

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BAYONNE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-96-24

BAYONNE TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Bayonne Board of Education. The Complaint, based on an unfair practice charge and amended charge filed by the Bayonne Teachers Association, alleges that the Board violated the New Jersey Employer-Employee Relations Act when it assigned the Association president to teach basic skills mathematics classes, allegedly in retaliation for his exercise of protected rights and when it unilaterally established salaries for three extracurricular positions. Absent any exception to a Hearing Examiner's conclusion that the assignment to basic skills classes did not violate the Act, the Commission dismisses that portion of the Complaint. The Commission also dismisses the allegation that the Board did not negotiate salaries for three extracurricular positions where the positions have existed for many years and the Association had not previously asserted that it represented the extracurricular positions.

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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Appearances:

For the Respondent, Apruzzese, McDermott, Mastro & Murphy,
attorneys (Robert T. Clarke, of counsel)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak,
attorneys (Paul L. Kleinbaum, of counsel)

DECISION AND ORDER

On July 28 and September 15, 1995, the Bayonne Teachers Association filed an unfair practice charge and amended charge against the Bayonne Board of Education alleging that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5).^{1/} The charge alleges that the employer violated subsections

^{1/} These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

5.4(a)(1) and (3) in June 1995, when it assigned Association president Alan D'Angelo to teach basic skills mathematics classes, allegedly in retaliation for his exercise of protected rights. The amendment alleges the employer violated subsections 5.4(a)(1) and (5) on August 29, 1995, when it unilaterally established salaries for three extracurricular positions.

On August 30, 1995, a Complaint and Notice of Hearing issued based on the original charge. On September 15, the employer filed an Answer. The amended charge was answered at the hearing held by Hearing Examiner Jonathon Roth on June 4 and 5, 1996.

On November 4, 1996, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 97-9, 23 NJPER 57 (¶28038 1996). He concluded that the charging party had not established that the employer was hostile to the exercise of protected rights. He further found that the employer had a legitimate business reason to assign D'Angelo to teach basic skills courses. The Hearing Examiner also found that the charging party had not proved that it was the majority representative of the disputed extracurricular positions and that, therefore, the employer had no duty to negotiate over compensation for those positions.

On December 9, 1996, the charging party filed exceptions. It claims that the Hearing Examiner erred in failing to find that the Authority violated the Act when it unilaterally established salaries for the three positions. On December 18, the employer filed a response urging adoption of the Hearing Examiner's recommendation to dismiss the Complaint.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-17).^{2/}

Absent any exceptions to the Hearing Examiner's conclusion that the assignment of basic skills classes to the Association president did not violate the Act, we dismiss that portion of the Complaint. Cf. N.J.A.C. 19:14-8.1(b).

We reject the charging party's assertion that the employer violated its obligation to negotiate over compensation for the positions of marching instructor, flagline consultant and drum consultant. We believe the Hearing Examiner properly analyzed this issue. Bergen Cty., P.E.R.C. No. 92-17, 17 NJPER 412 (¶22197 1991) is inapt, especially since the positions have existed for many years and the charging party had not previously asserted that it represented those positions.^{3/} Contrast Carlstadt-East Rutherford Reg. Bd. of Ed., P.E.R.C. No. 89-59, 15 NJPER 18 (¶20006 1988), aff'd NJPER Supp.2d 215 (¶190 App. Div. 1989), certif. den. 121 N.J.

^{2/} Finding no. 15 accurately reflects the fact that no collective negotiations agreement refers to any of the disputed titles and accurately reports the relevant portions of Article 8:1.5 of the parties' April 11, 1995 memorandum of agreement (J-2).

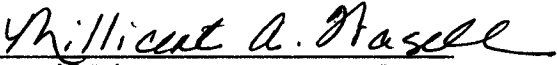
^{3/} Exhibit J-15 is a 1993 unfair practice charge (CO-93-230) filed by the Association. The charge identifies 15 extracurricular positions allegedly within the Association's unit, but the disputed positions do not appear in that list even though they existed before that charge was filed.

603 (1990) (long history of negotiations over coaching stipends showed that Association represented all coaches).^{4/}

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Ricci and Wenzler voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration. Commissioner Klagholz was not present.

DATED: May 29, 1997
Trenton, New Jersey
ISSUED: May 30, 1997

^{4/} We note that disputes over whether certain positions are encompassed within a recognition clause can be arbitrated. See City of Hoboken, P.E.R.C. No. 96-16, 21 NJPER 348 (¶26214 1995), aff'd 23 NJPER 140 (¶28068 App. Div. 1997); Caldwell-W. Caldwell Bd. of Ed., P.E.R.C. No. 88-110, 14 NJPER 342, 343 (¶19130 1988); see also Carey v. Westinghouse Electric Corp., 375 U.S. 261, 55 LRRM 2042, 2046-2047 (1964).

H.E. NO. 97-9

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

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Respondent,

-and-

Docket No. CO-H-96-24

BAYONNE TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that a public employer violated subsections 5.4(a)(1), (3) and (5) of the Act. The original charge alleged that the Association president was assigned to teach remedial classes in retaliation for the exercise of protected rights. Applying the test in In re Bridgewater Tp., 95 N.J. 235 (1984), the Hearing Examiner found that the public employer was not hostile to protected rights and that it had a legitimate business reason to reassign the Association president.

The amended charge alleged that the employer refused to negotiate compensation for three extra-curricular positions, violating subsection 5.4(a)(5) of the Act. The Hearing Examiner found that the Association did not prove that it was the majority representative of the disputed positions and that the employer had no duty to negotiate compensation.

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 Chairman 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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(Robert T. Clarke, of counsel)

For the Charging Party
Zazzali, Zazzali, Fagella & Nowak, attorneys
(Paul L. Kleinbaum, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 28 and September 15, 1995, the Bayonne Teachers Association filed an unfair practice charge and amended charge against the Bayonne Board of Education. The charge alleges that in June 1995, the Board determined to assign Association president Alan D'Angelo to teach remedial mathematics classes in retaliation for his exercise of protected rights, violating subsections 5.4(a)(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act,

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

N.J.S.A. 34:13A-1 et seq. The amended charge alleges that on August 29, 1995, the Board adopted a resolution establishing salaries for three positions -- marching instructor, flagline consultant and drum consultant. The Board's unilateral action allegedly violates subsections 5.4(a)(1) and (5)^{2/} of the Act.

On August 30, 1995, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On September 15, 1995, the Board filed an Answer admitting certain facts, denying others and asserting that it had a managerial right and legitimate business justification to assign classes to teachers.^{3/}

On June 4 and 5, 1996, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed on August 19, 1996.

1/ Footnote Continued From Previous Page

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

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

3/ I consider Board counsel's opening remarks on the record to be an Answer to the amended charge. N.J.A.C. 19:14-3.2. The Board answers that the positions are not new and that the disputed titles are not certificated staff, falling outside the recognition provision in the collective agreement.

Upon the record, I make the following:

FINDINGS OF FACT

1. The Bayonne Board of Education is a public employer within the meaning of the Act. The Bayonne Teachers Association is a public employee representative within the meaning of the Act.

2. The parties' current collective negotiations agreement runs from September 1, 1994 - August 31, 1997 (J-3).^{4/} The recognition provision (Article I) includes teachers, guidance counselors, psychologists, librarians, nurses, social workers, part-time teachers under contract and coordinators.... The provision excludes various administrators and "all Bd personnel not certificated by the State Education Department and all personnel hired on a per diem basis or employees paid on an hourly basis."

3. Alan D'Angelo is a mathematics teacher employed by the Board for more than twenty years. He is certified to teach mathematics to students in grades 7-12 (1T33).^{5/} He has also been president of the Association for four years; in the past ten years he has been chairperson of the Association negotiations team and of the grievance committee (1T34). D'Angelo led negotiations for three agreements, including the current agreement.

^{4/} "J" refers to joint exhibits; "C" refers to Commission exhibits; "R" refers to Respondent exhibits; "CP" refers to Charging Party exhibits.

^{5/} "1T" refers to the transcript of June 4, 1996; "2T" refers to the transcript of June 5, 1996.

4. In 1981, high school principal Michael Wanko told D'Angelo that he was seeking to transfer him from the high school to an elementary school. The superintendent at that time, James Murphy, denied the request because in his view, D'Angelo "could be better absorbed in the high school" (1T135-1T136). The phrase is a euphemism for keeping the problem relatively unnoticed (1T143). Several years later, Wanko asked superintendent Murphy to approve a transfer of D'Angelo to the compensatory education department, where he would teach basic skills mathematics.

For years, the compensatory education department offered remedial classes in english and in mathematics (1T140, 1T146). State certification is not a requirement to teach basic skills. Teachers in either the english or mathematics department would have to be formally "transferred" to (and from, presumably) the compensatory education department by Board resolution (2T103). The compensatory education department was dissolved by the 1994-95 school year and its classes were slotted into the english and mathematics departments, respectively (1T103, 1T144-1T145, 2T103). No transfer resolutions are required to reassign a teacher within a particular department.

Murphy denied Wanko's request to transfer D'Angelo. Wanko asked a third time the following year which was again denied (1T140-1T143).

5. In September 1986, Wanko wrote a memorandum to D'Angelo, criticizing the high student failure rate in his classes.

Wanko wrote that the failure rate had been a problem for as long as he was principal -- five years, and that parents were "irate." The problem, Wanko wrote, persisted after D'Angelo's courses were changed. Wanko advised that the math department director Audrey Langan, was to "...closely monitor your pedagogical techniques and testing/grading procedures...." Finally, Wanko wrote that the "severity of your failure rate [requires] placing a copy of this letter in your personnel file." (J-7; 1T134).

6. Similar criticisms appear in several of D'Angelo's annual staff evaluations and professional observation reports in years after 1986. In D'Angelo's 1986-87 annual evaluation, director Langan wrote that in a class of "high achievers", students had a "feeling of failure" on quizzes which were difficult but "did not count." Langan wrote that the practice of giving those quizzes was "counter-productive and intimidating." She also wrote, "...I have cautioned this staff member to be wary of a continuing high percentage of failing grades" (J-4).

In a March 1988 professional observation report, Langan wrote that D'Angelo's compliance with a professional improvement plan (PIP) to achieve a 70% retentive rate, will "need more explanation factually...at the end of the school year." In a 1989 observation report, D'Angelo was criticized for not "seeking out conferences which may be of value in improving math teaching methods." In the 1991 annual evaluation, Langan wrote that despite his students' "proclivity for excellence", D'Angelo has had "many

parent requests for conference[s] related to students' lack of success...." This concern again appeared in his 1992 annual evaluation. In the 1994 annual evaluation, Langan wrote that D'Angelo taught intermediate algebra, general math and "upper/repeater." His students,

represent a difficult target population to reach and Mr. D'Angelo is experiencing a high rate of failure (over 70%). During this year, we have had several parental requests for conferences to resolve issues of student difficulties. Also, on 3/2/94, Dr. Wanko, vice principals Gallagher/Smith and I met with Alan. Inherent in this colloquy was the matter of establishing reasonable levels of achievement, taking into consideration the groups and individuals involved. At this conference we explored remedies to reduce failure rate....

[J-4].

The annual evaluations almost always note that D'Angelo fulfilled his "professional growth objectives" and they all recommend salary increases (J-4). D'Angelo's 1995 annual evaluation was authored by new math department director Joan Coffey on March 30, 1995. It praises his "special teaching skills" and his "excellen[ce]" as a classroom manager.

7. Wanko's concern was that a high failure rate implicates teacher competency (1T134). No Board policy governs excessive failure rates and no standards exist to guide teachers (2T33). Wanko and Langan spoke often of placing D'Angelo in classes where he might be successful. D'Angelo taught a variety of classes at the high school (J-4; 1T138-1T139).

D'Angelo acknowledged that Langan regularly discussed class assignments with him throughout the school years and expressed her views on what courses he was most capable of teaching (1T147). D'Angelo was not informed that his class assignments changed because of his student failure rate (1T58, 1T62).

Wanko and Langan eventually placed D'Angelo in some pass/fail classes, such as SAT preparation in school years 1989-90 and 1990-91 (J-4). D'Angelo's failure rate for at least one SAT class was 12%, well within the norm for the entire school and better than the mathematics department rate of 16% (1T139).

8. Every April, class schedules for the next term are discussed by a team of administrators. The team is comprised of the high school principal, the director of guidance, two vice principals^{6/} and the particular department director (1T145). The team's discussions are based on tentative schedules drafted by the departmental directors. Changes are frequently made in all department schedules to maximize class availability. For example, a course that has one class only (a "singleton") must be offered at a time when the greatest number of students can enroll (1T146, 1T148). D'Angelo conceded on cross-examination that changes in tentative schedules are not unusual (1T108).

^{6/} One of the vice principals evaluated D'Angelo in 1987. The observation report is complimentary overall, though it notes D'Angelo's penchant for "strong discipline" and his "...working toward a 70% retention rate" (J-4; 2T28).

Sometime in spring 1995, math department director Joan Coffey spoke with D'Angelo about his classes in the 1995-96 term (1T44). Coffey had been director of the now-dissolved compensatory education department and knew D'Angelo, though she had never evaluated him. Their discussion was to help Coffey prepare the tentative math department schedule (1T44; J-8). She recommended to D'Angelo that he teach elementary algebra and intermediate algebra, Level A. In the 1994-95 term, D'Angelo taught elementary algebra and geometry (1T44, 1T45). D'Angelo's class assignments were completed at 1:12 p.m. in the 1994-95 term, so that he could devote afternoons to union activities (1T34, 2T74).

9. On April 10, 1995, the parties' negotiations teams met to reach agreement on terms and conditions of employment for 1994-97. Association representatives attending were D'Angelo, Frank Cocuzza from the NJEA and perhaps one or two others (1T35). Board representatives were business administrator Clifford Doll, counsel Robert Clarke, and three Board members (2T58). Negotiations this day began after business hours in Board offices (1T35). Board superintendent Richard Malanowski was not on the Board team, but was a "resource" for it and was in his office on April 10, while the teams tried to reach an agreement (2T93-2T95).

Four grievances and an unfair practice charge were pending as the parties met that evening. All had been discussed during negotiations (1T37, 2T59-2T61). Two grievances concerned teachers having to staff the "computer room" during a preparation period and

during a lunch period. Another grievance concerned a "back to school" night. These three were filed during negotiations (2T60, 2T62). The unfair practice charge was filed in 1993 and concerned extra-curricular and co-curricular positions (2T69). The "back to school" grievance and unfair practice charge were resolved at these negotiations.

At or around 5 a.m. on April 11, the parties drafted a memorandum of agreement in Doll's office (2T63). As the document (J-2) was drawn, Doll asked D'Angelo to withdraw the computer grievances, and D'Angelo declined, stating that he was willing to discuss them before arbitration (1T38, 2T63). Doll was upset by D'Angelo's response because he believed that the grievances were not "a big deal" (2T64). Doll returned to the Board team conference room and advised of D'Angelo's answer. The Board team discussed the pending grievances and counsel Clarke advised that the Board would probably prevail at arbitration and that they should not prevent a settlement. Doll returned to his office, where he and D'Angelo completed and signed the memorandum of agreement (2T64-2T65; J-2).

10. At or around the same time that the memorandum was drafted, D'Angelo asked Doll if he and his team could have the next day off or arrive later in the workday, considering the lateness of the hour (1T40, 2T65). Doll declined the request and D'Angelo

walked over to the superintendent's office to ask Malanowski directly.^{7/}

Malanowski had been apprised periodically through the night on the status of negotiations and was told of a tentative settlement in the early morning hours (2T95). He was also aware that D'Angelo was not "dropping" the computer grievances (2T96).

D'Angelo knocked on his office door and the two men spoke in the doorway, which was within earshot of the Board meeting room, where Doll and other Board members were gathered (1T97, 2T66-2T67).

Their versions of their discussion differ. D'Angelo testified that he asked for time off, to which Malanowski answered, "What have you ever done for me? I just asked you to drop four

^{7/} D'Angelo testified that he asked Doll to ask Malanowski for the next day off before the discussion about withdrawing the grievances. According to D'Angelo, Doll said he would ask the superintendent and left the room. When Doll returned, he advised that Malanowski said, "absolutely not" (1T41). D'Angelo said to Doll, "What seems to be the problem? In prior circumstances, he had no problem with it." Doll answered, "He has a problem with it now", to which D'Angelo asked if he could speak with Malanowski directly and Doll agreed (1T41).

D'Angelo also testified on cross-examination that he asked the mediator to ask the superintendent about the next day off "because the mediator controlled the situation" (1T96).

Doll testified that D'Angelo asked him about taking the next day off while the parties were drafting the memorandum and he answered, "No - we all had the late hour and we all were going to have to work the next day" (2T65). D'Angelo asked Doll if he could speak directly to the superintendent about it and Doll agreed (2T66). I find that the variations in Doll's and D'Angelo's testimonies on this point are inconsequential; the substantive fact is that D'Angelo was proceeding to ask the superintendent directly for the next day off.

grievances and you didn't do it." D'Angelo responded, "I just can't drop them. Two are gone by signing the agreement. The others - I'd discuss at any time." Malanowski allegedly retorted, "I don't want you to discuss them. I want you to drop them." D'Angelo testified,

And then we got into this whole idea of dropping grievances. And I didn't feel that was a fair position to take. And to - he was angry. He - one of the comments was well, 'I have no use for you...you'll come in tomorrow.'

[1T42].

Malanowski testified that he said "no" to D'Angelo's request for time off. D'Angelo asked why, to which Malanowski responded, "Frankly - I'm coming to work and so is everyone else on our side." Malanowski asked, "What happened with the grievances? What's happening with that?" to which D'Angelo asked, "What do you mean?" Malanowski asked, "Are you going to drop them?" and D'Angelo said, "No, I'm not dropping them." Malanowski asked why and D'Angelo answered that "[you] had no right to force the teachers to work during lunch." Malanowski replied, "It was strictly voluntary" (2T98-2T99).

Malanowski testified that their conversation "never got loud" and he denied saying to D'Angelo, "I have no use for you" (2T99). On rebuttal examination, D'Angelo agreed that neither of them yelled (2T125).

D'Angelo's testimony shows a causal connection between his refusing to withdraw grievances and Malanowski denying his team the next day off. Malanowski's testimony permits an inference of a

casual connection because his question about the grievances immediately followed discussion about the next day off. Considering that the Association had been given time off after previous collective negotiations, the likelihood that the parties had grown tired and impatient by 5 a.m. and a consistency in the testimonies on this point, I find that Malanowski denied D'Angelo's request because he refused to withdraw the grievances.

I do not find that Malanowski said, "I have no use for you"; D'Angelo's and Malanowski's testimonies stand in equipoise.

11. The April 11 memorandum of agreement did not resolve some minor issues. One issue was reimbursement of sick days to secretarial staff and another was salary adjustments on some extracurricular or co-curricular positions. The collective agreement was eventually "corrected" to the satisfaction of the Association (1T77-1T78). The memorandum did resolve the "back to school" grievance which was arbitrated during negotiations but the decision was pended upon the parties' joint request to the arbitrator (1T85).

12. In May 1995, high school principal Wanko realized that "major" changes were needed in math department director Coffey's tentative 1995-96 schedule. Coffey, new to this department, had copied the schedule from the previous year, merely deleting courses which were "...eliminated due to budgetary restraints." One course eliminated was SAT preparation (1T147). The main problem with the copied schedule was that it did not fall into line with the "grand

master" schedule for the 1995-96 term. Wanko estimated that about 76 changes were needed (1T147, 1T148). A review of the tentative and final schedules corroborates that a significant number of class changes were made; only three of about twenty-two teachers were unaffected (J-8, J-9; 1T150).

Wanko discussed his final schedule with Coffey and explained the reasons for the changes. She agreed with all the changes except those affecting a teacher other than D'Angelo (1T151, 1T154-1T155). In that one case, Wanko did not follow Coffey's recommendation (1T154). The final 1995-96 schedule shows that D'Angelo was assigned to teach three basic skills classes and released at 11 a.m. to conduct "union business" (1T34; J-9). Basic skills courses have pass/fail grading and are critical to certain students wanting to pass a high school proficiency examination, a prerequisite for earning a State-endorsed diploma (1T157). Wanko considered the following factors in assigning D'Angelo to basic skills courses; (1) the effect of his grading on class rank, (2) the high failure rate, (3) D'Angelo's skill at teaching various levels of mathematics (2T39).

The "crunching" of D'Angelo's schedule to provide an earlier release time was based on Malanowski's directive to Wanko (1T153). Malanowski asked Wanko to make similar accommodations to D'Angelo's schedule in the past (1T154).

These directives prompted Wanko to call Malanowski in early June 1995; he "didn't want the schedule to go out and then get a

call the next day from the superintendent telling [him] to change it" (1T154). In their brief conversation (30 to 45 seconds), Wanko advised that he was preparing the next year's math department schedule and that he intended to assign D'Angelo to different courses than those he taught in 1994-95. Malanowski asked Wanko for the reason, and he answered that he had serious concerns about D'Angelo's failure rate. Malanowski told Wanko that he should do what he thinks is best for the high school (1T159, 2T102).

13. Sometime around June 30, 1995, D'Angelo received a copy of his next year's schedule showing his assignment to teach three basic skills courses (1T45, 1T46). He promptly asked math department director Coffey about the changes in assignment since their last discussion (1T48; see finding 8). She raised her hand and said, "Listen - I had nothing to do with this. I submitted the schedule that we agreed upon to Dr. Wanko. When I got it back, this is what it was" (1T48). She also told D'Angelo that she asked Wanko the reason for the change and he said, "We felt that it was best" (1T49). D'Angelo testified that scheduling is done "primarily" by department directors, "with input from the principal and/or vice principals and/or director of guidance." D'Angelo testified that their "input" was limited to resolving scheduling problems (1T108). This testimony is not corroborated by other evidence, and D'Angelo has not attended mathematics department scheduling meetings. Moreover, Wanko's September 1986 letter and unrebutted testimony about assigning D'Angelo to SAT preparation classes demonstrates the

contrary - that the principal, perhaps in consultation with the director, has chosen courses for D'Angelo.

D'Angelo repeated the substance of his conversation with Coffey to Wanko and asked him if the superintendent knew about the assignment.^{8/} Wanko replied that Malanowski knew and agreed that the assignment "would be the best thing for everyone concerned" (2T160). D'Angelo asked why he was being placed in basic skills and Wanko answered "there was no longer a department. It's part of the mathematics schedule" (1T160). D'Angelo said that his union activities prompted the assignment (1T110).

Wanko does not participate in collective negotiations and no evidence indicates that he discussed D'Angelo's assignment with Malanowski before changing it on his drafted final schedule (1T163, 2T106).

14. On August 29, 1995, the Board approved a resolution transferring thirty-two teachers, including D'Angelo, from one department to another (J-10). D'Angelo was "transferred" from "mathematics" to "basic skills." Another high school teacher, Thomas Schiable, was transferred from basic skills to mathematics.

^{8/} D'Angelo testified that he asked Wanko who the "we" in "we felt that it was best" was. Wanko allegedly replied that he "talked it over" with the superintendent (1T110). D'Angelo then told Wanko that disagreements over union business should not interfere with scheduling; that "you've made comments over the years I'm one of your best math teachers....To reassign me to Basic Skills is...a demotion. It's an embarrassment. And it certainly attacks what I'm trying to do with the Union" (1T110). Wanko replied that that was not true, that he felt D'Angelo "would be best suited there."

Transfers of teachers to other departments are customarily done by Board resolution (2T103). Assignments within a department do not need a resolution. The elimination of the compensatory education department (see finding 4), meant the "transfers" of D'Angelo and Schiabile were unnecessary and mistaken (2T103-2T104, 2T108-2T110). The "transfers" were never officially rescinded (2T38).

D'Angelo spoke with Malanowski after the August 29 meeting. D'Angelo asked the superintendent if he knew about his course changes, to which he responded that he knew and had no problem with them (1T51). D'Angelo suffered no decrease in pay from the assignment to basic skills teaching. He regards basic skills classes as "remedial tutoring sessions" (1T60).

15. Also on August 29, the Board approved a resolution appointing three named individuals to the positions of marching instructor, flagline consultant and drum consultant at salaries of \$625, \$1500 and \$1500, respectively (J-11; 1T64).

The memorandum of agreement signed by the parties has a provision reading, "Art[icle] 8:1.5 shall be amended as provided by the attached. The related PERC unfair practice charge complaint shall be withdrawn with prejudice" (J-2). The "attached", entitled "Extra-Curricular and Co-Curricular", states in relevant parts:

(a) All extra and co-curricular positions shall be listed in schedule A as attached to this agreement.

(b) The compensation for all newly created extra and co-curricular positions not currently set

forth in schedule A shall be subject to negotiations between the Board and the Association.

Schedule A lists coaching, trainer and related positions, advisors, and music coordinator positions and their respective stipends. The three positions approved in the August 29, 1995 resolution are not listed in Schedule A.

The Board has signed individual employment contracts for stipended positions for many years (2T72-2T73; J-16). In virtually every year since 1986, the Board has signed contracts with persons agreeing to work as flagline consultants and drum consultants; the agreements are usually accompanied by Board resolutions setting the stipend amounts (J-16).

No collective agreement identifies any of these disputed titles and no facts suggest that persons employed in the titles are certificated staff (J-1, J-2, J-3).

The three positions report to the band director, a certificated position included in the unit (2T72). D'Angelo attended the August 29 Board meeting and objected publicly to the "creation of salaries without coming to the union" (1T64).

16. Arbitration awards on the "computer training" grievances were issued in fall 1995 and were in favor of the Board (J-13, J-14).

ANALYSIS

Under 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 motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, would not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs are first resolved by the hearing examiner.

The Association attempts to demonstrate hostility to protected conduct through superintendent Malanowski's refusal to give the Association's team time off on April 11, 1995.

I disagree that the superintendent's conduct amounts to hostility. The parties were attempting to reach a memorandum of

agreement on a successor contract; just as the Association was seeking time off for its negotiators as an accommodation for its anticipated signature on the memorandum, so was the Board seeking withdrawal of the computer grievances for its anticipated signature on the document. The 5 a.m. doorway discussion between Malanowski and D'Angelo was perhaps the final give and take proposal of these collective negotiations. Neither side received what it wanted and they promptly signed the memorandum anyway.

Assuming that Malanowski was hostile,^{9/} I find that the Association has not proved a connection between that hostility and the reassignment. No evidence suggests that Wanko participated in collective negotiations or was aware of D'Angelo's and Malanowski's doorway discussion. Nothing suggests that Board administrator Doll communicated with Wanko about negotiations. No evidence suggests that Malanowski is regularly involved with class scheduling and assignments.

Wanko called Malanowski to confirm his scheduling of D'Angelo's classes and secondarily, to inform the superintendent of the reassignment. Wanko's call to Malanowski makes sense in light of previous occasions when Malanowski directed Wanko to accommodate the Association president's schedule. Allegations of hostility to

^{9/} I assume that Malanowski said to D'Angelo, "I have no use for you; you'll come in tomorrow." The alleged statement reveals the extent of the superintendent's frustration; if D'Angelo would not withdraw the computer grievances, Malanowski was not about to grant his team any time off.

D'Angelo are further undermined by the Board's decision to grant D'Angelo an earlier release time for union activities in 1995-96 than he had in 1994-95. The Board also agreed to add provisions to the agreement granting benefits after the memorandum was executed, belying any indication of residual hostility from the negotiations.

Finally, I disagree that the Board's resolution to "transfer" D'Angelo connotes hostility. Nothing in the record suggests that basic skills mathematics classes are not within the mathematics department. And no evidence suggests that D'Angelo's "transfer" was more than a mistake (the same may be said of teacher Schiable's transfer).

I am persuaded that the Board reassigned D'Angelo to basic skills classes for legitimate business reasons. The record shows that for close to fifteen years D'Angelo's failure rate was a problem and a concern. He was also criticized for rendering a class of "higher achievers" to "feelings of failure" and "intimidation." As late as 1994, D'Angelo was criticized in writing for his high failure rate. The absence of this criticism in 1995 in no way eliminated the concern.

The record also shows that D'Angelo successfully taught the SAT preparation pass/fail class - the same evaluative process required in the basic skills courses. The unrebutted evidence also shows that Wanko discussed his projected "final" schedule with math department director Coffey, who had no objection to D'Angelo's

reassignment. Nor is it surprising under the circumstances that D'Angelo's "tentative" assignment to teach an "honors" math class would trouble Wanko. Under all the circumstances, I recommend the original unfair practice charge be dismissed.

I also recommend that the Commission dismiss the amended charge.

N.J.S.A. 34:13A-5.3 requires, in part, that:

A majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit.... Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established. In addition, the majority representative and designated representatives of the public employer shall meet at reasonable times and negotiate in good faith with respect to grievances, disciplinary disputes, and other terms and conditions of employment.

The Association alleges that the Board violated the Act by establishing salaries for three positions without negotiations.

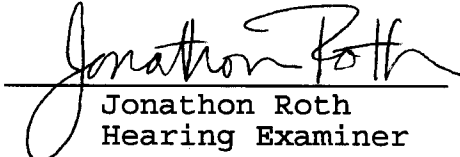
The threshold question is whether the Association represents the flagline consultant, drum consultant and marching instructor. See Carlstadt-East Rutherford Reg. Bd. of Ed., P.E.R.C. No. 89-59, 15 NJPER 18 (¶20006 1988), aff'd NJPER Supp.2d 215 (¶190 App. Div. 1989) certif. den. 121 N.J. 603 (1990). The recognition clause includes only certificated positions and excludes non-certificated positions. No evidence suggests that the disputed titles are certificated. The recognition clause therefore compels their exclusion.

The parties' practice also compels exclusion. The Board signed a series of individual employment contracts over the years with persons holding the disputed titles. The agreements also delineate salaries and no evidence suggests that the Association ever negotiated compensation for these employees. Nor has the Association shown that it has negotiated salaries for any non-certificated employees.

Employee organizations are responsible for searching out titles and promptly seeking to negotiate for them. Wayne Bd. of Ed., P.E.R.C. No. 80-94, 6 NJPER 54 (¶11028 1980); Bergen Pines Cty. Hosp., D.R. No. 80-20, 6 NJPER 61 (¶11034 1980). The facts show that the disputed titles had existed outside the unit and that the Association had not negotiated their inclusion. The amendment to Article 8 of the agreement does not extend the recognition clause to cover the disputed titles.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.


Jonathon Roth
Hearing Examiner

DATED: November 4, 1996
Trenton, New Jersey