

P.E.R.C. NO. 2003-83

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-2002-47

IRVINGTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Irvington Board of Education violated the New Jersey Employer-Employee Relations Act by refusing to appoint Andaiye Foluke to the English/Language Arts Literacy Curriculum Review Committee, in retaliation for her protected activities as a negotiations team member, grievance co-chair, and Association vice-president. The Commission concludes that the preponderance of the evidence supports the inference that Foluke's non-reappointment was substantially motivated by hostility toward Foluke's role as an Association leader.

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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In the Matter of

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Respondent,

-and-

Docket No. CO-H-2002-47

IRVINGTON EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Hunt, Hamlin & Ridley, attorneys
(Ronald C. Hunt, of counsel)

For the Charging Party, Oxfeld Cohen, PC, attorneys
(Nancy I. Oxfeld, of counsel)

DECISION

On August 16, 2001, the Irvington Education Association filed an unfair practice charge against the Irvington Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) and (3)^{1/} by refusing, in June 2001, to appoint Andaiye Foluke to the English/Language Arts Literacy Curriculum Review Committee,

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discrimination 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."

in retaliation for her protected activities as a negotiations team member, grievance co-chair, and Association vice-president.

On January 14, 2002, a Complaint and Notice of Hearing issued. On January 24, 2002, the Board filed an Answer, denying that it violated the Act and setting forth several defenses.

On April 15, 2002, Hearing Examiner Jonathan Roth conducted a hearing. The parties examined witnesses, introduced exhibits, argued orally, and filed post-hearing briefs.

On January 28, 2003, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 2003-14, 29 NJPER 66 (¶19 2003). He concluded that the Association had proved that Foluke had engaged in protected activity and that the Board knew of it. However, he found no evidence that the Board was hostile to Foluke's protected conduct when it deleted her name from a recommended list of candidates for several language arts curriculum writer positions. The Hearing Examiner concluded that Foluke was at least as qualified as three elementary teachers who were approved for the positions. However, he found that her non-appointment resulted from the fact that Ethel Davion, Assistant Superintendent for Academic Affairs, inaccurately described Foluke, during a personnel committee meeting, as primarily a science teacher. Further, he found that while Foluke was twice offered promotions and once offered college tuition payments for her daughter in exchange for quitting the Association, those

efforts by the Board superintendent, president and vice-president did not establish hostility toward her protected conduct.

The Association has filed exceptions. The Board has filed an answering brief urging adoption of the Hearing Examiner's Report.

The Association excepts to the finding that Foluke's alleged science expertise was discussed at the April 2001 personnel committee meeting; asserts that Davion's testimony to that effect should not be credited; and maintains that Foluke was removed because the personnel committee and the Board did not want her to earn extra money as a curriculum writer. It contends that Davion's testimony is an after-the-fact attempt to justify the Board decision, and that anti-union animus is evidenced by the Board member efforts to persuade Foluke to leave the Association.

The Association also reasons that, even assuming that Foluke's alleged expertise in science was discussed during the April 2001 personnel committee meeting, hostility should be inferred from the fact that the qualifications of the other candidates were not similarly debated. Similarly, it maintains that anti-union animus is demonstrated by the fact that Foluke was discussed at the closed session prior to the June 20, 2001 Board meeting, even though her name was no longer on the list of recommended candidates.

Finally, the Association has submitted 30 paragraphs of "proposed findings of fact", many of which parallel the Hearing Examiner's findings. We consider only those exceptions that are specifically described and supported, see N.J.A.C. 19:14-7.3(b), but note that the Association states that most of the facts in this matter are undisputed.

Preliminarily, we reject the Association's exception to the finding that there was a discussion of Foluke's science expertise at the personnel committee meeting. The Hearing Examiner was in the best position to assess Davion's demeanor and credibility and we decline to disturb his decision to credit her testimony on that point. We also accept and incorporate the Hearing Examiner's factual findings, which we supplement in our factual summary. However, we conclude that the Association met its burden of proving, by a preponderance of the evidence, that anti-union animus motivated the decision not to appoint Foluke to a curriculum writer position.

The standards for assessing discrimination claims are set forth in In re Bridgewater Tp., 95 N.J. 235 (1994). 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 and motivating factor in the adverse personnel action. This may be done by direct or 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 protected rights. Id. at 246.

If the employer does not present any evidence of a motive not illegal under the 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 unlawful motives under the Act and other motives contributed to a personnel action. In these dual motive cases, the employer has not 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 proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action.

In making his recommendation to dismiss the Complaint, the Hearing Examiner focused primarily on the deliberations at the personnel committee and Board meetings. We view the case through a broader lens and believe that those discussions must be considered in the context of the past interactions between Foluke, Superintendent Ernest Smith, Board President Andrea McElroy and Board Vice-President Lorraine Capers. Central to our analysis is our conclusion that the offers of promotion and

tuition-payment evidence hostility toward Foluke's protected activity in the legal, if not colloquial, sense.

These are the basic facts and chronology. Foluke has been an elementary school teacher with the district since 1986. For the first 13 years of her employment, she was assigned to a self-contained classroom where she taught all elementary subjects, including language arts, science, math and social studies. Beginning in 1999-2000, she was transferred to the "semi-departmentalized" University Six school, which is attended by all sixth grade students in the district. Of her six classes per day, Foluke teaches three science classes and three periods of language arts, a subject which is divided into six "strands" - reading, writing, spelling or vocabulary, grammar, mechanics and public speaking.

In the three years preceding the challenged action, Foluke held significant Association positions, and positions of increasing responsibility. She was a negotiations team member in 1998-2000 and a building representative in 1999-2000. During 2000-2001, Foluke became grievance co-chair; her name appeared on all grievances presented to the Board; and Davion and Foluke met an unspecified number of times after April 2000 to discuss grievances. In June 2001, around the same time that the Board appointed the summer curriculum writers, Foluke became

Association vice president. We add to finding no. 4 that she continued as grievance co-chair (T121).

In May 2000, Smith pulled Foluke out of a negotiations session and offered her an assistant superintendent position at the Union Avenue School. Also during the 1999-2000 negotiations, McElroy and Capers took her to a diner and assured her that they would see that her daughter's college tuition was taken care of if she would disassociate herself from the Association. Foluke refused both offers and, as noted, assumed positions of increased responsibility within the Association.

These offers do not show personal hostility to Foluke - quite the contrary. But they reflect a desire on the part of key actors in the non-appointment decision that Foluke cease her efforts on behalf of the Association. The college tuition proffer was a direct quid pro quo. And we infer from the timing and context of Smith's action that a promotion into a managerial executive position was offered at least in part so that Foluke could no longer be a union member. We thus find that the offers show hostility toward Foluke's protected activity.

Our finding reflects the well-established principle that an employer may violate the Act, not only by retaliating against or punishing employees who engage in protected conduct, but by promising wage or benefit increases for employees not supporting union activity. See NLRB v. Exchange Parts Co., 375 U.S. 405,

409 (1964); Bridgewater, 95 N.J. at 246-247; see also Thorgen Tool & Molding, Inc. and Local Lodge 1227, District Lodge 72 of the Intern'l Ass'n of Machinists & Aerospace Workers, AFL-CIO, 312 NLRB 628, 144 LRRM 1162 (1993) (employer violated Sections 8(a)(1) and (3) of the National Labor Relations Act by greatly increasing overtime in order to encourage employees to back decertification effort).

We next consider whether the Association proved that this hostility was a substantial and motivating factor in Foluke's non-appointment. Under all the circumstances, we conclude that it did. Foluke's name was one of several submitted to a personnel committee comprised of Smith, Davion, McElroy, and three other board members. Lucia T. Schneck, the language arts literacy supervisor, had personally solicited Foluke's application for a curriculum writer position and knew of her experience as a curriculum writer. We add to finding no. 6 that although Schneck understood Foluke to be primarily a science teacher, she knew that Foluke and all other teachers at the University Six school taught language arts (T60).

At the personnel committee meeting, there was no discussion of the qualifications of the other elementary school teachers who, unlike the English or reading teacher candidates, were not language arts specialists. Yet McElroy, one of the Board members who offered to see that Foluke's daughter's tuition was paid,

focused only on Foluke and asked what she taught. Davion responded that Foluke taught "mostly science courses." McElroy then went on at length about how Foluke should not be assigned a position that did not match her strengths, evidently convincing the other committee members not to approve Foluke for consideration by the full Board. Davion never volunteered that, in 1988 or 1989, she and Foluke had worked together on a language arts curriculum when Davion was language arts supervisor. We add to finding no. 3 that Davion "spearheaded" that curriculum committee (T65).

Foluke was the only candidate who was not approved by the committee and, in the one other instance where committee members questioned a teacher's qualification for the language arts assignment, the committee placed her in a social studies position, consistent with her teaching specialty. The committee's action meant that there was no sixth grade teacher on the list of curriculum writers - the only K through 8 grade left out. Moreover, while Davion stated that Foluke taught mostly science, we add to finding no. 8 that Davion also testified that the Board members already knew that Foluke taught some language arts classes (T103).

On June 20, 2001, just prior to the public meeting, the Board followed its practice of holding a closed session to review the agenda. Smith was asked if the teachers recommended for the

language arts positions were language arts teachers. Smith replied that they were and that Foluke was not, which was why she was no longer on the list. However, Capers, who testified to this colloquy, could not recall what if anything had triggered the reference to Foluke, whose name was not on the list that was presented to the full Board.

During the public comment session of the public Board meeting, Foluke asked McElroy if there was an oversight because her name was omitted from the list of summer curriculum writers. McElroy untruthfully responded that she knew nothing about the matter, and directed her to speak to Smith, who made the recommendations. Foluke ultimately met with Davion, who told her that the Board could appoint whomever it wanted. While Davion testified that she did not believe it was her place to reveal the personnel meeting discussions, the Hearing Examiner declined to credit that explanation, finding that Davion did not want to be drawn into a discussion of her own role at the meeting and Foluke's language arts qualifications.

We believe that this chain of events, viewed in its entirety, establishes that Foluke's non-appointment was motivated by hostility toward the union official, either for her active advocacy or her refusal to discontinue it. While we have accepted the finding that the colloquy about Foluke's teaching responsibilities occurred, we think the most salient point is

that McElroy initiated the discussion about Foluke and vigorously espoused her non-appointment. We also place significant weight on the fact that there was no discussion of the qualifications of the other elementary teachers, even though the committee must have known that they taught many subjects other than language arts. Further, the committee adjusted the assignment of the one other teacher whose suitability was questioned; and Foluke's non-appointment left the Board without a language arts curriculum writer who taught sixth grade.

Moreover, we find it unusual that Davion, as assistant superintendent and former language arts supervisor, would not be aware of the standardized course load of the University Six teachers - i.e., three periods of their specialty subject and three classes of language arts. We also find it unusual that Smith, who had offered to promote Foluke to assistant superintendent, was neither aware of Foluke's teaching responsibilities nor confident enough of her abilities to recommend her to a stipended summer position, particularly when no other sixth grade teacher had volunteered for the assignment.

In this posture, the preponderance of the evidence supports the inference that Foluke's non-appointment was substantially motivated by hostility toward Foluke's role as an Association leader. Our view of the record is that McElroy, and perhaps Smith, looked for a reason not to appoint Foluke, and persuaded

the other Board members, who likely did not have a particular investment in this fairly routine matter. The likelihood that the non-appointment was the result of a misunderstanding about Foluke's qualifications is further undermined by McElroy's refusal to acknowledge her and the personnel committee's concerns to Foluke, despite having had at least one personal interaction with her in the past.

In reaching this conclusion, we have these additional comments. The Hearing Examiner found that the timing of Smith's first discussion of a promotion, as well as McElroy's and Capers' tuition offer, did not particularly connote hostility because they occurred 12-14 months before the non-appointment. By contrast, we believe that the offers should be viewed as part of a continuum where Foluke refused the offers; assumed positions of increased responsibility in the Association; and was then denied appointment to a position for which her application had been solicited, despite being at least as well qualified as some other applicants and despite the fact that no one was chosen in her stead. Together, the incidents indicate a "carrot and stick" approach to dissuading Foluke from engaging in protected activity.

That perspective is supported by a November 2001 conversation that Smith had with Foluke, where he indicated that he wanted to promote her to assistant vice-principal before he

left the district, but that she would have to leave the Association. We add to finding no. 4 that the offer was made after the Association had objected to creation of a new position, and during a conversation in which Smith told Foluke that he could not deal with the Association president (T139-T140). As with Smith's earlier offer, it was closely tied to Association activity and not merely a factual statement as to the consequence of a promotion.

We also stress that the Board's theory of the case relies solely on Davion's testimony as to what she represented to the personnel committee. And even accepting, as we have, that Davion told the committee that Foluke taught "mostly science", Davion never testified as to the basis of her misunderstanding. Further, if, as Davion also asserted, the committee knew that Foluke also taught some language arts, no basis was offered to distinguish her from elementary teachers who also taught language arts, along with other subjects.

For all these reasons, we find that the Board's asserted reason for Foluke's non-appointment is pretextual, and that it violated N.J.S.A. 5.4a(1) and (3) when it failed to appoint her to a summer curriculum writer position.

ORDER

The Irvington Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to appoint Andaiye Foluke to a language arts curriculum writer position.

2. 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 the Act, particularly by failing to appoint Andaiye Foluke to a language arts curriculum writer position.


B. Take this action:

1. Make Andaiye Foluke whole by compensating her for the lost wages sustained as the result of the non-appointment, together with interest as provided in R. 4:42-11(a)(ii).

2. 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.

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

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, DiNardo, Mastriani, Ricci and Sandman voted in favor of this decision. Commissioner Katz was not present.

DATED: May 29, 2003
Trenton, New Jersey
ISSUED: May 30, 2003



**NOTICE TO 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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to appoint Andaiye Foluke to a language arts curriculum writer position.

WE WILL NOT discriminate 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 the Act, particularly by failing to appoint Andaiye Foluke to a language arts curriculum writer position.

WE WILL make Andaiye Foluke whole by compensating her for the lost wages sustained as the result of the non-appointment, together with interest as provided in R. 4:42-11(a)(ii).

CO-H-2002-47

Docket No.

IRVINGTON BOARD OF EDUCATION

(Public Employer)

Date: _____

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, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 2003-14

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

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-2002-47

IRVINGTON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint based upon an unfair practice charge filed by the Irvington Education Association against the Irvington Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act when it refused to appoint Adaiye Foluke to a paid summer language arts literacy curriculum committee. The charge alleges that the Board's refusal was in retaliation for Foluke's protected activities.

The Hearing Examiner recommends that the circumstantial evidence failed to prove that the Board had been hostile to Foluke's protected activities, pursuant to the standard set forth in In re Bridgewater Tp., 95 N.J. 235 (1984).

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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Docket No. CO-H-2002-47

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Charging Party.

Appearances:

For the Respondent, Hunt, Hamlin & Ridley, attorneys
(Ronald C. Hunt, of counsel)

For the Charging Party, Oxfeld Cohen, attorneys
(Nancy I. Oxfeld, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On August 16, 2001, the Irvington Education Association filed an unfair practice charge against the Irvington Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically, 5.4a(1) and (3)^{1/} by refusing to appoint Andaiye Foluke to the English/Language Arts Literacy Curriculum Review Committee, in retaliation for her protected activities.

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

On January 14, 2002, a Complaint and Notice of Hearing issued (C-1).^{2/} On January 24, 2002, the Board filed an Answer, denying that it violated the Act and setting forth several defenses (C-2). A hearing was held on April 15, 2002; the parties submitted post-hearing briefs by July 18, 2002 and reply briefs by July 31, 2002. Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The Association is the majority representative of a unit of all certificated personnel employed by the Board, excluding supervisors, secretaries, security guards, custodial and maintenance employees, and transportation employees (C-3).

2. Andaiye Foluke has been employed by the Board as a certified teaching staff member since 1986. Foluke began her employment at Grove Street School as a sixth grade teacher in a "self-contained" classroom (T113-T114; T140). In a self-contained elementary classroom, assigned students are taught math, language arts, social studies and science all by the same teacher (T113-T114; T158-T159). Students have different teachers only for "special" classes, such as music, art, foreign language and physical education. Teachers in self-contained classrooms are certified to teach all elementary subjects (T158-T159). Foluke taught all elementary subjects, including science, social studies, language arts, math and family life during her 13 years at Grove Street School (T141).

Foluke was laterally transferred to University Six School for the 1999-2000 school year.

^{2/} "C" refers to Commission exhibits received into evidence at the hearing; "CP" and "R" refer to Charging Party exhibits and Respondent exhibits, respectively. The transcript of the hearing is referred to as "T", followed by the page number(s).

Unlike the self-contained classrooms at Grove Street, University Six School is considered to be "semi-departmentalized," meaning that students remain with their homeroom teacher for four periods per day and spend their other two periods with a different teacher (T113-T114; T142-T143). All sixth-grade students report to University Six School (T114).

3. Foluke has taught language arts throughout her Board employment. She currently teaches science and language arts to sixth grade students. Of her six class periods per day, Foluke teaches three science classes. In her other three periods, Foluke teaches language arts, which consists of six "strands": 1) reading; 2) writing; 3) spelling or vocabulary; 4) grammar; 5) mechanics and 6) oral public speaking (T115-T116; T140-T143). Foluke has taught the same balanced schedule at University Six School in 1999-2000, 2000-2001 and 2001-2002 (T115-T116).

All 15 University Six School teachers teach the 6 strands comprising language arts to their homeroom students (T119-T120). Also in a typical day, a group of three teachers working as a team (with each teaching either science, social studies or math) teach for three periods a day. In her team, Foluke teaches science (T119; T141).

In 1988 or 1989, Foluke served on a summer curriculum writing committee for kindergarten through grade 12 (K-12) with Ethel Davion, the language arts supervisor at that time. The curriculum was not revised again until the summer of 2001 (T117). Foluke has also tested or "piloted" new book series and programs (T117-T118). In about April 2000, Davion became the Assistant Superintendent for Academic Affairs, providing direction to principals to ensure that the schools' curricula meet State mandates. She possesses an M.A. degree in

educational administration (T62; T63; T116-T117).

4. Foluke is an Association member and has held several positions with the Association (T120-T121; C-1). From 1998-2000, Foluke was a member of the Association's negotiations team and in 1999-2000, she served as a building representative. During the 2000-2001 school year, Foluke served as grievance co-chair and in June 2001, she became Association vice-president (T120-T121). Foluke and Davion have discussed an unspecified number of contractual grievances since April 2000 (T66). All Association grievances bear Foluke's name and that of President Madeline Edwards (T134-T136). I infer that their names signal to the Board the Association's authorization to process grievances.

Foluke testified that Board Superintendent Dr. Ernest Smith "offered her positions" to leave the Association on three separate occasions (T134-T139). Foluke testified that she was once "taken out of" a negotiations meeting and offered the assistant superintendent position at Union Avenue School (T136). According to Foluke, the solicitation was in "probably to maybe April or May" and when asked for the year, she testified: "I want to say 2000" (T136-T137). Foluke next testified that during negotiations, "and again that would have been between 1999-2000," Board President Andrea McElroy and Vice-President Lorene Capers, took her to a diner and solicited her to disassociate from the Association, offering to pay her daughter's college tuition if she agreed (T137-T138). Capers testified on behalf of the Board at the hearing and was not asked to confirm or deny Foluke's testimony about the solicitation at the diner (T175-T188). I draw an adverse inference from that omission because Capers would be favorably disposed to deny the solicitation, if it did not occur. Finally, Foluke testified that in November 2001,

Superintendent Smith offered her a promotion: ". . . [B]efore he left [the Board] he wanted to make me an assistant vice-principal but I had to leave the Association" (T139).

Foluke refused the Board's offers. The Board never paid tuition for Foluke's daughter. None of the solicitations were written. No witnesses were called to corroborate or refute Foluke's testimony (T139-T140). I credit it.

5. Lucia T. Schneck has been employed by the Board as a K-12 language arts literacy supervisor since 1999. Her duties include evaluating and training teachers, evaluating programs, screening textbook selections and overseeing language arts assessment and curriculum development (T15-T16).

Schneck promptly discovered that the Board's language arts curriculum needed revision to comply with State law. She recommended revision to the Superintendent and to the Director of Curriculum. During the 2000-2001 school year, the Board decided to proceed with revisions to the curriculum, pursuant to Schneck's recommendation (T19; T43). The Board wanted a K-12 curriculum revision completed by the end of summer 2001. On February 21, 2001, Schneck issued a memorandum, together with a posting to all K-12 english/language arts teachers and specialists, soliciting curriculum writers to revise the language arts literacy curriculum (T19-T20; T46; CP-1). Foluke received the memorandum and posting (T122; T144). Interested candidates were to apply for the \$28 per hour positions (to a maximum of 20 hours) not later than March 16, 2001 (CP-1). Schneck considered teachers that worked extensively in the language arts, and preferably those with "curricular experience" to be ideal for the curriculum writer positions (T46; T110).

6. In late February 2001, Foluke sent a letter expressing interest to Schneck (T122-T123; T144-T145). In April, Foluke encountered Schneck at a job fair. Schneck asked Foluke why she had not responded to the posting; Foluke replied that she had sent a letter. Schneck explained that the Board required her to re-post the notice and she asked Foluke to respond in writing to the new notice. Schneck also told Foluke that she needed people with experience and that her previous curriculum committee experience would be valuable (T122-T123). Schneck testified that she "probably encouraged [Foluke to apply] because I really needed bodies" (T28). She conceded: "I wasn't screening [the candidates] extensively because as indicated, I had a lot of trouble getting teachers to want to come on board" (T51). Sometime after the meeting, Schneck called Foluke to remind her to send her response (T122-T123; T145). Foluke submitted a second letter of interest to Schneck (T123-T124; T145).

Teachers of language arts were Schneck's first choice for the curriculum writing committee. By April 2001, and in the absence of interested candidates, Schneck desperately sought "bodies" who were somewhat qualified (T47; T51-T52). Schneck wanted as many curriculum writers as possible in order to increase funding for the project (T52). Schneck knew Foluke to "teach predominantly science" and recommended her for the language arts curriculum writer position (T59; CP-2). On rebuttal examination, Schneck testified that she regarded Foluke as highly as the other staff she recommended for the position (T28-T29; T170). Schneck's testimony is seemingly equivocal; Schneck issued the memorandum and posting directly to Foluke, knew of her previous curriculum-writing experience, and urged her to apply for a position in early April, demonstrating her belief that the union vice-president was desirable as a

curriculum writer in language arts literacy. Schneck also testified of her knowledge that Foluke was a "science" teacher; and that her desperation for volunteers drove her solicitation of Foluke, impliedly suggesting a lack of enthusiasm for Foluke's language arts literacy qualifications. I draw no such (latter) inference from Schneck's testimony. Any equivocation or ambivalence may be attributable to a knowledge revealed in an aside in one of her answers to a question on direct examination by Association counsel:

Q: How did you come to know Ms. Foluke?

A: I had seen her at Board meetings. I learned she was a teacher in the district. I learned through whatever means, talk, that she was - I knew that she was at University Six School. I knew she was a science teacher. I probably learned that she had some affiliation with the IEA. Politics is not always my strength, so I learned things late, you know.^{3/} [T28]

On April 23, 2001, Schneck issued a memorandum to Foluke and 8 other applicants, advising that their names will be submitted to the Board for approval at a May agenda meeting (T29-T32). Unit personnel listed were Judy D'Alessio, a reading specialist; Shirley Dutton, a high school English teacher; Foluke; Jackie Hirschfield, an elementary teacher with language arts curriculum experience; Terri Jefferson, a middle school language arts teacher; Lori Jenkins, a social studies teacher; Linda Kronstadt, a basic skills teacher; Sara Sutton, a high school English teacher; and Cary York, a "relatively new" elementary teacher, who, according to Schneck, "teaches language arts in the course of every-day work for at least two periods a day" (T59-T60; T166-T167; CP-2). I credit the facts reported about York but regard Schneck's phrasing as an

^{3/} The recognition clause of the parties' collective agreement includes "certified teaching personnel" and others, and excludes the Superintendent, Assistant Superintendents, Supervisors and others (C-3). I infer that Smith, Davion and Schneck are excluded from the negotiations unit.

anticipatory bow to Assistant Superintendent of Academic Affairs Ethel Davion's testimony that she believed that Foluke taught only one period daily of language arts (see finding no. 8). Copies of the memorandum were also issued to Davion and Personnel Director Anthony Salters, among others (T107; CP-2).

Schneck told Davion of her extreme difficulty in enlisting candidates, and that her list set forth practically every individual she persuaded to apply (T47). When Schneck handed Davion her list of candidates, Davion said, "Well, okay. We'll submit it to the committee and we'll see what happens" (T108).

In May, Schneck revised her language arts literacy curriculum writers list when she discovered other interested teachers, and learned that recommended teacher Linda Kronstadt was no longer available as a writer (T173; T174). Schneck also testified that "the earliest grade level I taught was middle school, so I wanted people that really knew elementary curriculum" (T164). When asked to define "elementary," Schneck testified: "K-5, K-6" (T164). In the absence of specific and contradictory evidence about Foluke's teaching schedule and experience, and in light of Schneck's enthusiasm for Foluke to apply for a position, I find that Foluke fit Schneck's definition of someone who "really knew elementary curriculum." Schneck testified on redirect rebuttal examination ". . . As I learned more of what was really going to happen [after her April 23 list was submitted] I realized how important it was for me to have more primary people there, additionally to have primary people there" (T171). She defined "primary" as "K-2." Schneck's testimony was un rebutted. Patricia Allen, Sheri Doll, Rosemary Lipinski, and Tina Lindor were added to the recommended list of language arts literacy curriculum writers (CP-3). They all were

"primary" educators, Doll being a "relatively new" first grade teacher (T165-T166; T167).

Schneck added: "[E]very K-5 school has the minimum of two periods a day of language arts and some have three periods a day of language arts, if you include reading" (T167). I credit Schneck's testimony and do not infer that a sixth grade class would necessarily have a different language arts schedule than classes of K-5 students. Schneck had no further role in selecting language arts literacy curriculum writers after submitting the lists of recommended candidates (T31-T32).

7. The Board personnel committee is a subcommittee of the Board and meets before the regular Board meeting in any given month. In 2001, the personnel committee members were Board President McElroy, Superintendent Smith, Assistant Superintendent of Academic Affairs Davion, and three other Board members (T83; T179). Personnel or hiring recommendations must be approved by vote of the personnel committee before proceeding to a Board meeting agenda for a vote by the full Board (T71).

Recommendations to the personnel committee arise from various sources, such as a principal or a supervisor. These recommendations are submitted to Human Resources Director Salters, who prepares the agenda for the personnel committee (T72). Davion testified that all recommendations for the agenda are first reviewed by the Superintendent, who has authority to reject any particular recommendation. If the Superintendent rejects a recommendation, the item (or candidate's name) is cut from the agenda and is not considered by the personnel committee (and by necessity, the Board) (T76-T77; T147-T148). She also testified that if the recommendation concerned a "curricular issue," Salters would ask her for approval (T72-T73).

The record is not clear whether Superintendent Smith personally reviewed Schneck's recommendations before the personnel committee meeting.

8. Sometime before June 20, 2001, the personnel committee met and discussed Schneck's recommended curriculum writers (T80-T84; CP-2). The name of each individual was read aloud. When Foluke's name was announced, Board President McElroy asked what Foluke taught. Davion replied that Foluke taught "mostly science courses" (T84). Davion testified that she "understood" that Foluke "taught three science classes and maybe one language arts" (T92). Davion did not testify about the basis of her understanding. She conceded not knowing the actual "breakdown" of Foluke's teaching of language arts and science classes (T102). Davion's reply was inaccurate, as is her "understanding" because I have credited Foluke's detailed testimony about her schedule. At least one Board member, probably McElroy, was troubled by that fact, as reported by Davion (T93). Board members asked about other names on the list. Davion recognized the others because "most of them appeared to be language arts teachers or specialists" and so informed the group (T84). Unspecified Board member(s) asked questions about candidates Lori Jenkins and Judy D'Alessio, who teach social studies and language arts literacy, respectively (T87; T94; T99). McElroy objected at length to hiring Foluke to revise the language arts curriculum when "her strength appeared to be in science," according to Davion (T85; T93). She testified:

The Board members in their discussion felt that individuals ought to be writing the curriculum guide who ha[ve] demonstrated experience and expertise in those [subject] areas. They really did not want science teachers or teachers who had a strength in science doing a curriculum guide for language arts literacy; so they sought language arts literacy teachers and I think that was the final result, that they accomplished that. [T89]

I credit Davion's testimony to the extent that she, McElroy and perhaps Smith had that discussion with other Board members on the personnel committee, who concurred with their expressed view. The group did not discuss why elementary school teachers in a self-contained classroom who taught as many or more subjects than Foluke would be desirable as curriculum writers, while Foluke would not (T104). I infer that Davion did not report that Foluke had participated in curriculum writing with her about 11 or 12 years ago.

During the personnel committee meeting, no one mentioned Foluke's Association affiliation or positions, including building representative and grievance committee co-chair (T91). I infer that her role in collective negotiations was not mentioned. Foluke's name was not approved by the personnel committee. All of Schneck's other recommendations, except Kronstadt (who became unavailable), were approved (T86-T87; T162-T163; CP-3). I credit Davion's testimony that the Board members removed Foluke from the list because they concurred with McElroy's opinion (based on Davion's characterization of Foluke's teaching load) that Foluke's area of expertise - science - would not adequately help produce a language arts literacy curriculum.

The personnel committee's approved list included representatives from kindergarten through grade 8, except for grade 6 - Foluke's grade. At no time was a replacement candidate for a 6th grade language arts literacy curriculum writer added to the list (T106). That position was never filled (T108-T109).

9. The personnel committee's approved list of candidates was placed on the agenda for the June 20, 2001 full Board meeting. Before every public Board meeting, the Board meets in a

closed session, when it reviews the agenda. In the June 20 closed session, the Board members, the Superintendent, and Board counsel discussed the curriculum writers. Although Foluke's name had been deleted (i.e., not merely crossed-out) from the recommended list of candidates presented to the Board, and was not on its agenda, it nevertheless arose in the discussion (T176-T183).

The Superintendent was asked if the teachers listed were language arts teachers (T178-T180). Superintendent Smith or another Board member said that all those listed [under the category, 'Language Arts Literacy'] were language arts teachers and that Foluke was not, which explained her rejection by the personnel committee. There was no discussion about Foluke being rejected because of her Association affiliation or positions (T178-T181; T185-T187). I do not find as a fact that all applicants approved by the Board were "language arts teachers," at least so far as that term distinguishes them from Foluke.

10. On June 20, 2001, immediately prior to the public Board meeting, a written agenda was issued, pursuant to Board custom (T125). Schneck approached Foluke and said, "Andaiye, I'm so sorry. I submitted your name and it's not here" (T125). Schneck confirmed to Foluke that her name was the only one omitted from the list recommended to the Board personnel committee (T127).

Foluke showed the agenda to Association President Madeline Edwards, noting that she was not on the list of summer curriculum writers. Edwards directed Foluke to address the Board. During the public comment section of the meeting, Foluke asked the Board if there was an oversight because her name was omitted from the list of summer curriculum writers. Board

President McElroy directed Foluke to speak to the Superintendent, stating that he makes the recommendations and that she knew nothing about the matter. The summer curriculum writers list without Foluke's name, together with lists of other curriculum writers under separate categories of "Computer Education," "Music," "Social Studies," and "Science" was approved by the Board (T128-T129; T153-T154; T161; T182; CP-3).

11. The Board has the authority to modify, reject, or pass a resolution. Schneck, Edwards, Davion and Foluke have attended Board meetings at which they observed the Board reject and edit resolutions. Foluke further acknowledges that the Board has specifically added or removed names from resolutions during Board meetings (T54-T55; T89; T146-T148; T160; T185). The Board does not advise Schneck of its modifications to her recommendations and Schneck never asks (T50). The Board had moved teacher Lori Jenkins' name from Schneck's recommended "Language Art Literacy" curriculum writers group to a "Social Studies" category. Jenkins teaches at University Six School (CP-2; CP-3).

12. Soon after the June 20, 2001 Board meeting, Foluke phoned the Superintendent's office to schedule an appointment to discuss the matter. Superintendent Smith was unavailable and Foluke was directed to arrange an appointment with Davion (T130; T155).

On July 3, 2001, Foluke, Edwards and Davion met in Davion's office to discuss why Foluke was not chosen as a summer language arts curriculum writer (T78-T80; T130). Foluke and Edwards asked Davion to state the Board's criteria for selecting the curriculum writers; Davion replied that she did not know (T130). Davion phoned Salters and asked him for a copy of the personnel committee records. Salters came to Davion's office but did not provide any

records (T131-T132). Davion shrugged her shoulders and said that the Board could appoint whomever it wanted (T134; T155). Davion testified that "it was not her place" to tell Foluke that she was not chosen because the Board believed that her expertise was in science and not in language arts (T104; T155). I do not credit Davion's testimony regarding the reason for her silence. I am also suspicious of her feigned ignorance of the Board's "criteria" for selecting the curriculum writers. In all likelihood, Davion did not wish to disclose to Foluke that she had advised the personnel committee of Foluke's "mostly science" teaching. Such an admission would have likely prompted their further discussion of Foluke's actual language arts teaching responsibilities and her previous curriculum writing experience with Davion, when the Assistant Superintendent was the language arts supervisor (see finding no. 3).

13. In early July 2001, the curriculum writers had their first meeting. Only a small number attended. Schneck realized that she could not produce a K-12 curriculum revision, as originally planned. No sixth grade teacher had been approved and the approved seventh and eighth grade teachers failed to attend. Schneck directed the group to work on a K-5 document; a draft K-5 curriculum revision was completed by the summer's end (T39-T41; T52-T54).

ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the charging party has proven, 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 an illegal motive has been proven and if the employer has not presented 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 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 Commission to resolve.

The decision on whether a charging party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, and the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

I find insufficient direct evidence proving that the decision not to approve Foluke as a summer language arts literacy curriculum writer was in retaliation for protected activity. I must next assess the circumstantial evidence to determine if the Act was violated.

The Association has proved the first two Bridgewater elements; Foluke engaged in

protected activity and the Board knew it. Specifically, Foluke had participated in collective negotiations on behalf of the Association with Board representatives and she was grievance co-chair and Association vice-president, signing contractual grievances given to the Board for processing. The evidence, however, does not show that the Board was hostile to Foluke's protected conduct when it deleted her name from a recommended list of candidates for paid language arts literacy curriculum writer positions.

The Association contends that hostility is circumstantially shown by Board efforts to woo Foluke away from her membership and organizational positions; by the purported, pretextual justification that she was predominantly a science teacher; and by the facts that she was the only recommended candidate rejected by the Board and was more qualified for a position than other approved unit personnel.

Foluke was twice offered promotions in exchange for quitting the Association and once offered college tuition payment(s) for her daughter. Two of the solicitations were extended during collective negotiations for a successor agreement, demonstrating a modicum of earnestness and a desire to have Foluke leave the Association or diminish her efforts on its behalf during a period that would be especially advantageous to the Board's collective negotiations posture. The offer of payments shows a more single-minded desire to be rid of her efforts on behalf of the Association. The two offers were extended about 12-14 months before the alleged discriminatory act, and does not particularly connote hostility. The third lure was extended in November 2001, several months after the Board deleted Foluke's name from the recommended list of writers and is not particularly relevant to prove hostility. It could show a continuing Board

interest in turning Foluke's allegiance away from the Association throughout the period of April 2000 through June 20, 2001 (the date of the Board's approval of the list of curriculum writers minus Foluke) and beyond. One might further infer that Foluke's protected activities, including grievance processing, were an ongoing annoyance or tiresome encumbrance to the Board throughout that period, but no particular evidence demonstrates that state of mind. The November 2001 solicitation alternatively could suggest that the Board harbored no hostility and wished to reward and promote Foluke to a supervisory position in recognition of administrative excellence.

In early April 2001, language arts literacy supervisor Schneck personally encouraged Foluke to submit a (second) letter expressing interest in a summer curriculum-writing position. She knew of Foluke's previous curriculum-writing experience. Soon afterwards, Schneck called Foluke and reminded her to file the letter. Foluke filed the letter. On April 23, Schneck, who had become "desperate for bodies" to fill the positions, recommended Foluke and 8 other unit members to the Board for paid positions in language arts literacy curriculum writing.

Foluke was the only recommended curriculum writer applicant rejected by the Board. Its personnel committee included Board President McElroy and Superintendent Smith, both of whom had directly solicited Foluke to leave the Association. The record shows that in the committee meeting, McElroy asked what Foluke taught and argued against her approval to the members present. The argument persuaded the Board members on the committee. Davion, for her part, inaccurately answered the President's question, saying that Foluke taught "mostly science." The record shows that Foluke had a teaching load comprised of equal parts of science

and language arts for the three most recent and consecutive academic years. No evidence suggests that McElroy or Smith had specific and independent knowledge of Foluke's teaching responsibilities or previous curriculum-writing experience. I have inferred that Davion did not disclose to the committee the facts of Foluke's 13 years of elementary teaching at Grove Street and participation with her (Davion) on the previous language arts curriculum-writing endeavor in 1988 or 1989. Assuming that Davion intentionally withheld Foluke's relevant curriculum experience from the committee and misrepresented her teaching responsibilities, I find no evidence in the record indicating that her motive was hostility to protected conduct. Davion had met with Foluke to discuss an unspecified number of grievances on unspecified dates, and about unspecified topics. I cannot infer hostility from those meetings. Nor is there evidence that McElroy or Smith conspired with Davion against Foluke.

I also do not infer hostility from the fact of the Board's discussion of Foluke's candidacy at its June 20 closed agenda meeting, inasmuch as her name had been deleted by the personnel committee on a previous date. In the June closed session, Superintendent Smith confirmed aloud that Foluke was not a language arts teacher, merely reiterating the (inaccurate) justification cited by McElroy and Davion at the committee meeting. The question of motive again distills to Davion's negligent or intentional and undefined reasons for mischaracterizing Foluke's teaching and curriculum writing experience. The reprised discussion of Foluke's qualifications (i.e., that she was a "science" teacher not suitable for a language arts literacy curriculum writing position) before the full Board may have been prompted by a knowledge of her Association position, coinciding with the knowledge among some Board members (those on the personnel committee)

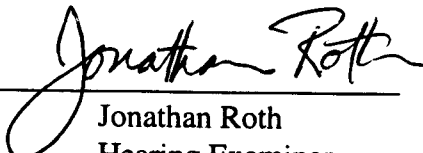
that Foluke was the only candidate rejected. No evidence suggests that Foluke's Association activities were mentioned at this session or in the previous personnel committee meeting; the Board may have only reassured itself of the propriety of its decision.

I find that Foluke's qualifications for the paid position were at least as compelling as those of elementary teachers Hirschfield, Doll and York, who were approved by the committee and the full Board. The result was that the sixth grade - Foluke's grade - was the only unrepresented elementary or middle school class (K-8) among the approved language arts literacy curriculum writers. Assuming that Foluke was more qualified than the three others named, I am not persuaded that the Board was hostile. From the evidence on this record, I can conclude only that the personnel committee and full Board relied upon the substance of Davion's mischaracterization of Foluke's experience. This fact undercuts the significance of the assumption; it is enough (i.e., legally sufficient) that Hirschfield, Doll and York rationally appeared to be desirable or qualified for the position and that Foluke did not.

Finally, I have found that Davion's terse, dismissive and misleading responses to the Association's inquiry of the criteria used for selecting language arts literacy curriculum writers at their July 3, 2001 meeting bespeaks an intention to withhold facts. Standing alone or with other evidence, Davion's conduct does not prove that the Board was hostile to Foluke's protected activities when it refused to appoint Foluke to a Language Arts Literacy Curriculum writing position in June 2001.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.


Jonathan Roth
Hearing Examiner

DATED: January 28, 2003
Trenton, New Jersey