

P.E.R.C. NO. 96-9

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BELVIDERE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-93-452

BELVIDERE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by the Belvidere Education Association against the Belvidere Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act by reducing the work hours of the Association's president and past president and transferring the Association's negotiations chairperson to destroy the Association and retaliate against its leadership. The Commission adopts the Hearing Examiner's recommendation that the work hour reductions and transfer were consistent with the Board's determination that the business education and industrial arts areas could best sustain necessary budget cuts and that the reductions and transfer did not violate the Act.

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

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Appearances:

For the Respondent, Green & Dzwilewski, P.A., attorneys
(Allan P. Dzwilewski, of counsel)

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

DECISION AND ORDER

On June 25, 1993, the Belvidere Education Association filed an unfair practice charge against the Belvidere Board of Education. The charge alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and (5),^{1/} by reducing

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

the work hours of the Association's president and past president and transferring the Association's negotiations chairperson to destroy the Association and retaliate against its leadership.

On August 24, 1993, a Complaint and Notice of Hearing issued. On August 27, the Board filed its Answer denying that it violated the Act and asserting that it had legitimate business reasons for the employment actions.

On November 16 and 17, 1993, Hearing Examiner Elizabeth J. McGoldrick conducted a hearing. The parties examined witnesses and introduced exhibits. They filed post-hearing briefs by February 24, 1994. On July 24, the Association requested the Hearing Examiner to reopen the record. The Board did not formally respond. On November 7, the Association withdrew its request.

On May 22, 1995, the Hearing Examiner recommended dismissing the Complaint. H.E. 95-24, 21 NJPER ____ (¶____ 1995). She found that the Board was not hostile to the protected activity of any of the Association's leaders. She therefore concluded that the Board had not violated the Act when it reduced the work hours of the Association's president and past president and transferred its negotiations chairperson.

On June 5, 1995, the Association filed exceptions. It claims that it proved that the Board was motivated by anti-union animus and that the Board did not prove that there were "cost deficit problems in the District." It asks that we reject the Hearing Examiner's recommendation. On June 14, the Board filed an

answering brief responding to the exceptions and urging that we adopt the recommendation.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-15).

In re Bridgewater Tp., 95 N.J. 235 (1984), sets the standards for analyzing allegations of retaliation for engaging in activity protected by the Act. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

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

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


Applying Bridgewater, the Hearing Examiner found that the Board knew that the three Association officers engaged in protected activity. However, she also found that the Association did not establish by a preponderance of the evidence that hostility to that activity motivated the disputed personnel actions. In particular, she rejected the claim that the superintendent wanted to make a name for himself as a union buster.

The Hearing Examiner also rejected the inference that restrictions placed on the Association president's access to the school premises bore evidence of hostility. Although we differ on this one point, we do not believe that this evidence proves hostility given the Hearing Examiner's other determinations, including those based on credibility evaluations. We conclude that the work hour reductions and transfer were consistent with the Board's determination that the business education and industrial arts areas could best sustain necessary budget cuts and that the reductions and transfer did not violate the Act.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners, Klagholz, Ricci and Wenzler voted in favor of this decision. Commissioners Buchanan and Finn voted against this decision. Commissioner Boose abstained from consideration.

DATED: July 28, 1995
Trenton, New Jersey
ISSUED: July 28, 1995

H.E. NO. 95-24

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

In the Matter of

BELVIDERE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-93-452

BELVIDERE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Belvidere Board of Education did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by reducing the hours and involuntarily transferring officers in the Belvidere Education Association. The Hearing Examiner found that the Association did not prove, by a preponderance of the evidence, that the Board or its superintendent were hostile to the affected employees' protected activity. Therefore, the Association did not prove the third element, anti-union animus, necessary for concluding that an employer has illegally discriminated against employees in retaliation for their exercise of protected activity. Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984)

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. 95-24

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For the Charging Party,
Balk, Oxfeld, Mandell & Cohen, Attorneys
(Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 25, 1993, the Belvidere Education Association filed an unfair practice charge with the Public Employment Relations Commission against the Belvidere Board of Education. The charge alleges that just prior to April 28, 1993, the Association voted and declared that it had "no confidence" in the Board or its superintendent; and that as a result, on April 28, 1993, the Board voted for a reduction-in-force, effectively halving the hours of the Association's president and past president thereby disqualifying them from receiving benefits. The charge further alleges that the Association's negotiating chairperson was involuntarily transferred from a science teaching position to a physical education position;

and that all of these actions were intended to destroy the Association and retaliate against its leadership, in violation of subsections 5.4(a)(1), (3) and (5)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act").

On August 24, 1993, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On August 27, 1993, the Board filed an Answer (C-2). It denies that it engaged in any unfair practice, and asserts that it had "legitimate business justification" for the employment actions.

On November 16 and 17, 1993, I conducted a hearing at which the parties examined witnesses, introduced exhibits and argued orally.^{2/} Post-hearing briefs were filed by February 24, 1994. On July 20, 1994, the Association requested to reopen the record. The Board was invited to respond to the request but did not formally

^{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; and, (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

^{2/} The transcripts will be referred to as 1T (November 16) and 2T (November 17); Commission exhibits will be referred to as C- ; the Association's exhibits will be referred to as CP- ; and the Board's exhibits will be referred to as "R-). At the close of the charging party's case, the Respondent moved to dismiss (1T104-1T111). I denied the motion (1T117).

respond. On November 7, 1994, the Association withdrew its request to reopen the record.

Based upon the entire record, I make these:

FINDINGS OF FACT

1. The Board is a public employer and the Association is a public employee representative within the meaning of the Act (1T7). The Association is the majority representative of all teachers, guidance counselors, librarian, nurse, child study team members, co-curricular personnel and teacher aides employed by the Board (1T7, J-1, p. 3-4).

2. Robert Dombloski has been employed by the Board for 25 years as a business education teacher. He is also president, negotiations chairperson and grievance chairperson of the Association. He has been president for at least the past eight years (1T10). Dombloski is well known to the Board and Superintendent Robert Gratz; he has appeared on behalf of the Association at the superintendent and Board levels of the parties' grievance procedure and has regularly addressed the Board (1T12-1T13). Dombloski is also employed part-time by the New Jersey Education Association as a negotiations consultant for school districts in Sussex and Warren counties (1T9).

3. Gratz has been employed by the Board for eight years as assistant principal, principal and superintendent (1T32, 1T40, 1T118). Dombloski and Gratz have had a good working relationship (1T40-1T41, 1T57). Dombloski gave Gratz a favorable recommendation

to several Board members who were considering Gratz for the superintendent's position (1T40). They had cooperated on issues, but, according to Dombloski, their relationship declined after several disagreements, especially over a project initiated by Gratz in Fall 1992 (1T41-1T42, 1T55-1T58).

4. In the Fall 1992, Gratz formed a committee of parents, community members, students and teachers to formulate a statement about the educational intent and mission of the district (1T57-1T58). Dombloski believed this was "a colossal and obscene waste of money" (1T42, 1T93-1T94). Gratz wanted Dombloski on the committee as an Association representative (1T42). Dombloski attended meetings but when the statement came out in early 1993, he refused to endorse it (1T42, 1T56, CP-4). On February 25, 1993, Dombloski sent Gratz a letter in which Dombloski refers to himself as an educator, not as Association president (CP-4). Dombloski felt that the experience of sharing ideas "was a valuable experience," but was disappointed that so many resources were expended and that the draft mission statement did not contain any specific measurable standards:

In order for me to totally support a statement of this type, I really need some type of assurance that this statement will lead to a more committed attitude on the part of the school to more strictly enforced standards which will lead to a more educationally oriented attitude. (CP-4)

5. Dombloski believed his relationship with Gratz deteriorated: "Because of my refusal to support him in his mission statement, I feel Mr. Gratz felt our relationship was at an end"

(1T42, 1T95). Dombloski previously saw Gratz frequently, conferred with Gratz on issues, but after the letter criticizing the mission statement, these meetings ceased (1T95-1T96). Dombloski observed that Gratz spent more time away from school, pulling teachers away from students to participate on a quality education committee; and that Gratz had wanted Dombloski to be on the committee, but Dombloski refused (1T96).

6. During the late 1970s, when Dombloski was negotiations chairperson, there were two strikes by Association members (1T37). In the Fall of 1992, Dombloski and Gratz had conversations about the strikes and how to avoid the issues which led to their occurrence (1T176-1T177). Dombloski testified that he believed Gratz envied the special notice the NJEA had taken of Dombloski during the strikes and that he (Gratz) needed "something of the same sort to propel him into the same sort of prominence" (1T38, 1T62). Gratz denied that he made this statement. I credit Gratz' testimony that their discussions centered on the nature of the problems that led to the strikes and not on his expression of envy or ambition. First, both Gratz and Dombloski characterized their relationship as "very good," and cooperative; Gratz stated he wanted "to set a new course" as superintendent but I draw no inference of desire for notoriety from this (1T128-1T129, 1T40-1T41). Second, there is no other evidence which corroborates the idea that Gratz felt the need to do something extraordinary like "riffing a local president and statewide consultant" to gain notoriety. Accordingly, I conclude

that they respected each other, rather than that Gratz envied Dombloski's prominence in the NJEA.

7. During the 1992-93 school year, Dombloski was employed full-time, six periods per day, at the high school (1T13). He taught accounting, money management, general business training, freshman typing and computer instruction (1T13). During this year, the Board and Association were not engaged in contract negotiations, or grievance arbitration (1T98).

8. On or about March 29, 1993, Superintendent Robert Gratz stopped Dombloski as he was leaving school and informed him that the Board was considering reductions in teaching staff to accommodate the next school year's budget (1T15, 1T68-1T69, 1T155). Dombloski knew that the Board was undergoing the final stages of developing the next year's budget (1T15-1T16).

9. On April 7, 1993, Gratz handed Dombloski a letter stating that the Board was considering cutting his position (1T16, 1T67-1T68, R-1). The letter, dated April 6, 1993, and signed by School Business Administrator Michael A. Simonetta, states:

Please be advised that, pursuant to the requirements of N.J.S.A. 10:4-12b.(8), you are hereby notified that at a special meeting of the Board of Education, on April 21, 1993, and/or April 28, 1993, the Board will discuss the possible reduction of your position for the 1993-1994 school year.

Discussion will take place in closed session unless you request, in writing by April 19, 1993, a public discussion of the matter. (R-1)

Dombloski then met with Board President Allan Frosch, who he had known for a long time, about the proposed reduction. Frosch

informed Dombloski that the Board was obligated to accept the superintendent's program recommendations (1T17).

Although Dombloski has 24 years of experience, he is the least senior teacher in the business education department (1T16-1T17). The Board also issued similar letters to tenured Industrial Arts Teachers Bill Hengglar and Kevin Kehoe, who have 15 years experience each (1T18).

10. Dombloski addressed the Board on both April 21 and 28, 1993 (1T19, 1T66). He was surprised to learn at the April 21st meeting that Gratz had proposed the elimination of his position; he had believed from the April 6th letter that the Board planned to reduce his hours (1T21, 1T23, 1T99-1T100).

11. In an effort to persuade the Board not to cut business education, Dombloski presented statistics showing that the Board lags behind all other Warren County districts in business education course offerings (1T18-1T20).^{3/} Dombloski asserted that it is now impossible for students to enroll in the electives: accounting, money management and business education computers because of the number of required courses for juniors and seniors and the reduction in his own hours (1T45-1T46). And, freshman typing, formerly a

^{3/} Dombloski's poll of other schools compared percentage of students taking courses, number of subjects offered, and number of subjects actually taught (1T19-1T20).

mandatory class, had already been replaced prior to 1992-1993 by mandatory speech (1T43-1T44).^{4/}

12. At its April 28, 1993, meeting, instead of eliminating Dombloski's position, the Board reduced it to half-time; his salary is half what it was and he receives no health benefits (1T22, 1T62). Dombloski would be entitled to health benefits if he taught one additional period (1T36-1T37). Hengglar, the Association's past president and negotiating team member, was also reduced to half-time (1T24-1T26, 1T180, 1T183). Gratz was aware of Hengglar's role on the negotiations team (1T183). Tom Karabinus, the Association's past negotiations chairperson, was involuntarily transferred to a full-time position in the physical education department (1T27-1T29, 1T182, R-3, p. 1763). Unlike Dombloski and Hengglar, Karabinus was also certified in a second subject, physical education, but he had not taught physical education for 15 years (1T29). Karabinus did not suffer any reduction in salary or benefits (1T90, 1T181-1T182).

At the same meeting, the Board also abolished a part-time secretarial position (Nancy Ehasz), reduced an elementary counselor position to part-time (Donna Jean Lynott), reduced a custodial

^{4/} The Board offers a nine week course of study ("array") for students who have tested above a certain level; the courses include math, reading, writing and speech (1T170). The array's purpose is to prepare freshmen in skills needed to pass the high school proficiency test. Typing was one of the courses in the array before 1992-1993; it was replaced in the array by speech on the recommendation by the Department of Education that speech is one of the core areas of English proficiency (1T171-1T172).

position to part-time (Melissa Tomsa), and did not renew the teaching contracts of three non-tenured teachers (1T169-1T170, R-6, p.1729-1731).

13. Moving Karabinus into the physical education position solved two of the Board's needs: avoiding the elimination of a full-time position in science and filling a vacancy created by the Board's decision not to renew a non-tenured physical education teacher (1T182).

14. After the Board's April 28th meeting, Dombloski formed a committee of four Association members to develop alternatives to staff cuts (1T29, 1T69). On or about May 18, 1993, the Committee presented its alternatives to the Board through spokesperson Karl Rice (1T30, 1T173, R-7, p. 1743). These included eliminating freshman sports; reducing or eliminating the most junior employees positions in certain departments; combining programs; eliminating an administrative position; placing oil tanks above-ground and avoiding underground tank regulations; refinancing bonds and long-term planning around probable staff retirements (1T30-1T31, 1T69 1T157-1T158). The Board then considered these suggestions and on June 29, 1993, informed the Association that it found many of them cost inefficient or programmatically inappropriate (1T158-1T159, 1T161, 2T48-2T49, R-5, p. 3-5).

15. Prior to 1992-1992, Robert Repko, a math teacher, taught computer math, BASIC programming, advanced programming and programming in PASCAL, all of which require Algebra I as a

prerequisite (1T101-1T102, R-8, R-9, CP-2, CP-3).^{5/} Dombloski's computer courses "introduce the student to the functions of personal computers; (2) instruct the student in BASIC programming; and (3) instruct the student in business-related software," CP-2, and do not require Algebra (1T101-1T102). Dombloski's courses were always filled to capacity, whereas, the math courses were often not filled (2T76, 2T79). All of the above courses are electives and not required by the State for high school graduation (2T6-2T7).

16. In April 1993, the Board decided not to offer computer instruction through the business education department, but added a math computer course, taught by Jorgenson, an untenured math teacher (1T32, 1T184-1T186). Dombloski does not possess a math certification; he did not ask for, and was not offered the opportunity to teach the courses now taught by Jorgenson (1T89). The Board also retained the elective courses of sociology, journalism and behavior studies (2T6).

17. On April 26, 1993, the Association took a vote of "no confidence" in Gratz, with no dissenting votes (1T34-1T36, 1T85-1T86). Gratz first learned of the vote on April 29th, one day after the Board voted to reduce Dombloski's and others' positions for 1993-1994 (2T55).

18. As early as June 23, 1992, the Board was considering actions needed to control its facilities maintenance problems

^{5/} This requirement is often waived (2T76).

(1T125, 1T131, 1T146, R-2, p. 1644). In August 1992, the Board and administration walked through each building to identify the facilities' needs for the upcoming year (1T126, R-2, p. 1673). The Board was also concerned about the long range condition of its buildings, which were aging, and wanted a professional facility study of optimum utilization and the issue of renovation (1T126-1T127, 1T129). By November 10, 1992, the school business administrator was planning to meet with architects to discuss ways to address these problems (R-2, p. 1687). Four priorities were identified: the removal and replacement of underground storage tanks, roof repairs, implementation of an asbestos abatement plan and compliance with the access requirements of the Americans with Disabilities Act (1T126-1T128).

19. These facilities issues emerged in 1992, in part at Gratz' initiative, who wanted "to set a new course" for the district, by addressing the facilities issues which had gone unattended for some time, developing a mission statement and reviewing curriculum (1T128-1T129, 1T151-1T152, R-4, p. 6-8).

20. In October-November 1992, Gratz asked administrators to identify educational program areas which could be reduced without negatively affecting the core course of study (1T146-1T147). The core subjects: English, science, mathematics and social studies, are those required for high school graduation (1T148). Non-core courses are electives, including business education (1T148). Mr. Pappas, the high school principal, identified the business education

department, among others, as one area which could withstand a reduction (2T43-2T44).^{6/} Gratz made the final recommendations to the Board about which positions to cut or reduce.

21. Between October 1992 and February 1993, Gratz reviewed the administrators' recommendations, the probable effect of cuts on programs and staff, and by February 10, 1993, he and the business administrator had presented the Board members a preliminary budget and program recommendation which were considered at a regular Board meeting (R-2, p. 1710-1711).

22. The Board estimated that the cost of remediating the facilities would be around \$300,000 to \$400,000, but that this amount could not come from one school year's budget (1T129-1T130). By February 1993, it determined that \$150,000 "seed money" for attention to its facilities in 1993-1994 was affordable, even though this would mean a cut in the educational program (1T129-1T130, 1T146, 1T149-1T150, 2T24-2T25, 2T72-2T73). The Board's projected budget was "at cap" and it had decided not to request a cap waiver. A proposed budget was presented to the voters and Town Council which included the \$150,000 for facilities much or all of which would come from staff and program reductions (1T149-1T150, R-4, p. 3-5, p.

^{6/} I credit Robert Gratz' testimony that Pappas had reviewed his programs and recommended that the business education and industrial arts departments could absorb staff cuts down to one and one-half teachers each, without destroying the elective programs. Gratz' overall testimony was generally consistent as it pertained to the budget and staffing decisions made in school year 1992-1993.

11). The budget was approved by the county superintendent on February 26, 1993 (1T152). The Board's budget was defeated by the voters but the Town Council, after meeting with the Board about the facilities needs, decided they would not cut the proposed school budget (1T135-1T137).

23. Unanticipated repair costs also occurred in 1992-1993 (1T134). In Spring 1993, just prior to the school musical Charlie Brown, the stage lighting failed because of a short circuit and needed to be overhauled (1T134). The fire inspector found that the Third Street School fire doors did not meet code requirements and had to be replaced (1T137, R-2, p.1768).

24. By July 28, 1993, bid specifications were being prepared for the first phase of the underground storage tank removal and replacement project and architects were making presentations for the possibility of performing facility and feasibility study (R-2, p. 1773, 1775).^{7/}

25. The Board had been downsizing its staff since 1989 (1T163, 1T172, R-6). It had attempted to concentrate reductions in non-teaching and non-core programs (1T163). In 1988 it reduced positions in music, art, math, physical education, English and French (1T166, 2T30-2T32, R-6). In 1989 it reduced a horticulture

^{7/} After the date the unfair practice charge was filed (June 25, 1993), the Board continued to review bid proposals for the architects, storage tanks, and other facilities matters from July 1993 to October 1993 (R-2, 1786, 1789-1791, 1798). By October 1993, the Board contracted out a facilities feasibility study (R-4, p. 14).

teaching position (2T29, R-6). In 1990 it reduced positions in home economics and business education (1T166, 2T33-2T36, R-6). In 1991, it reduced vocational agriculture; in 1992 it reduced a music position (1T166-1T167, 2T36-2T38, R-6). In addition to the 1993-94 cuts noted above (finding #12), the Board eliminated non-instructional functions; it reduced a half-time English position by eliminating grant writing so the educational program was not affected (2T67). It eliminated a half-time staff development position and reassigned that teacher to a full-time gifted/talented and extended learner position. This move resulted in displacing Karabinus (2T68).

26. The Board provides office space and telephone use to the Association (1T50-1T51). Prior to becoming a part-time employee, Dombloski was not restricted as to when he could be at school (1T49). No other part-time teachers have been disciplined or restricted as to their presence at school when not actually teaching (1T48). A month after the instant charge was filed, in July 1993, Gratz sent Dombloski a memo detailing Dombloski's new hours (9:20 a.m. to 11:34 a.m.) and stating:

You will be expected to depart the premises shortly thereafter.

However, I am aware that due to your Association responsibilities, your intention may be to stay within the district for an extended period of time each day. Please be advised that I am willing to negotiate the extent of the time period you may remain in district each day, at the conclusion of your assignment. Absent an agreement, you will be required to follow the schedule outlined in the first paragraph. (CP-1)

Subsequently, Dombloski, the principal and superintendent met and reached an informal agreement to accommodate Dombloski's teaching and Association business schedules (1T47-1T48, CP-1).

ANALYSIS

The issue presented by this charge is whether the Belvidere Board of Education violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when, in April 1993, it announced the reduction-in-force for 1993-1994, reducing the hours and benefits of certain leaders of the Belvidere Education Association in retaliation for their protected activity. The Association also alleged that the Board violated subsection 5.4(a)(5) of the Act, but presented neither facts nor argument that the Board had "refused to negotiate in good faith with the Association... or refused to process its grievances." Accordingly, I recommend that the section 5.4(a)(5) allegation be dismissed.^{8/}

^{8/} The Board moved to dismiss the entire charge at the conclusion of the Association's case. I denied the motion, applying the standards set forth in Dolson v. Anastasia, 55 N.J. 2 (1959) and N.J. Turnpike Authority, P.E.R.C. No. 79-81, 5 NJPER 197 (¶10112 1979). Inferences must be drawn in favor of the opposing party; the motion cannot be granted if material facts are in dispute; and the motion must be denied if the charging party has produced at least a scintilla of evidence in support of its allegation. Having found that the Association had produced at least a scintilla of such evidence and that there were material facts in dispute, the motion was denied. This was not a finding that the charging party had satisfactorily established a prima facie case, but only that it had produced at least a scintilla of evidence supporting its allegation that the Board had violated subsection 5.4(a)(3) of the Act.

N.J.S.A. 34:13A-5.4(a)(3) prohibits public employers or their agents from:

discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act.

Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984) sets forth the standard to be applied in determining whether an employer has illegally discriminated against employees in retaliation for their exercise of protected activity. The Court in Bridgewater explained that to make its prima facie showing, the charging party must show by a preponderance of the evidence on the entire record, sufficient to support the inference that protected conduct was a substantial or motivating factor in the adverse action that the employee engaged in protected activity, that the employer knew of this activity, and that the employer was hostile toward the exercise of the protected activity. Id. at 246. This may be done by direct or circumstantial evidence.

If a charging party satisfies those tests, the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. If the employer did not present any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove,

by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and/or the Commission to resolve.

Applying that standard to the facts here, the Association has satisfied the first two parts of the Bridgewater test, Dombloski's, Hengglers, and Karabinus' protected activity and the Board's knowledge of the activity. However, the Association has failed to establish by a preponderance of the evidence that the Board exhibited anti-union animus toward Dombloski's, Hengglers or Karabinus' protected activity. It therefore did not establish that anti-union animus was a motivating or substantial reason for the reduction-in-force.

Anti-Union Animus

The Association based its anti-union animus allegation on:

- 1) retaliation for the Association's "no confidence" vote,
- 2) the decline in the relationship between Dombloski and Gratz because of Dombloski's rejection of the mission statement;
- 3) Gratz' desire to do something to promote his own notoriety to the Association's detriment;
- 4) the Board's elimination of computer courses in the business education department while retaining them in the math department;
- 5) the superintendent's memo to Dombloski placing

restrictions on his hours; and 6) the Board's decision to retain the elective courses sociology and journalism, while eliminating the elective business computer courses.

The record does not establish that Gratz or any Board member knew of the Association's vote of "no confidence" (April 26, 1995), at a time which could have affected their personnel reduction decisions. Gratz did not know of the vote until April 29th, one day after the meeting at which the Board formally implemented the reduction and well after the period February-March 1993, when the Board had first considered cutting staff positions to transfer money needed for facilities projects. Thus, Gratz' feelings about the Association's "no confidence" vote could not have provided a motive for his actions in recommending the reduction-in-force since that had occurred much earlier in the year, and the record does not establish when the Board members were aware of the "no confidence" vote.

The Association suggests that Gratz had a motive to retaliate against Dombloski who, on behalf of the Association, criticized Gratz' mission statement project on February 25, 1993. The evidence the Association suggests is proof of Gratz' hostility is that after receiving Dombloski's letter criticizing the mission statement, Gratz and Dombloski's informal meetings ceased, and Gratz absented himself from school to attend quality education committee meetings. The parties were not in or preparing for negotiations, there were no outstanding grievances or other indicia of conflict

between the Association and the Board during this period. No arguments, scolding, angry words, sarcasm or the like were spoken by Gratz; yet the Association would have me infer hostility significant enough to cause the superintendent to recommend a lay-off of the Association's president. It strains the imagination to find, as the Association argues, that the described change in Gratz' behavior toward Dombloski manifests such hostility. Even assuming that their relationship did cool, this does not rise to the level of hostility toward Dombloski's protected activity of the type or magnitude alleged here and contemplated in Bridgewater. Furthermore, the timing of this attitude change would have been months after Gratz, with the Board's blessing, had worked on finding program areas to cut to fund facilities projects, and a month or two after the high school principal had identified Dombloski's department as an elective area which could sustain a staffing reduction and continue to offer a program.

The Association argues that Gratz was motivated by his need to do something to propel him into the same prominence he credited Dombloski as having with the NJEA. I credited Gratz' testimony and did not credit Dombloski's assertion that Gratz had a need for notoriety. Further, I found no other corroboration to the idea that the superintendent felt the need to promote his career by taking some extraordinary action like "riffing a local president and statewide consultant." The assertion that Gratz believed that if he reduced staff members who were also union activists, he would make a

reputation for himself as a strong "union busting" superintendent is not supported by the record here.

The Association also argues that the Board's choice to offer computer courses taught by an untenured teacher in the math department, but not in the business education department, was another example of Gratz' hostility toward Dombloski. That the Board chose to eliminate a popular elective course taught by the Association president raises suspicion about its motives. However, the record does not show that the courses are "practically identical," though there is one overlapping area: BASIC programming. The math courses emphasize PASCAL and advanced programming, the business education courses emphasize familiarity with and use of a personal computer. Dombloski was the least senior teacher in the business education department, is not certified to teach other subjects and was not eligible to be transferred to the math department. The Association did not demonstrate that in a reduction-in-force, the law requires the Board to lay off the least senior teachers in the entire district first.

The Association alleges that Gratz' July 23, 1993 letter to Dombloski is evidence of hostility because it requires him to leave the school premises upon the completion of his teaching day, disallowing him to conduct union business in the building.

This characterization of the letter is incorrect. Gratz specifically offered in the letter to "negotiate" additional hours to accommodate Dombloski's Association duties. The parties soon

after reached an agreement on such hours, a fact that does not suggest hostility. Furthermore, Gratz' unprecedented solicitation was prompted by Dombloski's need for access to the building in light of his part-time status.^{9/}

Finally, the Association argues that the Board's choice of retaining sociology and journalism while eliminating business computers makes "poor educational sense" and must be viewed as pretextual; that the real reason for these choices is its hostility toward the Association and especially toward Dombloski. The Association presented no evidence that the Board's choice was illegal or suspicious.

Based on the above, I conclude that the Association has not shown that Gratz or the Board were hostile to the protected activity of any of the Association leadership affected by the 1993-94 reduction-in-force. At the relevant time, these parties were not engaged in collective negotiations or grievance arbitration. The record here does not establish animosity between these parties. To the contrary, Gratz and Dombloski had a good working relationship.

There was only one incident, Dombloski's negative response to Gratz' mission statement project, which could have provided a motive for retaliation. However, this criticism occurred after a

^{9/} Even if this amounted to a scintilla of hostility toward or interference with protected activity, an independent violation could not be found because this event occurred after the charge was filed and was never pled by the charging party. See, County of Middlesex, P.E.R.C. No. 93-120, 19 NJPER 357 (¶24161 1993), 359 n.2

the Board's plan to reduce staff was underway. The assertion that Gratz was motivated by a desire for notoriety is unsupported. The July 23, 1993 letter concerning Dombloski's new part-time schedule and the subsequent negotiation does not show hostility.

Accordingly, I conclude that the Association has not shown the third element of the prima facie case, anti-union animus, or, necessarily, a nexus between animus and the reduction-in-force. Therefore, the burden does not shift to the Board to show it would have implemented the RIF in the absence of the protected activity.

Even if there were some evidence of hostility, the record shows that the Board would have taken the same action in the absence of the protected activity. As early as June 1992, the Board was deliberating its facilities maintenance problems. Unanticipated repair costs also occurred in 1992-1993. By January-February 1993, the Board estimated that the cost of facilities projects would be \$150,000 from the 1993-1994 budget. This would unavoidably result in educational program reductions.

In October 1992, Gratz anticipated the reductions and directed administrators to identify areas where staff cuts could be effected without eliminating entire departments. The emphasis on retaining core programs was consistent with the Board's priorities in reductions from 1989 to 1992. By January-February 1993, industrial arts and business education were identified by the high school principal as areas which could sustain reductions.

The Association argues that the Board's justification for eliminating business education and industrial arts while retaining other electives highlights the pretext of its position. The Association argues that these practical courses are more necessary because most students taking those courses will not go to college, but will go to work. The Association further argues against eliminating computer courses in a highly technological era. The Association argues that it would be more practical to retain popular courses at the expense of less popular ones. The Association's theory about the retention of sociology and journalism is interesting but not supported by this record. The explanation for the Board's curriculum choice could simply be its preference for sociology and journalism. Both theories are equally supported by the evidence. The Association may not share the Board's curriculum choices or resource allocation to facilities. But I am not in a position to second-guess the Board's managerial decisions, having found that its claimed managerial reason is not pretextual.

The Board was faced with finding \$150,000 from its educational program budget to fund the seed money for facilities problems. The high school principal had identified business education and industrial arts as areas which could be reduced without eliminating the entire programs; Superintendent Gratz made the ultimate recommendation and it was consistent with the principal's information and the desire not to affect core courses. In view of the above legitimate business justification and absent

proof of illegal motivation, I conclude that the reduction in hours of positions held by Dombloski and Hengglers were not made in retaliation for the exercise of protected rights.

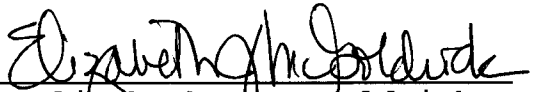
CONCLUSIONS OF LAW

The Board did not violate subsection 5.4(a)(5) of the Act by refusing to negotiate in good faith with the Association concerning terms and conditions of employment of employees in its unit, or refusing to process grievances presented by the Association.

The Board did not violate subsections 5.4(a)(1), (3) or (5) of the Act by reducing the hours of Association president Robert Dombloski or Bill Hengglers or involuntarily transferring Tom Karabinus in retaliation for protected activity.

RECOMMENDATION

I recommend the complaint be dismissed.


Elizabeth J. McGoldrick
Hearing Examiner

Dated: May 22, 1995
Trenton, New Jersey