lichtenberg answered "probably not" to only the "worked out the grievance" portion of the question, I find that his follow-up response indicates that he was chiefly concerned with Rizzo's improved attendance and by extrapolation, her commitment to that goal. One indication of that commitment, in Lichtenberg's view, was her acceptance of a revised reprimand letter. Another indication would have been a positive response to his verbal demand for "improvement," which Rizzo rebuffed.

22. One or two days later, September 24 or 25, Garland spoke with Lichtenberg, advising that Rizzo did not want "to accept

anything at this point. She wants to go further" (T207). On an unspecified later date in September, Lichtenberg met with Moldan and discussed both Rizzo's grievance and tenure (T208; T256).

Lichtenberg testified:

I asked the Superintendent, 'Where are we going to go from here?' When she doesn't want to settle it, there is a teacher that is not attending or that is misrepresenting time, what do you do? [T256]

I infer from this unguarded cross-examination testimony that Lichtenberg was mostly exasperated about Rizzo's prospects as an employee (despite her "outstanding" performance) because she was "not attending" and "misrepresenting time." I infer that the "it" which Rizzo assertedly did not want to "settle" was both the grievance and the matter of her attendance, notwithstanding the singular pronoun. In other words, I do not believe that Lichtenberg delineated Rizzo's not wanting to settle the grievance from her persistent refusal to acknowledge either an attendance "problem" or a need to improve her attendance.

Lichtenberg also told Moldan that he had concerns about "more and more issues that are flourishing" and about "...granting tenure if these kinds of violations of the contract are occurring now" (T210). He also said to her: "Everytime I negotiate and sit with the Association and Rizzo, more things come out" (T208). Lichtenberg was referring to Rizzo's "misrepresentation" of leave time. He denied that he and Moldan discussed a "quid pro quo" between resolving the grievance and granting tenure (T210). Moldan suggested that they consult with Board labor counsel.

To the extent that Lichtenberg's testimony could suggest that he was more than "concerned" about granting tenure, i.e., that he recommended against granting tenure, I do not credit it for reasons set forth in finding nos. 23, 24, and 25.

23. Moldan and Lichtenberg met with counsel on some undisclosed date before October 20, 1999 (T210-T211). Moldan conceded that Lichtenberg mentioned Rizzo's "non-tenured status" to her between September 22 and October 20, 1999 (T165). Lichtenberg testified that "the result of the meeting" with counsel was that he recommended to Moldan that Rizzo "should not be retained" (T212). He testified that Rizzo did not "follow the contract for the five days two years in a row; called in a misrepresentation of ill days and personal leave," and had an "overabundance of absences such that [the Board needed] a better attendance by state regulation of about 6%" (T212-T213).

I do not credit Lichtenberg's testimony that he recommended Rizzo's termination. Lichtenberg's alleged (and unwritten) recommendation to Moldan to fire Rizzo was the time proximate result of his and Moldan's meeting with labor counsel on an unspecified date.

On October 18, two days before Moldan wrote a letter to Rizzo, advising that the Board will discuss her employment status on October 25, Lichtenberg wrote a letter to Garland with copies to Moldan and Rizzo (see finding #25). Lichtenberg wrote that he was seeking Rizzo's "input" and that he was offering to change the

wording of the reprimand. His proposal is consistent with his efforts at the meetings on September 21 and September 23 or 24 and a reiteration of his proposal dating to July 14 and repeated subsequently. Nothing in the letter suggests that termination was possible, let alone, imminent.

If Lichtenberg's testimony about his recommendation to fire Rizzo is accurate, I am virtually certain that he would have so recommended that action before October 18. (If not, the meeting with labor counsel would have occurred on October 19, followed closely by Lichtenberg's "recommendation" and Moldan's October 20 letter. No witness intimated such a tight sequence of events). I cannot posit in an administrator nor reconcile as a finder-of-fact what conflicting, self-contradictory or duplicitous motives would one day prompt a recommended firing and several days later prompt a letter "encouraging" an employee's "input" toward resolving a grievance. I also infer that if Lichtenberg had known or had reason to know of Moldan's decision to recommend Rizzo's firing at the October 25 Board meeting, he would not have solicited her "input" with an eye toward removing the reprimand from her personnel file at the end of the 1999-2000 school year two days before notice was issued. At most, Lichtenberg knew or was convinced that Moldan intended to fire Rizzo on some undisclosed date.

If Lichtenberg had recommended Rizzo's termination for the reasons he cited (i.e., her attendance deficiencies, including too many absences, not coming to work the days "after" the school years

ended and misrepresenting leave time), it would have either changed his decision from the prescribed penalty set forth in his July 8 letter or modified his thinking such that in the absence of an eight-month "proof" period by which Rizzo's attendance could be assessed, he could not in good conscience recommend her for tenure. Lichtenberg did not testify about a change or modification in his thinking; he testified only that following the meeting with Board counsel, he recommended that Rizzo "should not be retained."

Accordingly, I find that Lichtenberg did not recommend to Moldan that Rizzo should be fired.

24. Moldan testified that "we needed to make a determination, it was a tenure decision" (T279). Lichtenberg provided "all the information with his recommendation" to Moldan and she "concurred that this employee did not meet the standards..." for granting tenure because of "excessive absenteeism" (T279-T280). The decision to "non-renew" was based on "the whole picture," testified Moldan, and not whether Rizzo did or did not think she should have worked the five days in June (T289-T290). For the reasons expressed above, I do not find that Lichtenberg recommended Rizzo's termination, even if he provided "all the information." Nor do I credit Moldan's testimony that she was "making a tenure decision," though I do credit her perceived need to make a determination for reasons unrelated to tenure. I find that the timing of Moldan's decision to fire Rizzo, apart from her incredible explanation for it, is most persuasively explained by an October 18 letter

Lichtenberg sent to Garland, with a copy to Moldan (also see findings #23, 25, and 26).

Moldan had hoped that the Association would have agreed to her September 22nd proposal (T160) (see finding #19). Asked what circumstance(s) led to the termination decision, Moldan testified:

Because Ms. Rizzo's employment, time-period wise, the Superintendent is called upon to make a recommendation for continued employment. Unfortunately, that period was coming mid-year. Therefore I collect data from my field administrators in order to make recommendations to the Board. Customarily, boards of education hear those in April, March, April. Mid-year hires require them to hear this 60 days prior to the date of employment. So we were in that position in the fall of 1999. [T161-T162]

Without an interruption of employment, Rizzo was to have acquired tenure three years and one day after the date of hire, which was to have been on March 4, 2000 (T162). Although Moldan speculated that other "continued employment" decisions may have been "heard" at that time, none were proffered (T162). I do not infer that other tenure decisions were made that fall. She testified:

[the] mid-year situation requires 60 days and you back that up and this one, because it would have been the 60 days, and encompassed a couple of vacations, it seemed like a very long, long time. And I made the suggestion to the administrators because you can easily miss it and have done that as a rookie principal, I never forgot the lesson. [T280-T281]

I do not credit Moldan's testimony explaining the timing of the termination decision. Applying her 60-day timetable to Rizzo's upcoming March 4, 2000 tenure date fails to account for the October 20, 1999 notice to Rizzo that her "employment status" will be

discussed at the October 25 Board meeting (see finding #25). Following the timetable, Rizzo would have been notified in early January 2000 and allowance for "a couple of vacations" would have set the notice date back as much as one month -- to early December 1999, about 6 weeks later than the actual notification date. Nor was any explanation proffered for the December 31, 1999 termination date (see finding #27).

Lichtenberg conceded that his and Moldan's meeting with labor counsel "resulted" in his recommendation to terminate Rizzo's employment. Ordinarily one infers that "resulted" implies causation. In the limited context of Lichtenberg's credited direct examination, I find that "resulted" connotes time proximate to the meeting with counsel, and that Moldan promptly recommended Rizzo's termination.

25. On October 18, 1999, Lichtenberg wrote a memorandum to Garland (with copies sent to Moldan and Rizzo), thanking her for "working with me to resolve Joy's issues." He wrote that he "encouraged [Rizzo's] input and would change language to read: 'The letter would be removed next year following improvement in attendance and the summer obligation'." He also wrote, "If you have any questions regarding this matter, please contact me" (CP-18). Garland did not receive and read the memorandum until October 28, 1999, when a secretary gave it to her (T103).

The record does not show whether Lichtenberg wrote the letter before or after he recommended Rizzo's termination to

Moldan. Considering that only two days separated his letter from Moldan's October 20 notice to Rizzo (that her employment status was to be reviewed by the Board on October 25), I infer that Lichtenberg wrote his October 18 letter either without knowing that Moldan was imminently intending to advise Rizzo of her upcoming termination or with the intention of reaching a prompt resolution to preempt her decision to fire Rizzo, of which he was at least confident (see findings #23 and 24).

By October 18, Rizzo "understood" that she would be required to report to work the five days after the school year ended (T81-T82). I do not infer that she ever articulated that "understanding" to Board representatives. She testified about why the Board's proposal was unacceptable:

I wanted the letter to be taken out of my folder this year, not - before attendance was looked at, and consider that a warning, cause I'd never gotten a written warning or anything that my attendance was being questioned. [T84]

I infer from this testimony that Rizzo did not consider Lichtenberg's June 1998 phone call to her about her three absences in the week after classes ended a "warning about an overall attendance problem."

26. On October 20, 1999, Moldan addressed a letter to Rizzo at the middle school, advising that her "employment status" will be discussed in the Board's "executive session" on October 25. She also wrote that Rizzo had the option of having her "status" discussed in public (CP-19). Lichtenberg gave Rizzo the letter (T85).

Villano, Rizzo and Garland attended the Board meeting on October 25th, When Moldan recommended Rizzo's termination because of her "attendance." The Board approved the recommendation (T137).

By October 25, Rizzo had taken a one-half sick day as her total of absences in the 1999-2000 school year, including the five days before the teaching personnel "work schedules" as defined in Article 6 (see finding #1) (T82-T83; T221). Rizzo was also absent at least one-half day on November 4, December 8, 9, 10 and 14, 1999, taking sick, personal and family illness leaves (T221-T228; R-2).

27. On November 5, 1999, Moldan sent a letter to Rizzo at her home, advising that on October 25, the Board voted to "terminate your employment as library clerk." The termination date was December 31, 1999 (CP-20). The grievance was not mentioned in the executive session (T282-T283).

ANALYSIS

Public employees and their organizations have a statutory right to avail themselves of negotiated grievance procedures. N.J.S.A. 34:13A-5.3. Retaliation for the exercise of that right violates the Act. N.J.S.A. 34:13A-5.4(a)(1) and (3). The standards for establishing whether an employer has violated those subsections are set out in In re Bridgewater Tp., 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 unlawful motives 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.

The Association must prove that Rizzo's protected conduct - pursuing a grievance contesting a letter of reprimand - was a substantial or motivating factor in the Board's decision to terminate her employment. If the Association proves that case by a preponderance of the evidence, the Board must prove that it would have terminated Rizzo's employment regardless of her protected conduct.

The first two parts of the three-part test have been met. The Association pursued a grievance on Rizzo's behalf, which is

protected activity under the Act. The employer knew of the grievance and discussed it with Association representatives and Rizzo on several occasions. The remaining question is whether the Board was hostile toward Rizzo for pursuing that grievance.

The Association has shown direct evidence that the Board was hostile toward Rizzo's exercise of protected rights. On September 21, 1999, during the third and final formal grievance meeting among the parties, Superintendent Moldan said that if Rizzo continued to "pursue the matter" or "fight the reprimand letter" [placed in her personnel file by principal Lichtenberg] she was "jeopardizing her employment." The meaning of Moldan's threat is that if Rizzo did not withdraw or settle her grievance, she could be fired. Rizzo did not withdraw or settle the grievance. Circumstantial evidence, contrary to Lichtenberg's and Moldan's testimonies, shows that principal Lichtenberg did not recommend Rizzo's termination, and that the timing of the superintendent's recommendation to fire Rizzo was intended to thwart Lichtenberg's continuing effort to resolve the grievance. Accordingly, I find that the Association has proved that anti-union animus was a motivating or substantial reason for Rizzo's termination. I also find that the Board has not proved by a preponderance of evidence on the entire record that it would have fired Rizzo for a legitimate reason even in the absence of protected conduct. I am persuaded that Lichtenberg was not hostile to Rizzo during the grievance process and did not recommend her termination. I also find that

Moldan would not have recommended Rizzo's termination to the Board in the absence of protected conduct, despite her belief that Rizzo was excessively absent.

Rizzo had been absent the large majority of "after" school year days contractually required of library clerks for two consecutive years. When Lichtenberg phoned Rizzo at home on the third day of such absences in 1998, she advised him of her preference not to work those five days and that she was planning to be absent the next two days, using sick leave one day to take her children to a doctor. Lichtenberg advised that a sick day was inappropriate leave in that circumstance. She reported to work the next two days. Rizzo conceded in her testimony that she did not consider Lichtenberg's phone call a "warning" about an overall attendance problem. In July 1999, after Rizzo was again absent the days "after" that school term ended, Lichtenberg wrote a detailed memorandum to her expressing concern over her recidivism, which also sparked his further stated concern over accumulated absences. Rizzo wrote a detailed reply, disputing Lichtenberg's characterization of her absences, disagreeing with his view that her total number of absences compromised the students' education, and opining that personal days may be used "anytime we like without being questioned."

I have little doubt that the palpable anger in Rizzo's response was fueled by a perceived lack of Board appreciation for her recent substitute librarian efforts and her demonstrated

excellence as library clerk. I am not persuaded that her anger was motivated by a sincere belief that as a substitute "teacher" for three months, she was not required to work the five days after the school year ended. Rizzo conceded that she had phoned the office to report her absences because she was unsure of her status, an understandable consequence of having recently received a completed "secretarial" evaluation form. I infer however, that Rizzo believed that she ought to have been considered a "teacher" if only for the purpose of being excused from working the five days after the year ended.

Throughout the July 14, August 25, and September 21 grievance meetings, the parties elaborated upon the positions taken by Rizzo and Lichtenberg. On July 14, Lichtenberg refused to remove his reprimand letter from Rizzo's personnel file. He reiterated that Rizzo was required to work the five days; that she was absent most of those days two years consecutively, suggesting a "pattern"; and that she was absent too many days. Rizzo stated that she had completed her library duties, to which Lichtenberg replied that other library clerk duties remained. I infer that Rizzo resisted or rejected the contractual duty to work those last days. Lichtenberg later spoke with Moldan about removing the reprimand, pursuant to Villano's request, and the principal replied to the Association that the letter would remain in Rizzo's file, notwithstanding a year-end review of her attendance, when "removal of the letter [will be] entertain[ed]."

On August 25, Rizzo asserted that she was a tenured employee, which Moldan regarded as one of two "conflicting facts" because Lichtenberg had told her that Rizzo was not tenured. Precisely why Lichtenberg first mentioned Rizzo's untenured status to Moldan is unclear, as is whether it was Rizzo or Moldan who first mentioned "tenure" at this meeting. I infer that Lichtenberg's reason for mentioning Rizzo's untenured status to Moldan is that the reprimand, which Lichtenberg and Moldan discussed and modified in July, contemplates Rizzo's acquiring tenure (in March 2000) by providing for a review of her attendance at the end of the 1999-2000 school year. Lichtenberg regarded Rizzo as an "outstanding" employee and logically wished to retain her services. That Rizzo was untenured is itself unrelated to anti-union animus and is an inherently and lawfully coercive fact to any employee seeking to retain employment. An employer initially raising the subject of an employee's untenured status in a grievance meeting unrelated to tenure may violate 5.4a(1) of the Act. See Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998); N.J. Sports & Expo. Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). But the Association has not alleged that the Board violated that section independently of 5.4a(3), obviating the need to resolve that factual uncertainty.^{3/}

^{3/} Moldan's threat to Rizzo in the September 21 meeting would independently violate 5.4a(1) of the Act, if it had been so alleged. See Blackhorse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981).

Rizzo's overall attendance was again reviewed. Moldan emphasized that Rizzo's improved attendance and meeting contractual obligations were "central" to the dispute with Lichtenberg. Villano asserted that Rizzo was only recently advised of the "attendance concern" for which she should have been verbally "warned."

The parties also discussed "future cooperation" between Rizzo and Lichtenberg, who was away on vacation. This aspect of a reconciliation was personal; that is, Lichtenberg had remarked to local president Garland that Rizzo did not "respect" him, the meaning of which I have credited Garland's interpretation. Lichtenberg meant that Rizzo did not respect him because she refused to work the five days after the school year ended. Similarly, Rizzo had previously expressed her disappointment in Lichtenberg because he had not appreciated her efforts and contributions to the district.

On September 14, Moldan issued a "decision" not deciding the grievance. I have found that that her written reason for postponing her decision - the existence of "conflicting facts" - was pretextual, and that her real reason was to allot more time for Lichtenberg and Rizzo to reconcile in the two ways she described in the letter - personally and professionally. By the latter, I mean that Moldan had said on August 25 (and was now repeating in her letter) that Rizzo's improved attendance and meeting contractual obligations were "central" to the dispute with Lichtenberg. Moldan's reference to Rizzo's future conduct (as distinguished from

her past performance) as Lichtenberg's paramount concern is inferentially corroborated by her and Lichtenberg's differing assessments of Rizzo. Lichtenberg believed that Rizzo was an "outstanding" employee, deserving of the superior evaluations she had received, including the highest possible score in the category, "dependability." Moldan disagreed that an employee with Rizzo's absenteeism was highly dependable; she would not have given Rizzo an equally superior evaluation. She deferred to Lichtenberg's assessment however, which was concerned mainly with future attendance (see finding #16).

On September 21, the parties met formally for the last time, and Rizzo's attendance was discussed extensively. Lichtenberg again criticized her taking personal leave time at the end of the year. Nothing in Rizzo's testimony or in Garland's notes of this meeting suggest that Rizzo expressed an intention to either improve her overall attendance or to report to work the five days after the year ended, despite Moldan's question(s) about such intentions. I infer from these omissions that Lichtenberg had no reason to think that Rizzo had altered her previously stated view that personal leave days could be taken whenever she wished. Moldan's threat was framed by her statements about Rizzo's attendance infractions, including her exceeding the staff's annual average percentage of absences. The notes and testimony reveal no further discussion about the threat, despite incensed argument between the parties over tangential matters. Lichtenberg proposed to move the five "after"

school-year days to later dates in the summer, which elicited no apparent commitment from Rizzo.

At their last meeting on September 23 or 24, Rizzo expressly stated to Lichtenberg that she did not want to work the five days after the school year ended, repeating her stated preference from 1998. Nor did she promise to work those five days even if they were moved to other dates in the summer. Rizzo also refused to commit to any improvement in her attendance, and advised that family responsibilities preempted the possibility that she could improve it by 50%.

In the context of these facts, I found that Lichtenberg was exasperated in his late-September 1999 meeting with Moldan, at which the grievance and tenure were discussed. The source of his frustration was Rizzo's excellence as an employee together with her refusal to abide or commit to attendance obligations, at least insofar as Lichtenberg defined them (i.e., not working the five "after" school year days, relatively poor overall attendance and misrepresenting leave time). Lichtenberg was also needled by other minor infractions of which he learned in the meetings, such as Rizzo's having left work early on June 22 and another instance of "misrepresented" leave time. For the reasons I have ascribed in the factual findings, I believe that Lichtenberg's conceded desire for Rizzo to "settle," references the pending grievance predominantly as it relates to Rizzo's attendance obligations (see findings #21 and 22). Moldan's and Lichtenberg's concessions on the proposed penalty

ironically resulted in Rizzo's continuing resistance to those obligations. Stated another way, throughout the grievance process, Rizzo consistently conveyed her implicit view that she should not have been reprimanded because she could be absent as she had been absent. Even if she did not intend to impart that attitude, Lichtenberg was affronted by it, first complaining to Garland that Rizzo did not "respect" him and later asking Moldan (rhetorically), "where are we going to go from here?" The question inferentially conveys a sense of futility about the efficacy of adhering to the imposed reprimand; what good would it serve if Rizzo did not now appreciate her obligations? It also conveys a concern about the Board's future with Rizzo, which is inextricably linked to tenure considerations. Nothing in the record suggests that Lichtenberg opposed the grievance continuing to arbitration. At most, it indicates his consternation, but not hostility, that the grievance, by itself, was unresolved.

I acknowledge that delineating a line between Lichtenberg's exasperation with Rizzo and his purported recommendation to "not retain" her is at best a fact-intensive and honest assessment of his state of mind, based on the record. The question I needed to answer was, had Lichtenberg given up on Rizzo? Contrary to the affirmative answer implied by his testimony that he recommended to Moldan that Rizzo be fired, I found that Lichtenberg's October 18 letter to Garland (with copies to Moldan and Rizzo) demonstrates that he had not given up on Rizzo as an employee and that his testimony cannot be credited.

I have found it illogical and incredible that Lichtenberg would first recommend Rizzo's termination to Moldan and days later send a thank-you note to the Association president, inviting the "input" of the person he had just unofficially vanquished, with an open eye toward removal of the reprimand in June 2000, together with a stated interest in answering the president's questions. What statement of professional reputation or expression of labor relations would this note portend when the Association discovered that Lichtenberg had recommended Rizzo's firing? Lichtenberg's motive always was to secure Rizzo's improvement in attendance and secondarily, her stated commitment to improve, or an acknowledgment of responsibilities. Minimally, he expected "corrective measures," upon which he insisted in his July 8 letter to Rizzo.

Moldan disagreed with a portion of Lichtenberg's overall superior evaluation of Rizzo, believing instead that her absences lessened her "dependability." She did not modify his evaluation, conceding that "it's his call." Moldan also postponed her decision on the grievance so that Lichtenberg and Rizzo might reconcile their differences. She advised the Association that Rizzo's improved attendance and meeting contractual obligations were "central" to the dispute with Lichtenberg (my emphasis). Moldan also proposed or agreed with Lichtenberg to modify the reprimand to include a provision requiring its removal from Rizzo's personnel file upon demonstrated improvement in attendance. I infer from these actions that Moldan was accommodating an administrator seeking to retain an "outstanding" library clerk.

On September 21, 1999, Moldan was hostile to Rizzo's protected rights by threatening to fire her if she "continued to fight the reprimand." In her unexplained threat, I infer that by this date Moldan's tested patience with Rizzo and with her principal's persistent efforts to resolve the grievance had worn thin. In accord with the way Rizzo's grievance had been processed, this meeting constituted the "Board of Education" appeal step. The next step was binding arbitration, unless "...the complaint involved the retention of a nontenure employee," pursuant to Article 3 of the collective agreement (see finding # 1). The agreement, in tandem with the fortuity of Rizzo's March tenure date, provided the segue from a decision on a pending grievance to a hastily announced October 25th referendum on tenure.

In late September, Lichtenberg reported to Moldan that his recent meeting with Garland and Rizzo did not resolve the grievance. Moldan had already threatened Rizzo and was inferentially pessimistic about the chances for settling the grievance. She was also more critical of Rizzo's absences than Lichtenberg, and now, hearing of yet another failed meeting on the grievance, decided to call in labor counsel with an eye toward firing Rizzo. She was also aware that Rizzo's tenure date was March 4, 2000.

Neither Lichtenberg nor Moldan testified about the substance of the meeting with labor counsel and cross-examination of them on that subject would have violated the asserted

attorney-client privilege. I have found that Lichtenberg did not recommend Rizzo's termination but he was aware of Moldan's intent to fire Rizzo. He did not know when the proverbial ax would fall or he may have surmised that it would fall sometime before the end of the calendar year. On October 18, several days after the meeting with counsel, Lichtenberg again tried to settle the grievance in an effort to keep an "outstanding" employee. He sent his letter to Garland and I infer, despite its late delivery to her, that Moldan promptly received her own copy. Having decided to fire Rizzo, Moldan was not about to countenance the possibility that the grievance would be settled and that Rizzo would soon thereafter acquire tenure. She preemptively ordered Lichtenberg to personally deliver her October 20 letter to Rizzo, advising that the Board will discuss her "employment status" at its meeting five days hence. I contrast this hasty delivery, addressed to Rizzo at the middle school, with Moldan's November 5 letter, advising of her termination on December 31, addressed (and apparently posted) to Rizzo's personal residence.

I do not see how another version of events coherently explains the close timing of Lichtenberg's and Moldan's letters (to contrary ends) and the decision to terminate Rizzo's employment. I have found that the decision to terminate Rizzo was at least six weeks premature, based upon Moldan's own timetable for tenure decisions, and notwithstanding the absence of any statutory or regulatory duty to provide 60 days notice (see finding #24). At no

time was Rizzo informed that she would soon (or ever) be fired for poor attendance. Considering the direct evidence of anti-union animus in Moldan's threat, together with circumstantial evidence that she alone recommended Rizzo's termination in direct response to Lichtenberg's October 18 effort to resolve the grievance, I find that Rizzo's contest of the reprimand through the grievance procedure was a substantial or motivating factor in the Board's decision to terminate her employment.

If the grievance was never filed (i.e., if Rizzo did not reply to Lichtenberg's July 8 letter), Lichtenberg would have met with Rizzo and demanded her attendance on the five "after" school-year days and advised of the need for her to improve her overall attendance. Such a meeting would be protected by the Act and cannot be considered as part of the respondent's burden of proof in a Bridgewater analysis. See No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978); ("[I]ndividual employee conduct, whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions...constitute protected activities under our Act").

I must assume that Rizzo (without being insubordinate) would not have committed to either "corrective measure." Without her stated commitment to improve and a demonstrated improvement, Lichtenberg would have imposed (or recommended to impose) the ascribed threatened action, which "could include" an increment

withholding and requests for doctors' notes. I do not infer that Lichtenberg was threatening a more severe "administrative action." Lichtenberg's letter was intended to intimidate Rizzo into better attendance; I do not think he hesitated in expressing the ramifications of her continued non-compliance. For purposes of this analysis, I infer that on July 8, Lichtenberg was not contemplating possible termination.

Nothing in the record shows that on July 8, Lichtenberg was consciously aware of Rizzo's unusual "mid-year" tenure date. I infer, however, that Lichtenberg knew that Rizzo was untenured and had he thought of her tenure date at all, he would have assumed that her status would be decided in the usual course, i.e., in April, when tenure decisions are reached for September hires. Assuming Lichtenberg's general awareness of Rizzo's untenured status and the presumed notion that tenure decisions were rendered in April, I find that Lichtenberg would have recommended or recommended against (to Moldan) Rizzo's tenure two months before she could have proved her attendance on the five days "after" the school year ended. By April 2000, the only evidence of Rizzo's improvement or "corrective action" would have been the record of her attendance until the tenure-decision date.

I find that on July 8, in ignorance of her specific tenure date, Lichtenberg intended to impose this lengthy timetable largely because he admitted so and because he valued Rizzo as an "outstanding" employee. Lichtenberg conceded that even if Rizzo

agreed to the reprimand, she would have had to demonstrate improved attendance before tenure was granted, "or at least within that year." If Rizzo improved her overall attendance by April 2000, he would have given her the benefit of a presumption that her compliance with one directive (to improve overall attendance) augured her compliance with his other directive (to work the five "after" school year days). Even if Rizzo complained about working those five calendar days in June, Lichtenberg would have been amenable to substituting other dates later in the summer for them.

After July 8 and sometime during the fall, Lichtenberg learned that Rizzo's tenure date was coming in March 2000. I have found that this fact did not prompt Lichtenberg to recommend Rizzo's termination. Without Rizzo's protected activity, Lichtenberg would have based a tenure recommendation on Rizzo's attendance through December 31, 1999 or thereabouts, when Moldan would have sought it, based upon her 60-day timetable for tenure decisions.

By December 31, Rizzo was absent at least three full days, taking sick, personal and family illness leaves. By October 25, when the Board voted to terminate Rizzo's employment at a meeting she attended, Rizzo had been absent one-half sick day. I do not consider her absences after the Board's October 25 decision to fire her an especially relevant or reliable measure of her overall attendance. Conceding the likelihood that Rizzo would have taken as much as another one and one-half days absences between October 25 and December 31, I find that Lichtenberg would have recommended

Rizzo for tenure because she would have had significantly improved her overall attendance, based on a pro rata calculation and a comparison with her attendance in 1998-99.

No statute or regulation requires a 60-day tenure notice to boards of education secretarial employees. Without Rizzo's protected activity, Moldan would have taken no action at all because Lichtenberg's recommendation on July 8 demanded only Rizzo's improved attendance over the course of the 1999-2000 school year. Sometime shortly before March 4, 2000, the matter of Rizzo's tenure may have been actively considered by Lichtenberg and Moldan, the result being based upon Rizzo's overall performance as an employee, her attendance representing (at most) one variable. Rizzo's attendance through October 25 was perfect except for one-half sick day. Even assuming that she would have taken some absences between October 26 and March 3, 2000, I extrapolate that the number of them would not have renewed Lichtenberg's stated concerns and consequently would not have been negatively assessed in his recommendation to Moldan.

The record shows that through the grievance processing to September 21, Moldan deferred action to Lichtenberg's efforts, concerns and appraisal. That deference, in the absence of protected conduct, would have assured Rizzo's tenure on March 4, 2000. Allowing that Rizzo's attendance would have downgraded her "dependability" in Moldan's view, I find that a score lower than "5" in that one category would not have resulted in Moldan's decision to

"non-renew" Rizzo's employment. Accordingly, the Board has not proved that Rizzo would have been fired in the absence of her protected conduct.

DECISION

The Tinton Falls Education Association has proved that protected conduct was a substantial or motivating factor in the Tinton Falls Board of Education's decision to terminate library clerk Joy Rizzo.

The Board has failed to prove that it would have terminated Rizzo, regardless of her protected conduct.

Accordingly, the Tinton Falls Board of Education has violated section 5.4a(3) and (1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

REMEDY

The Association seeks reinstatement, back pay, punitive damages and attorney fees. I recommend reinstatement and back pay and do not recommend punitive damages and attorney fees.

I recommend that Rizzo be reinstated as library clerk at the middle school, with back pay, plus interest (see R.4:42-11), minus mitigation from other (ten-month) employment, from January 1, 2000 until the date of reinstatement. I also recommend that Rizzo shall be eligible for tenure at three years plus one day of actual employment (about 61 days after reinstatement), pursuant to N.J.S.A. 18A:17.2. The criteria for granting tenure shall be Rizzo's evaluations from the 1997-98 and 1998-99 school years, together with

her evaluations from the 1999 school year until October 25 (assuming it exists) and from the date of reinstatement until the tenure-eligibility date or the date of a decision on tenure in the usual course of such decisions for clerical employees approaching a completed third year of employment, whichever comes first. The latter evaluations shall together be given a weight in the tenure decision not greater than their combined proportion to and proportionate with each of the 1997-98 and 1998-99 evaluations, based on the number of days of employment.

To the extent that Rizzo's prospective "attendance" may be considered in a tenure decision, the standard against which it shall be measured will be the average annual percentage of staff days of absence, prorated to the number of days Rizzo shall be employed from the date of reinstatement until the date of tenure eligibility or the date of a decision on tenure, whichever comes first. Unless there is good cause to find that any such absences within the permissible percentage is not a bona fide absence, the fact of the absence shall be regarded as one criteria of the "dependability" category in the overall assessment in the period from the date of reinstatement until the date of tenure eligibility or the date of a decision on tenure, whichever comes first.

A decision to deny Rizzo tenure shall not be arbitrary or in bad faith.

I disagree that Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 59 (1980) generally applies to employees represented

collectively by a union or majority representative. Nor do the circumstances of this case implicate a "clear mandate of public policy." Id. at 84 N.J. 72. Punitive damages are unwarranted.

The Commission has exclusive jurisdiction to decide unfair practices. N.J.S.A. 34:13A-5.4c. Having recommended that the public employer violated the Act and that a make-whole remedy does not include litigation in another forum, I deny the application for attorney fees, pursuant to Commerical Tp. Bd. of Ed. and Commerical Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶3253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

RECOMMENDED ORDER

The Tinton Falls Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by threatening to terminate employee Joy Rizzo for contesting a written reprimand through the negotiated grievance procedure; terminating employee Rizzo for contesting a written reprimand through the negotiated grievance procedure; and pretextually using the tenure-decision process to terminate an employee for contesting a written reprimand through the negotiated grievance procedure.

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 terminating Rizzo for contesting a written reprimand through the negotiated grievance procedure; and pretextually using the tenure-decision process to terminate Rizzo for contesting a written reprimand through the negotiated grievance procedure.

B. Take the following affirmative action:

1. Reinstatement Joy Rizzo as library clerk in the middle school as of January 1, 2000.

2. Make Joy Rizzo whole for all wages and wage increases to which she would be entitled had she been employed as library clerk from January 1, 2000 until the date of reinstatement, plus interest, pursuant to R.4:42-11.

3. Consider and evaluate Joy Rizzo for tenure under N.J.S.A. 18A:17-2, pursuant to the attached "Remedy," about 61 days from the date of reinstatement, or the date when such decisions for clerical employees are usually rendered, based upon a tenure-decision date about 61 days from the date of reinstatement, whichever comes first.

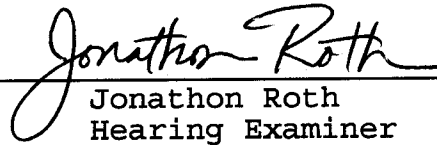
4. Remove the written reprimand dated July 10, 1999 from Joy Rizzo's file upon her fulfillment of conditions set forth in that reprimand, extended through school year 2000-2001.

5. 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.

6. Within twenty (20) days of receipt of this decision, notify the Chair of the Commission of the steps the Respondent has taken to comply with this order.


Jonathon Roth
Hearing Examiner

DATED: February 22, 2001
Trenton, New Jersey



RECOMMENDED



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 employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by threatening to terminate employee Joy Rizzo for contesting a written reprimand through the negotiated grievance procedure; terminating employee Rizzo for contesting a written reprimand through the negotiated grievance procedure; and pretextually using the tenure-decision process to terminate an employee for contesting a written reprimand through the negotiated grievance procedure.

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 terminating Rizzo for contesting a written reprimand through the negotiated grievance procedure; and pretextually using the tenure-decision process to terminate Rizzo for contesting a written reprimand through the negotiated grievance procedure.

WE WILL reinstate Joy Rizzo as library clerk in the middle school as of January 1, 2000.

WE WILL make Joy Rizzo whole for all wages and wage increases to which she would be entitled had she been employed as library clerk from January 1, 2000 until the date of reinstatement, plus interest, pursuant to R.4:42-11.

WE WILL consider and evaluate Joy Rizzo for tenure under N.J.S.A. 18A:17-2, pursuant to the attached "Remedy," about 61 days from the date of reinstatement, or the date when such decisions for clerical employees are usually rendered, based upon a tenure-decision date about 61 days from the date of reinstatement, whichever comes first.

WE WILL remove the written reprimand dated July 10, 1999 from Joy Rizzo's file upon her fulfillment of conditions set forth in that reprimand, extended through school year 2000-2001.

Docket No. CO-H-2000-137

Tinton Falls 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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"