P.E.R.C. NO. 99-68

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WEST DEPTFORD TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-96-256

WEST DEPTFORD TOWNSHIP
EDUCATION ASSOCIATION and
ELWOOD HUMPHRIES,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the West Deptford Township Board of Education. The Complaint was based on an unfair practice charge filed by the West Deptford Township Education Association and Elwood Humphries. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it retaliated against Association representative Humphries for engaging in activities protected by the Act. The Commission finds that, on this record, the Board has proved that it would not have renewed Humphries' contract based upon his attendance record, even absent his protected activities.

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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WEST DEPTFORD TOWNSHIP
EDUCATION ASSOCIATION and
ELWOOD HUMPHRIES,

Charging Parties.

Appearances:

For the Respondent, Raymond T. Page, attorney

For the Charging Parties, Selikoff & Cohen, P.A., attorneys (Keith Waldman, of counsel)

DECISION

On March 5 and July 12, 1996, respectively, the West Deptford Township Education Association and Elwood Humphries filed and amended an unfair practice charge alleging that the West Deptford Township Board of Education violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A. 34:13A-5.4a(1), (3), (4) and (5),[1/] by retaliating against

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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

Footnote Continued on Next Page

Association representative Humphries for engaging in activities protected by the Act. Specifically, the charge alleges these retaliatory threats and acts: on July 21, 1995, Humphries' supervisor threatened to get the "union man" who filed a complaint pursuant to the Public Employees Occupational Safety and Health Act, N.J.S.A. 34:6A-25 et seq. ("PEOSHA"); on September 5, 1995, the supervisor told Humphries he knew Humphries had called PEOSHA and that was a "big mistake"; on or after September 13, 1995, the supervisor changed Humphries' schedule, restricted his work, and issued him written warnings for engaging in protected activity and processing grievances; on March 7, 1996, the Board changed Humphries' shift, job responsibilities and work place; and on May 28, 1996, the Board voted not to renew Humphries' employment for the next school year. These events were alleged to violate 5.4a(3) and 5.4a(1), the latter both independently and derivatively. The portion of the charge alleging that the Board violated 5.4a(4) asserted that Humphries was discharged because he gave information under the Act, and the alleged violation of

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1/ Footnote Continued From Previous Page

in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (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."

5.4a(5) was that the Board refused to process grievances, including those filed by Humphries.

The charging parties sought a cease and desist order; a reversal of retaliatory actions and expungement of references to them in personnel files; reinstatement of Humphries with back pay, benefits and regular shift assignment; and other relief.

On September 27, 1996, a Complaint and Notice of Hearing was issued. The Board did not file an Answer.

On January 15, 16 and 17; February 26 and 28; April 15 and 17; and August 13, 1997, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On June 30, 1998, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 98-32, 24 NJPER 377 (¶29178 1998). He concluded that the charging parties had not proven that the Board was hostile to Humphries' exercise of rights protected by the Act and recommended dismissal of the alleged violation of 5.4a(3) on that basis. He also concluded that even if the record had demonstrated hostility to protected activity, the Board would have taken the same actions toward Humphries, in particular his non-renewal, based upon Humphries' poor attendance/tardiness record; insubordinate conduct; poor attitude and unsafe performance; and inadequate custodial work. He recommended dismissal of the alleged violation of 5.4a(4), concluding that the

filing of the initial charge and a non-renewal recommendation, made one week later, were coincidental and that there was no showing that the building supervisors who signed the recommendation were aware of the charge. With respect to the alleged violations of 5.4a(1), the Hearing Examiner found that two of the alleged events occurred more than six months before the filing of the charge; and that the charging parties had not proven their allegation that an event within the limitations period had occurred. He concluded that the rejection of the grievances and the failure of Humphries' supervisor to respond to them did not amount to a refusal to process grievances in violation of 5.4a(5) because the grievances were subsequently adjusted.

On July 14, 1998, the charging parties filed exceptions. The Board did not file a response.

The charging parties except to the Hearing Examiner's not finding violations of 5.4a(1) and 5.4a(3). Incorporating portions of their post-hearing brief, the charging parties challenge portions of the Hearing Examiner's recommended findings of fact. They assert that the record establishes that Humphries' supervisor threatened him on September 5, 1995 and that threat, coupled with earlier statements, constitutes interference with and hostility to the exercise of protected rights. They also except to the Hearing Examiner's ruling that Humphries' right to lodge a complaint under PEOSHA was not protected by our Act.

We have reviewed the record. We adopt the Hearing Examiner's findings of fact (H.E. at 5 to 52) as modified below.

Elwood Humphries was a licensed electrician hired by the Board in December 1992. During the 1993-1994 school year, maintenance employees were organized. In early 1994, Humphries became an Association representative.

During the 1993-1994 and 1994-1995 school years, Humphries did not show up for some assignments and did not perform some assignments satisfactorily. His employment was renewed for the 1994-1995 and 1995-1996 school years.

Humphries received unsatisfactory ratings in attendance for the 1994-1995 school year and a written warning about absenteeism on May 9, 1995. His supervisor, Ray Bavi, also noticed a pattern of his taking sick days on Mondays and Fridays.

During the spring of 1995, Humphries told Bavi about a potentially dangerous condition in the maintenance garage. When the problem was not corrected, Humphries filed a complaint in accordance with PEOSHA. State officials conducted an unannounced inspection and asked Humphries and another Association representative to accompany them on the tour.

A week later, the garage was vandalized. Bavi was angry and suspected Humphries. The Hearing Examiner found that Bavi said that he would "get the union man who called OSHA." We accept that finding based in large part on witness credibility. We believe that Bavi's statement reflected his anger about the vandalism, but given his words and the other credited testimony, we also find that he was angered by the complaint to PEOSHA. We

further find that Bavi knew on the day of the inspection that Humphries had called PEOSHA. Bavi testified that the PEOSHA inspectors asked for Humphries by name when they came to inspect the garage (4T155-1 to 4T155-9).

In mid-August 1995, the Association representatives among the maintenance staff were invited to meet with the new business administrator and the superintendent. The administrator remarked that he expected the representatives to work with Bavi but that he had an open door policy. After Humphries remarked that Bavi might be upset if any of them went over his head, the superintendent responded, "If you go over Ray's head you have to expect a little retaliation."

Between August and mid-December 1995, additional problems arose with Humphries and his absenteeism persisted. Another electrician blamed Humphries for work deficiencies that had caused electrical shocks. After the complaints about Humphries' work performance and attitude, Bavi told a supervisor to monitor his work.2/

Humphries testified that he had meetings with Bavi on September 5 and 12, 1995. On September 5, Humphries and Building Supervisor Les Smith prepared Special Reports about Smith's having received an electrical shock in a computer lab where Humphries had

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2/ In a May 9, 1996 memorandum (CP-13), Bavi said he had asked a supervisor to look into Humphries' performance after receiving complaints from the other electricians.

worked. Humphries testified that when he went to deliver a report to Bavi at his office on September 5, Bavi told him that he knew that Humphries was the one who called PEOSHA and that Humphries had made a big mistake. Bavi denied meeting with Humphries on September 5. The Hearing Examiner found that no meeting occurred on that date. That finding was, in large part, based on the Hearing Examiner's determination that Humphries was not, in general, a reliable witness. The Hearing Examiner stated that he often found Humphries' account of particular events or incidents to be evasive, non-responsive and unreasonably inconsistent with other evidence.

The Hearing Examiner did not explain why he was inclined to believe Bavi's denial that he had met with Humphries on September 5, despite his having discredited Bavi's denial that Bavi earlier threatened to get the union person who had called PEOSHA. Nevertheless, the Hearing Examiner was not convinced by Humphries that the meeting took place and there is not enough other evidence to convince us that a meeting took place on that date.

At the September 12 meeting, Bavi and Humphries discussed a number of the grievances Humphries was filing.3/ On October 2

3/ We clarify and supplement finding no. 8 to reflect that a disciplinary memorandum issued by Bavi (CP-7), which chastised Humphries for leaving early on a day when he could

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and 10, Bavi sent memoranda to Humphries asserting that the grievances were "null and void" because they were not on a grievance form. However, no official form exists. Bavi passed the grievances on unanswered to the superintendent who discussed and adjusted them with the Association's president.

During the 1995-1996 school year, Humphries' absences continued. Following surgery, he was out from mid-December 1995 until March 6, 1996. He was cleared to return to light duty work in February 1996, but did not report. To accommodate his light duty restriction, the superintendent wrote to Humphries advising that he could work as a night custodian at an elementary school. The letter also warned that unless Humphries made a written request for unpaid leave or returned to work on March 6, a recommendation would be made to terminate him. On March 5, the Association and Humphries filed their unfair practice charge. Humphries returned to work on March 6, but was absent the next two days. His work was then monitored.

3/ Footnote Continued From Previous Page

not take lunch, was not discussed at the September 12 meeting and was rescinded by the Board in response to a grievance (CP-17; 6T82-24 to 6T83-11). We supplement finding no. 4 to indicate that the September 28, 1995 written reprimand, which chastised Humphries for taking three days off for a compensable injury, was revoked by the business administrator in response to a grievance (CP-8; 6T84-25 to 6T88-4).

On March 13, 1996, Bavi's secretary prepared a memorandum recommending that Humphries not be rehired for the 1996-1997 school year. The reasons included his poor attendance for the past three years and his poor attitude. The memorandum was signed by Bavi and the department's seven building supervisors who report to him. We find that Bavi did not recommend Humphries for renewal, in part, because he was hostile to Humphries' protected activity. However, we accept the Hearing Examiner's findings that the building supervisors were solely motivated by Humphries' unsatisfactory performance and/or excessive absenteeism.

On May 1, 1996, Humphries was issued an evaluation recommending that he not be renewed. That same day, a Commission staff agent sent a letter to the business administrator scheduling a conference for May 20, 1996. On May 7, Humphries was sent a Rice [v. Union Cty. Reg. H.S. Bd. of Ed., 155 N.J. Super. 64 (App. Div. 1977)] letter by the superintendent, who wrote that he would recommend to the Board that Humphries not be rehired for the following reasons:

1. Excessive/chronic abuse of sick leave
2. Failure to report to work in a timely manner on February 7, 1996 after having been given medical clearance to do so;
3. Inefficiency relative to your failure to perform light duty assignments at an acceptable standard.

On May 20, 1996, Humphries attended a conference at the Commission's offices. The business administrator and Bavi were also present. A second Rice notice was sent to Humphries in advance of the May 28, 1996 Board meeting, during which the Board

approved the recommendation not to renew Humphries. An amended unfair practice charge was filed on July 12, 1996.

The charging party challenges the Hearing Examiner's conclusions that the filing of the PEOSHA complaint was not activity protected by the New Jersey Employer-Employee Relations Act and that the alleged retaliatory responses to the filing of the PEOSHA complaint were beyond our jurisdiction. We agree with the charging party.

We have jurisdiction to determine whether a public employer has retaliated against a union official for having made a PEOSHA complaint. The Board's non-renewal of Humphries was allegedly based upon its agents' hostility to protected activity engaged in by Humphries, an Association representative. His PEOSHA complaints resulted in an on-site inspection and a directive to remedy unsafe conditions on premises under Bavi's supervision and Bavi responded by threatening to get the "union man who called OSHA." Under the circumstances of this case and in accordance with the way these issues have been addressed by the courts, we find that such activity is protected and that retaliatory responses are remediable under our Act.

N.J.S.A. 34:6A-45 provides:

> a. No person shall discharge, or otherwise discipline, or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this section or has testified or is about to testify in any such proceeding, or because of the exercise by such employee on behalf of himself or others of any right afforded by this section.

> b. Any employee who believes that he has been discharged, disciplined or otherwise discriminated against by any person in violation of this section may, within 180 days after the employee first has knowledge such violation did occur, file a complaint with the commissioner alleging that discrimination. Upon receipt of the complaint, the commissioner shall cause an investigation to be made as he deems appropriate. If, upon that investigation, the commissioner or his designee determines that the provisions of this section have been violated, he shall, not more than 90 days after the receipt of the complaint, notify the employer and the employee of his determination, which shall include an order for all appropriate relief, including rehiring or reinstatement of the employee to his former position with back pay and reasonable legal costs. The notice shall become the commissioner's final determination, unless, within 15 days of receipt of the notice, the employer or employee requests a hearing before the commissioner or his designee, in which case the commissioner shall issue his final determination not more than 45 days after the hearing report is issued.
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> c. Nothing in this section shall be deemed to diminish the rights of any employee under any law, rule or regulation or under any collective negotiation agreement.
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> d. Any waiver by an employee or applicant for employment of the benefits of this act shall be against public policy and be void and any employer's request or requirement that an employee waive any rights under this act as a condition of employment or continued employment shall constitute an act of discrimination.
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> Amended by L.1995, c. 186, ¶13, eff. July 25, 1995.

This statute does not preclude a union official from filing an unfair practice charge alleging that the official was discharged because she or he filed a PEOSHA complaint. It is clear that a union could file such a charge if the safety

complaints were made to management and we do not believe a different result is required because the safety complaints were made to PEOSHA instead. Further, the import of section c. is that the enactment of PEOSHA, which occurred after this Commission was given unfair practice jurisdiction, was intended to give employees additional protection to seek redress of unsafe or hazardous workplaces in addition to the rights they already had under existing laws, regulations, collective negotiations agreements and the common law. Before PEOSHA was enacted in 1984, employees covered by collective negotiations agreements already had the ability to address safety concerns to their employer, as such issues were mandatory subjects of negotiations. See, e.g., Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981); Saddlebrook Tp., P.E.R.C. No. 78-72, 4 NJPER 192 (¶4097 1978). Compare N.J.S.A. 34:19-1 et seq. (Conscientious Employee Protection Act specifies that institution of action in accordance with that act shall be deemed a waiver of rights and remedies under any contract, State law, rule or regulation or under the common law).

Court cases recognize that remedies provided by workplace safety laws do not preempt the unfair practice jurisdiction of labor relations agencies. See Zurn Industries v. NLRB, 680 F.2d 683 (9th Cir. 1982), cert. den. 462 U.S. 1131 (1983)(existence of

remedy under OSHA does not preempt NLRB jurisdiction);[4/] cf. Lepore v. National Tool and Mfg. Co., 224 N.J. Super. 463 (App. Div. 1988), aff'd 115 N.J. 226 (1989)(recognizing union member's right to seek tort remedies for wrongful discharge after reporting workplace safety violations to occupational safety agency).

The charging parties' claim that the Board terminated Humphries as a result of his PEOSHA complaints is within our jurisdiction to consider. We now analyze the exceptions in light of our findings of fact.

Under In re Bridgewater Tp., 95 N.J. 235 (1984), no violation of 5.4(a)(3) will be found unless the charging party has proved, by a preponderance of the evidence, 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 does 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.

4/ The most recent amendments to N.J.S.A. 34:6A-45 were designed to conform the language to its federal counterpart, which was interpreted in Zurn. See "Senate State Government Committee Statement" to L. 1995, c. 186, reproduced at N.J.S.A. 34:6A-29.

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

Humphries engaged in protected activity. That activity included his filing, as an Association representative, a safety complaint, first with Bavi and then through PEOSHA; providing information to and answering questions from state safety inspectors during their tour of the garage; filing grievances throughout the 1995-1996 school year; filing an unfair practice charge; and attending a conference during the processing of that charge.

The Board was aware of this activity, primarily through Bavi. Humphries first mentioned the unsafe conditions to him and both were present during the PEOSHA inspection. Humphries' grievances were first filed with Bavi, who then passed them on to the business administrator. The unfair practice charges and Commission correspondence about the case were served on the

administrator, who attended the exploratory conference, as did Bavi.

The record contains both direct and circumstantial evidence establishing Bavi's hostility to Humphries' protected activity. Bavi threatened to "get the union man" who had contacted PEOSHA. This statement was triggered by Bavi's anger about the vandalism, but also reflected anti-union animus. Bavi's written rejoinder to grievances filed by Humphries that they were "null and void" because they were not filed on a nonexistent "Grievance Form" also suggests hostility to Humphries' protected activity. We conclude that Bavi's role in recommending Humphries' non-renewal was motivated, at least in part, by that hostility.

We next examine whether the Board also acted out of reasons unrelated to Humphries' exercise of rights protected by the Act. The Board gave these reasons for terminating Humphries:

1. Excessive/chronic abuse of sick leave;
2. Failure to report to work in a timely manner on February 7, 1996 after having been given medical clearance to do so;
3. Inefficiency relative to your failure to perform light duty assignments at an acceptable standard.

These reasons were contained in the superintendent's Rice letter (CP-14). Based on the record, we find that Humphries' absenteeism and tardiness record also motivated the superintendent to recommend non-renewal.5/

5/ Given the following analysis, we need not also decide whether the superintendent's two other reasons also motivated his recommendation.

Prior to his safety complaints, Humphries had been warned that his absenteeism could lead to his termination. Even allowing for leaves attributable to on-the-job injuries, Humphries did not correct those deficiencies during the 1995-1996 school year. During the last portion of his extended leave (December 15, 1995 through March 5, 1996), Humphries was cleared to work but did not report. When termination was threatened, Humphries reported on the date set by the Board, March 6, but was absent the next two days. The building supervisors who recommended Humphries' non-renewal did so on the basis of his poor attendance and his poor work attitude. Because Humphries had been warned repeatedly about his absenteeism record and patterns, we find that the superintendent and the Board were motivated by Humphries' poor attendance record in accepting the supervisors' recommendation not to renew his employment contract because of his absenteeism.

Thus, we conclude that there were two reasons which prompted Humphries' non-renewal: his PEOSHA complaint and grievances and his poor absenteeism and tardiness record. In a mixed motive case, we will not find a violation, despite the existence of an illegal motive, if the employer has shown by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Bridgewater at 242. On this record, the Board has proved that it would not have renewed Humphries' contract based upon his attendance record even absent his protected activities.

We focus on the May 9, 1995 written warning from Bavi citing the number of Humphries' absences and his pattern of taking sick days on Mondays or Fridays. That document had been preceded by evaluations which had consistently noted Humphries' attendance shortcomings. All these records preceded Humphries' protected activity in contacting PEOSHA. The May 9 reprimand warned of termination if Humphries failed to improve in that area. That warning was not heeded. In December 1995, Bavi issued a similar document just before Humphries' extended leave. Even though Humphries had by then engaged in protected activity to which Bavi was hostile, this warning was based on continuing and real absenteeism concerns. Finally, when Humphries returned to work in a light duty assignment, he worked March 6, 1996, the day set as a deadline for him to report, and then was absent March 7 and March 8, a Friday. Before the start of the term of his last contract, Humphries had been warned that unless his attendance record improved, he could face termination. It is undisputed that he did not improve his attendance record while working either as an electrician or a night shift custodian during the 1995-1996 school year. The building supervisors thus recommended that his contract not be renewed. Hence we conclude that his non-renewal would have occurred even if he had not engaged in protected activity. We therefore dismiss the allegation that the Board violated 5.4a(3).

The charging party also asserts independent violations of 5.4a(1) based upon: Bavi's July 1995 threat to "get the union man"

who called PEOSHA; the superintendent's August 1995 comment regarding retaliation for going over Bavi's head; and Bavi's alleged September 5, 1995 statement to Humphries accusing him of being the one who had called PEOSHA. The Hearing Examiner determined that the July and August statements were made more than six months prior to the filing of the charge on March 5, 1996 and therefore were time-barred. Bavi's threat that he would get the "union man" who had called PEOSHA tends to interfere, restrain or coerce employees in the exercise of rights guaranteed to them by the Act, in violation of 5.4a(1). However, we cannot remedy this unfair practice as the charge was not filed within six months of the date the threat was made. N.J.S.A. 34:13A-5.4c. We also dismiss, on timeliness grounds, the allegation in the Complaint that the superintendent's statement regarding retaliation for going over Bavi's head independently violated 5.4a(1).6/ The Hearing Examiner found that the September 5 statement was not made and we did not disturb that determination.

6/ These statements were properly considered in our analysis of the alleged violation of 5.4a(3) because the Association's charge asserting that Humphries' non-renewal violated the Act was timely. But where the statements themselves are asserted to violate the Act, a charge must be filed within six months of the date they were made. See West Orange Tp., P.E.R.C. No. 99-13, 24 NJPER 429, 430 (¶29197 1998)

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

Chair Wasell, Commissioners Finn and Ricci voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioner Boose abstained from consideration.

DATED: January 28, 1999
Trenton, New Jersey
ISSUED: January 29, 1999

H.E. NO. 98-32

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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EDUCATION ASSOCIATION/
ELWOOD HUMPHRIES,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the West Deptford Township Board of Education did not violate the New Jersey Employer-Employee Relations Act by its actions concerning employee Elwood Humphries up to and including his non-renewal. The Hearing Examiner found that the Board took certain actions including Humphries non-renewal for legitimate business reasons. The Hearing Examiner also found that the Commission did not have jurisdiction over allegations of discrimination for engaging in PEOSHA activities under N.J.S.A. 34:6A-25 et seq. He found that such allegations must be pursued through the forum provided in that law and not thru the Commission.

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.

H.E. NO. 98-32

STATE OF NEW JERSEY
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Charging Party.

Appearances:

For the Respondent, Raymond T. Page, Esq.

For the Charging Party, Selikoff & Cohen, P.A., attorneys (Keith Waldman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 5, 1996, the West Deptford Township Education Association/Elwood Humphries ("Association" or "Charging Party") filed an unfair practice charge (C-1A), which was amended on July 12, 1996 (C-1B), with the New Jersey Public Employment Relations Commission alleging that the West Deptford Township Board of Education ("Board" or "Respondent") violated the New Jersey Employer-Employee Relations Act, specifically N.J.S.A.

34:13A-5.4a(1) and (3).[1/] In the amended charge, the Charging Party added allegations that the Board violated N.J.S.A. 34:13A-5.4a(4) and (5).[2/]

In the original charge, the Charging Party generally alleged that the Board was hostile toward, and retaliated and discriminated against, Elwood Humphries, an Association representative, for engaging in activities protected by the Act. The Charging Party specifically alleged that on or about July 21, 1995, Humphries' supervisor threatened to get the person who called PEOSHA[3/]; that on or about September 5, 1995, the

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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."

2/ These provisions prohibit public employers, their representatives or agents from: "(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (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/ PEOSHA stands for the Public Employees Occupational Safety and Health Act, N.J.S.A. 34:6A-25 et seq., and was designed to protect public employee health and safety in the workplace. That Act is administered through the New Jersey Department of Labor. The Department of Labor is responsible for safety concerns and the New Jersey Department of Health is responsible for all health concerns arising under PEOSHA CP-4).

supervisor told Humphries he (the supervisor) knew Humphries had called PEOSHA and that was a mistake; that on or after September 13, 1995, the supervisor changed Humphries' schedule, restricted his work, and issued him written warnings for engaging in protected activity.

The Charging Party sought a cease and desist order; a reversal of all retaliatory actions taken against Humphries, and expunging Humphries' record of any retaliatory documents.

In the amended charge, the Charging Party alleged that after March 7, 1996, the Board changed Humphries' shift, job responsibilities and work place, and on or about May 27, 1996 voted not to renew Humphries' employment for the next school year, all because he engaged in protected activities.

The Charging Party further alleged that the Board gave non-union members more favorable treatment than union members and that the Board discriminated against employees because of their affiliation with the Association.[4/]

The Charging Party only alleged violations of 5.4a(1) and (3) on the face of the amended charge, but in the body of that

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4/ As an example of more favorable treatment, the Charging Party alleged that a non-union member who became inebriated was not disciplined until the union insisted on discipline. The Charging Party noted that the employee was disciplined, but so was the union member, Dave McIntosh, who called the police about the inebriated employee.

The Charging Party withdrew the McIntosh allegation on January 15, 1997 (1T146).

charge it also alleged the Board violated 5.4a(4) and a(5) of the Act. The 5.4a(4) allegation was that Humphries was discharged because he gave information under the Act, and the 5.4a(5) allegation was that the Board refused to process grievances, including grievances filed by Humphries.

The Charging Party again sought a cease and desist order; a reversal of retaliatory actions; reinstatement of Humphries with back pay, benefits and regular shift assignment and more.

A Complaint and Notice of Hearing was issued on September 27, 1996 (C-1). Hearings were held on January 15, 16 and 17; February 26 and 28; April 15 and 17; and August 13, 1997.5/ Both parties filed post-hearing briefs by November 14, 1997 and reply briefs by January 23, 1998.

Procedure

Pursuant to PEOSHA, N.J.S.A. 34:6A-45(b), any employee who believes he/she has been discharged or otherwise discriminated against for engaging in activities protected by PEOSHA may file a complaint with the Commissioner of Labor. The Charging Party did

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5/ The transcripts will be referred to as 1T (January 15), 2T (January 16), 3T (January 17), 4T (February 26), 5T (February 28), 6T (April 15), 7T (April 17), and 8T (August 13).

not file any claim under that statute alleging that Humphries' non-renewal was in violation of PEOSHA protections (1T29-1T30).6/

At the beginning of the eighth and final day of this hearing which was scheduled for rebuttal testimony, the Charging Party moved to reopen the hearing to allow it to supplement its pleadings relating to a Board employee who was terminated on or about August 11, 1997 possibly for engaging in PEOSHA activity (8T5-8T6). I denied the motion, concluding that administrative efficiency would not be served by reopening this case (8T6-8T14).

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Elwood Humphries was employed by the Board as an electrician/maintenance employee from December 1992 until June 30, 1996 (2T6-2T7). He was recommended for hiring by Ray Bavi, Director of Facility Management (4T114). The actual job description Humphries signed (R-1) contained the title "Maintenance Person-Certified License." Humphries was a licensed

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6/ When N.J.S.A. 34:6A-45(b) originally became effective in January 1984, it provided that discrimination claims under PEOSHA be brought in Superior Court. The Legislature amended that statute in July 1995, providing that a complaint of discrimination may be filed with the Commissioner. At hearing on January 15, 1997, the Charging Party represented it had not filed any action in Superior Court or any action with respect to its rights under PEOSHA law. From its representation, and noting no contrary evidence, I infer the Charging Party has not filed a complaint with the Commissioner.

electrician, but he did not possess an HVAC license (2T98-2T99). R-1 requires an employee in that title to be able to safely lift 70 pounds.

Maintenance and custodial employees employed by the Board were supervised on a day to day basis by the building supervisor in the building to which they were assigned. Bavi was responsible for all such employees and supervisors.

In early 1994, Humphries became a union representative for the Association. There is no evidence he began filing grievances, however, until after mid-1995 (CP-16, CP-25).

2. Bavi first evaluated Humphries in March 1993, just a few months after his hiring. The evaluation form (CP-5A) showed that Humphries received ten excellent and two above average ratings. Bavi's comments were:

> Elwood has showed [sic] great initiative and drive. He does his job with no supervision. Elwood is a pleasure to work with.

Bavi recommended Humphries' employment be renewed, but he also noted that Humphries was absent four times in just those first few months of employment.

3. On May 6 and December 7, 1993, Humphries was assigned certain electrical work to complete, but he did not perform the work (R-22A-D; 4T80-4T81). Later in 1993, Humphries was assigned to work at the Oakview School, at least on Thursdays, where he was supervised by Building Supervisor Jacalyn Manganaro.

Often Humphries did not report to work at Oakview as required (3T168-3T169). On September 17, 1993, Manganaro issued Humphries a corrective action notice (R-6) for failing to report to Oakview to complete a particular job. Humphries did not deny the incident (3T20).

On January 6, 1994, Manganaro again issued Humphries a corrective action notice (R-7), this time for leaving two batteries with attached wires on top of a water fountain used by students. Humphries denied leaving the batteries on a fountain. He said he left them on top of a fire extinguisher (2T111; 3T21).

Humphries had been directed to replace batteries in a hall emergency light. On the morning of January 6, the school principal and a teacher's aide showed Manganaro the batteries on top of the fountain. Manganaro testified she removed the batteries and placed them in her office (3T169-3T172). Both the aide and Manganaro sent memos to Bavi explaining the incident (R-7 attachments).

Humphries did not remember whether wires were attached to the batteries, yet despite being shown the two memos that were sent to Bavi over the incident, he insisted he left the batteries on an extinguisher and denied his memory was flawed (2T21-2T23). I credit Manganaro's testimony regarding the incident. It was supported by the attachments to R-7, and Humphries' denials appeared to be more out of stubbornness than conviction.

On January 13, 1994, Manganaro issued Humphries a corrective action notice (R-15) for insubordination. She had left

messages for him at the middle school to contact her about not appearing at Oakview but he did not respond (3T184). Humphries did not have a clear recollection of the matter, he remembered Manganaro called about him and spoke to Bavi, but Humphries denied receiving messages to call her (5T190-5T191). I credit Manganaro's version of the incident. I found her to be a credible witness. I believe she left the messages regardless of whether Humphries received them.

Between July 1994 and September 1995, Humphries had been assigned many tasks to perform at the Oakview School, several of which he failed to complete. On July 14, 1994, Manganaro assigned Humphries to repair an emergency light that he had, allegedly, repaired in January 1994. Manganaro knew the light did not work (3T185-3T156). After being given the assignment, Humphries wrote back on the July work request form (R-14) "Bullshit the light I fixed does work." Humphries did not complete the work. Manganaro was upset with Humphries' written response and reported it to the Board Business Administrator (3T187).

On November 4, 1994, the Oakview principal assigned a task to Humphries which he did not complete. It was completed by electrician Ron Lake (3T190; R-14). On March 3, 1995, Manganaro assigned two tasks to Humphries which he never completed. They were completed by Lake in September 1995 (3T189; R-14). On September 14, 1995, Manganaro assigned Humphries to replace certain electrical receptacles. He did the work, but wrote on the work request form that he could not test them because Bavi, allegedly, would not give

him a voltage tester. Manganaro testified that Oakview had a voltage tester but that Humphries never inquired about it. Manganaro noted to Humphries on the work request form that a tester was available, but he did not test his work (3T187-3T188; R-14). I credit Manganaro's testimony. Humphries did not dispute it.

4. Attendance - Tardiness and Evaluations

Humphries had a problem with attendance and tardiness throughout his employment with the Board. He was entitled to 12 sick and 2 personal leave days per work year which ran from July 1 to June 30 (4T137).

For January 1, 1993 - June 30, 1993, he used all his pro-rated allotted sick time and one leave without pay day; for July 1, 1993 through June 30, 1994, he used all twelve allotted sick days by January 31, 1994, then was on leave without pay on February 1 and 2, 1994 (R-25, R-26, R-27; 4T137-4T138).

By memorandum of February 7, 1994 (R-23), Bavi notified Humphries to meet with him that day regarding his attendance. During that meeting Bavi noted Humphries' absences and also noted that Humphries had reported to work late on 16 occasions and that Board policy was that habitual lateness would result in dismissal (R-23 attachment).

On February 10, 1994, Bavi sent Humphries a memorandum (R-24) noting that his 1993-94 attendance record showed he had developed a pattern for using sick time on Monday, Thursday and

Friday. The memo concluded with a warning that discipline or termination could result. R-24 provides:

> During your 1993-94 work period, your attendance records show a number of sick days being used on Monday, Thursday and Friday. This trend shows a continuous pattern.
>
> This letter is to re-emphasize this issue that was stressed in our meeting on February 7, 1994. I will be monitoring your attendance record in the future and I am looking forward to much of an improvement.
>
> It is essential that you show improvement in this area or disciplinary action will be taken and/or possible termination could result.

On April 15, 1994, Humphries received his second evaluation as a Board employee (CP-5B). The evaluation form was completed by Supervisor Les Smith and was different from that used in 1993. In work performance categories, all of Humphries ratings were 4 out of 5, but he received nearly all five ratings in the work practice categories.7/ His lowest scores were in the personal traits category where he received threes in work attitude, cooperation, and flexibility. The remaining items in the personal traits category were rated four. He received unacceptable ratings in his use of sick leave and personal leave, and the comment section of the evaluation form noted he needed to improve on his attendance. Smith recommended Humphries' employment be renewed.

7/ The performance ratings on CP-5B, C, and D were 5 = excellent; 4 = above average; 3 = average; 2 = below average; and 1 = poor.

For July 1, 1994 through June 30, 1995, Humphries used all twelve sick days, eight of which were either a Monday or a Friday, two personal days, approximately 74 workers compensation days, and he was late for work five times (R-25, R-28,; CP-23). Humphries was out on workers compensation from February 22, 1995 to April 20, 1995 for an injury to one shoulder, then was out on workers compensation from May 9, 1995 to June 23, 1995 for injuring the other shoulder (R-25). When he returned to work in June he was under a doctors restriction not to lift his hands over his head, additionally he had a 50 lb. lifting restriction (R-33). Despite his lifting restriction, Humphries, on October 24, 1995, volunteered to hang a light fixture in a hallway even though it involved work over his head. When Bavi visited that school and learned Humphries was working up on a ladder he told Building Supervisor Eugene Livingston to get something in writing from Humphries (4T68-4T72). As a result, Humphries wrote the following comment on the October 24 work order:

> I see no problem with doing this job on light duty.
>
> Let Ray know I survived (R-20).

That same day Livingston sent a memorandum to Bavi (R-21) explaining that the light fixture weighed approximately ten pounds and that Humphries had been the one who thought of the project and volunteered to do the work.

Humphries acknowledged that his written remark on R-20 was sarcastic. But he didn't think it was insubordinate, he thought it was appropriate because he was annoyed he was asked for something in writing while he was doing his job (6T43).

On May 5, 1995, Humphries was evaluated for the third time (CP-5C). Most of his work performance ratings were threes, though he had three ratings of five; one item in the work practice category was only a two, and the remainder of items in that category were all threes; the entire personal traits category was lower. Humphries received below average twos in the work attitude and the dependability sections, and only threes in the remainder of that category. He received an unacceptable rating in his use of sick leave, and the comment section noted he needed to "work on being more positive in his attitude and job duties", and needed to improve his attendance record. Bavi recommended Humphries' employment be renewed, but did not sign CP-5C until July 25, 1995 due to Humphries' second workers compensation absence in May and June (4T158-4T159).8/

8/ Humphries did not return from his second workers compensation leave until June 26, 1995. He had expected to receive CP-5C within a week or two after his return to work. When he asked about it he was told it wasn't ready because he had been out (2T26). When he received CP-5C from Bavi on July 25, Humphries asked why he didn't receive it earlier and Bavi said he was busy and had just gotten to it (2T26). Humphries' testimony that he was told CP-5C wasn't ready earlier because he (Humphries) had been out supports

Footnote Continued on Next Page

On May 9, 1995, Bavi sent Humphries a written warning (R-29) concerning his excessive absenteeism. Bavi noted there was a pattern of absenteeism with a number of sick days used on Mondays and Fridays; that he (Bavi) would monitor Humphries' attendance and expected to see improvement; that Humphries provide a doctor's note whenever he was using a sick day; and concluded with the following sentence:

> Insufficient improvement in this area may result in further disciplinary action leading up to and including termination.

Copies of R-29 were sent to the superintendent, the Association President, and Building Supervisor Smith.

Humphries' attendance/tardiness record and his evaluation deteriorated during his last year of employment with the Board, July 1, 1995 through June 30, 1996. He used all twelve sick days and was on leave without pay for approximately 21 days because he had no additional sick time; he was on workers compensation for approximately 46 days; and he was late for work on 12 occasions (R-25, R-30).

Most of his sick and leave without pay time was on Mondays or Fridays, and there were three occasions when he took off both

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8/ Footnote Continued From Previous Page

Bavi's testimony that he (Bavi) hadn't signed the evaluation earlier because of Humphries May/June absence. I credit both witnesses in that regard and do not infer CP-5C was signed late because of the July 1995 PEOSHA incident discussed infra.

Thursday and Friday. Humphries' 1995-96 absence record included the fact that he was out on workers compensation from December 14, 1995 until February 7, 1996 for shoulder surgery and recuperation, then was out on leave without pay from February 8 to March 6, 1996 (R-30).

By memorandum of September 28, 1995, Bavi issued Humphries a written warning (CP-8) for failing to call Supervisor Jackie Manganaro at Oakview to report his absence. On December 4, 1995, Bavi issued another written warning to Humphries (CP-9 and R-32) over excessive absenteeism.9/ He had previously warned him about excessive absenteeism on May 9, 1995 (R-29).

In CP-9/R-32 Bavi reviewed the absences Humphries had already accumulated in the 1995-1996 work year. He noted that there was a pattern of absences on Mondays and Fridays, and he reminded Humphries to submit a doctors note for each absence. Bavi concluded the letter with the following paragraph:

> I will continue to closely monitor your attendance record and fully expect improvement. It is essential that you show improvement in this area. Insufficient improvement in this area may result in further disciplinary action leading up to and including termination.

A copy of CP-9/R-32 was sent to Association President Robert Greene, and others.

9/ CP-9 and R-32 are the same letter from Bavi to Humphries dated December 4, 1995, but Humphries 1995-1996 attendance record is attached to R-32.

Humphries' last evaluation occurred on or about May 1, 1996 (CP-5D). He received a rating of two in each of the items in the work performance category; he received four ratings of one in the work practices category including the "performs work in safe manner" and "abides by rules and regulations" sections, and the remaining items in that category were rated two's and one three; he received five ratings of one in the personal traits category out of a possible seven items, the remaining items were only rated a two and a three. The poor ratings in that category came in "physical fitness for the job," "work attitude", "cooperation", "dependability," and "flexibility." He was rated "unacceptable" in sick leave, unpaid leave, and lateness. The comment section included the following negative remarks:

> Elwood has had a poor attendance record for the last 3 evaluations. He was advised to improve his attendance for the past 3 years evaluations. He had 14 incidences and used 39 [34.5] days for sickness this year. Excessive absenteeism places an undue burden on all personnel associated with the District. He does not abide by rules and regulations and, overall, he is a below average employee.

Building Supervisor David Schweigart who signed CP-5D did not recommend Humphries for another contract.

5. The PEOSHA Incident

Bavi has been the Board's Director of Facility Management since approximately 1993 (4T104). Since his employment he has, on numerous occasions, interacted with the Department of Labor's Office

of Public Safety, the office that administer's PEOSHA. He has called them many times regarding various matters (4T156).10/

Bavi noted that PEOSHA was first called in 1993 to inspect a scaffold. The scaffold was missing a safety guard. Bavi had the scaffold corrected and the matter was resolved (4T150-4T151). In 1994 PEOSHA was called regarding asbestos removal from the school. A complaint had been filed regarding the way the asbestos was being removed. Whatever problem existed was resolved (4T151). Bavi did not know who called PEOSHA on those two specific occasions (4T153).

In late winter-early spring of 1995, Humphries became concerned about the storage of certain materials in the Board's maintenance garage. He noticed that fertilizer had been stored next to diesel fuel some of which had mixed together; the fuel pump, he thought, was improperly wired; there were mice droppings throughout the garage; certain electrical plates were missing; the gas pump safety shut-off switch was mislabeled; and other problems (2T9-2T11). Humphries reported these items to Bavi but felt Bavi did not take action to rectify the problems (2T10-2T13).

As a result of what he believed was Bavi's inaction, Humphries, in late April or early May of 1995 filed a complaint with

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10/ Bavi simply testified he has called PEOSHA himself many times to ask questions (4T156). I credit that testimony. He did not say he called the Office of Public Safety, I inferred that because CP-4 noted that Office handles the safety issues. There really is no "PEOSHA" office or agency, it's really just the name of the law, but the parties refer to PEOSHA as if it were a separate agency.

PEOSHA presumably listing the above safety complaints (2T13). By letter of June 22, 1995 (CP-4), the Office of Public Employee Safety notified the Board of the complaint and indicated that an investigation would be conducted. CP-4 did not contain any reference to Humphries, but concluded by citing N.J.S.A. 34:6A-45 which made it illegal to discharge, discipline or discriminate against any employee for filing a complaint with PEOSHA.[11/] Humphries was sent a copy of CP-4 by the Public Safety Office (2T13-2T15).

Humphries testified that Superintendent Hobdell began to ignore him after he (Hobdell) received CP-4 (2T15-2T16). Even if that is true, I do not infer it was related to Humphries PEOSHA complaint since no evidence was offered proving when Hobdell knew that Humphries had filed a complaint.

As a result of Humphries' complaint, PEOSHA conducted a surprise inspection of the Board's maintenance garage on July 11, 1995 (2T16). Humphries, too, was surprised by the inspection but he and maintenance employee Dave McIntosh happened to be in the maintenance garage when the inspector arrived and asked for Bavi.

11/ N.J.S.A. 34:6A-45(a) provides:

> No person shall discharge or otherwise discipline or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this section or has testified or is about to testify in any such proceeding or because of the exercise by such employee on behalf of himself or others of any right offered by this section.

After Bavi arrived at the garage the inspector asked Humphries and McIntosh to participate in the inspection since they were both Association representatives. Then the inspector explained that employees had the right to call PEOSHA and that they could not be retaliated against for taking such action (2T117-2T118).

The group of four walked around the garage going through the complaints that had been filed. Humphries often answered the inspector's questions but testified he felt intimidated when he did because Bavi stared at him and disagreed with some answers (2T18-2T19). Humphries thought Bavi was getting more angry as the inspection continued, and he also believed that some of the PEOSHA complaints may have led Bavi to believe that he (Humphries) had called PEOSHA (2T21; 3T11). Humphries felt Bavi knew immediately after the July 11 inspection that he (Humphries) had called PEOSHA, but he had not talked to Bavi about that. It wasn't until September 5, 1995, according to Humphries, that Bavi either asked or told Humphries that he found out that Humphries had called PEOSHA, and Humphries said it was after September 5 when changes began occurring in his job position (3T11-3T12).

McIntosh testified that Bavi seemed nervous during the inspection. McIntosh also explained that when Bavi told the inspector that batteries were not serviced at the garage he (McIntosh) told the inspector that there were batteries in the garage and Humphries told the inspector they were charging some batteries. When the inspector told Bavi that battery charging

should not be done in the garage, McIntosh thought Bavi looked disappointed with him for giving the information (1T151).

Although I credit Humphries' and McIntosh's testimony as to how they felt about Bavi's reactions during the inspection, their testimony is insufficient evidence for me to conclude or infer that Bavi knew, on July 11, that Humphries had called PEOSHA. There was no showing that Bavi acknowledged knowing about Humphries involvement at that time or that he made any negative remarks about Humphries, or anyone else on July 11.

As a result of the July 11th PEOSHA inspection other PEOSHA inspections were scheduled. But shortly after the July 11th inspection, and prior to any other inspection, an incident occurred at the Board's maintenance garage that resulted in damage to Board property.

On Monday, July 17, 1995 or Tuesday, July 18, 1995, it was discovered that many of the supplies at the Board's garage had been vandalized. The trap underneath a sink in the garage had been disconnected and the faucet was turned on enough to cause considerable water damage to supplies in the garage (1T67; 1T77-1T80; 1T106; 1T115; 4T167; CP-13). The vandalism was reported to the police (4T167-4T168; CP-13).

Bavi was extremely angry over the vandalism and loss of supplies (4T170, 4T193). When he checked the time cards to see which employees reported to the garage and who was the last one to leave the night before detecting the damage, he discovered that

Humphries had been there that night, he had worked overtime, and Bavi learned from other employees that Humphries was the last employee to leave the garage that night (1T80; 4T167-4T169). As a result, Bavi blamed Humphries for causing the damage (1T115). I credit Bavi's testimony. There was no evidence contradicting him that Humphries was the last employee in the garage that night, and it was evident from Bavi's demeanor and tone of his testimony that he was angry over the damage caused in the garage.

After learning of the vandalism and damage at the garage, Bavi directed supervisor Harlett (Shorty) Hummel, and maintenance employees Earl McEwen and Robert (Paunch) Morgey to assist in cleaning up the garage. While they were all in the garage with Bavi they heard him make a remark about getting the guy who called PEOSHA.

On direct examination, Shorty first testified that Bavi said "that someone in the union called OSHA and they were going to get him." He noted that Bavi did not mention any name. Hummel was then asked if he could remember Bavi's exact words and he (Hummel) testified Bavi said, "...that someone in the union called OSHA and he was going to find out who." Hummel then admitted he did not know the exact words (1T75).

On cross-examination, Hummel again testified he couldn't remember Bavi's exact words (1T76), but then testified he remembered the "I'm going to get him" remark (1T77). Finally, when asked whether he knew if Bavi was going to get somebody because he called PEOSHA or because somebody vandalized the garage, Hummel testified

it was for calling PEOSHA, but could also have been for vandalizing the garage (1T80-1T81).

McEwen could not remember why he went to the garage or what he did there, but testified Bavi said, "that he was going to get the union person that called PEOSHA" (1T83-1T84; 1T95-1T96; 1T98-1T99).

Morgey testified that when Bavi arrived at the garage to see the damage he was very mad and upset and said, "I'm going to get the union man who called OSHA" (1T106). Bavi did not give Morgey any indication at that time whether he knew who had called PEOSHA, but within one week Bavi told Morgey he knew Humphries called PEOSHA (1T108). McEwen and Morgey told Humphries about Bavi's remark later that week (2T22).

Sometime shortly after the damage in the garage, Bavi was talking to custodian Joseph Johnson who testified that Bavi told him a union member had contacted PEOSHA and that he would find out who it was and would get him back (1T37). Morgey told Johnson that Bavi had made a similar threat in his presence (1T40).

Bavi testified that he is a certified consultant with the Department of Health, he did not mind when PEOSHA came to inspect Board premises, and he was not angry about the July 11 inspection. He said he was angry only because of the loss of materials at the garage (4T192-4T193).

Bavi also forcefully denied that he made a remark about getting the person that called PEOSHA, and he specifically rebutted testimony by Hummel, McEwen, Morgey and Johnson. Rather, he

testified he said he would "find out who did this, who did this damage" (4T170, 4T199-4T201). In a May 7, 1996 report to Board Secretary Bob Delengowski about Humphries (CP-13), Bavi wrote about the July 1995 remark he made and told Delengowski he said "...we will find whoever did this to our supplies".

I believe that Hummel, McEwen, Morgey, Johnson and Bavi testified based upon their sincere recollection of the facts. But I do not believe that any one of them was completely accurate or completely reliable about what Bavi said, thus, I cannot reconstruct the exact remarks Bavi made at the garage when he observed the damage caused by the vandalism. Nevertheless, since I have no basis to question the veracity of Hummel, McEwen, Morgey and Johnson's testimonies, I find that Bavi did make a remark about getting the person or the union person who called PEOSHA.

While I believe Bavi honestly thought he did not make a remark about PEOSHA, since he was admittedly very angry over the damage when he arrived at the garage, and believed Humphries caused the vandalism, I think it is entirely possible that the remark was made. But I do not find that Bavi made the remark because a complaint had been filed with PEOSHA or because Humphries was a shop steward and member of the Association. Rather, I credit Bavi's testimony that he was not upset over the PEOSHA complaint and did not mind the PEOSHA inspection on July 11, 1995. I find that Bavi made the remark only because he was upset over the damage and loss of materials in the garage and wanted to get (i.e. punish) the

person who did the damage. My impression of Bavi was that he was a very conscientious employee who, as Director of Facility Management, felt responsible for Board property under his control and took the loss of materials in a personal way.

Bavi and Humphries did not have a good relationship. Bavi is of Persian ancestry and is an emigrant from Iran. He speaks English with a noticeable accent. Humphries has made racist remarks about Bavi, and wrote letters accusing him of being a dictator (4T166, 4T170, 4T187-4T188). Bavi testified he has not retaliated against Humphries because of his racist remarks (4T170). While I credit that testimony, I believe the combination of Bavi's dislike for and distrust of Humphries, his belief that Humphries vandalized the garage, and his sense of responsibility for Board property created the anger in him that lead to the PEOSHA remark. At that point, Bavi apparently knew or believed Humphries had called PEOSHA. Although I think Bavi wanted to punish Humphries for the damage in the garage, ultimately, he did not take any direct action against Humphries for the vandalism.

A second PEOSHA inspection of the maintenance garage was conducted on August 22, 1995 as a follow-up to the July 11 inspection. On September 27, 1995, the Office of Public Safety issued a letter with attachments (CP-6) listing the violations found at the maintenance garage.

6. Robert Delengowski became the Board's Business Administrator/Board Secretary in July 1995. In mid-August 1995,

Delengowski and Superintendent Hobdell held a meeting with union representatives of the custodial staff to introduce Delengowski to the employees (2T28), and to hear and address some of the concerns of the custodial/maintenance employees (2T146-2T147; 2T161). The meeting took place at the middle school and was attended by Humphries, Johnson, Morgey, McIntosh and John Miller, in addition to Delengowski and Hobdell (1T109-1T110; 2T147; 2T162).

Delengowski began the meeting explaining to the employees that he had an open door policy. While he expected them to work with Bavi, he told them he was available to them if there were problems (1T42; 1T110; 2T29; 2T149-2T150; 2T164). Humphries interjected that if employees went to him (Delengowski) over Bavi, Bavi might retaliate (1T111; 2T29; 2T151; 2T164). Humphries, Morgey and Johnson testified that Hobdell then said: "...you got to expect a little retaliation "(1T43; 1T111; 2T29).

Johnson became upset by Hobdell's remark and told him they did not have to expect retaliation. Hobdell replied that was not what he meant, and Johnson advised Hobdell that he didn't know what he meant, only what he said (1T43; see also 1T111; 2T29).

Hobdell vehemently denied making such a remark (2T151; 2T154). Delengowski did not remember Hobdell making any such remark (2T165; 2T180).

Although I find that Hobdell made the remark, I do not infer therefrom that he was condoning retaliation.

7. On August 10, 1995, Building Supervisor Eugene Livingston sent a handwritten memorandum to Bavi (R-9) criticizing Humphries for his work attitude, and for not following up to complete his work assignments. R-9 provides:

> In regards to Elwoods work habits, I personally wrote at least 2 work orders that were never complied with. He will come back with he needs permits or he does not have time, or uses quotes of P.E.O.S.H.A. Rules or Labor Law Rules. He seems to miss a lot of time for various reasons. That follow a extended weekend pattern like Fri. and Mon. I know he is not happy with his raises and complains continually about this. If he would apply his knowledge of rules and regulations to assist us in getting the work accomplished instead of using it to ridicule and avoid work he could be of great value to us. He also has a habit of directing our H.V.A.C. man in doing electrical work instead of performing his own phase of work.

Livingston wrote R-9 because he felt Humphries attitude had worsened and he (Humphries) wasn't fulfilling his responsibilities (4T81-4T84). Livingston was not certain Humphries received a copy of R-9 (4T90-4T91).

In its post-hearing brief, the Charging Party inferred that Livingston wrote R-9 either because of Bavi's urging or threats. I make no such inference. I find that Livingston wrote R-9 voluntarily to express his concern over what he believed was Humphries' poor performance and attitude.

On or about September 1, 1995, Humphries and electrician Ron Lake were assigned to do wiring for a new computer lab at the middle school (3T38; 4T39). Lake ran the main lines from the

breaker panel down the walls to the computer counters, and Humphries wired the main lines to the power strips and cord caps under the counter (4T40-4T41).

Supervisor Les Smith unpacked, set up and pluged in the computers. He set up 28 computers which worked without a problem, but two additional computers would not turn on. When he checked the wiring underneath the counter where they were plugged in he received a severe electric shock. He discovered a cord cap that had been improperly wired by Humphries (4T39-4T40). When Smith confronted Humphries about the wiring problem, Humphries did not deny he wired the cord caps, but he accused Smith of sabotoging his work (4T41). Later that day Ron Lake told Bavi that he did not want to work with Humphries because of his bad attitude (CP-13).

On September 5, 1995, Humphries prepared a special report (R-19) alleging "sabotage". In the report Humphries posed the question "...how did he (Smith) know just where to look first." That same day Smith prepared his own special report (R-18) noting the wiring mistake.

On September 7, 1995, Smith sent Bavi a memorandum (R-8) regarding Humphries special report (R-19), particularly the accusation of sabotage. On the cover page of R-8 Smith explained the incident to Bavi and noted he did not appreciate being implicated by Humphries. On the second page of R-8 Smith noted he was being harassed by Humphries and did not feel safe having Humphries in his building. R-8 provides in pertinent part:

> 3. Elwood is always accusing me of tampering with H.V.A.C. controls electrical breakers and other electrical equipment at the M.S.
>
> 4. Ray I have been a custodian and maintenance worker at the M.S. for the last 17 years and before that an auto mechanic. I feel that I have more than enough mechanical knowledge to perform minor heating, electrical and plumbing repairs at the M.S. without being harassed by Elwood all the time.
>
> 5. I further feel the School Board should investigate this problem and others with Elwood that me and the other Supervisors have had with him. I ask this for the safety of the students, teachers and staff members in the district.
>
> 6. Ray I really do not want Elwood in my building for I do not feel safe with him in my building.

I credit Smith's account of the wiring incident and do not find he "sabotaged" the cord caps. I infer from R-19 that Humphries wired the caps, and I also find that Humphries failed to offer any evidence to establish his claim of sabotage.

8. On September 6, 1995, Humphries left work early without permission. He testified he had been working at the middle school with Ron Lake, and that Lake took the truck that contained Humphries lunch and left before lunch to obtain certain supplies. Lake apparently didn't return until after Humphries' appointed lunch break, thus, Humphries did not eat lunch. Humphries claimed he asked Smith if he could leave early instead of causing overtime and that Smith agreed (2T46-2T47; 3T34-3T35).

Smith testified Humphries never asked him about working through lunch, and he denied giving Humphries permission to leave

early (4T43; 4T47). I credit Smith's testimony. While I do not question Humphries' account of Lake driving off with his lunch, I do not believe he had Smith's permission to leave early. I found Smith to be straight forward and sincere. Humphries, however, was often evasive and equivocal.

As a result of the September 6th incident, Bavi sent Humphries a memorandum dated September 25, 1995 (CP-7) reminding him that working through lunch and leaving early was not acceptable and his supervisor had not given his approval.

In its post-hearing brief, the Charging Party argued that CP-7 was nothing more than harassment by Bavi of Humphries because of Humphries PEOSHA activity. The Charging Party noted that CP-7 was not mailed to Humphries until October 2 or 3, 1995, after the date PEOSHA notified the Board of certain violations which was September 27, 1995 (CP-6). While CP-7 may not have been mailed to Humphries until October 3, I do not infer from that event that CP-7 was written after CP-6 was received and back dated to September 25. CP-6 was dated September 27, a Wednesday, and addressed to Hobdell. I do not know when it was mailed, or when Hobdell received it or when Bavi saw it. I find that Smith did not give Humphries permission to leave early on September 6, and therefore, there was a legitimate basis for Bavi's issuance of CP-7.

9. Humphries and Morgey testified that on September 6 or 7, 1995, Hummel told them that Bavi had told him (Hummel) to catch Humphries standing still and write him up (1T135; 2T73). Humphries

filed a grievance (CP-16MM) over the matter on or about September 12, 1995. The grievance states:

> On 9/6/95, Ron Lake supposedly told Ray that I stood all day and watched him do all the work. Ray then called Shorty at the High School and told him to write me up for standing around all day. (I was at the Middle School on 9/6/95.) Shorty told Ray he couldn't write me up because he didn't witness me standing around since I wasn't at the high school. The next morning I was told of this by Shorty, he also told me he was told by Ray to catch me standing still and write me up.

As a result of Lake's complaint about Humphries work attitude, Bavi had told Hummel to check into Humphries work performance (CP-13). Bavi also talked to Hummel about writing up employees, but Hummel denied that Bavi singled out Humphries. When asked if Bavi told him to write up Humphries, Hummel responded:

> Answer: Not necessarily Elwood. Anybody that's not doing their job to write them up.
> Question: Not necessarily Elwood?
> Answer: No.
> (1T76).

While Hummel may have told Morgey and Humphries that Bavi told him to catch Humphries standing around and write him up, I believe, at most, that was Hummel's exaggeration of what Bavi said. I credit Hummel's testimony that Bavi never actually singled out Humphries. I found Hummel to be a reliable witness. Since he had testified earlier about hearing Bavi make the PEOSHA remark, I do not believe he suddenly became timid in testifying about what Bavi said. Hummel was never asked to confirm or deny that he told

Humphries and Morgey that Bavi told him to catch Humphries and write him up. He was only asked what Bavi told him, and I credit his response.

10. On September 7, 1995, Humphries and Lake were working at the Oakview School where Manganaro was supervisor, installing a computer line for the nurse's office. Humphries was working in the nurses office installing a circuit breaker into a breaker box, and Lake was in the hallway feeding wires from a junction box into the nurse's office (3T23-3T24; 3T174-3T175). While in the nurse's office, Humphries disconnected one end of a wire to what he thought was a spare or unused circuit and he left that end of the wire in the ceiling (3T25-3T26; 3T176).

Later that day the nurse noticed that her air conditioner didn't work. The following day, September 8, Lake was checking to see why the air conditioner wasn't working. When he checked wires in the ceiling he received a shock from the end of the wire Humphries had placed in the ceiling the prior day. Lake determined that the wire Humphries partially removed was the air conditioner wire and was live when the air conditioner was turned on (3T178-3T179).

On September 8, 1995, Lake prepared an accident report (R-17) because of the shock he received. On September 11, 1995, Manganaro prepared a memorandum for Bavi (R-16) explaining the incident and asking Bavi to investigate similar mishaps that were happening at all the schools.

Humphries was not under orders from Lake or Manganaro to remove the wire. Although he tried to shift the blame to Lake, Humphries testified that he, not Lake, was working on the breaker in the nurses office, Lake was not in the room, and that he removed the wire even though he had not determined what that wire was for (3T25-3T27). Consequently, I find that Humphries was primarily responsible for the incident.

11. Humphries claimed he had a meeting with Bavi on September 5, 1995 at which time Bavi, allegedly, told Humphries that he (Bavi) had talked to a PEOSHA inspector who told him that Humphries had called PEOSHA. Humphries further alleged that Bavi told him he made a big mistake (2T31-2T33; 3T11-3T12).

Bavi denied meeting with Humphries on September 5 (5T43-5T44). He said he met with Humphries and Morgey on September 12 to discuss 14 grievances, and that Humphries accused him (Bavi) of wanting to get even with the union because of the PEOSHA inspection. Bavi said he responded: "it was not true" (CP-13).

Humphries testified there was a meeting on September 12 about 14 potential grievances (2T66). I credit that part of his testimony. But I credit Bavi's account of the incident. Generally, I did not find Humphries to be a reliable witness. I often found his account of particular events or incidents to be evasive, non-responsive and unreasonably inconsistent with other evidence. For example, Humphries' insistence that he did not leave the batteries on the water fountain was not credible, particularly after

he was shown written statements (R-7) by an aide (Mrs. Beaver), and by Manganaro, who wrote that Mrs. Beaver and Principal Strandwitz showed her the batteries on the fountain and asked her to remove them; his accusations of sabotage against Smith over the cord cap incident for which there was no reasonable evidentiary support and from which I conclude Humphries simply blamed Smith rather than accept responsibility for his work; and his insistence that he did nothing wrong and that Lake was responsible for disconnecting the nurses air conditioner.

On September 11, Manganaro issued Humphries a corrective action notice for using a Board truck to go to lunch (CP-13). Humphries said he used a Board truck to go to lunch, he even signed a statement to that effect (3T13). At the September 12 meeting, Bavi and Humphries discussed Humphries' use of Board vehicles. Humphries told Bavi to take back the truck and give it to someone else because he got penalized for having the truck. The following day, September 13, Humphries voluntarily gave Bavi the keys to the truck and told Bavi he would not use his personal car to go from school to school. Therefore, Bavi decided to assign Humphries to one school for each day of the week, and he arranged to have Humphries tools moved from school to school to be available for him (CP-13).

On September 29, 1995, Humphries filed a grievance (CP-25) alleging that on September 13 Bavi put him on a special schedule and told him he (Humphries) could no longer operate school vehicles. I

do not draw such an inference from that grievance. I credit Bavi's explanation in CP-13 that Humphries voluntarily surrendered using a Board vehicle and his own vehicle to go between schools and, therefore, Bavi had to schedule Humphries to one school per day and move his tools.

In October 1995, Humphries sent a letter to the Environmental Protection Agency (CP-19) relieving himself of any responsibility for handling freon for the Board, and telling the EPA about an incident involving Run Lake's entry into a freon storage area. Copies of the letter were sent to Hobdell, Delengowski and Bavi. There was no evidence that any Board official took exception to CP-19.

12. Grievances - The parties have a grievance procedure that requires written grievances to specify:

a. the nature of the grievance
b. the terms and conditions of employment which were violated
c. the day of the alleged grievance
d. the results of previous discussions
e. a statement regarding the relief sought, and
f. signature of the aggrieved person (J-1, Article III, Section C.2.).

But the contract does not require grievances be submitted on a particular grievance form (4T190-4T191). Grievances are defined as "...a claim by an employee, or a group of employees and/or the Association, based upon a violation of any provision of the Agreement, as defined in N.J.S.A. 34:13A-5.3" (J-1, Art. III A.1).

Level One of the grievance procedure is an informal discussion of the problem with the Director of Facility Management (Bavi). If the problem is not resolved there, Level Two requires that a formal written grievance be filed with the Director. Level Three of the procedure is before the District Business Administrator; Level Four is before the Superintendent; and the last step, Level Five, is before the Board (J-1).

From September 1995 through May 1996, Humphries filed numerous grievances with Bavi (CP-16A - CP-16MM; CP-25) mostly about himself. Some of the grievances contained the information required by J-1, Art. III, Section C.2, but many did not. Bavi met with Humphries and explained to him how to include the information he (Bavi) believed was required by the contract (4T188).

On October 2 and October 10, 1995, Bavi sent memorandums to Humphries (CP-17A, CP-17C, respectively) noting that he (Humphries) had not properly followed the grievance procedure. CP-17A provided:

> On September 27, 1995, you submitted several typed letters labelled as grievances. This is to inform you that you must follow the proper procedure for filing a grievance by submitting it on a Grievance Form. Your union representative has these forms in his possession. Also, the grievance procedure states that "A grievance is a claim by an employee based upon a violation of any provision of the Agreement, as defined in N.J.S.A. 34:13a5.3." The letters you have sent are null and void.

CP-17C concerned grievances filed on October 5, 1995 and contained the same language as CP-17A but minus the "null and void" sentence. Bavi rejected the grievances because they were not on what he

believed was the proper grievance form and because they did not comply with the procedure set forth in J-1 (4T189-4T190).

At that same time, Bavi decided he could no longer respond to Humphries grievances and began passing them directly through to Delengowski, the next step of the procedure, in part because he believed Humphries was not following the proper procedure, but primarily because of the accusations and racial/ethnic remarks Humphries was making about him (4T177; 4T187-4T190). I credit Bavi's testimony about why he rejected the grievances and why he began passing them to Delengowski.

As a result of CP-17A, Association President Bob Greene filed a grievance (CP-16W) regarding Bavi's concept of what the grievance procedure requires, and his declaring the grievances null and void. That grievance led to a discussion between Superintendent Hobdell and Greene about how to resolve the problem (6T73). Apparently, Greene was going to talk to Humphries and Hobdell was going to talk to Bavi.

Before anything else could occur, however, Bavi sent Humphries CP-17C. That memo resulted in Hobdell sending Greene the following note on October 12, 1995 (CP-18).

> Bob:
>
> Since our discussion yesterday relative to your grievance filed regarding Ray Bavi's response to Elwood Humphries, it has come to my attention (in yesterday afternoon's mail) that Ray has fired off another volley (see attached).
>
> Note that I haven't had an opportunity to discuss with him his first written response to Elwood

> Humphries. I would therefore expect you to retain the principles of our agreement in resolving this particular grievance and I will make every effort to work with Ray on the grievance procedures.

The attachment to CP-18 was CP-17C. Hobdell believed Bavi was frustrated with the sheer number of grievances from Humphries and he (Hobdell) wrote CP-18 to ask Greene to hold off processing the grievance (CP-16W) until he could talk to Bavi. Greene agreed (2T156; 6T73). The Association's grievance was resolved by Greene and Delengowski (2T153).

The following day, October 13, 1995, Humphries filed another grievance with Bavi (CP-16S) which made its way to Hobdell who was confused by Humphries' terminology. As a result, Hobdell sent Greene the following memo (CP-26) on October 18, 1995 with CP-16S attached (6T74-6T77):

> Bob:
>
> Can you assist Elwood in clearly restating the reason(s) for this grievance and to provide any substantiation for his submission of this form? -or perhaps we can sit and discuss this one. I am thoroughly confused by it.
>
> Lawrence A. Hobdell

Humphries continued filing grievances and just two days later, on October 20, 1995, Hobdell sent Greene the following memo:

> Bob:
>
> More unintelligible ramblings. What gives here? Let's review. (CP-27).

Greene and Hobdell discussed the matter. The discussion concluded when Hobdell "threw up his hands" and expressed his inability to understand the grievances because of the way they were written (6T77; 6T79). At that point Greene began to work with Delengowski to resolve the grievances (6T78; 6T109).

Prior to formal meetings between Greene and Delengowski to try to resolve Humphries grievances, Humphries had requested Greene bring the grievances before the Board. But in an effort to resolve the grievances Greene proposed to Delengowski that the parties agree to waive filing deadlines in order to try to settle the grievances. The Board agreed (6T105-6T106).

Greene and Delengowski met in late October or early November and were successful in resolving most of the grievances (2T176; 6T79; 6T104). On November 17, 1995, Delengowski sent Greene a memorandum (CP-28), listing the grievances that remained unresolved (6T80-6T81). The Association did not bring the remaining grievances to the Board (6T105).

13. Johnson, McEwen, and Humphries testified that non-union members such as Jim Ervin and Bob Conover received preferential treatment, particularly from Bavi. Johnson said that when union guys called out sick they were questioned about it or had to produce a doctor's note, but non-union employees did not get the same treatment (1T47-1T48). McEwen made the same remark, and said that Ervin often took off but was not harassed. McEwen, acknowledged, however, that he didn't know if Ervin clocked out, he

hadn't examined employer records, and didn't know whether Ervin was compensated for days off (1T84-1T89). Humphries said that Ervin wasn't required to clean up his job area but union members were expected to clean their own mess (2T84-2T87), only non-union members could smoke on school property (2T92, 3T104), and non-union employees worked overtime but union members were often denied overtime (2T122).

The testimony by Johnson, McEwen and Humphries is generalized at best. Even crediting their testimony, I find it only shows that they personally believed Bavi showed favoritism. There was no showing how many non-members existed, no evidence that there was a consistent pattern of nearly all non-members receiving preferential treatment, and no evidence on how much overtime was given to members versus non-members. Consequently, I do not find on this evidence that Bavi treated employees differently because of their union affiliation or lack thereof.

14. Humphries had shoulder surgery in December 1995 and was out on workers compensation. The doctor for the workers compensation insurance company approved Humphries' return to work on light duty with lifting restrictions beginning February 7, 1996 but Humphries did not return to work at that time (2T186-2T187; R-4; R-5). On February 27, 1996, the insurance company doctor again approved Humphries to return to work on light duty (R-3, R-5), but he did not immediately return.

On March 1, 1996, Delengowski sent Humphries the following letter (CP-20) requiring his return to work by March 6, 1996. CP-20 provides:

> I have been advised by Penn National Insurance Company that you have been cleared by Dr. Obade's office to return to work (light duty). In order to accommodate your need for light duty, you will be assigned as night custodian at Red Bank School until further notice. Regarding your assignment to Red Bank, it is expected that you will report to work on Wednesday, March 6, 1996 at 3:00 p.m. At that time, a meeting will be held at the school with Mr. Bavi and Mr. Schweigart to review the scope of your duties.
>
> In order to retain your status as an employee with the Board of Education, you will be required to begin work on March 6, 1996. You may also continue your status as an employee with the Board of Education if you request in writing an unpaid leave of absence prior to March 6, 1996.
>
> If you do not request an unpaid leave of absence and you fail to report to work on March 6, the Board of Education will then interpret your inaction as abandonment of your position. At that time, a recommendation will be made to the Board on Monday, March 11, 1996 to terminate your services.
>
> I look forward to hearing from you by March 6, 1996 or meeting with you at Red Bank on that date.

The original unfair practice charge was filed on March 5, 1996.

As an electrician, Humphries had worked the day shift, rotated from school to school, and also performed concrete, asphalt, roof and other work in addition to electrical work (5T91). Humphries worked on March 6, but called in sick on March 7 and 8, 1996, a Thursday and Friday (R-30).

Upon his return to work on March 6, Humphries was assigned to return as a night custodian at the Red Bank School because that was the only unfilled or open position at that time (3T121). There were no open positions on the day shift to accomodate Humphries work restrictions (3T93; 4T176-4T178), and the Board was trying to accommodate those restrictions (5T90).

Humphries testified that there was a day shift custodian position available at the time he was put on night shift because the Board hired someone for that position at the same time he started working nights. But Humphries did not know the job responsibilities of that day position, and did not know if he could do the work (6T17-6T18). Consequently, I do not find there was an appropriate position for Humphries on the day shift.

On Monday, March 11, 1996, Dave Schweigart, the Building Supervisor at the Red Bank School instructed Humphries on how to clean classrooms and the library. The work did not require Humphries to lift anything over his head. Humphries signed a form that day (R-10) showing the training and the equipment (goggles, gloves, safety shoes, coveralls and back support) he received (3T127-3T129). Normally, there is a 90 day probationary period for new custodians (3T148).

It was Schweigart's practice to inspect the school every morning he came in, but generally, he was only required to inspect specific custodial work three times a month (3T124). Schweigart did not report on Humphries' performance until about 14 days after he

began (March 20) in order to give him time to become familiar with the work (3T125, 3T136).

But after the March 20th inspection, Schweigart began to notice Humphries was not cleaning rooms properly, thus, he decided, on his own, to check Humphries' work every other day. He felt it was part of his job for the safety of the children (3T136-3T137). Schweigart had not been directed to do frequent inspections, and was, in part, responding to many complaints he had received (3T136-3T137).

15. On March 13, 1996, the Commission mailed a letter to Delengowski and the Charging Party's attorney (CP-10) scheduling an exploratory conference in the original charge for May 2, 1996. Simultaneously on March 13, Bavi sent two memoranda to Delengowski. The first R-2, was signed by Bavi and Building Supervisors Hummel, Allen, Smith, Brinkman, Livingston, Manganaro and Schweigart noting they were not recommending Humphries be rehired in 1996-97. R-2 provided:

> After reviewing Elwood Humphries file, we are not recommending him for rehiring for the 1996-97 school year. The reasons for not rehiring him include his poor attendance record for the past three years and his poor work attitude. Please see his attached employee file for further information.

The second document Bavi sent to Delengowski that day (R-31) was a list of employees he was recommending be rehired for 1996-97. Humphries name was not on the list.

Evaluations for rehire are made by the supervisors, and for employees like Humphries who moved from school to school (before returning to work on March 6, 1996), all or most of the supervisors would meet as a group and make a recommendation (4T75). Such was the case for Humphries. Bavi had a meeting with most if not all the supervisors on March 13; Bavi, Manganaro, Schweigart, Livingston, Hummel and Brinkman were there, but the record is not clear whether Smith and Allen were at that meeting (4T21-4T22; 4T47-4T49; 4T96-4T100; 5T10; 5T102-5T107). After the supervisors expressed their preference not to renew Humphries, Bavi dictated the language for R-2 to his secretary who typed it and brought it into the meeting at which point it was signed by those present (4T21-4T23; 4T97-4T100, 4T134-4T135; 5T102-5T105). Smith may have signed separately (4T47-4T49).

Humphries testified about why he thought some of the supervisors signed R-2. He said Hummel, Allen and Smith did not sign R-2 voluntarily, he thought they signed out of fear of retaliation by Bavi (3T78; 3T80-3T81; 3T84). He said Manganaro and Livingston signed voluntarily, not out of fear, but he alleged they signed as part of a conspiracy with Bavi to retaliate against him (3T79; 3T83). But when asked if he could give any reason why he believed Manganaro would conspire with Bavi, he couldn't (3T79). When pressed further he said "I don't know why she did. I don't understand the question I guess." (3T80). I found no conspiracy.

Most of the supervisors testified about why they signed R-2. Manganaro signed R-2 voluntarily because she personally did not like Humphries (4T8), he was often absent and failed to come to work when expected (3T167-3T169), he had a poor attitude (3T172; 4T9), he did not respond to her work requests (3T180), he was disrespectful and sarcastic towards her because of her gender (3T172; 4T8; 4T25-4T26), and because of the work related mistakes he made regarding the batteries on the fountain and the nurses air conditioner (3T170-3T179). Additionally, when asked why she was recommending Humphries non-renewal, Manganaro responded:

> Because it got to the point where he was always calling out sick when I was to have him on Thursdays. He took an attitude. He always had comments he had to say. He would try to start little arguments. Some of the things he was starting to do on spite. (3T192-3T193).

Manganaro further testified that it was not Bavi who suggested Humphries not be renewed, it was the supervisors (4T23). At the March meeting the supervisors discussed Humphries and agreed that nobody wanted to work with him anymore and they suggested he not be renewed (4T22-4T23).

I credit all of Manganaro's testimony. Humphries allegation that she conspired with Bavi against him is unsupported and lacks merit. I found Manganaro to be a sincere and trustworthy witness. I was especially convinced that Humphries harassed her because of her gender, that she did not want to work with him again, and that the supervisors, not Bavi, first suggested non-renewal.

Livingston denied Bavi influenced his signing R-2 (4T85). He said he did not have a problem with Humphries work at the school where he was supervisor, but he signed R-2 because district-wide there were too many problems with Humphries and his attitude (4T76; 4T84). Livingston based his conclusions on personal observations of Humphries attitude, and on verbal complaints he heard or received from other supervisors and school principals (4T93). He, like Manganaro, said that it was the supervisors who recommended the non-renewal (4T78). Livingston noted as an example of Humphries poor attitude that he often came up with a reason why he couldn't do an assigned job by citing electric rules or codes and claiming a particular permit was needed, but he would refuse to obtain the permit (4T83-4T84).

I credit Livingston's testimony. It was consistent with Manganaro's testimony, and other evidence, and Humphries mere assertion of a conspiracy with Bavi was insufficient to negate Livingston's reasons for signing R-2.

Smith denied he signed R-2 because of influence by or fear of Bavi (4T45), if anything, he signed R-2 over safety concerns caused by what he believed was Humphries poor work performance. Smith testified that the main reason he signed R-2 was over concern for the safety of the students and staff in the buildings within which Humphries worked (4T36-4T37; 4T44; 4T59). He gave the computer cord cap incident as an example (4T38-4T42).

I credit Smith's testimony. Humphries' unsupported allegation that Smith signed R-2 out of fear for Bavi is not believable in light of what I found was Smith's sincere safety concerns generated by the inadequacy of Humphries' work. I do not, however, credit that part of Smith's testimony where he said he believed Bavi raised the issue of Humphries' non-renewal (4T59). The record is unclear whether he was at the March 13th meeting where R-2 was signed. Smith said he signed it separately (4T48) and had attended a meeting on an earlier date (4T59). I credit Manganaro and Livingston that the supervisors, not Bavi, raised the non-renewal.

Schweigart strongly denied that he was threatened, placed under duress, was promised or received a benefit for, or had any reservation about signing R-2 (3T115), or that his signing was in any way related to a promotion he received in late June 1996 (3T155). He testified that he had received many teacher complaints about Humphries' work (3T137; 3T149), and that he signed R-2 as an evaluation of Humphries' performance (3T116).

Morgey testified that Schweigart made a remark to him about Humphries saying something to the effect that if he (Humphries) comes in and does his job why can't they just leave the man alone (8T25-8T26). Even if I credit that testimony I do not infer from that remark that Schweigart felt threatened or compelled to sign R-2. Schweigart denied any such duress, and clearly stated he had no reservation about signing R-2 (3T115), and I credit his testimony

about why he signed R-2. Finally, I do not infer that the Board's hiring of Schweigart's future sister-in-law was at all related to his signing R-2. Both he and Bavi deny any connection (3T157-3T158; 3T195-3T196; 5T112) between her hiring and Schweigart's actions and I credit their testimonies.

Allen testified he had no problem with Humphries' work, attitude or performance (7T14-7T15; 7T19-7T20), but he signed R-2 primarily because Humphries failed to report for work in his (Allen's) building on two occasions and didn't call him (Allen) to report off (7T15; 7T17-7T19). He further testified he was not pressured by Bavi to sign R-2 (7T11; 7T13).

Morgey testified that a few weeks prior to Allen's testimony in this case Allen telephoned him and told him (Morgey) that he (Allen) was pressured and harassed into signing R-2. Allen allegedly said he never had a problem with Humphries and wanted to get on the witness stand and say what he had to say (8T21), and he also allegedly said he would never recommend a non-renewal (8T22). Morgey said he hadn't spoken to Allen since then (8T22).

Allen acknowledged he spoke to Morgey but denied the statement attributed to him. He testified he told Morgey that he signed R-2 and was stating the truth (7T12-7T13). I credit Allen's testimony, particularly that he was not pressured to sign R-2. That was consistent with both Smith and Schweigart who said they were not pressured, and it is unlikely that Allen would be pressured and not the other supervisors.

Brinkman had never supervised Humphries or personally observe or evaluate his attitude or work (5T12-5T15). No one suggested she sign R-2. She signed it for one reason, she didn't think Humphries had a good attendance record (5T14; 5T17). Brinkman only considered Humphries' use of sick days, she did not consider his workers compensation leaves (5T21-5T22). In considering his sick day usage, however, Brinkman did not consider why he was off sick on particular days, she based her decision only on Humphries total sick day use (5T19). On June 19, 1996, Brinkman voluntarily signed a form (CP-22) terminating dues deduction for the Association (5T8-5T9).

I credit Brinkman's testimony and find she signed R-2 voluntarily because she believed Humphries had a poor attendance record. I do not draw any negative inference from the fact she did not review the basis for Humphries use of particular sick days, nor from her decision to discontinue dues deductions. Brinkman was under no obligation to review Humphries sick days, and there was no suggestion that she was anti-union, and I make no such finding.

After meeting with the supervisors on March 13 to evaluate Humphries, and learning that they did not want to recommend him for renewal, Bavi signed R-2 because of Humphries' poor attendance record, work attitude and job performance (4T134). I credit Bavi's above testimony as to why he signed R-2. I do not find that Bavi's recommendation was based upon Humphries having filed the PEOSHA complaint or his having filed grievances. I credit Bavi's

explanation that his PEOSHA remark was based upon his anger over the vandalism in the maintenance garage and not over Humphries filing with PEOSHA.

16. On March 20, 1996, Bavi sent Hobdell a copy of a memorandum Schweigart had sent him regarding Humphries job performance at Red Bank School (CP-11 attachment). The memo Schweigart sent Bavi provides:

> I, David Schweigart (Supervisor of Red Bank School), am informing you of Elwood Humphries work progress as a custodian at Red Bank School.
>
> Elwood started work here at Red Bank School, on March 6, 1996. At this time he was trained by me (David), how to clean the school. So far, I have been coming in every morning and finding certain things not done.
>
> 1. Shelves not being dusted in library.
> 2. Trash being left on counter tops in rooms 1, 2, 3 & 4.
> 3. Rooms 3, 5 & 125 not being wet moped or spot moped.
> 4. Classroom door glass not being cleaned.
> 5. Main front entrance doors not being cleaned.
> 6. Hallways not being moped every night.
>
> As a Supervisor, I know that the job can be done in 7 1/2 hours because I have cleaned this area many times.
>
> At this time, Elwood should know what he is doing on a daily basis, considering he has done this type of work in the past at the Middle School.

On March 29, 1996 Schweigart sent another memo to Bavi regarding Humphries job performance (CP-15 attachment) which provided:

To Ray Bavi:
On March 29, 1996, I David Schweigart Red Bank School Supervisor, was inspecting rooms in Elwood Humphries and Bobby Scarletts area. I noticed that in Elwood's area that there were things not done.

1. Main door windows were not clean.
2. Door frames not wiped off.
3. Walls not wiped off.
4. Papers left on floor in Teachers Room, and not swept or spot moped.
5. Tables in library not wiped off.
6. Speech room not clean, only trash was emptied.
7. Under mats were not clean or swept.
8. Room 3 not spot moped or desk cleaned.
9. Rooms 1, 2, 3, 4, 5, 6 and 125 counter tops not wiped off.

By memorandum of April 1, 1996 (CP-15), Bavi sent Schweigart's March 29, 1996 memo to Hobdell along with other documents showing some of the work that Humphries had not completed.

On May 3, 1996, Humphries broke two pieces of safety glass at Red Bank but failed to clean up the broken glass. He left a note for Schweigart that he accidentally broke the glass in the boiler room and didn't have gloves or glasses to clean it up (R-11 and attachments). Humphries denied the incident was vandalism, he said it was unintentional (5T193-5T195).

Schweigart testified he had provided Humphries with equipment which included goggles, gloves and safety shoes (3T128). When Humphries told Schweigart he didn't clean up the glass because he didn't have gloves or a broom and pan, Schweigart told him they were on his work cart. As a result of that discussion Schweigart did not believe Humphries explanation of how the glass was broken

and he (Schweigart) assumed it was deliberate (3T130-3T131; 3T135). Therefore, he filled out a vandalism report and took pictures of the damage (R-11) (3T133-3T134). Schweigart strongly denied that Bavi told him to take the pictures. He said he took them to prove Humphries was lying to him (3T165).

It is unnecessary for me to determine whether Humphries broke the glass accidentally or deliberately. I credit Schweigart's testimony about the glass incident at least to the extent that he did not trust Humphries explanation of the incident, and I credit his testimony that Bavi did not prompt him to take pictures.

During his work at Red Bank School several teachers and the principal complained about Humphries performance, specifically not cleaning their classrooms properly (3T137; 3T149-3T150; 4T129-4T130; 8T40-8T45). One of the teachers Schweigart said complained about Humphries (3T150) denied making such a complaint (5T25-5T26; 5T28). In fact, she mentioned two other teachers told her they didn't complain either (5T27).

Even if I find that three of the five teachers named by Schweigart did not complain to him about Humphries work, there was no evidence the other two teachers did not complain, and Principal Holefelder of the Red Bank School testified credibly that teachers complained to him about Humphries and that based upon his own inspection he felt the rooms had not been cleaned properly (8T40-8T42). Consequently, I find that complaints were made and Humphries did not perform his duties as required.

On May 1, 1996, the parties were notified that the exploratory conference was rescheduled for May 20, 1996 (CP-12). On May 7, 1996, Humphries was sent a letter by Hobdell (CP-14) (also known as a Rice notice) notifying him that Hobdell would recommend Humphries' non-renewal for the following reasons:

1. Excessive/chronic abuse of sick leave;
2. Failure to report to work in a timely manner on February 7, 1996 after having been given medical clearance to do so;
3. Inefficiency relative to your failure to perform light duty assignments at an acceptable standard.

That letter also notified Humphries of his rights relative to the non-renewal recommendation. That same day Bavi sent a memorandum to Delengowski (CP-13) wherein he (Bavi) responded to charges made by Humphries.

On May 10, 1996, Holefelder sent Bavi a memo (R-35) noting Humphries was still cleaning rooms in an unsatisfactory manner. On May 24, 1996, Bavi sent Hobdell two memos about Humphries job performance. Attached to one memo (R-13) were documents from Schweigart noting Humphries unsatisfactory work. The other memo (R-34) was a chronology of events in May 1996 noting several instances where Schweigart found Humphries work unacceptable. From those documents, I find that Schweigart did not believe that Humphries was properly performing his custodial job.

On May 20, 1996, the exploratory conference was held at the Commission's office. At least Humphries, Bavi and Delengowski attended that meeting (2T60; 5T108). On or about that same date

Humphries received a second Rice notice for a Board meeting scheduled for May 28, 1996 (2T60-2T61).

At the Board meeting on May 28, 1996, the Board approved the recommendation not to renew Humphries employment (CP-21).

ANALYSIS

This case raises allegations under 5.4a(1), (3), (4) and (5) of the Act. The a(1) allegations include Bavi's remark in July 1995, may include Hobdell's remark in August 1995; and includes Bavi's alleged remark on September 5, 1995. The a(3) charge primarily relates to Humphries PEOSHA activity. The Charging Party contends that Bavi (the Board) was hostile toward, interfered with and discriminated against Humphries because he contacted PEOSHA. Included within that framework was Bavi's July 1995 PEOSHA remark; the allegation that on September 5 Bavi told Humphries he made a mistake calling PEOSHA; that Bavi attempted to have Humphries written up on September 7; that beginning September 13 Bavi changed Humphries schedule; restricted his use of Board vehicles; issued written warnings; changed his shift in March 1996; and that Humphries was non-renewed for contacting PEOSHA. The a(3) charge, however, also includes a general allegation that Humphires was discriminated against because of his union affiliation and for filing grievances.

The a(4) charge alleges Humphries was non-renewed for filing the charge and attending an exploratory conference, and the a(5) charge alleges the Board refused to process grievances.

Based upon an analysis of the merits, and an analysis of jurisdictional and procedural issues I recommend the complaint be dismissed.

The a(3) Allegation

The standard for evaluating a(3) cases was established by the New Jersey Supreme Court in In re Bridgewater Tp., 95 N.J. 235 (1984). There the Court held that: "no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing 1) that the employee engaged in activity protected by the Act, 2) that the employer knew of this activity, and 3) that the employer was hostile toward the exercise of the protected activity." Id. at 246.

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

whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner, and then the Commission to resolve.

Although the Charging Party established that Humphries was engaged in certain activity protected by the Act, and that the Board was aware of that activity, the Charging Party did not establish that the Board was hostile to the exercise of that activity. But even if the Board had been hostile to certain protected activity, the record shows the Board would have taken the same actions regarding Humphries, particularly his non-renewal, based upon legitimate business considerations including his poor attendance/tardiness record; insubordinate conduct; poor attitude and unsafe performance; and, his failure to adequately complete his custodial duties.

Procedure

The Charging Party listed Humphries' protected activity in its charge as including: service as an Association representative, the May 1995 contact with PEOSHA, filing grievances, filing the unfair practice charge, and attending the exploratory conference. The PEOSHA activity was the primary activity relied upon by the Charging Party to prove its a(3) case. But its reliance on that activity to prove a violation in this forum is misplaced. Humphries' PEOSHA activity is not protected activity under the New

Jersey Employer-Employee Relations Act. N.J.S.A. 34:13A-1 et seq. It is protected activity under the Public Employees Occupational Safety and Health Act, N.J.S.A. 34:6A-25 et seq., and a claim of a violation of that Act (PEOSHA) must be filed with the Commissioner of Labor.

N.J.S.A. 34:6A-29 designates the State Department of Labor to be the sole agency responsible for administering and enforcing PEOSHA.

N.J.S.A. 34:6A-45 provides in pertinent part:

> **34:6A-45. Discriminatory acts against employees; prohibition; restraining orders; waiver of benefits or requirements of act; invalidity**
>
> a. No person shall discharge, or otherwise discipline, or in any manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this section or has testified or is about to testify in any such proceeding, or because of the exercise by such employee on behalf of himself or others of any right afforded by this section.
>
> b. Any employee who believes that he has been discharged, disciplined or otherwise discriminated against by any person in violation of this section may, within 180 days after the employee first has knowledge such violation did occur, file a complaint with the commissioner alleging that discrimination. Upon receipt of the complaint, the commissioner shall cause an investigation to be made as he deems appropriate. If, upon that investigation, the commissioner or his designee determines that the provisions of this section have been violated, he shall, not more than 90 days after the receipt of the complaint, notify the employer and the employee of his determination, which shall include an order for all appropriate relief, including rehiring or reinstatement of the

> employee to his former position with back pay and reasonable legal costs. The notice shall become the commissioner's final determination, unless, within 15 days of receipt of the notice, the employer or employee requests a hearing before the commissioner or his designee, in which case the commissioner shall issue his final determination not more than 45 days after the hearing report is issued. Amended by L.1995, c. 186, ¶ 13, eff. July 25, 1995.

I find that Humphries' activity in calling PEOSHA and filing a complaint with it over the conditions in the Board's maintenance garage was the kind of activity specifically covered and protected by N.J.S.A. 34:6A-45(a). If the Charging Party believed that Bavi's PEOSHA remarks or the changes to Humphries schedule, his shift, and other actions including his eventual non-renewal were based upon Humphries PEOSHA activities, it should have filed an action with the Commissioner of Labor. To the extent this charge is based upon Humphries PEOSHA activity it is dismissed for lack of jurisdiction.

The Charging Party did not discuss N.J.S.A. 34:6A-45 in its post hearing brief. Rather, it cited cases holding that since the maintenance of physical facilities concern the health and welfare of employees it is a mandatory subject of negotiation, Town of Kearny, P.E.R.C. No. 82-12, 7 NJPER 456 (¶12202 1981); and Twp. of Saddlebrook, P.E.R.C. No. 78-72, 4 NJPER 192 (¶4097 1978); and

argued that an employee's activities as a building representative or shop steward is protected within the meaning of the Act.12/

Finally, the Charging Party argued that protected activity includes employee complaints about non-negotiable matters which are grievable through advisory arbitration. Salem Cty. Bd. Voc. Ed., P.E.R.C. No. 79-99, 5 NJPER 239 (¶10135 1979), aff'd in pt., rev'd in pt., rem'd, NJPER Supp.2d 82 (¶63 App. Div. 1980).

The Charging Party seems to argue that since Humphries was engaged in activity to protect the health and safety of himself and others it was protected activity within the meaning of our Act. Under the circumstances here, however, I don't agree. Even if the above cases support the proposition for which they were cited, they do not address whether activity specifically protected by PEOSHA is also protected by our Act.

I am not suggesting that Humphries' PEOSHA activity was not protected, I merely find that N.J.S.A. 34:6A-45 preempts our Act on the issue. The Legislature has determined that the protections for engaging in PEOSHA activity are within the Commissioner of Labor's jurisdiction. I distinguish the instant facts from a situation where an employee openly complains to management, but not PEOSHA, about health and safety issues in the workplace and/or files a grievance over such concerns and is disciplined for such activity.

12/ The Charging Party relied upon Hamilton Twp. Bd. Ed., P.E.R.C. No. 78-243, 5 NJPER 115 (¶10068 1979); Clinton Twp. Bd. Ed., P.E.R.C. No. 78-45, 4 NJPER 78 (¶4038 1978), to support this claim of protected activity.

I would find that employees' activity to be protected within the meaning of our Act. But since the Legislature provided a specific forum to seek protection for engaging in PEOSHA activity, employees must use that forum when claiming that an employer took action against them for engaging in that specific activity.

The Charging Party did not demonstrate any reason why it did not or could not comply with N.J.S.A. 34:6A-45. To the extent the Charging Party was concerned about the Entire Controversy Doctrine (R.4:30A), it should have filed the claims arising under PEOSHA with the Commissioner, file the remaining claims with our Commission, then file for predominant interest to merge the issues in one forum for hearing, N.J.A.C. 1:1-17.1 et seq. That was not done here, thus, the alleged violations by the Board against Humphries because of his PEOSHA activity must be dismissed. The remaining activity Humphries engaged in, serving as a shop steward, filing grievances, and filing the charge and attending an exploratory conference are within the Commission's jurisdiction.

The Merits

Notwithstanding the above procedural dismissal of some of the a(3) allegations, having fully litigated the facts of this matter including the PEOSHA facts, I find that the Board was not hostile toward and did not take action against Humphries for engaging in protected activity or the PEOSHA activity. The decision on whether a charging party has proved hostility in (a)(3) cases is

based upon consideration of all the evidence presented at hearing which includes the evidence offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987). Based upon my credibility determinations here, I find that there was a legitimate basis for the Boards actions.

In its post-hearing brief, the Charging Party argued it had proved hostility by a combination of circumstantial evidence, inferences it made from testimony of witnesses it credited, and the timing of certain actions extending back primarily from 1995 through May 1996.

The theory to the Charging Party's a(3) case is that Bavi was angry at Humphries for contacting PEOSHA as evidenced by his remark in July 1995 and allegedly his remark on September 5, 1995, leading to changes in Humphries position, written warnings to him and his eventual non-renewal. In its brief the Charging Party also argued that every time Humphries engaged in protected activity, Bavi met that activity with retaliation on a "tit for tat" basis based upon the chronology of events. That theory is built upon Humphries' testimony, and others to a lesser extent, and presupposes that Bavi's testimony and the testimony of the supervisors who signed R-2 would not be credited. However, having found that Humphries was not a reliable witness, and the supervisors were, the Charging Party's theory of the case must fall. Generally, I found Bavi a more reliable witness than Humphries, and I found the supervisors particularly reliable.

Bavi's July PEOSHA remark was made out of anger and frustration over the garage vandalism, not because Humphries called PEOSHA.

In its post-hearing brief, the Charging Party argued that the lower ratings Humphries received on CP-5C, his 1994-1995 evaluation form signed by Bavi on July 25, 1995, were in reaction to Humphries filing the PEOSHA complaint. I do not agree. If Bavi was determined to retaliate against Humphries for filing with PEOSHA CP-5C gave him a good opportunity. But Bavi recommended Humphries employment be renewed at that time, and the evaluation seemed fair considering Humphries' poor attendance record. Additionally, CP-5C reflects that the evaluation took place on May 5, 1995. The Charging Party did not dispute that. He testified that all the other evaluations had been done in May (2T27). The mere signing of it in July does not establish that its content was inaccurate or inappropriate. Finally, Humphries, himself, testified that it was after September 5 when changes began occurring in his job position (3T11-3T12).

Humphries did not convince me that Bavi met with him on September 5 or made a remark about Humphries PEOSHA activity. I credited Bavi that he and Humphries met on September 12 and that it was Humphries who accused Bavi of wanting to get even because of the PEOSHA inspection. Similarly, I find it was Humphries who voluntarily surrendered use of a Board vehicle, Bavi did not arbitrarily remove it, that caused Bavi to have to assign Humphries to one school per day.

The Charging Party's argument that Humphries was moved to the night shift as a form of discrimination lacks merit. The record shows the night position was the only available position to accomodate Humphries physical needs. Finally, the record shows that Humphries' non-renewal was precipitated by R-2 and the supervisors, not Bavi. There was no showing the supervisors had a negative reaction to Humphries PEOSHA activity, and the Charging Party's assertion that they had either conspired with Bavi or reacted out of fear of him lacked merit.

The Charging Party's a(3) case, as well as its a(4) case, is also based on Humphries' activity that is clearly protected by our Act, including: his role as a shop steward, filing grievances, filing this charge and attending the exploratory conference. I find, however, that such activity was not a factor in his schedule/shift changes or his non renewal. Although R-2 was signed shortly after this charge was filed, the seeds for R-2 were sown well before the charge, and the exploratory conference was held well after the supervisors had recommended non-renewal in R-2.

Upon reviewing all of the evidence presented in this case, as envisioned by Rutgers Medical School, I find Humphries was non-renewed for cause. I found him to be an unreliable, unsafe and at times, obstreperous employee. Humphries' problems began early and continued throughout his employment. He had an abysmal attendance/tardiness record. That is not a finding that Humphries' sick leave use was always inappropriate. It simply means the Board

could not rely on the continuity of his attendance to do the job. He was warned in February 1994 (R-23, R-24), May 1995 (R-29), and December 1995 (CP-9 & R-32) that his excessive absenteeism could lead to his termination but his attendance continued to deteriorate. In its post-hearing brief, the Charging Party questioned the veracity of certain supervisors who signed R-2, ostensibly because of Humphries' poor attendance record, because they did not bother to investigate the reasons behind the absences. Such a test is inappropriate in this case. The basis for Humphries absences is not at issue here. The supervisors were simply reacting to the sheer number of Humphries absences, and since there was no evidence they were hostile to Humphries because he engaged in protected activity they were entitled to make the recommendation they did.

Humphries' problems with Manganaro began in 1993 and 1994 (R-6; R-7; R-15) well before his PEOSHA activity, and his mishandling of the nurses air conditioner was not related to protected activity. While the Charging Party attempted to elicit doubt from Manganaro about that incident, I believe, as did Manganaro, that Humphries was primarily responsible for that incident. Similarly, Humphries problems with Smith were unrelated to his (Humphries) exercise of protected activity. Smith felt harassed by Humphries (R-8), and genuinely believed Humphries miswiring of the computers posed a safety risk to students and others (R-18). I found Smith to be a sincere and reliable witness who did not support rehiring Humphries for legitimate reasons.

Schweigart, like the other supervisors, had a legitimate basis for recommending Humphries non-renewal. Based upon his personal observations of Humphries work, Holefelder's observations, and the complaints of certain teachers, he supported Humphries non-renewal. There was no equivocation in his explanation for supporting the non-renewal which made it that much more reliable. Consequently, the 5.4a(3) charge should be dismissed.

The 5.4a(4) Allegation

The Charging Party's argument that Humphries was discriminated against beause he filed this charge and attended an exploratory conference lacks merit. The mere filing of a charge and attendance at a conference is not enough to prove an a(4) violation.

The Charging Party's theory of this allegation is apparently based on timing. The supervisors recommendation not to renew Humphries, R-2, was signed on March 13, 1996, and the charge was filed on March 5, and the Board's decision not to renew Humphries was on May 28, 1996, just a week after the exploratory conference which was held on May 20, 1996. The Charging Party argues that the Board's non-renewal decision would violate the Act even if it was motivated in part by the filing of the charge or conference attendance. Compare Randolph Twp. Bd. of Ed., P.E.R.C. No. 82-119, 8 NJPER 365 (¶13167 1982). But other than the mere filing of the charge and conference attendance, the Charging Party has not offered any other evidence to support its a(4) allegation.

It is apparently hoping I infer an inappropriate motive. I make no such inference.

Although the charge was filed on March 5 and served on the Board, there is no evidence the supervisors knew of it on March 13 when they signed R-2 or that even if they had that any of them had ever demonstrated any animus toward the exercise of rights protected by our Act. The Board's non-renewal of Humphries one week after the exploratory was purely coincidental. His non-renewal had been put into motion on March 13 with R-2, obviously well before the exploratory conference was conducted. Humphries work performance problems from March through May of 1996 only contributed to the reasons for Humphries non-renewal begun by R-2.

Consequently, I found no basis to support the a(4) allegation and recommend it be dismissed.

The 5.4a(5) Allegation

The standard for evaluating an a(5) allegation is the totality of conduct test, State of N.J., E.D. No. 79, 1 NJPER 39, 40 (1975), aff'd 141 N.J.Super. 470 (App. Div. 1976).

The premise to the Charging Party's a(5) allegation is Bavi refused to process Humphries grievances as evidenced by his statement in CP-17A that some of Humphries grievances were "null and void," and by his decision to begin passing Humphries grievances to Delengowski. In its post-hearing brief, the Charging Party argued that Bavi's conduct had shut down the grievance process; abrogated

the agreement; and, demonstrated hostility toward Humphries exercise of protected rights (filing grievances). I find that argument to be overbroad and misleading. It does not reflect the totality of the Board's conduct and its sincere effort to resolve the grievances filed by Humphries. Bavi's actions cannot be looked upon in a vacuum to determine whether the Board violated the Act. Where, as here, the Board's Business Administrator (Delengowski) and Superintendent (Hobdell) made a conscientious effort, together with Association President Greene, to resolve Humphries grievances it is simply inappropriate to characterize the overall Board response to these grievances as having shut down the grievance process. Quite the contrary. While Bavi may have failed to respond according to the grievance procedure, Hobdell and Delengowski sent a clear message that they were not abrogating the grievance procedure and they worked with Greene to resolve most grievances. To the extent some grievances were not resolved, there was no showing they were submitted to the Board; that the Board failed to consider any grievances it may have received, or that Board officials refused to attempt to resolve outstanding grievances. Hobdell's frustration in throwing up his hands in attempting to resolve new grievances by Humphries was of no import. Delengowski quickly assumed responsibility to meet with Greene to attempt resolution of those matters.

Although the grievance procedure in this case does not end in binding arbitration, the holding in New Jersey Transit Bus

Operations, Inc., P.E.R.C. No. 86-129, 12 NJPER 442 (¶17164 1986); Borough of Mountainside, D.U.P. No. 85-17, 11 NJPER 6 (¶16003 1984); and similar cases is relevant. Those cases held that assertions of an employer's refusal to respond to a grievance, or allegations of improper treatment of a grievance at an intermediate step of the procedure does not violate the Act when the contract provides for a self-executing procedure which ends with binding arbitration. Here the procedure was self-executing and once Humphries grievances were brought to Hobdell and Delengowski they were acted upon within the spirit of the grievance procedure. Under the totality of conduct test, I found their actions more than adequately satisfied the Board's obligation under the grievance procedure. Consequently, I recommend the 5.4a(5) allegation be dismissed.

The Independent 5.4a(1) Allegation

There were three possible incidents in this case that could constitute independent a(1) violations. Bavi's PEOSHA remark in July 1995; Hobdell's "expect retaliation" remark in August 1995; and Bavi's alleged PEOSHA remarks on September 5, 1995. However, none of those incidents constitute a violation in this case.

The Charging Party correctly argued that the test for determining whether an independent a(1) violation was established is whether the actions complained of had the tendancy to interfere with rights protected by our Act. New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 note 1 (¶10285 1979).

But in order for allegations to be considered within that test they must first be found as fact and second, they must have arisen within the Commission's jurisdictional authority.

Although I found that Bavi and Hobdell made the remarks attributed to them in July and August 1995, respectively, both of those remarks were outside our Acts (and PEOSHA's) six month statute of limitations, N.J.S.A. 34:13A-5.4c (and N.J.S.A. 34:6A-45b). This charge was initially filed on March 5, 1996, thus, it extended back up to and including September 5, 1995. Events prior thereto cannot be considered as violations in this case.

Although events occurring on September 5, 1995 would be timely here, since I did not find Bavi made remarks to Humphries about PEOSHA on that day (or another day since July 1995), there was no basis to find that an independent a(1) violation was committed. Thus, the allegations of an independent a(1) violation should be dismissed.

Accordingly, based upon the above findings and analysis, I make the following:

RECOMMENDATION

I recommend the complaint be dismissed.

Arnold H. Zudick
Senior Hearing Examiner

Dated: June 30, 1998
Trenton, New Jersey