P.E.R.C. NO. 90-66

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, INC.,

Charging Party

SYNOPSIS

The Public Employment Relations Commission finds that the Mt. Olive Township Board of Education violated the New Jersey Employer-Employee Relations Act when its superintendent recommended that Michael J. Ryan be transferred because of his Association activities and when the superintendent told Ryan that he had been told to watch him. The Complaint was based on an unfair practice charge filed by the Education Association of Mt. Olive.

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In the Matter of

MT. OLIVE TOWNSHIP
BOARD OF EDUCATION,

Respondent,

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

EDUCATION ASSOCIATION
OF MT. OLIVE, INC.,

Charging Party

Appearances:

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

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

DECISION AND ORDER

On July 13, 1987, the Education Association of Mt. Olive, Inc. filed an unfair practice charge against the Mt. Olive Township Board of Education. The charge alleges 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 the high school to the upper elementary school, allegedly in retaliation for his activity as the Association's president.

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

On September 2, 1987, a Complaint and Notice of Hearing issued. On September 18, the Board filed an Answer admitting it transferred Ryan, but denying it retaliated against him.

On September 23, 1987, the Association filed an amended charge. The amendment alleges that subsection 5.4(a)(1) was violated when: (1) two Board members allegedly told support staff employees that the Association had sold them out; (2) Ryan was transferred soon after criticizing these Board members, and (3) the superintendent allegedly told Ryan that the Board had to scrutinize everything he did because of his union activities. The Board filed an amended Answer denying each allegation.

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 dismissing 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), he concluded that Ryan's Association activity was not a motivating factor in his transfer and that the Board would have transferred him even absent that activity.

On January 23, 1989, the Association filed exceptions. It asserted that the transfer was illegally motivated and that the Hearing Examiner did not address the amended charge.

On April 20, 1989, we remanded the case to the Hearing Examiner to address the amended charge and to make supplemental findings. P.E.R.C. No. 89-106, 15 NJPER 268 (¶20115 1989).

On August 7, 1989, the Hearing Examiner issued his second report. H.E. No. 90-5, 16 NJPER ___ (¶____ 1989). He reaffirmed his recommended finding that Ryan's transfer was not illegally motivated, but he concluded that subsection 5.4(a)(1) was independently violated by: (1) a statement by Maurice Geiger, a Board member, to Betty Nagle, a support staff employee, that the Association had sold out the support staff; (2) a statement by superintendent Chester Stephens to Ryan that it was wrong for Geiger and Norma Licitra, another Board member, to accuse the Association of selling out the support staff; (3) a statement by Stephens to Ryan that the Board had told him to "watch" Ryan; and (4) statements by Stephens to teachers Louis Palazzi and Jeffrey Swanson calling Swanson a "big mouth" and "too outspoken for the union."

On September 8, 1989, both parties filed exceptions. The Association's exceptions incorporated its prior exceptions and post-hearing brief. They reasserted that the transfer was illegally motivated. The Board's exceptions asserted that there is insufficient non-hearsay evidence to prove any violations of subsection 5.4(a)(1). The Board noted in particular that the Hearing Examiner had erroneously found that Stephens had not denied telling Ryan that the two Board members had made improper statements or that the Board had told Stephens to watch Ryan.

On October 30, 1989, we remanded the case again. P.E.R.C. No. 90-40, 15 NJPER 631 (¶20265 1989). We ordered the Hearing Examiner to reconsider his findings in light of the denials.

On November 9, 1989, the Hearing Examiner issued his second supplemental report. H.E. No. 90-23, 16 NJPER ____ (¶____ 1989). After rejecting a Board motion to reopen the record, he found that subsection 5.4(a)(1) was violated when Stephens told Ryan that (1) Geiger and Licitra should not have accused the Association of selling out the support staff, and (2) the Board had told Stephens to watch Ryan. He also found that subsection 5.4(a)(1) was violated when Stephens told Swanson that Swanson had a big mouth and was too outspoken for the union. The Hearing Examiner rescinded his hearsay-based finding that Geiger told Nagle that the Association sold out the support staff and his recommendation that Stephens violated 5.4(a)(1) by criticizing Swanson in a conversation with Palazzi. The Hearing Examiner readopted his recommended finding that the transfer had not been illegally motivated.

On December 11, 1989, both parties filed exceptions incorporating their prior exceptions and post-hearing briefs. The Association took issue with certain supplemental findings and the Hearing Examiner's application of the residuum rule. The Board took issue with the Hearing Examiner's findings that Stephens made the two statements to Ryan discussed in the preceding paragraph.

We have reviewed the record. The Hearing Examiner's original findings of fact in H.E. No. 89-18 (H.E. at 3-33) and his supplemental findings of fact in H.E. No. 90-5 (H.E. at 3-9) and H.E. No. 90-23 (H.E. at 4-8) are generally accurate. We incorporate them with these corrections, observations, and additions.

Findings of Fact in H.E. No. 89-18

We modify finding no. 3 to reflect that Ryan was hired by the West Morris Regional School District in 1977 to teach at Mt. Olive High School. He became a Board employee after the 1978 deregionalization (1T17).

We correct a typographical error in finding no. 6. The school year should be 1979-80.

We modify finding no. 7K to reflect that Stephens recommended that Palazzi not be rehired as football coach. His job as a social studies teacher was not an issue (1T117).

We defer considering finding no. 7M about Geiger and Licitra's alleged statements to support staff members until we review the supplemental findings of fact in H.E. No. 90-23.

We modify finding no. 7K to reflect that Stephens spoke with Swanson in January 1987 (5T9).

We modify finding no. 7Q to add Gagnon's explanation of his statement that the Board didn't have to listen to the union about the calendar issue. Gagnon explained that the issue also affected students, parents and administrators (6T46-6T47).

We add to finding no. 8 that the high school and the upper elementary school had an integrated social studies department since the 1978 deregionalization. The schools had an integrated curriculum and one department head (10T56; 11T13-11T14). Stephens admitted that the Board was mistaken in thinking that the social studies department was not organized on a 7-12 basis (13T11-13T12). Other departments have not been merged yet (13T6).

We modify finding no. 11 to reflect that Stephens recommended the transfer of William Wolgamuth, the high school principal, to the Mountain View School (R-4). We add that at the April 13 meeting, Gagnon asked if the transferees had been notified. When Stephens said they had, Gagnon asked Stephens to send him a copy of the notice as well as the written reasons (7T11). We also add that the minutes of that meeting reflect that the reason Stephens gave for transferring Ryan was "to improve the middle school" (R-6).

We add to finding no. 13 that the Board was upset with Stephens at the April 27 meeting because he had disobeyed its instruction to give the transferees proper notice and written reasons (9T110).

We add to finding no. 17 Wolthoff's explanation of what she meant when she said the Board was "under pressure" and the proposed transfer was a "controversial vote." She explained that Board members "felt that we had to really be sure in our decision on the vote and that part of our code of ethics once that decision was made was that we would honor the final decision" (9T52).

We accept finding no. 17. The evidence was inconclusive on who wrote and circulated "Rat Poison."

We accept finding no. 22 about the motivations of each Board member who voted to transfer Ryan. The Board did not investigate the reasons for Stephens' recommendation (8T33; 10T7; 11T51).

We correct finding no. 23. Ryan's weekly lesson plan referred to a film, but no VCR was available. Ryan's department head, Noreen Risko, checked the folder which was supposed to contain his emergency plans. It was empty. Risko wrote Ryan a memo (CP-13; 10T73).

Supplemental Findings in H.E. No. 90-5

We defer consideration of the alleged "sold you out" and "watch you" comments until we review the findings in H.E. No. 90-23.

We add to finding no. 29 that Palazzi had two disputes with Stephens about his status as football coach: (1) when Stephens recommended against hiring him in August 1985, and (2) when Stephens recommended against reappointing him in early 1987. We accept the Hearing Examiner's credibility determination based on Palazzi's demeanor, although we would not have ruled out the possibilty that Palazzi had a grudge.

Supplemental Findings of Fact in H.E. No. 90-23

We agree with finding no. 35. No competent evidence supports Ryan's hearsay testimony that Betty Nagle told him that Geiger told her that "your union sold you out."

Ryan also testified that another support staff employee, Melinda Marquis, told him that Licitra told her that the Association was a teachers' union and did not care about the support staff. Licitra denied making these comments. The Hearing Examiner credited that denial. We accept that determination.

The Hearing Examiner also found that Stephens told Ryan that it was wrong for Licitra and Geiger to have made the alleged statements to support staff employees. In light of our review of the record and given Licitra's credited denial, we modify that finding. We find that Stephens merely acknowledged that if such statements were made, they were improper.

First, we look at Ryan's own testimony. During a workshop break in late March 1987, he spoke with Stephens about a letter he sent on March 27 to the Board. That letter (R-3) alleged that two Board members had approached support staff members and criticized the Association, but did not identify the Board members or the employees. Ryan "brought up the issue of Board of Education members allegedly having made certain statements to staff people. [He] told Mr. Stephens if that was true, that was really wrong for them to have done that." According to Ryan, Stephens agreed: "Yes, I know that was wrong for them to do that. I don't know why they would have done that. They tried to be really helpful but then they get involved in things and they screw things up" (1T98). Given the way Ryan framed the question, we do not read Stephen's response as an acknowledgement that the statements were made.

Second, we note the circumstances. Ryan wrote the letter on March 27 and spoke with Stephens soon afterwards. The letter did not identify any names; the Board did not meet until April 13; no one admitted having made the statements; the names were not supplied until after the meeting, and Stephens testified he did not speak

with Licitra or Geiger about the alleged statements (13T85). We think it improbable that Stephens would have had a basis for acknowledging the statements as true before he talked with Ryan.

Finally, Licitra did not make the alleged statement. Why then would Stephens acknowledge that she did?

Accordingly, we find that Stephens answered the question asked: if the statements alleged were made, they were improper.

We accept finding no. 37 that Stephens told Ryan that the Board had told Stephens to watch Ryan. We elaborate on the context.

At the May 18 Board meeting, Stephens answered a question about Ryan's personnel file by citing three incidents, one of which involved his submitting many incomplete grades. Ryan knew he could correct the grades before the report cards were printed and in fact all but two were corrected. But he did not appreciate that correcting so many grades meant a lot of clerical work. He and another teacher were reprimanded for creating that extra work (9T88-9T89; 10T75-10T76; 15T14-15T16).

Two days after the meeting, Ryan showed Stephens a form verifying that there were only two incompletes. Ryan asked Stephens why he had said that Ryan had turned in a large number of incompletes. According to Ryan, Stephens replied: "I have been told to watch you by the Board of Education. I have to watch you" (3T59). Anne St. Ledger, an Association official, overheard the conversation, but could not recall what Stephens responded to Ryan's first question. She testified, however, that Ryan then asked

Stephens why he was so involved in grades. Stephens replied: "It is different. I have been told to watch you" (4T111). Stephens denied making this statement (11T161). The Hearing Examiner credited Ryan and St. Ledger's accounts and discredited Stephens' denial. We will accept that determination. We adopt St. Ledger's account, as she gave a more plausible context for Stephens' response than Ryan did.

Additional Findings of Fact

Stephens denied ordering that reprimands be placed in Ryan's personnel file (11T147-11T148). But the high school principal testified that Stephens ordered him to have the department chairperson write up the chair incident (15T22). The order was carried out (10T105).

Robert Stoll is the curriculum coordinator and works in the same building as Stephens. In April 1987 he called Noreen Risko, Ryan's department head, and asked her questions about such matters as whether Ryan was late for work or behind in his lesson plans. Risko was upset and consulted with the high school principal who was also upset (10T101-10T102). St. Ledger testified that Risko told her that Stoll called her the day Risko observed Ryan teach a class and asked about her evaluation, but Risko denied that he did and no other evidence supports St. Ledger's account (4T106-4T108;10T103). We reject that account.

Stephens could not recall Board members being accused of anti-union animus or salary payments being corrected before 1986-87 (13T104). Disputes over Martin Luther King day and a teacher's

seniority and tenure rights also arose for the first time that year (13T101).

Thomas Shuba, the upper elementary principal, testified that Stephens told him Ryan was being transferred because Shuba could do a better job supervising him (11T18). Stephens confirmed that he told Shuba he could do a better job supervising Ryan, but insisted that better supervision was not a factor in his recommendation to transfer Ryan. Stephens had recommended that the high school principal be transferred because many people, including Ryan, had been late for school (11T139).

Lois Strong, a township resident, testified that Board member Sandra Wolthoff told her that Ryan was transferred so he could be better supervised (14T4-14T5). But Wolthoff denied knowing or speaking to Strong (9T54) and Strong appears to have misidentified Wolthoff (14T6). We reject Strong's testimony.

Secretary Dee Bolatti testified that Geiger's wife told her that Ryan's transfer was meant to be a slap on the wrist (14T29). No competent evidence supports this hearsay testimony. We reject it.

Celeste Smith, a former teacher, testified that in August 1987, Stephens told her that Linda Conners, an English teacher, had "almost got herself into a lot of trouble with the Board over all this union stuff" (2T8). Stephens did not deny saying that.

Stephens told the Director of Guidance to talk with a guidance counsellor whose spouse had been calling parents to attend Board meetings on Ryan's transfer. The Board instructed Stephens not to do that (3T129; 13T66-13T70; 15T17).

In 1985, Geiger sent Ryan a newspaper article criticizing the National Educational Association (11T37).

Peggy Robinson, a resource room teacher, testified that when Stephens hired her in 1974, he asked her if she was going to be active in the Association (5T24). Stephens did not recall such a conversation (11T177).

We first analyze whether Ryan's transfer violated subsections 5.4(a)(1) and (3). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence in the entire record, that protected activity was a substantial or motivating factor in the adverse action. Mere presence of anti-union animus is not enough; the animus must contribute to causing the action. Id at 242. This causal link may be established 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 towards the exercise of the protected rights. Id at 246.

If anti-union animus was a substantial or motivating factor in the disputed personal action, a violation will be found unless the employer can prove, by a preponderance of the evidence in the entire record, that it had a second motive, not unlawful under the Act, which would have caused the adverse action even absent the protected conduct. Conflicting proofs are for us to resolve.

Ryan engaged in extensive and aggressive Association activity. The superintendent and the Board knew about this

activity. They negotiated with him and repeatedly dealt with him about grievances and personnel matters. Several times the Board reversed the superintendent's actions after Ryan's intervention. The disputed questions are whether the superintendent or the Board had any anti-union animus and, if so, whether that animus motivated Ryan's transfer.[2/]

Each Board member credibly testified about his or her reasons for accepting the recommendation to transfer Ryan. We have accepted the Hearing Examiner's findings about their motivations. The evidence of anti-union animus among Board members is not substantial enough to find that it was a motivating factor in the Board's unanimous vote.[3/]

2/ A principal, Richard Wenner, told an employee, Marge Levine, that she should not have 'gone to the union' over a certification problem and the Director of Special Services, George Kelley, questioned how St. Ledger could find time to conduct union business without neglecting her teaching responsibilities. We do not consider these findings further because neither Wenner nor Kelley played any role in the transfer. We also do not consider Robinson's testimony about a 1974 conversation with Stephens; that incident was too long ago to be probative.

3/ We have found insufficient competent evidence that Geiger or Licitra told support staff that the Association had sold them out. Geiger sent Ryan an article criticizing the NEA in 1985 and Licitra told Ryan that the support staff erred in joining the Association; but these comments are within their right of free speech. Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). Geiger said at a March 1987 meeting "we don't have to listen to the Union" on a calendar issue and McLaren said at a May 1987 meeting that Ryan's transfer would not have been a problem if he were not the

Footnote Continued on Next Page

The superintendent stands in different shoes. Direct and circumstantial evidence proves that he was hostile to protected activity and that this hostility motivated his recommendation to transfer the Association's president.

Stephens expressed anti-union animus several times just before, during and just after the transfer. In January 1987, Stephens told Jeffrey Swanson, an Association spokesperson, that a lot of people on the Board thought Swanson had a big mouth and was too outspoken for the union. In January or February, Ryan grieved a snow day issue. Stephens accused Ryan and the Association of "once again just looking around for issues to try to embarrass him and make him look bad." In May, a dispute arose when Betty Harac was denied personal leave. Stephens agreed she should be paid, but was angry that the Association had gotten involved. In August, Stephens told a former teacher that another teacher had almost gotten into trouble over "all this union stuff."

With respect to the transfer, Stephens told Ryan that he had been told to "watch him" and that was why he knew about Ryan's incomplete grades and reported that problem to the Board the night it voted to transfer him. This statement suggests that Stephens

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3/ Footnote Continued From Previous Page

union head; but both satisfactorily explained the context of their comments. Wolthoff admitted that Geiger and other members had criticized her as "too soft" on the union; but she credibly testified that the only pressure Board members felt about this vote was the need to support whatever decision was made.

believed it necessary to scrutinize the conduct of the Association's president.[4/] Other evidence supports a finding that Stephens was "watching" Ryan or having him "watched." Stephens ordered principal Wolgamuth to have Ryan written up for the chair incident and Wolgamuth carried out the order. The curriculum coordinator called up department chairperson Risko and upset her by asking her a series of questions about Ryan; she consulted with Wolgamuth who was also upset. Stephens told Shuba he could do a better job of supervising Ryan than Wolgamuth had.

The circumstantial evidence also supports a finding that Stephens had an illegal motive. In Bridgewater, the Court noted that failure to follow normal personnel procedures could warrant an inference of anti-union animus. Stephens' handling of the transfers was so grudging and strange as to raise that inference.

In early March 1987, the Board's education committee instructed Stephens to submit reasons for the transfer recommendation. Stephens had not prepared them by the April 13, 1987 meeting. At that meeting, Gagnon asked Stephens if he had notified Ryan and Wallace of the proposed transfers; Stephens said he had when he hadn't.

4/ Swanson testified that when Stephens would say that a lot of Board members did not like something, that meant Stephens did not like something (5T9). No other evidence indicated that the Board told Stephens to watch Ryan. Given the Hearing Examiner's crediting of the Board members' testimony, we will not infer that Stephens received such an instruction.

The Board instructed Stephens to inform Ryan and Wallace of the reasons for their transfers. Stephens met with Ryan on April 16, the last day before spring vacation, and asked him to consider a voluntary transfer to the upper elementary school. Rather than wait for Ryan's response, Stephens placed the transfer on the April 27 agenda, the first day after vacation. He did not tell Ryan he had done this. Nor did he make sure that Wallace was notified.

At the meeting that night, the Board was upset by Stephens' failure to follow its instruction. It removed the transfer from the agenda and directed Stephens to give Ryan written reasons. On May 8, Stephens gave Ryan a bare bones statement of reasons: to encourage professional growth, to add a new perspective at the upper elementary school, and to improve program articulation.

At the May 11, 1987 meeting, the Board's attorney advised the Board that these reasons were too sketchy. Stephens was directed to elaborate. He submitted that elaboration on May 15.

Stephens dragged his heels in giving Ryan either timely notice or a meaningful explanation. This reluctance suggests a hidden and illegal motive.[5/]

An inference of illegal motivation may also be warranted if the reasons for a personnel action shift. Bor. of Tinton Falls, P.E.R.C. No. 89-108, 15 NJPER 270 (¶20117 1989); Morris, The

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5/ We contrast the Board's actions and its attorney's advice. Rather than rush to judgment, the Board ensured that Ryan got the notice and statement of reasons required by the contract (J-1).

Developing Labor Law, at 193 (2d ed. 1983). Stephens told Ryan that he wanted to transfer Ryan because of an unspecified problem at the upper elementary school. Stephens also admitted discussing the transfer with Thomas Shuba, the upper elementary school principal, and telling him he could do a better job supervising Ryan than the high school principal. The superintendent's shift from the oral reasons given Ryan and Shuba to the written reasons later given Ryan suggests a hidden and illegal motive.

An inference of illegal motivation may also be warranted if the timing of a personnel action is suspicious. Bridgewater at 247; Morris at 193. We find the timing of Ryan's transfer mildly suspicious. The 1986-87 school year had an unusual amount of labor relations activity, starting with the contract negotiations in the fall and running through several grievances and personnel disputes in the spring. Stephens expressed anti-union attitudes about some of these matters, and the Board reversed some of his recommendations after Ryan's intervention. Although Stephens began thinking about transferring Ryan in November or December 1986, this recommendation was not made public until March 1987. Stephens did not explain why he recommended this transfer at this time.

Under all the circumstances, we conclude that anti-union animus was a substantial and motivating factor in Stephens' recommendation to transfer Ryan. We now consider whether the Board has proved by a preponderance of the evidence that Ryan would have been transferred absent his protected activity. It is not enough to

prove that the transfer was reasonable. It must be proved that a legitimate motive by itself would have produced the transfer.

That the Board voted unanimously and in good faith to accept Stephens' recommendation does not prove that Ryan would have been transferred anyway. Fields v. Clark Univ., __ F. Supp. ___, 40 FEP Cases 670 (D. Mass. 1986), rem'd on other gnds. 817 F.2d 931, 43 FEP Cases 1247 (1st Cir. 1987). First, if Stephens had not recommended the transfer, the Board never would have considered the issue. Cf. Dover MUA, P.E.R.C. No. 84-132, 10 NJPER 333 (¶15157 1984) (no investigation absent anti-union animus). Second, Board members did not independently investigate the recommendation: they accepted Stephens' reasons. We must therefore determine whether Stephens would have recommended Ryan's transfer if he had not resented Ryan's protected activity. The preponderance of the evidence does not establish that he would have.

This is not a case where a schedule of transfers had been established. Contrast Bor. of Highland Park., P.E.R.C. No. 83-27, 8 NJPER 556 (¶13255 1982) (rotation system of transfers). There had been an average of six transfers a year, but the record does not reveal any pattern or establish how many transfers were made to merge upper elementary and high school programs. The two schools already had an integrated social studies department and curriculum. Other departments were still not organized on a 7-12 basis. Stephens did not explain why he believed the social studies department needed transfers (11T114).

Neither school had a problem prompting the switch of two excellent teachers. Nor did any misconduct warrant the transfers. None of the immediate supervisors had recommended a transfer; indeed Wallace's principal was upset at losing her. While we do not secondguess the educational wisdom of the reasons proffered by Stephens, the record does not establish that they would have produced this transfer at this time absent Stephens' anti-union animus.

Having found that the Association has proved that anti-union animus was a substantial and motivating factor in the recommendation to transfer Ryan and having further found that the Board has not proved Ryan would have been transferred anyway, we conclude that the transfer violated subsections 5.4(a)(1) and (3). We order that Ryan be offered an opportunity to transfer back to a high school position.

We next consider the allegation that Licitra and Geiger told support staff members that the Association had sold them out. Licitra did not make such a statement and there is no competent evidence that Geiger did. Weston v. State, 60 N.J. 36, 51 (1972). We dismiss this part of the second count.[6/]

We next consider the allegation that the Board independently violated subsection 5.4(a)(1) by transferring Ryan soon after his letter criticizing Board members for allegedly making

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6/ The Hearing Examiner went beyond the charge's allegations and the remands' scope to find a violation of subsection 5.4(a)(1) based on Stephens' conversation with Ryan about the alleged statements. Given our findings of fact, we see no violation.

the "sold out" statements. Having found no connection between that letter and the transfer, we dismiss this part of the second count.

We next consider the allegation that Stephens told Ryan that he had been instructed to "watch" Ryan. Stephens said that. Under all the circumstances, we believe such a statement would tend to interfere with an employee's exercise of protected rights. New Jersey Sports Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The statement suggests that the superintendent had placed the Association's president under surveillance to build up information to support his controversial transfer.

We last consider the Hearing Examiner's determination that Stephens violated subsection 5.4(a)(1) when he told Swanson that a lot of people on the Board thought he had "a big mouth" and was "too outspoken for the Union". The pleadings did not allege that this statement violated the Act; the parties did not fairly and fully litigate this issue, and neither remand asked the Hearing Examiner to address that issue. We decline to consider it now. See Brookdale Community College, P.E.R.C. No. 78-80, 4 NJPER 243 (¶4123 1978).

ORDER

The Mt. Olive Township Board of Education is ordered to:

I. Cease and desist from:

A. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act,

particularly by the superintendent recommending that Michael J. Ryan be transferred because of his Association activities and by the superintendent telling Ryan that he had been told to watch him.

B. Discriminating in regards to transfers to discourage Association activities, particularly by the superintendent recommending that Michael J. Ryan be transferred because of his Association activities.

II. Take this action:

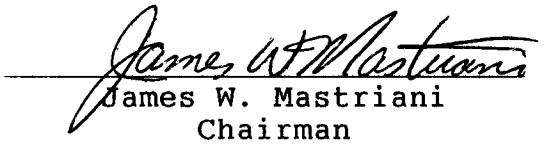
A. Offer Michael S. Ryan the opportunity to transfer back to a high school position.

B. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

The remaining allegations of the Complaint are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
January 31, 1990
ISSUED: February 1, 1990

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

AND IN ORDER TO EFFECTUATE THE POLICIES OF THE

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED,

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly by the superintendent recommending that Michael J. Ryan be transferred because of his Association activities and by the superintendent telling Ryan that he had been told to watch him.

WE WILL NOT discriminate in regards to transfers to discourage Association activities, particularly by the superintendent recommending that Michael J. Ryan be transferred because of his Association activities.

WE WILL offer Michael S. Ryan the opportunity to transfer back to a high school position.

Docket No. CO-H-88-12 MT. OLIVE TOWNSHIP BOARD OF EDUCATION

(Public Employer)

Dated: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 90-23

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, upon remand of H.E. No. 90-5 (P.E.R.C. No. 90-40), makes additional Supplemental Findings of Fact with respect to certain omissions and inconsistencies which the Commission requested the he cure by reexamining several prior Findings of Facts and the relevant transcript. The Hearing Examiner concludes again: (1) that the Respondent did independently violate the Act with respect to certain actions by members of the Board and its Superintendent; and (2) that the Complaint be dismissed as to a Bridgewater contention that the transfer of the Association's President on May 18, 1987, was in retaliation for his exercise of protected activities.

A Hearing Examiner's Recommended Supplemental Report and Decision on Remand is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Supplemental Report and Decision on Remand, 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. 90-23

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 SUPPLEMENTAL REPORT AND DECISION ON SECOND REMAND

Following the Hearing Examiner's issuance of his initial Recommended Report and Decision on December 1, 1988 (H.E. No. 89-18, 15 NJPER 38 (¶20016 1988), the Commission on April 28, 1989, remanded the matter for supplemental findings of fact and recommendations (P.E.R.C. No. 89-106, 15 NJPER 268 (¶20115 1989). The Commission explained that this was done so that the Hearing Examiner might "...make findings and recommendations..." and "...should also make any supplemental findings of fact necessary to resolve factual disputes identified in the post-hearing briefs and reiterated in the exceptions..."

On August 7, 1989, the Hearing Examiner issued his Recommended Supplemental Report and Decision on Remand (H.E. No. 90-5, 15 NJPER ___ (¶20___ 1989), recommending again that the Complaint be dismissed as to the Bridgewater contention that Michael J. Ryan was transferred in May 1987 in retaliation for protected activities. Further, he concluded that the Respondent independently violated Section 5.4(a)(1) of the Act when: (1) a Board member told a Support Staff member in March 1987, that "Your Union sold you out..."; (2) the Superintendent acknowledged to Ryan in March 1987, that two Board members were "wrong" in having made statements to Support Staff members; (3) the Superintendent on May 20, 1987, stated to Ryan that he had been told by the Board to "watch you"; and (4) the Superintendent stated that Jeffrey Swanson had a "big mouth" and was "too outspoken," according to "a lot of people on the Board."

The Commission on October 30, 1989, remanded this matter for the second time (P.E.R.C. No. 90-40, 15 NJPER ___ (¶20___ 1989), first noting that the Board in its exceptions to H.E. No. 90-5 stated that certain testimony relied upon by the Hearing Examiner was rebutted and that the rebuttal was not considered. The Commission therefore asked the Hearing Examiner to reexamine his finding regarding Stephens' explicit denial that he made the "told to watch you" statement (11 Tr 160, 161).[1/]

1/ Referring to Supplemental Finding of Fact No. 28.

The Commission also asked the Hearing Examiner to reexamine his finding that Stephens told Ryan that two Board members had been "wrong" to make certain statements to Support Staff members, in light of Stephen's denial, Licitra's conflicting testimony, and Ryan's testimony regarding staff members' reports of the alleged statements.[2/]

The Current Exceptions To H.E. No. 90-5.

Before proceeding to the Additional Supplemental Findings of Fact, infra, the Hearing Examiner notes that the Respondent Board has requested that the record be reopened so that each Board member involved and the Superintendent may respond to the Hearing Examiner's prior Supplemental Findings of Fact. The Hearing Examiner recommends that this request be rejected since the record is sufficient for him to comply with the instant remand.

The Respondent further contends that each of the four findings by the Hearing Examiner, supra, of an independent violation of Section 5.4(a)(1) of the Act must fall under the "residuum" rule: Application of Howard Savings Bank, 143 N.J. Super. 1, 6 (App. Div. 1976) and Weston v. State, 60 N.J. 36, 51 (1972). The Respondent also submits that the Hearing Examiner in his Supplemental Finding of Fact No. 27 stated that the record did not reflect that Superintendent Chester Stephens had contradicted the testimony of Michael J. Ryan that Board members Norma Licitra and

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2/ Referring to Supplemental Finding of Fact No. 27.

Maurice J. Geiger were "wrong" having made direct statements to members of the Support Staff. Additionally, the Respondent contends that in Supplemental Finding of Fact No. 28, the Hearing Examiner failed to consider the entire testimony of Stephens in his rebuttal of the testimony of Ryan and Ann St. Ledger that Stephens made the "told to watch you" statement.

The Charging Party in its exceptions to H.E. No. 90-5 obviously agrees with the findings of independent violations of Section 5.4(a)(1) of the Act as set forth above, but then argues that on the basis of these "(a)(1)" violations a violation of Section 5.4(a)(3) of the Act should be found.

* * * *

Based upon the Exceptions filed by the parties to H.E. No. 90-5, and responding to the instant remand by the Commission, the Hearing Examiner makes the following:

ADDITIONAL SUPPLEMENTAL FINDINGS OF FACT[3/]

35. Although not requested to do so on remand, the Hearing Examiner, responding to an exception of the Board that Supplemental Finding of Fact No. 26 violates the "residuum" rule in that it is based solely upon the testimony of Ryan without independent corroboration, the Hearing Examiner rescinds the prior finding that

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3/ Necessarily, the findings of fact set forth in H.E. No. 89-18 and H.E. No. 90-5, supra, are incorporated by reference. For convenient reference, the Paragraph Nos. in these "Additional Supplemental Finding is" shall follow numerically the Paragraph Nos. in the Supplemental Findings of Fact set forth in H.E. No. 90-5.

Geiger stated to Support Staff member Betty Nagle, sometime prior to March 17, 1987, that "Your Union sold you out..." (1 Tr 81, 82), there being no independent competent evidence that this statement was made.

36. In Supplemental Finding of Fact No. 27, the Hearing Examiner credited the testimony of Ryan that in March 1987, at a workshop, Ryan encountered Stephens during "a break" and raised the issue of Board members allegedly having made certain statements to Support Staff members (1 Tr 97-99). However, the Hearing Examiner failed to consider the testimony of Stephens, which contradicted Ryan as to this incident (11 Tr 105, 106). Upon a rereading of the testimony of Ryan and the rebutting testimony of Stephens, and after appraising again the respective demeanors of the two witnesses on this issue, the Hearing Examiner credits again the testimony of Ryan for the following reasons: Ryan has portrayed a detailed and credible scenario of the circumstances in which his conversation with Stephens occurred plus the fact that the conversation described by Ryan strikes this Hearing Examiner as completely plausible (1 Tr 98, 99); whereas the denial of Stephens that he said, "Yes, I know, that was wrong for them to do that. I don't know why they would have done that, etc." (1 Tr 98) is couched in terms of his inability to recall rather than specifically to deny that the quoted conversation by Ryan ever occurred (11 Tr 105). Further, although Stephens did make an emphatic denial as to whether Licitra and Geiger ever stated that the Union had failed to "act efficiently for

their membership" this was not responsive to the phrasing of the testimony of Ryan as to what Stephens said on that occasion (11 Tr 105). Further, Stephens' denial that he ever told Ryan that he had been "critical" of those two Board members is likewise not directly responsive to the testimony of Ryan that Stephens said that "...I know, that was wrong for them to do that. I don't know why they would have done that..." (1 Tr 98). Thus, the Hearing Examiner finds herein that the explicit testimony of Ryan as to what Stephens said at the workshop in March 1987 is credited while the less than responsive denials of Stephens are not credited.[4/] The Hearing Examiner perceives nothing inconsistent in his having credited Ryan's testimony as to Stephens' statement that it was "wrong" for the two Board members, Licitra and Geiger, to have made statements to Support Staff members vis-a-vis Licitra's credited testimony, contradicting Ryan, that she had not told Melinda Marquis, a teacher's aide, that the Association was predominantly a teachers' union and that it did not care about Support Staff salary increases or working conditions [9 Tr 103-106; Finding of Fact No. 7m].[5/]

4/ Ryan does not appear to have been cross-examined as to his testimony on this issue although Stephens was cross-examined in general terms (13 Tr 84-86).

5/ The Commission, in its instant remand, requested the Hearing Examiner to reexamine his finding regarding the testimony of Ryan, Stephens and "Licitra's conflicting testimony..." The Hearing Examiner finds no conflict in the testimony of Licitra, he having originally credited her testimony, supra,

Footnote Continued on Next Page

Therefore, the Hearing Examiner reconfirms his earlier findings in Supplemental Finding of Fact No. 27 as clarified herein.

37. Regarding the "watch you" testimony of Ryan, St. Ledger and Stephens, the Hearing Examiner, has, in response to the remand, reexamined the testimony set forth in Supplemental Finding of Fact No. 28 and his conclusion that Stephens' testimony failed to rebut the explicit testimony of Ryan and St. Ledger. The Respondent's Exceptions and the remand indicate to the Hearing Examiner that he omitted to consider the "explicit denial" of Stephens regarding the "watch you" statement when he testified that he "never said that" and "That is a crying lie..." (11 Tr 161). The Hearing Examiner finds as a fact that Stephens' "...crying lie..." response to Ryan's explicit testimony that Stephens said, "I have been told to watch you by the Board of Education, I have to watch you..." (3 Tr 59), corroborated by St. Ledger (4 Tr 111), adds nothing more than an emotional dimension to the equation of Stephens' denial and does not constitute a credibly sufficient denial of the more plausible testimony of Ryan and St. Ledger. Accordingly, based upon the respective demeanors of Ryan, St. Ledger and Stephens on this issue, the Hearing Examiner restates his

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5/ Footnote Continued From Previous Page

with respect to what she told Marquis, coupled with the fact that when Marquis asked Licitra for assistance regarding placement on the salary guide, Licitra advised her to see first her Building Principal and then, if necessary, to contact Ryan [see Finding of Fact No. 7m, supra].

earlier finding that Stephens did not credibly rebut the testimony of Ryan and St. Ledger on the "watch you" issue and, therefore, Supplemental Finding of Fact No. 28 is reconfirmed.

38. The Hearing Examiner clarifies sua sponte the import of his earlier Supplemental Finding of Fact No. 29 with respect to Louis J. Palazzi, Jr., in that any conclusion of law recommending that the Respondent Board independently violated Section 5.4(a)(1) of the Act as to Palazzi must fall and is rescinded since the facts as found as to Palazzi are time-barred under Section 5.4(c) of the Act, the events having occurred more than six months prior to the filing of the original Unfair Practice Charge herein. However, the testimony of Palazzi with respect to Jeffrey Swanson may be considered as "background" under Local Lodge No. 1424, IAM v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 45 LRRM 3212 (1960) and, therefore, Supplemental Finding of Fact No. 30 is reconfirmed together with the background facts as found in Supplemental Finding of Fact No. 29.

* * * *

ADDITIONAL SUPPLEMENTAL DISCUSSION AND ANALYSIS

The Respondent Did Not Violate Section 5.4(a)(3) Of The Act Upon The Record On Second Remand.

Nothing in the above Additional Supplemental Findings of Fact has changed this Hearing Examiner's conclusion that the Respondent did not violate Section 5.4(a)(3) of the Act under the Bridgewater analysis when the Board voted 8-0 on May 18, 1987 to transfer Ryan from the High School to the Upper L. This reaffirmation is based upon prior discussion (see H.E. No. 90-5, pp. 10, 11) with the caveat that:

1. The Hearing Examiner has herein rescinded Supplemental Finding of Fact No. 26 so that there is not in this case at present the prior finding (Supplemental Finding of Fact No. 26), i.e., the testimony of Ryan that Board member Geiger told Support Staff member Nagle that "Your Union sold you out..." and, thus, at this juncture, Geiger's vote on May 18th was not tainted.

2. Stephens' "watch you" statement was never placed in a viable context from which a reasonable inference could be drawn that the Board's vote of 8-0 on May 18, 1987 to transfer Ryan was tainted by Stephens' revelation of May 20th, two days after the date to transfer.

The Respondent Independently Violated Section 5.4(a)(1) Of The Act Upon The Record On Second Remand.

A public employer independently violates §5.4(a) of the Act if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification: Jackson Tp., P.E.R.C. No. 88-124, 14 NJPER 405 (¶19160 1988), adopting H.E. No. 88-49, 14 NJPER 293, 303 (¶19109 1988); UMDNJ--Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); Gorman, Basic Text on Labor Law, at 132-34 (1976). Also, the Charging Party need not prove an illegal motive in order to establish this independent violation of §5.4(a)(1) of the Act: Morris, The Developing Labor Law, at 75-78 (2d ed. 1983).

It is clear to the Hearing Examiner upon the instant remand that the Respondent has still independently violated Subsection (a)(1) of the Act by the conduct of its agents in several instances. For example, the Hearing Examiner finds and concludes that the acknowledgment by Stephens to Ryan, at a workshop in March 1987, that Licitra and Geiger were "wrong" in having made statements to Support Staff directly imputes the illegal conduct of Licitra and Geiger to the Board as its agents. [See Additional Supplemental Finding of Fact No. 36, supra.]

Further, the Hearing Examiner finds and concludes that the Respondent independently violated Section 5.4(a)(1) of the Act when Stephens stated to Ryan, on May 20, 1987, that he had been told by the Board to "watch you." The findings of fact in this regard are fully set forth in Supplemental Finding of Fact No. 28 and Additional Supplemental Finding of Fact No. 37, supra, and need not be repeated herein.

The Hearing Examiner finally finds and again concludes sua sponte that Stephens violated the Act as an agent of the Board by his statement to Swanson, supported by Palazzi,[6/] that Swanson had a "big mouth" and was "too outspoken for the Union..." Stephens specifically attributed these characterizations of Swanson to "...a lot of people on the Board..."

* * * *

6/ See Bryan Mfg. Co., supra.

Based upon the entire record on the second remand in this proceeding and the Additional Supplemental Findings of Fact made above, and all prior consistent Findings of Fact, the Hearing Examiner now makes the following:

ADDITIONAL SUPPLEMENTAL CONCLUSIONS OF LAW

1. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(3), nor derivatively, N.J.S.A. 34:13A-5.4(a)(1), 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.

2. The Respondent did, however, independently violate N.J.S.A. 34:13A-5.4(a)(1) by certain conduct of its agents and representatives; i.e.: (a) Stephens in March 1987 acknowledged that Board members Licitra and Geiger were "wrong" in having made statements to Support Staff members; (b) Stephens' "watch you" statement on May 20, 1987; and (c) Stephens' statement to Swanson in January 1987 that a lot of people on the Board thought that Swanson had a "big mouth" and was "too outspoken for the Union."

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the

Act, particularly, by directing that the Superintendent refrain from stating to Michael J. Ryan that he had been told to "watch" him on and after May 20, 1987; and, further, by directing that the Superintendent refrain from making statements to Jeffrey Swanson to the effect that he had a "big mouth" and was "too outspoken for the Union..."

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

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

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

C. That the allegations that the Respondent violated N.J.S.A. 34:13A-5.4(a)(3) be dismissed in their entirety.

Alan R. Howe
Hearing Examiner

DATED: November 9, 1989
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by directing that the Superintendent refrain from stating to Michael J. Ryan that he had been told to "watch" him on and after May 20, 1987; and, further, by directing that the Superintendent refrain from making statements to Jeffrey Swanson to the effect that he had a "big mouth" and was "too outspoken for the Union..."

Docket No. CO-H-88-12 MT. OLIVE TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.