P.E.R.C. NO. 89-106

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MT. OLIVE TOWNSHIP
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-88-12

EDUCATION ASSOCIATION
OF MT. OLIVE,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission remands to the Hearing Examiner an unfair practice charge filed by the Education Association of Mt. Olive, Inc. against the Mt. Olive Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when it transferred a social studies teacher from a high school position to an elementary school position allegedly in retaliation for his protected activity as the Association's president. The Hearing Examiner did not consider the allegations in an amended unfair practice charge or expressly determine whether the transfer violated subsection 5.4(a)(1) of the Act. The Commission expresses no opinion on the merits at this juncture.

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EDUCATION ASSOCIATION
OF MT. OLIVE, INC.,

Charging Party.

Appearances:

For the Respondent, Ribis, Graham, Verdon & Curtin, Esqs. (Thomas R. Curtin, of counsel; Kathleen M. Noonan, on the brief)

For the Charging Party, Klausner, Hunter & Oxfeld, Esqs. (Stephen B. Hunter, of counsel)

DECISION AND ORDER

On July 13, 1987, the Education Association of Mt. Olive, Inc. ("Association") filed an unfair practice charge against the Mt. Olive Township Board of Education ("Board"). The charge alleged that the Board violated subsections 5.4(a)(1) and (3)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it transferred Michael Ryan, a social studies teacher, from a

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

high school position to an elementary school position, allegedly in retaliation for his protected activity as the Association's president.

On September 2, 1987, a Complaint and Notice of Hearing issued. On September 18, the Board filed an Answer to the original charge admitting that it had transferred Ryan, but denying that it had retaliated against him for his protected activity.

On September 23, 1987, the Association filed an amended charge. The amendment alleges three new independent violations of subsection 5.4(a)(1). These violations allegedly occurred when: (1) two Board members allegedly told support staff members that the Association had sold them out; (2) Ryan was transferred within weeks of his letter criticizing these Board members, and (3) the superintendent allegedly told Ryan that the Board had to scrutinize him and everything he did because of his union activities. On October 27, the Board filed an Answer to the amended charge, denying each of the factual allegations.

On December 2, 1987, Hearing Examiner Alan R. Howe opened a hearing that lasted 15 days and closed on June 6, 1988. The parties filed post-hearing briefs by September 26, 1988.

On December 1, 1988, the Hearing Examiner recommended dismissal of the Complaint. H.E. No. 89-18, 15 NJPER 38 (¶20016 1988). Applying the standards of In re Bridgewater Tp., 95 N.J. 235 (1984), for assessing allegations of anti-union discrimination, he concluded that the Association had not proved that Ryan's protected activity was a motivating factor in his transfer and that the Board

had proved that it would have transferred Ryan even absent his protected activity.

On January 23, 1989, after receiving two extensions of time, the Association filed exceptions. It asserts that the Hearing Examiner did not address the allegations in the amended unfair practice charge, did not determine whether the transfer independently violated subsection 5.4(a)(1), and did not address several alleged incidents of anti-union animus. It also asserts that the Hearing Examiner misapplied the Bridgewater standards and erred in not concluding that the Board's reasons for the transfer were pretextual.

On February 14, 1989, after receiving an extension of time, the Board filed a response supporting the Hearing Examiner's findings and recommendations.

We have reviewed the pleadings, the Hearing Examiner's report, and the parties' submissions. The Hearing Examiner did not consider the allegations in the amended unfair practice charge or expressly determine whether the transfer violated subsection 5.4(a)(1). We will remand the case so the Hearing Examiner can make findings and recommendations on these issues. The Hearing Examiner should also make any supplemental findings of fact necessary to resolve factual disputes identified in the post-hearing briefs and reiterated in the exceptions. We will then consider all the issues in the case at once. We express no opinion on the merits at this juncture.

ORDER

The case is remanded for proceedings consistent with this opinion.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Ruggiero, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Reid abstained.

DATED: Trenton, New Jersey
April 28, 1989
ISSUED: April 28, 1989

H.E. NO. 89-18

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

In the Matter of

MT. OLIVE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-12

EDUCATION ASSOCIATION OF MT. OLIVE,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission dismiss a complaint alleging violations of §§5.4(a)(1) and (3) of the New Jersey Employment Relations Act for the reason that the action of the Respondent Board in transferring Michael J. Ryan on May 18, 1987 was in furtherance of valid educational reasons and not because of his exercise of protected activities. The Hearing Examiner found that the Charging Party failed to meet the first part of the Bridgewater test, namely, it failed to establish prima facie that hostility existed on the part of the Respondent against Ryan, as the President of the Association, because of his exercise of protected activities. Even assuming arguendo that the first part of the Bridgewater test had been met, the Board established that it had a valid educational reason for the transfer.

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.

H.E. NO. 89-18

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

In the Matter of

MT. OLIVE TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-88-12

EDUCATION ASSOCIATION OF MT. OLIVE,

Charging Party.

Appearances:

For the Respondent, Ribis, Graham, Verdon & Curtin, Esqs. (Thomas R. Curtin, of counsel & Kathleen M. Noonan, on the brief)

For the Charging Party, Klausner, Hunter & Oxfeld, Esqs. (Stephen B. Hunter, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 13, 1987 by the Education Association of Mt. Olive, Inc. ("Charging Party" or "EAMO") alleging that the Mt. Olive Township Board of Education ("Respondent" or "Board") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"), in that Michael J. Ryan, a tenured teacher, who had in his ten years of employment with the Board received laudatory evaluations and observations was involuntarily transferred by the Board on May 18, 1987, from the

High School Social Studies Department to the Social Studies Department in the Upper Elementary School; Ryan's transfer was intended to isolate him from his effectiveness as the seven-year President of the Association and in retaliation for his exercise of protected activities on behalf of the Association, Ryan having been the most vocal person within the Association regarding challenges to the decisions of the Board that have adversely affected teaching staff members, particularly between March 1987 and the date of his involuntary transfer in May 1987; all of which is alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on September 2, 1987.. Pursuant to the Complaint and Notice of Hearing, fifteen days of hearing were held on December 2, 3, 1987; and on January 27, 28, 1988; and on February 8, 11, 1988; and on March 11, 1988; and on April 11, 18, 21, 27, 1988; and on May 4, 16, 17, 1988; and on June 6, 1988,[2/] in Newark, New Jersey, at which

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

2/ The citations to transcripts of hearing shall be as follows: December 2, 1987 (1 Tr ___); December 3, 1987 (2 Tr ___) and thereafter seriatim.

time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by September 26, 1988.[3/]

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Mt. Olive Township Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Education Association of Mt. Olive, Inc. is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. Michael J. Ryan is a classroom teacher possessing a New Jersey State Certification to teach teach social studies from grades kindergarten through 12 (1 Tr 4). Ryan has been employed by

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3/ The delay in the filing of briefs was occasioned by vacation schedules of the parties and the Hearing Examiner together with the length of transcript, which had to be analyzed in the post-hearing briefs.

the Board as a social studies teacher at the High School since September 1977 and remained in that capacity until May 1987, when the Board voted to transfer him to the Upper Elementary School ("Upper L"), which includes grades seven and eight.[4/] When Ryan was initially employed in September 1977, the Mt. Olive School District was at that time a part of the West Morris Regional School District. However, in April 1978, the Mt. Olive School District "deregionalized" from the West Morris Regional School District and, at that point Mt. Olive, which had been a K-8 district, became a K-12 district. [1 Tr 14-18].

4. When Ryan was first employed by the district its Superintendent was Chester Stephens, who has been the Board's Superintendent for 26 or 27 years (1 Tr 16; 11 Tr 58).

5. Ryan became an EAMO Building Representative during the 1978-79 school year at a time when EAMO was, according to Ryan, "weak" in that it had been working without a contract for over a year (1 Tr 21, 23, 24).

6. By the spring of 1980, Ryan had been elected President of EAMO, after having had his first contact with Stephens in negotiations during 1970-80 (1 Tr 26).

4/ It is this transfer which is the gravamen of the Unfair Practice Charge herein.

7. Ryan was involved in the following activities on behalf of EAMO[5/] between 1980 and May 1987:

a. In 1980, at the urging of the NJEA, EAMO and Ryan became actively involved in a campaign to encourage the members of the Board's "Support Staff" to join EAMO. Ryan and the NJEA organized meetings and disseminated authorization cards to these employees. Ryan attempted to obtain a written guarantee from Stephens that these employees would not lose any benefits if they were to join EAMO. According to Ryan, Stephens "reluctantly" assured that this would be done (1 Tr 45). The President of the Board, E. Carrol Gagnon, testified that the Board adopted a neutral position with regard to the Support Staff's inclusion in EAMO. The Board's only request was that it be presented with the proper documentation certifying that the requisite percentage of Support Staff members had designated EAMO as their representative. Once this documentation was received by the Board, and Ryan received his requested guarantee that their benefits would be retained, the Support Staff members became part of the EAMO unit. [1 Tr 42-45; 6 Tr 20-22].

b. In June 1981, EAMO filed a grievance on behalf of Janet Toler, a member of the Child Study Team. Toler had been asked to work until the last calendar day in June while other employees

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5/ The facts involving Ryan's activities are essentially undisputed although several conflicts in the testimony appear from time to time.

were dismissed earlier in that month and she did not receive any compensation for the additional time that she worked. The grievance was sustained and Toler received per diem compensation for the additional days that she had worked. [1 Tr 30, 36-39].

c. In the spring of 1981, an employee spoke to Ryan regarding the fact that he was retiring in June 1981 and when he inquired about payment for his accumulated sick days he was told that he was not entitled to them. Ryan, after checking the agreement, went to Stephens' office and advised him that he was misinterpreting the agreement. Stephens told Ryan that he would "think it over" and when he did so he advised Ryan that he (Ryan) was correct and that the employee was entitled to be paid for unused sick days upon retirement; the employee was paid. [1 Tr 39, 40; 11 Tr 88, 89].

d. In the spring of 1984, an issue arose concerning a non-tenured art teacher who had been hired for an opening created by a teacher on maternity leave. The Board had failed to notify this teacher by April 30th that it did not intend to rehire her for the following year. The art teacher, realizing the Board's error, sent a letter to Stephens thanking the Board for employing her for the next school year. According to Ryan, Stephens asked Ryan to speak to the teacher and ask her to withdraw her letter, since when this teacher was hired she was aware that she was replacing a teacher on maternity leave. However, Ryan refused since he did not think that this request fell within the scope of his role as

President of EAMO. The matter was resolved by the Board when it passed a motion eliminating one art teacher position with the result that the affected teacher became the subject of a RIF. [1 Tr 74-78].

e. In June 1984, James Gudzinas, a custodian, who had been given good evaluations, was informed that he was being terminated. Ryan was told by both Gagnon and Stephens that there was not enough money in the budget for Gudzinas' continued employment. When Ryan, on behalf of Gudzinas, argued that the Board was being unfair, the Board passed a motion to reinstate Gudzinas to his job as custodian. [1 Tr 61, 62; 6 Tr 30, 31].

f. In the fall of 1984, Lucille Maglio, who had been employed as a secretary in an elementary school for many years, was transferred to a secretarial position in the high school without notification. A grievance was filed on her behalf by EAMO, prior to which Ryan informally discussed the matter with Stephens, who stated that Maglio was being transferred because no one in the elementary school liked her. Ryan pointed out to Stephens that Maglio was transferred from a position, which she had held for a number of years, and that her past evaluations had shown no problems. However, the grievance was rejected by the Board and EAMO did not pursue the matter to arbitration. [1 Tr 51, 52; 6 Tr 27].

g. In the spring of 1985, Ann St. Ledger, then a non-tenured teacher, learned that she would not be reappointed for the following school year. Ryan advised her to follow the procedures established for challenging the dismissal of a

non-tenured teacher. Ryan testified that during legal proceedings instituted by a former Board member, Lynn Pierce, he received a telephone call from Stephens, in which Stephens allegedly reminded Ryan "...that if things went against him..." he would not be able "...to exercise his influence with members of the Board of Education to reinstate Ann St. Ledger..." (1 Tr 67). After Ryan had made numerous telephone calls to members of the Board, in which he "...presented her side of the story...," a compromise was suggested and St. Ledger's department chairman eventually agreed to change his recommendation and she remained in her position (1 Tr 68). It is found as a fact that Stephens denied calling Ryan at his home, stating that he would see what he could do for St. Ledger. However, it is also found as a fact that Stephens discussed the subject matter with St. Ledger's department chairman and that Stephens changed his position and ultimately supported the reappointment of St. Ledger. [1 Tr 63-68; 11 Tr 97-99].

h. In the spring of 1985, Ryan testified that a group of twelve-month secretaries in the Special Education offices claimed that they were being paid less than other twelve-month secretaries. Ryan filed a grievance on their behalf, which was rejected by Stephens who stated that they were "wrong" and were "...just looking to stir up trouble..." (1 Tr 71). The grievance then went to Board level and Ryan addressed the Board during a closed meeting. The conclusion of the Board was that the claim of these secretaries was an attempt to open up negotiations on salaries

and, thus, the Board rejected the grievance. [1 Tr 70-73; 6 Tr 36; 11 Tr 99].

i. In the fall of 1985, Stephens circulated a memo to all High School employees prohibiting them from jogging during lunch hour or immediately after school. Ryan objected to this memo and contacted Stephens, who disagreed with Ryan and felt that he was within his rights as Superintendent to issue this rule. According to Stephens, the prohibition was only in effect when teachers were to be teaching and, in fact, the directive was never enforced. [1 Tr 69, 70; 11 Tr 100-102].

j. In 1985, there were two vacancies at the High School, one for a social studies teacher and one for a head football coach. Stephens wanted to hire two different individuals to fill these positions while Ryan urged that Louis Palazzi was qualified to fill both positions and Ryan spoke with the Athletic Director at the High School in this regard. According to Ryan, who spoke with Stephens, the plan of Stephens to hire an applicant from another school would mean that a physical education teacher would have to be discharged, to which Stephens responded that that was the way it had to be. When EAMO presented its position to the Board, the Board agreed with its position and decided to hire Palazzi to fill both positions. [1 Tr 53, 54; 11 Tr 95, 96].

k. In February 1987, the Board attempted to terminate Palazzi and Palazzi indicated to Ryan that he intended to fight the Board's decision. After speaking with Palazzi, Ryan spoke

with the Athletic Director and the Building Principal, both of whom stated that they had recommended that Palazzi be retained but that Stephens had refused to pass their recommendations on to the Board. Ryan testified that Stephens would not give him his reasons for not recommending the rehiring of Palazzi. Palazzi, as a rebuttal witness for the Charging Party, testified regarding the circumstances surrounding Stephens' refusal to recommend his rehiring and the Board's concurrence in this recommendation. But, after Palazzi had mobilized community support in his favor, he addressed the Board, both publicly and in closed session, following which the Board stated its disagreement with Stephens and voted unanimously to rehire Palazzi. [1 Tr 117-119; 6 Tr 32-34; 11 Tr 95; 14 Tr 14, 15].

1. In the first half of the 1986 calendar year, John DiCola, a physical education teacher, attended a Board meeting where a problem that had arisen in the Physical Education Department was discussed. Ryan was also present at this meeting and, when one of the Board members recognized DiCola as a member of the Physical Education Department, directed a question to him relating to departmental problems, to which DiCola responded. The following day DiCola received a written reprimand from his Department Head, Roger Stephens, who was the nephew of the Superintendent. The reprimand was issued because of DiCola's having spoken at the meeting. Ryan advised DiCola to contact the NJEA, whose counsel contacted the attorney for the Board, all of which resulted in the removal of the

reprimand from DiCola's file. Stephens testified that he supported the placing of the reprimand in DiCola's file and did not think that it should have been removed, giving as his reason that DiCola should have discussed the situation first with his immediate supervisors. However, contrary to the Superintendent's position, the Board removed the reprimand from DiCola's file. [1 Tr 55-58; 11 Tr 102, 103].

Events Involving Ryan Which Occurred During the 1986-87 School Year

m. In September 1986, the unit employees of the Board returned to school without a contract. Also, this was the first year in which the Support Staff were included in the contract negotiations. EAMO decided to form a Crisis Committee to plan for a potential strike and Ryan was involved in the planning. Although a contract was ratified by both parties in November 1986 (J-1), shortly thereafter Ryan began to hear complaints from members of the Support Staff, centering around their salary increases. In an effort to resolve this matter, Ryan scheduled meetings with Support Staff members, which occurred during January, February and March 1987. Ryan and Jeffrey Swanson, a social studies teacher at the High School and an EAMO negotiator, attended these meetings and explained what compromises had to be made during the negotiations process. [1 Tr 78-81; 5 Tr 16, 17]. Ryan testified without contradiction that on March 17, 1987, a Support Staff member, Betty Nagle, stated that "...Board of Education members have told us that you sold us out in negotiations...", specifically identifying

Maurice J. Geiger as the Board member who made this statement (1 Tr 82). Ryan testified further that he interviewed other Support Staff members, including Melinda Marquis, a teacher's aide, who had had a telephone conversation with Norma A. Licitra, a Board member, in which Licitra stated that EAMO was predominantly a teachers' union and did not care about Support Staff salary increases or working conditions.[6/] Licitra acknowledged that she had had a telephone conversation with Marquis in 1987, after the contract had been signed. Marquis was very concerned over her placement on the salary guide and had called Licitra for assistance. Licitra advised her first to see her Building Principal, then, if necessary, to contact Stephens. When Marquis later telephoned Licitra to ask her if she should contact the "union," Licitra stated her opinion that she did not think it was a "grievable issue" but, nevertheless, Licitra urged her to contact Ryan. The Hearing Examiner credits Licitra's testimony, contradicting Ryan, that Marquis had not been told by Licitra that EAMO was predominantly a teachers' union and did not care about Support Staff salary increases or working conditions. [1 Tr 88; 9 Tr 103-106].

n. On March 27, 1987, Ryan sent a letter to the Board, stating that two Board members had made comments to Support

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6/ It is noted that the Charging Party did not call Nagle or Marquis to substantiate their testimony as what was stated to them by Geiger and Licitra. However, the testimony of Ryan as to what Nagle told him Geiger stated was neither contradicted nor rebutted by Geiger, who testified as a witness for the Board.

Staff members regarding contract negotiations and requested a closed session with the Board (CP-1). Gagnon responded on April 9, 1987 (R-3). At the April 13, 1987 Board meeting, Ryan asked Gagnon if the Board was going to respond to the letter. Gagnon told Ryan that the Board would not respond until the Board members who allegedly made the statements contained in CP-1 were identified. Gagnon told Ryan that no one on the Board admitted to having made the statements as alleged. After Ryan identified the two Board members, as Geiger and Licitra, no formal response was received from the Board. However, Gagnon testified that he verbally communicated to Ryan the fact that both Geiger and Licitra had denied making the statements attributed to them after their names surfaced. [1 Tr 90-99; 6 Tr 40-44].7/

o. In October 1986, Jeffrey Swanson was one of two teachers who applied for a vacancy in the Chairmanship in the Social Studies Department at the High School. During his ten years of employment with the Board, Swanson had been EAMO's Chief Negotiator for seven years and Membership Chairman for one year. Both candidates, Swanson and one Noreen Risko, were interviewed by a four-member committee appointed by Stephens. After the interview, Swanson spoke with one of the committee members, Paul Reilly, a Vice

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7/ Although Gagnon testified that both Geiger and Licitra stated to him at a closed session of the Board that they had not made the statements attributed to them regarding EAMO's representation of the Support Staff, only Licitra specifically made a denial while Geiger did not.

Principal, who told Swanson that the committee was divided evenly. Eventually the committee recommended Risko to the Board. [5 Tr 6-8]. Thereafter, Swanson spoke directly to Stephens who stated that "...there were a lot of people on the Board who thought that...(Swanson)...had a big mouth and...was too outspoken for the Union..." (5 Tr 9; see also, 14 Tr 12, 13). Swanson also spoke to several Board members, one of whom was Gagnon. Swanson told Gagnon of his upset over the interview procedure and that as a result he had no recourse but to leave the district. It was the Board that had directed Stephens to form the interview committee and it had supported the members selected by Stephens. The Board ultimately accepted the recommendation of the interview committee that Risko fill the vacant Chairmanship position. [5 Tr 10, 11; 6 Tr 58, 59; 9 Tr 63-66].

p. One school day in January or February 1987, it began to snow so heavily that Stephens decided on early dismissal. Due to difficulties with the school buses, some students were not dismissed until the regular dismissal time and these students had to be supervised. Therefore, some of the teaching staff worked a full day while others only one-half day. Ryan informally initiated the grievance procedure with Stephens, who became angry that EAMO was taking up the issue and accused Ryan and EAMO of "...once again just hunting around for issues to try to embarrass him and make him look bad..." (1 Tr 116). Stephens denied making such a statement to Ryan and the matter was never resolved. [1 Tr 113-117; 11 Tr 108].

Based on their respective demeanors, the Hearing Examiner credits Ryan's version of what transpired as to this incident.

q. In 1983, 1984 and 1987, disputes had arisen between the Board and EAMO with respect to the Board's intention to eliminate the mid-winter "break." Routinely, the Board had been in favor of reducing or eliminating the break while EAMO and, usually Stephens, had been in favor of retaining it. In March 1987, the Board had decided to eliminate the mid-winter break for the next year and Ryan testified that he had met with EAMO members to determine their position. Their decision was that Ryan should appear and argue for the maintenance of the mid-winter "break." Ryan did so and included in his presentation the results of a survey that EAMO had conducted throughout the district, which indicated that the "break" should remain on the calendar. However, the Board voted to eliminate the "break" and, according to Ryan, Gagnon stated that "...We don't have to listen to the Union..." (1 Tr 105). In response, Ryan then asked the Board if it would consider including three additional legal holidays in the school calendar for the next year, i.e., Martin Luther King's Birthday, Veterans' Day and Columbus Day. However, the Board would not agree and, at the end of its meeting, Board member Licitra stated that Ryan might as well have asked for St. Patrick's Day as an additional holiday. The final resolution was that the Board in 1987 voted for a long weekend as opposed to a full-week mid-winter "break." [1 Tr 100-105; 6 Tr 45-47; 9 Tr 101, 102; 11 Tr 80, 107].

r. Peggy Robinson, a resource room teacher and the Vice President of EAMO, learned in the spring of 1987, that Marge Levine, a supplemental teacher, was not on the list of teachers to be reappointed for the 1987-88 school year. The reason for this was that in the 1987-88 school year all supplemental teachers were required to be fully certified as teachers of the handicapped. Levine did not possess this certification but was, however, in the process of becoming certified. Robinson took up Levine's problem with George Kelley, the Director of Special Services. Robinson explained to Kelley that Levine would be properly certified by December 1987. However, Kelley stated that the certification had to be completed by September 1987, and that there was nothing he could do. Thereafter, there were several confrontations between Levine and Board administrators, one of whom, Richard Wenner, the Building Principal, told Levine that she should not have "...gone to the union..." (5 Tr 31). Wenner's testimony that he "...just asked her (Levine) why she went to the Association..." is not credited. The issue was ultimately resolved between legal counsel for EAMO and the Board, the result of which was that Levine was retained because she had tenure and, thus, was given the opportunity to complete her certification. [2 Tr 16, 17; 5 Tr 23-34; 6 Tr 50; 10 Tr 40-43, 48, 50].

s. In March 1987, Claire Sommers, a non-tenured teacher, was advised by Kelley that her contract was not going to be renewed for the following year. St. Ledger accompanied Sommers to

her post-evaluation conference with Kelley and some days later noticed that Kelley was observing Sommers again. St. Ledger asked Ryan for advice and he told her to speak with Kelley in the hallway, at which time Kelley told St. Ledger that he didn't "...have anything to say to you people. I talked to you the other day..." (4 Tr 114). Later that same day St. Ledger was asked to see the Vice Principal, Joseph Pezak, who told her that Kelley was asking questions about her schedule and wanted to know how she could find time to conduct union business when she should have been teaching. Pezak also stated that Kelley told him that he felt that St. Ledger was neglecting her responsibilities and that Pezak "...should write her up for neglecting her responsibilities..." (4 Tr 117). Kelley testified as a witness for the Board and did not deny making such a statement. There was no apparent resolution of Sommer's problem. [4 Tr 112-118; 10 Tr 16-21].

t. Early in April 1987, Ryan and Licitra had a conversation in the office of the Vice Principal of the High School. Swanson, although not a participant, overheard their conversation, in which Licitra stated, according to Ryan, that "...the worse [sic] thing the Support Staff did was to join EAMO..." and that if Ryan had enough evidence he should "...take her to PERC..." (1 Tr 112). Although Licitra denied having referred to PERC, claiming she had never heard of PERC, she did state that Ryan should do as he saw fit. Swanson's testimony as to what Licitra said was exactly as Ryan testified to above. Ryan and Swanson are

credited as to what Licitra is alleged to have said. [5 Tr 21; 9 Tr 133].

u. In April 1987, Ryan and EAMO became involved in an attempt to correct an error made by Stephens in the placement of about a dozen teachers on the salary guide in September 1986. Stephens had placed these teachers one step higher than they should have been and upon learning this he corrected the error by reducing them by one step without any prior notification. After discussions between counsel for the NJEA and counsel for the Board the matter was rectified when the Board's counsel agreed that EAMO's position was meritorious. The Board then made the appropriate adjustments. [1 Tr 124-129; 12 Tr 112-116; CP-9].

v. In the spring of 1987, discussions were initiated by the Board concerning the possible redistricting of the Board's kindergarten students and Ryan, on behalf of EAMO, became involved. Ryan was instructed by EAMO to contact Stephens in order to arrange a meeting but the issue ultimately became dormant, there having been some confusion between Ryan and Stephens' office as to whether or not EAMO intended to file a "grievance." [2 Tr 11-14].

w. In May 1987, Betty Harac, a secretary, asked Stephens for personal time in order to look for a house in Chicago due to her husband's transfer. In is undisputed that Stephens granted her permission to take this time. However, Harac later returned to work and discovered that Stephens had issued instructions that she was not to be paid for her personal time. She

requested that EAMO file a grievance on her behalf. Stephens testified that the reason for this occurrence was an error in the payroll department and that he, Stephens, never ordered that Harac not be paid. According to Ryan, Stephens stated that he was angry that EAMO had become involved in the situation since it did not concern the union and that it should not be filed as a grievance. Ultimately, Harac was paid for her personal days. [2 Tr 18-20; 11 Tr 110-112].

The Facts Relevant to the Board's Decision to Transfer Ryan

8. Stephens testified that over the past six years, there had been approximately six transfers per year, in some years there being more than six and in some years there being none. According to Stephens, the transfer of teaching staff is an ongoing process to improve education by increasing professional growth in the district. He testified that as Superintendent he is best able to see the overall picture. Stephens began to focus on the need for transfers within the Social Studies Department in November or December 1986. Ryan and Maryanne Wallace, a social studies teacher in the Upper L, were among the teachers initially considered for transfer the following year. The transfer plan formulated by Stephens for Ryan and Wallace was that they would interchange with Ryan going to the Upper L and Wallace going to the High School. It was Stephens' opinion that Ryan could "...handle pretty much any situation..." and that Wallace, among the Upper L teachers, had "...had high school experience..." [11 Tr 62, 63, 112-115; 13 Tr 3, 4].

9. Stephens did not disclose his intention to recommend the transfers of Ryan and Wallace plus two other teachers, Bruce Yates and Carol Wieboldt, until he convened a Principals' meeting on March 10, 1987. The agenda of that meeting indicates only that there was considered the "Transfer of staff members by April 1, 1987..." (CP-16). The Hearing Examiner credits the testimony of Stephens that the proposed transfers of Ryan, Wallace, Yates and Wieboldt were discussed and that no opposition was expressed by those in attendance to the transfers of Ryan and Wallace.[8/] Subsequent to the Principals' meeting, Stephens discussed the transfers of Ryan and Wallace with Shuba. Shuba testified credibly that he told Stephens that he was upset about losing Wallace because she was an excellent teacher and that he did not know what kind of a teacher Ryan was. [11 Tr 11, 115-117].

10. The Board's Education Committee meets on the first Monday of each month. A meeting was held on the first Monday of March 1987 with its three members present: Sandra Wolthoff, the Chairman for the previous three years, Carol Ann Millard and Charles J. Brinamen, Jr. At this meeting Stephens presented his proposed transfers for the next school year, i.e. Ryan, Wallace, Yates and

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8/ Thomas Shuba, the Principal of the Upper L, testified that at the Principals' meeting on March 10th, Wallace's name was not mentioned but that Ryan and the other two teachers, Yates and Wieboldt, were the subject of discussion. The discrepancy being minor, the Hearing Examiner credits the testimony of Stephens that all four individuals were discussed. [Compare 11 Tr 8-11 with 11 Tr 116].

Wieboldt However, the Committee decided not to discuss these proposed transfers since Stephens had not presented any background or reasons. The Committee members asked Stephens to provide them with the educational reasons for the transfers, after which the Committee would discuss them. Another reason for the Committee's decision not to discuss the transfers was that a new Education Committee was to be appointed on the second Monday of April, following the election of Board members the prior Tuesday and, thus, the composition of the Committee was subject to change. [9 Tr 39-44].

11. At a closed session of the Board on April 13, 1987, Stephens verbally presented his proposed transfers of Ryan, Wallace, Yates and Wieboldt.[9/] The Board's discussion regarding Stephens' transfer proposals was in general terms since the members had not seen any documentation. A concern was expressed that the individuals involved be notified as to the reasons for their transfer. Stephens was instructed accordingly. [6 Tr 66, 67; 11 Tr 122, 123; R-6].

12. On April 16, 1987, Ryan met with Stephens at the latter's request and Stephens asked Ryan if he would consider transferring voluntarily to the Upper L. Stephens gave as his reason for this request that there was a problem in the Upper L

9/ Stephens did not mention the prospective transfer of William Wolgamuth, the Principal of the High School, to the Upper L (11 Tr 122).

Social Studies Department but he did not amplify further upon his request. Stephens testified that Ryan's response was that he would "...think about it..." [2 Tr 24-26; 11 Tr 125].

13. On April 27, 1987, the first day following the spring vacation, Ryan learned that the agenda for the Board's meeting that evening contained a motion to transfer him to the Upper L and to transfer Wallace to the High School. Ryan had not discussed his proposed transfer with Stephens since April 16th. At the end of the teaching day Ryan asked Wolgamuth for permission to leave in order to speak with Stephens. However, before departing, Ryan was told by Wolgamuth and Risko, his immediate supervisor at that time, that they had had no input into the decision to transfer him to the Upper L. On his way to Stephens' office, Ryan spoke with Wallace and Shuba. Upon inquiry, Wallace stated that she was not aware of her pending transfer. Shuba told Ryan that he, too, had had no input into the decision to transfer Ryan or Wallace and that Wallace was one of the strongest teachers on his staff. [2 Tr 28-35; 11 Tr 7, 8, 10, 11].

14. When Ryan ultimately arrived at Stephens' office, his first statement was that Stephens was not being honest with him because he had just discovered that his proposed transfer was on the agenda of the Board for that evening. Ryan advised Stephens that Shuba, Wolgamuth and Risko had told him that they had had no input into the proposed transfer decision. Stephens was reminded that on April 16th he had told Ryan that he would have time to think about a

voluntary transfer. Stephens told Ryan not to worry about the evening Board meeting that day because many times in the past agenda items have been tabled, etc. [2 Tr 35-37]. Stephens in his testimony amplified upon the matters discussed between him and Ryan on April 27th, first acknowledging that it was he, Stephens, who had the transfer subject placed upon the agenda for the April 27th Board meeting, adding that the Board frequently removed from the agenda matters that Stephens had placed upon it. Stephens invited Ryan, who "appeared rather angry," to attend the meeting that evening and attempt to persuade the Board to remove his transfer from the agenda. [11 Tr 129-132].

15. At a regular meeting of the Board on April 27, 1987, Ryan and Wallace, among others, appeared. During the public portion of the meeting Ryan spoke against his transfer and Wallace requested a meeting with the Board in closed session, which was granted. [CP-3 (pp. 80, 92)]. According to Ryan, all nine members of the Board were present during the closed session as was Stephens, Ryan, Wallace and St. Ledger as a representative of EAMO. Ryan advised the Board members that he had not received any notice of involuntary transfer with written reasons as required by the contract. [J-1, Art. 5, §4]. Wallace had only learned of her proposed transfer at around 2:00 p.m. on the day of this Board meeting. Only two or three of the Board members asked questions. Millard mentioned that Ryan's transfer would be good for his professional growth. Ryan testified that Stephens offered no reasons for the proposed

transfers at the closed session and Stephens in his testimony did not contradict Ryan. Stephens was directed by the Board to provide Ryan, and presumably Wallace, with written reasons for their proposed transfers. The Board decided to remove the transfers of Ryan and the others from the agenda for that meeting. [2 Tr 37-41, 43; 6 Tr 69-72; 11 Tr 133, 134].

16. On April 28, 1987, Ryan telephoned Wolthoff and wanted to know if his proposed transfer had been discussed by the Education Committee, to which Wolthoff replied the transfers had not been discussed. Wolthoff indicated to Ryan that all of the Board members were "under pressure" because his proposed transfer was a "controversial vote..." (9 Tr 52). Ryan testified that she told him that she had in the past often been chastised by some Board members for being "...too soft on the union..." and that one of those members was Geiger (2 Tr 46).[10/] Wolthoff did indicate to Ryan that her mind was not made up as to whether or not she would support Ryan's transfer and that her vote would be based upon what she felt was best for the students in the district. Wolthoff, in a telephone conversation initiated by St. Ledger on May 5, 1987, told St. Ledger that several of the Board members she knew felt that Ryan's transfer was for educational purposes and that it was not a vendetta of any sort (9 Tr 58). Wolthoff ended her conversation with Ryan, and had

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10/ Wolthoff acknowledged that she is sympathetic to the interests of EAMO and that at some Board meetings she has found herself attempting to articulate the position of the teachers and EAMO (9 Tr 59, 60).

no further communication with him thereafter, when he stated that it was time that EAMO got involved in school board elections and that it would support people who supported them, then asking Wolthoff when she was up for election. [2 Tr 44-46; 9 Tr 52-54]. Ryan also testified without contradiction that on April 29, 1987, he telephoned another Board member, Lee Mund, and asked him why Geiger appeared to have a negative attitude toward him (Ryan). Mund replied that Geiger didn't like him. [2 Tr 46, 47].

17. On May 1, 1987, Stephens accused Ryan of having written an underground newsletter, entitled "Rat Poison" (R-2). This document strongly criticized Ryan's transfer and referred unfavorably to the Board and its members. It had been distributed to EAMO members through the inter-school mails. EAMO disclaimed any responsibility for the issuance of this document but Stephens elected to pursue the matter further on the theory that Ryan might have written "Rat Poison" on a typewriter which he borrowed from the Social Studies Department on April 27th. On April 30, 1987, Risko told Ryan that the Mt. Olive Police Department wanted to check the typewriter, which was returned by Ryan to the High School office on May 1st. Thereafter Stephens summoned Ryan to his office where Stephens accused him of writing "Rat Poison." When Ryan accompanied Stephens to a room where two secretaries were present, Joyce Martelli and Vera Burd, Ryan saw the typewriter on the table. Next to it was a piece of paper with the first sentence "Rat Poison." typed upon it. Ryan testified that he told Stephens that anyone

could have typed that sentence using that typewriter. Stephens testified that although he did not believe that Ryan was the author he did believe that it was typed on the Social Studies Department typewriter. Stephens also added that although he did not believe that EAMO was responsible for the authorship of "Rat Poison," he did believe that members of EAMO aided in its publication.11/

18. On May 8, 1987, Ryan received a list of three reasons for his transfer from Wolgamuth, his Building Principal, which were in skeleton form, i.e., for professional growth; to add a new perspective at the Upper L; and to improve program articulation (CP-11). Although this document was unsigned there is no doubt but that it was written by Stephens. [2 Tr 53-58].

19. On May 11, 1987, the Board held an agenda meeting and the minutes reflect that among others, Arnold Chait, the Board's counsel, and Stephens were present (CP-5 & R-7). Chait testified as a witness for the Board that Ryan had not really been given a reasonable opportunity to learn of his transfer and the reasons for it. The Board asked Chait for guidance and, in response, Chait listed four elements that he thought the Board should consider. First, the Board should examine whether or not sound educational

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11/ The Hearing Examiner notes here that many pages of testimony focused upon the "Rat Poison" issue but no definitive testimony ever pinpointed that Ryan or EAMO was responsible for its authorship and issuance, notwithstanding that the Social Studies Department typewriter may have been the instrument upon which it was written. [3 Tr 41-51; 11 Tr 165-169].

reasons existed for the proposed transfers. Secondly, the Board should also consider whether the particular individuals, who were proposed for transfer, were selected based upon educational objectives and goals. Third, Chait advised the Board that it ought to know whether or not the recommendations for transfer were coming from the Superintendent or were recommendations initiated from lower level management. In this third connection, Chait queried whether or not the proposed transfers were part of a program of departmental reorganization. Finally, Chait was troubled by the absence of appropriate notice and a reasonable explanation to Ryan, in particular, as well as to the others whose transfers were proposed. During the time that Chait addressed the Board, Ryan was not present although he was later invited into the meeting for about three minutes by Gagnon, at which time he was advised that the Superintendent was being directed to elaborate upon the three reasons given to Ryan (on May 8th). Chait also testified that the Board informed Ryan that they had set May 18th as the date when they would consider Stephens' statement of reasons and any response that Ryan wished to offer. [2 Tr 61, 62; 11 Tr 135, 136; 12 Tr 12-19].

20. On May 15, 1987, Ryan received from Wolgamuth a one and one-half page document, which amplified upon the three earlier reasons that Stephens had given to Ryan and to the Board for Ryan's

transfer (CP-7). May 15th was the Friday immediately preceding the next Board meeting of May 18, 1987. [2 Tr 62, 63; 11 Tr 136].12/

21. The Board held its next regular meeting on May 18, 1987, and the minutes of this meeting and the relevant testimony establish the following:

a. Among the matters on the Board's agenda of this meeting were the recommendations of Stephens to transfer Ryan, Wallace, Yates, Wieboldt and Wolgamuth. The minutes disclose that Gagnon opened the meeting to the public at 8:00 p.m. and that a number of citizens, parents, colleagues and students came forward to speak against Ryan's transfer on the ground that it was not educationally motivated. [R-4, p. 105; 2 Tr 76, 77; 4 Tr 84, 85].

b. Thereafter, the Board went into closed session to discuss the issue of Ryan's transfer, following which the public session was resumed and Stephens gave his reasons for recommending the transfers of Ryan and Wallace. According to the Board's minutes and the testimony of Ryan, Stephens gave as his reasons the three reasons cited in the document provided to Ryan on May 15, 1987, supra. [R-4, p. 106; CP-7; 2 Tr 77-79].

c. Ryan, in response, accused the administration of transferring him under the guise of educational gains, following which Licitra asked Stephens if there was anything in Ryan's

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12/ The Charging Party notes correctly that Stephens never responded, either in CP-7 or in any subsequent writing, to the four points raised by Chait at the Board's closed session meeting on May 11th, supra.

personnel file which might affect the Board's decision "...one way or the other as far as the transfers..."? (9 Tr 122) [2 Tr 80]. Stephens responded in the affirmative, stating that there were three memoranda: (1) a memorandum to Ryan from a Building Principal regarding an argument that he had had with a Vice Principal in the High School; (2) a memorandum reprimanding Ryan for an incident in his classroom where he either kicked or threw a chair through a window (the "chair" incident); and (3) a claim by Stephens that Ryan had submitted a large number of incomplete grades at the end of the third marking period. [2 Tr 80-82; 6 Tr 85].[13/]

d. After Stephens addressed the three matters contained in Ryan's personnel file, supra, Ryan addressed the Board, following which he questioned Stephens as to the reasons for his transfer recommendation of Ryan (2 Tr 82-89).

e. After Ryan had finished addressing the Board and questioning Stephens, the Board voted unanimously[14/] to approve the transfers of Ryan and Wallace; the Board also approved the transfers of Yates and Wieboldt with three dissenting votes and the transfer of Wolgamuth with two dissenting votes (R-4, pp. 106, 107).

13/ Although considerable testimony was elicited regarding these three events, the Hearing Examiner will not dwell further upon them for the reason that Stephens testified that none of these three items were taken into consideration in his recommendation to transfer Ryan (11 Tr 143-150). The references to the testimony regarding these three items may be found in the transcript as follows: 3 Tr 29-39; 11 Tr 144-150; 13 Tr 37-42.

14/ Only eight members of the Board voted since Millard was absent (R-4, p. 103).

22. All nine of the members of the Board testified at the hearing and each was asked for his or her reasons for voting to approve Stephens' recommendation that Ryan be transferred from the High School to the Upper L.

a. Gagnon testified within the framework of the three reasons for transfer, which were set forth by Stephens in CP-7, indicating his agreement with those reasons (6 Tr 100-105). Gagnon was persuaded that the transfers of Ryan and Wallace, respectively, would further the attempt of the Board to "marry" the curriculum of the High School into that of the Upper L (6 Tr 104). Specifically, Gagnon testified that EAMO's activity was not a factor in his decision (6 Tr 105).

b. Licitra testified that she felt Ryan would be invaluable in preparing lower level students for the High School curriculum, and that the transfers of Wallace and Ryan would aid in program articulation between the schools (9 Tr 125). Also, like Gagnon, Licitra insisted that Ryan's presidency of EAMO was not a factor in her decision (9 Tr 125, 126).

c. Sandra Bullock, the newest Board member, had interviewed Board members, parents and students in order to gain background information on Ryan, which caused her to vote for his transfer inasmuch as she felt that it would aid his professional growth and that Upper L students could benefit from his expertise as a teacher (9 Tr 25-27). She, too, testified that Ryan's union participation played no part in her decision (9 Tr 26).

d. Wolthoff testified that, as a former teacher, she was in favor of transfers as a means for teachers to learn more about themselves and their subject and, finally, that she never took into consideration that Ryan was the President of EAMO (9 Tr 37, 46, 47).

e. Like testimony was given by the remaining Board members, which appears in the transcript as follows: McLaren--8 Tr 45-47; Mund--8 Tr. 56; Millard--9 Tr 9, 10;[15/] Brinamen--10 Tr 6-9; and Geiger--11 Tr 22-24, 28, 31, 32.[16/]

23. On May 20, 1987, Risko issued a memorandum to Ryan, in which she stated that his "sub folder lacked emergency plans," the significance of which was that the librarian sent the wrong equipment to his classroom. Ryan testified that Risko told him that Stephens had directed her to place this memorandum in Ryan's personnel file and St. Ledger's testimony corroborated Ryan. However, Risko testified credibly that the memorandum was not placed in Ryan's personnel file nor was it given to Stephens; rather it was

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15/ Although Millard was absent from the May 18th meeting where Ryan's transfer was unanimously approved, she testified that she was in favor of his transfer (9 Tr 11).

16/ See, also, the testimony of Board counsel Chait, who stated that in his years of representing the Board he has observed a positive working relationship between the Board and EAMO and Ryan. Chait also testified that in his opinion the Board has never manifested anti-union sentiments toward EAMO or Ryan and that the decision to transfer Ryan was in no way related to his activities on behalf of EAMO (12 Tr 8, 26, 27, 34-38).

simply a memorandum from Risko to Ryan. [CP-13; 3 Tr 57, 58; 4 Tr 103, 104; 10 Tr 73, 74].17/

24. The Board held a meeting next on June 8, 1987, where, even though it was an agenda meeting, the public was permitted to address the transfer issue. A spokesman for a parent group known as "Parents to Protect Education in Mt. Olive" presented the Board with the petition bearing over 1200 signatures. Also, members of the public, including parents, students and others, spoke in opposition to Ryan's transfer and thereafter, at some point, the focus of the meeting was upon the transfer of Wolgamuth. Although Ryan addressed the Board and Stephens several times during the meeting, the Board did not discuss Ryan's transfer either at the public portion of the meeting or in the two closed sessions. [3 Tr 5-14; 6 Tr 95; 12 Tr 49-53; R-8; CP-15].

17/ The Hearing Examiner places little weight upon any post-May 18, 1987 events, such as that of Risko's May 20th memorandum, since the operative event of Ryan's transfer by the Board occurred at its meeting on May 18th, supra. The presence or absence of discriminatory motivation in Ryan's transfer must necessarily be assessed in terms of the conduct of the Board members, Stephens and other administrators, who acted as agents of the Board. Occasionally, an event or events may occur subsequent to the incident of alleged discriminatory conduct, which may shed light on the motivation of the Respondent's agents, notwithstanding that it occurred after the event or incident upon which the Complaint is founded. However, no probative events occurred in the instant case. In so concluding, the Hearing Examiner has considered Risko's May 20th memorandum, supra, the June 8th and June 29th Board meetings, infra, and the testimony of Celeste C. Smith regarding an August 1987 conversation with Stephens (2 Tr 7, 8).

25. The final meeting of Board during the 1986-87 school year occurred on June 29, 1987. Wolgamuth made a public statement regarding his transfer and, although Ryan did not speak on his own behalf, St. Ledger and Cathy Thornton, spokesmen for EAMO, continued to challenge the action of the Board in having transferred Ryan to the Upper L at its May 18th meeting. [3 Tr 15-22, 26-28; R-9, pp. 14, 15].[18/]

DISCUSSION AND ANALYSIS

The Respondent Board Did Not Violate §§5.4(a)(1) And/Or (3) Of The Act Because It Established A Legitimate Business Justification For Its Transfer Of Michael J. Ryan From The High School To The Upper L For The 1987-88 School Year.

This case is governed by Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) where the New Jersey Supreme Court adopted the analysis of the National Labor Relations Board in Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980)[19/] in "dual motive" cases, involving an alleged violation of Section 8(a)(1) or Section 8(a)(3) of the National Labor Relations Act.[20/] In such

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18/ No other events occurred prior to the filing of the instant Unfair Practice Charge on July 13, 1987.

19/ The United States Supreme Court approved the NLRB's "Wright Line" analysis in NLRB v. Transportation Mgt. Corp., 562 U.S. 393, 113 LRRM 2857 (1983).

20/ These provisions of the NLRA are directly analogous to Sections 5.4(a)(1) and (3) of our Act.

cases, Wright Line and Bridgewater articulated the following test in assessing employer motivation: (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision, in this case the Board's non-renewal of Pelaschier's contract; and (2) once this is established, the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity (see 95 N.J. at 242), i.e., the employer must establish a legitimate business justification for its action.

The Court in Bridgewater further refined the above test by adding that the protected activity engaged in must have been known by the employer and, also, it must be established that the employer was hostile towards the exercise of the protected activity (see 95 N.J. at 246).[21/] Finally, as in any case involving alleged discrimination, the Charging Party must establish a causal connection or nexus between the exercise of the protected activity and the employer's conduct in response thereto: see Lodi Bd. of Ed., P.E.R.C. No. 84-40, 9 NJPER 653, 654 (¶14282 1983) and University of Medicine and Dentistry of New Jersey, P.E.R.C. No. 86-5, 11 NJPER 447 (¶16156 1985).

21/ The Court in Bridgewater stated further that the "Mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or a substantial reason for the employer's action" (95 N.J. at 242).

As to the first part of the Bridgewater test, it is clear that Ryan engaged in extensive protected activities under the Act since he became an EAMO Building Representative during the 1978-79 school year. By the spring of 1980, Ryan had been elected president of EAMO and participated in contract negotiations that year, followed by numerous formal and informal grievance activities on behalf of EAMO from the spring of 1980 through the date of his transfer from the High School to the Upper L on May 18, 1987. [See Findings of Fact Nos. 5-7(a) through (w), supra].

The fact that Ryan's "grievance" activity was both informal and formal in nature is irrelevant to the issue of protected activity under the Act. The Commission in Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3, 9 (¶17002 1985) stated that "...Under Bridgewater...any level of protected activity could satisfy the first part of the test if that activity motivated the discipline..." (emphasis supplied). Also, the Commission many years ago decided that "...individual employee conduct whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employees in a recognized or certified unit, constitute protected activities under our Act...": North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (at fn. 16) [¶4205 1978]. Subsequent decisions of the Commission with respect to filing of grievances as protected activity have never distinguished between formality or informality

regarding the filing of grievances, complaints, etc. as set forth in North Brunswick, supra. For example, see Lakewood Bd. of Ed., P.E.R.C. No. 79-17, 4 NJPER 459, 461 (¶4208 1978); Dover Municipal Utilities Authority, P.E.R.C. No. 84-132, 10 NJPER 333, 338 (¶15157 1984); Pine Hill Bd. of Ed., P.E.R.C. No. 86-126, 12 NJPER 434, 437 (¶17161 1986); and Hunterdon Cty. Sheriff, P.E.R.C. No. 87-13, 12 NJPER 685 (¶17259 1986).

It cannot be gainsaid that Ryan's extensive protected activities were known to the Respondent, having either been admitted or proven on the record. Hence, the next question is whether or not there is prima facie evidence that the Respondent Board manifested hostility or anti-union animus towards Ryan, sufficient to satisfy the Bridgewater caveat, supra, that the "Mere presence of anti-union animus is not enough..." The Charging Party must also establish that "...anti-union animus was a motivating force or a substantial reason..." for the Board's decision to transfer Ryan from the High School to the Upper L for the 1987-88 school year.

The Charging Party's proofs as to hostility or anti-union animus establish the following:

(1) In Finding of Fact No. 7(m), Geiger is found to have stated in or around of March 1987, that EAMO had "sold out" the

Support Staff members in negotiations;[22/]

(2) In Finding of Fact No. 7(o) Stephens is found to have stated to Swanson, in or around October 1986, that a lot of people on the Board thought that he "...had a big mouth and...was too outspoken for the Union...";

(3) In Finding of Fact No. 7(p) it is found that in January or February 1987, Stephens [in response to Ryan's having informally initiated the grievance procedure when certain teachers worked a full day on a "snow day"] accused Ryan and EAMO of "...once again just hunting around for issues to try to embarrass him and make him look bad...";

(4) In Finding of Fact No. 7(q), it is found that in March 1987, Board President Gagnon [in discussing the issue of the appropriate mid-winter "break"] stated that "...we don't have to listen to the Union..." Licitra later stated to Ryan, in an obviously sarcastic manner, that he might as well have asked for St. Patrick's Day as an additional holiday, this having occurred after Ryan had suggested Martin Luther King's Birthday, Veterans' Day and Columbus Day as alternative holidays in the school calendar;

22/ Geiger, who testified as a witness for the Board, did not deny making this statement, which was attributed to him by Nagle. On the other hand, Licitra credibly denied that Marquis had been told by her (Licitra) that EAMO was predominantly a teachers' union and did not care about Support Staff salary increases or working conditions. See also, Finding of Fact No. 7(n).

(5) In Finding of Fact No. 7(r) it is found that in the spring of 1987, Richard Wenner, a Building Principal, told Levine that she should not have "...gone to the union...";

(6) In Finding of Fact No. 7(s) it is found that in March 1987, Kelly stated to St. Ledger that he didn't "...have anything to say to you people. I talked to you the other day...," which statement occurred in the context of St. Ledger assisting Summers; and later in the same day Pezak told St. Ledger that Kelly was questioning her schedule, questioning how she could conduct union business when she should have been teaching; Kelly added that Pezak "...should write her up for neglecting her responsibilities..."; and

(7) In Finding of Fact No. 7(t) it is found that Licitra stated to Ryan in April 1987 that "...the worse [sic] thing the Support Staff did was to join EAMO..."[23/]

The Hearing Examiner, in disagreement with the Charging Party, is convinced that the above catalog of the statements and conduct of Respondent's representatives fails to demonstrate [even prima facie] that anti-union animus or retaliation was a "substantial" or a "motivating factor" in the Board's decision at

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23/ The Hearing Examiner, in evaluating the proofs as to animus or hostility on the part of the Board, does not find probative either the conduct of Stephens in connection with "Rat Poison" (see Finding of Fact No. 17, supra) or any failure of the Board to have followed the recommendations of Chait, which were provided at its meeting on May 11, 1987 (see Finding of Fact No. 19, supra).

its meeting on May 18, 1987, to transfer Ryan from the High School to the Upper L for the 1987-88 school year. This is particularly evident when the facts of this case are compared with those in four previous decisions of the Commission, involving involuntary transfers of teachers who were highly visible activists. See: Laurel Springs Bd. of Ed., P.E.R.C. No. 78-4, 3 NJPER 228 (1977)[Association's Chief Negotiator]; West Paterson Bd. of Ed., P.E.R.C. No. 83-22, 8 NJPER 545 (¶13250 1982)[Association President]; Lodi Bd. of Ed., P.E.R.C. No. 84-40, 9 NJPER 653 (¶14282 1983)[Association President]; and Fairview Bd. of Ed., P.E.R.C. No. 87-107, 13 NJPER 542 (¶18200 1987)[AFT Local President, Vice-President and Chairman of Negotiations Committee].

The Commission agreed with the Hearing Examiner in Laurel Springs that the involuntary transfer of the Association's Chief Negotiator (Becken) was not in retaliation for her Association activities but rather was "...for educational policy reasons based upon its (the Board's) judgment of what was best for the educational process in the...district..." (3 NJPER at 228). The Hearing Examiner had found no "hostile reaction by the Board" to the exercise of protected conduct by Becken in the months immediately preceding her transfer even though the Board's President had manifested annoyance and even anger toward her on at least one occasion in the prior year, thus, concluding that illegal motivation was not established. [3 NJPER at 133].

The Association President (Binder) in West Paterson had an even more extensive record of protected activities than had Ryan in the instant case. Not only had she handled twelve informal grievances during a four or five-year period but she had testified as the main witness for the Association at five arbitration hearings where the Association prevailed. Also, Binder's testimony had directly conflicted with that of the superintendent. Additionally, Binder had been the primary witness for the Association in two proceedings initiated by the Board before the Commission. [8 NJPER at 452, ¶6].

Further, in West Paterson, it was found that a deteriorating relationship had existed between Binder and the superintendent over the course of ten or twelve years, i.e., the superintendent had on at least 12 to 15 occasions referred to her as a "thorn in his flesh" and had advised her that the Board considered her a "troublemaker" who was always "stirring up things." Finally, about one year before the involuntary transfer, the superintendent had become very upset over Binder's having filed three grievances within one week, stating that he did not know what she was trying "to do to me." [8 NJPER at 452, ¶7].

The Commission concluded in West Paterson that the Charging Party failed to prove that Binder's activities were a substantial or a motivating factor in the superintendent's recommendation to transfer her from the middle school to an elementary school. Also, even assuming arguendo that such proof had been established, the

Respondent proved that a legitimate business justification was the reason for the involuntary transfer of Binder, based upon an educational policy decision to remedy a deficiency in the elementary school.

In Lodi, the Commission dismissed the complaint where this Hearing Examiner found that the Association President's (Coppa) involuntary transfer from a Title I teacher to a fifth grade teacher was not illegally motivated, i.e., the transfer was not in retaliation for the filing of numerous grievances over an eight-year period. Nor was there evidence of anti-union animus on the part of the Board where, as a result of the transfer, Coppa found it more difficult to perform her Association duties. The Board's action was predicated upon an educational policy decision.

Finally, in Fairview, the Commission concluded that a teacher, who had served as the AFT Local President, Vice-President and Chairman of the Negotiations Committee (Stefan), was transferred involuntarily because of the educational needs of the district, i.e., protected activities were not a motivating factor in the decision to transfer her. The alleged hostility between a Board member and Stefan was found to involve "personality disagreements" rather than anti-union animus.[24/]

24/ Although the Hearing Examiner was troubled by certain aspects of the transfer decision, which suggested some contradiction in the stated reasons for the transfer, the record as a whole did not warrant the conclusion that the transfer was for anti-union reasons. [12 NJPER at 801].

The Hearing Examiner can find no basis for distinguishing the conclusions reached by the Commission in each of the four above cases from that reached in the case at bar, namely, that anti-union animus or hostility was not a motivating force or reason for the Board's decision to transfer Ryan from the High School to the Upper L. However, even assuming arguendo that the Charging Party's proofs satisfied the first part of Bridgewater, supra, the Hearing Examiner is satisfied that the Respondent has demonstrated by a preponderance of the evidence that the same action would have taken place even in the absence of Ryan's exercise of protected activities on behalf of EAMO.[25/] When one looks closely at all of the evidence adduced in this case, it parallels most closely the facts in West Paterson, where the President of the Association was engaged in extensive protected activities and had a most difficult relationship with the superintendent. This is precisely what the Charging Party contends is the factual setting in the instant case. Nevertheless, the Board in West Paterson established that it had a valid educational reason for transferring the President and it did so over her objection.

25/ In concluding that the Board legally transferred Ryan on May 18, 1987, the Hearing Examiner has not relied upon Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 156 (1978) as authority. The Commission has distinguished Ridgefield Park for the purpose of deciding whether or not a public employer retaliated against an employee for the exercise of protected activities. See Essex Cty. Vocational Schools, P.E.R.C. No. 82-32, 7 NJPER 585, 587 (¶12263 1981), which states that while a public employer has an unfettered prerogative to transfer an employee involuntarily "...such a transfer may not be motivated by any discriminatory intent..."

So, too, does the Hearing Examiner find in the instant case that the Board had valid educational reasons for the reciprocal transfers of Ryan and Wallace between the High School and the Upper L.

The Hearing Examiner finds the evidence persuasive that there had been an average of six transfers per year within the district. Further, he has accepted the testimony of Stephens that transfers are part of an ongoing process to improve education by increasing professional growth and, also, that as superintendent he is in the best position to see the overall picture as to when and whether transfers are necessary. Additionally, the reasons given by the nine Board members for approving Stephens' recommendation to transfer Ryan strike the Hearing Examiner as essentially neutral and not tainted by any discriminatory motivation.[26/] Recall that the decision of the Board was unanimous as to the eight members present on May 18th and, therefore, any alleged illegal motivation on the part of one or two or the Board members, even if credited, would not have affected the outcome. Each of the nine Board members credibly

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26/ Admittedly, the conduct of the Board and its representatives in this case was a bit rough around the edges in that Ryan was only belatedly given satisfactory written reasons for his transfer and, additionally, the Board failed to follow the guidance which it had requested at its May 11, 1987 meeting from attorney Chait, who "laid out" four basic procedural elements for the Board to follow in the transfers involved. See Fairview, supra [12 NJPER at 801].

testified[27/] that Ryan's protected activities played no part in their decision to vote for his transfer.

Thus, the Hearing Examiner finds and concludes that the Respondent Board has established a legitimate business justification for its decision on May 18, 1987, to transfer Ryan from the High School to the Upper L. In other words, the Board made its decision to transfer Ryan even in the absence of his protected activities.

* * * *

Based upon the entire record in this case,the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) when it involuntarily transferred Michael J. Ryan from the High School to the Upper Elementary School on May 18, 1987, notwithstanding that Ryan, as the Association President, had engaged in extensive protected activities and had a confrontational relationship with the Superintendent, Chester Stephens.

27/ In concluding that the eight Board members did not vote to transfer Ryan because of his activities on behalf of EAMO, the Hearing Examiner has duly considered Findings of Fact Nos. 7(m) through 7(v) and Nos. 16, 19, 21 and 22, supra.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: December 1, 1988
Trenton, New Jersey