P.E.R.C. NO. 2004-12

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WOOD-RIDGE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-2002-80

WOOD-RIDGE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Wood-Ridge Board of Education. The Complaint was based on an unfair practice charge filed by the Wood-Ridge Education Association. The charge alleges that the Board violated the New Jersey Employer-Employer Relations Act when it did not renew the employment contract of a custodian in retaliation for his activity as Association representative. The charges also alleges that this custodian was the third Association custodian representative to be terminated and that the Board's actions chilled employee rights. The Commission concludes that the Board has proven, by a preponderance of the evidence on the entire record, that it would not have renewed the custodian's contract even absent his protected activity. It further concludes that there was insufficient evidence in the record to find that the employer violated the Act by otherwise interfering with protected rights.

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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WOOD-RIDGE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Mark T. Janeczko, attorney

For the Charging Party, Springstead & Maurice, attorneys (Alfred F. Maurice, of counsel)

DECISION

On September 24, 2001, the Wood-Ridge Education Association filed an unfair practice charge against the Wood-Ridge 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 5.4a(1), (3) and (4),[1/] when it did not renew

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

the employment contract of custodian Albert D'Aurizio in retaliation for his activity as Association representative. The charge further alleges that D'Aurizio was the third Association custodial representative to be terminated and that the Board's action has chilled employee rights.

On February 27, 2002, a Complaint and Notice of Hearing issued. On March 14, the Board filed an Answer denying the allegations and asserting that D'Aurizio's non-renewal was motivated by his poor work habits, not his Association activity.

On October 1 and 2, 2002, Hearing Examiner Don Horowitz conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On July 3, 2003, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 2004-1, 29 NJPER 312 (¶97 2003). He found that the termination was motivated both by D'Aurizio's protected activity and his declining work performance, which paralleled deficiencies that had been documented for years. The Hearing Examiner concluded that the Board would not have renewed D'Aurizio's contract even absent his protected activities, and that therefore the Board did not violate the Act. Finally, the Hearing Examiner found that the record concerning other terminated Association representatives was not sufficient to

establish that D'Aurzio's termination was part of a pattern or policy of discharging Association representatives.

On July 18, 2003, the Association filed exceptions. It argues that the Hearing Examiner's findings of fact and conclusions of law regarding hostility to protected activity and anti-union animus are inconsistent with his ultimate recommendation to dismiss the Complaint. In particular, the Association contends that a former Association representative who had been rehired did not testify because he was afraid for his job, and that there was no evidence that D'Aurzio's performance was worse than that of the remaining custodians.

On July 28, 2003, the Board filed an answering brief. It argues that a pattern of poor work performance and unsuccessful remediation attempts led to D'Aurizio's non-renewal. In addition, it argues that the record lacks any testimony indicating that former Association representatives failed to testify because they were afraid. The Board urges adoption of the Hearing Examiner's recommendations.

We have reviewed the record. We incorporate the Hearing Examiner's undisputed findings of fact (H.E. at 3-29).

Allegations of retaliation for union activity are governed by the standards established in In re Bridgewater Tp., 95 N.J. 235 (1984). 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.

The Hearing Examiner inferred hostility to protected activity from the juxtaposition of D'Aurizio's Association activities in late 2000 and a series of written reprimands and

criticisms in early 2001. However, he credited the testimony of D'Aurizio's supervisor about why he rated D'Aurizio unacceptable in ability to get along with staff and fellow workers. Absent compelling contrary evidence, we will not substitute our reading of the transcript for the Hearing Examiner's credibility determination. City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980).

The Hearing Examiner also found that deficiencies in D'Aurizio's performance during the 2000-2001 school year were similar to problems that had been documented during previous years. Applying Bridgewater, he concluded that the Board had proven, by a preponderance of the evidence on the entire record, that it would not have renewed D'Aurizio's contract even absent his protected conduct. Given the Hearing Examiner's decision to credit the performance evaluations that preceded D'Aurizio's non-renewal, we accept his conclusion that the Board did not violate 5.4a(3) or (4).

The Hearing Examiner acknowledged that an employer's conduct can tend to interfere with protected rights and independently violate 5.4a(1). He concluded, however, that there was insufficient evidence in this record to find such a violation in this case. We agree and dismiss that allegation as well.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Millicent A. Wasell
Chair

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

DATED: September 25, 2003
Trenton, New Jersey
ISSUED: September 25, 2003

H.E NO. 2004-1

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

In the Matter of

WOOD-RIDGE BOARD OF EDUCATION,

RESPONDENT,

-and- Docket No. CO-H-2002-80

WOOD-RIDGE EDUCATION ASSOCIATION,

CHARGING PARTY.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission dismiss a Complaint based upon an unfair practice charge filed by the Wood-Ridge Education Association against the Wood-Ridge Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when it did not renew the contract of Albert D'Aurizio who was the Association's representative for custodial and maintenance employees . The charge alleged that the termination was in retaliation for D'Aurizio's exercise of rights protected by the Act, in the workplace and in connection with a clarification of unit petition the Association had filed with the Commission. It further alleged that D'Aurizio's discharge was the third consecutive non-renewal of an Association custodial representative and was part of a pattern of conduct which tended to restrain, coerce or intimidate employees in the exercise of rights protected by the Act.

The Hearing Examiner recommends that the Commission find that the discharge was motivated both by D'Aurizio's protected activity and by his declining work performance which paralleled deficiencies which had been documented in prior years. The Hearing Examiner recommends that the Commission find that the Board would not have renewed the custodian's contract even absent his protected activities and therefore, pursuant to In re Bridgewater Tp., 95 N.J. 235 (1984), the Board did not violate the Act. The Hearing Examiner further recommends that the

Commission find that, although the Board was hostile to D'Aurizio's protected activity, the record concerning the non-renewals of the prior Association representatives is not sufficient to establish that D';Aurizio's termination was part of a pattern or policy of discharging Association representatives.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair, or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

H.E NO. 2004-1

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

In the Matter of

WOOD-RIDGE BOARD OF EDUCATION,

RESPONDENT,

-and- Docket No. CO-H-2002-80

WOOD-RIDGE EDUCATION ASSOCIATION,

CHARGING PARTY.

Appearances:

For the RESPONDENT,
Mark T. Janeczko, attorney

For the CHARGING PARTY,
Springstead & Maurice, Attorneys
(Alfred F. Maurice)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 24, 2001, the Wood-Ridge Education Association filed an unfair practice charge against the Wood-Ridge Board of Education. The charge alleges that on June 20, 2001, the Board did not renew the employment contract of custodian Albert D'Aurizio in retaliation for his activity, as the Association representative for custodial staff, specifically his filing of grievances and a clarification of unit petition with the Commission and his actions in defending unit members and asserting their contractual rights before administrators and

supervisors. The charge further asserts: that the Board has developed a plan or scheme designed to discriminate and retaliate against an Association officer for participating in Association activities; has created an environment which is hostile to the filing of grievances and the Association's ability to effectively represent its members; and that D'Aurizio's discharge, the third consecutive termination of Association custodial representatives, has created a chilling effect upon the ability of its members to advance their statutory and contractual rights as shown by the Association's inability to appoint a successor representative for the custodial staff. The charge alleges that the Board's action violates N.J.S.A. 34:13A-5.4a(1)(3) and (4),[1/] part of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

On February 27, 2002, a Complaint and Notice of Hearing issued.[2/] On March 14, 2002, the Board filed an Answer, denying

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1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed an affidavit, petition or complaint or given any information or testimony under this act"

2/ The Complaint designated Susan L. Stahl as Hearing Examiner. On May 22, 2002, the case was reassigned to me.

the allegations and asserting that D'Aurizio's non-renewal was not motivated by his Association activities but was instead based upon and justified by his work habits, a legitimate business reason. The Board also asserted that it has not renewed the contracts of other custodians with similar work habits and that D'Aurizio's status as an Association official should not immunize him from the obligation to perform his duties in accordance with the same standard applicable to other custodial employees.

On October 1 and 2, 2002, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by January 8, 2003.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. In December 1997, Albert D'Aurizio was employed by the Board, a public employer, as a full-time custodian. While employed in another district, he had worked for Wood-Ridge as a substitute custodian for a few months prior to his appointment (1T107-18 to 1T108-6; 2T4-12 to 2T5-4). He ceased working for Wood-Ridge on June 29, 2001, after the Board, on June 20, 2001, voted not to renew his contract (J-1).

2. D'Aurizio's supervisor was Robert Csigi until Csigi left the district in April 2001. Cisgi hired D'Aurizio as a full-time custodian based on his work as a substitute. He testified that D'Aurizio had performed "very well" and felt fortunate to be able

to hire him full-time. (1T113-16 to 1T113-21; 2T4-14 to 2T4-24; 2T56-5 to 2T56-6). In March 2001 Csigi recommended that the Board not renew D'Aurizio's contract, but, after the supervisor left the district, he was contacted by the custodial supervisor in the Midland Park school district who was considering giving D'Aurizio a full-time job (2T57-16 to 2T57-24; 2T63-22 to 2T64-6). Csigi felt that D'Aurizio had performance peaks and valleys while in Wood-Ridge and told his counterpart that D'Aurizio was a good employee and added that "if you stay on top of him and work with him he will do a good job." (2T64-7 to 2T65-10).

Association Custodial Representatives and their Activities

3. After working for several months, D'Aurizio noticed that there was no Association representative for the custodial staff. In September or October 1998, he requested the job and was appointed the Association representative for custodial and maintenance employees (1T 108, 20-25; 1T 109, 2-4). He said he was not deterred by warnings from other custodians who had referred to the non-renewals of prior custodial representatives (1T111-8 to 1T111-18).

4. From 1986 until his contract was not renewed in 1989 or 1990, George Lord served as the Association representative for the custodial staff (1T18-17 to 1T19-6). For part of that period the custodians were in their own separate negotiations unit. Lord lobbied to have the custodians added to the Association's

unit, an event which came to pass while he represented the custodians. Lord participated in and supported a wide range of Association activities and became vice-president of the Association (1T22-5 to 1T23-21). Lord was later rehired by the Board but did not take any active or leadership role in the Association (1T20-9 to 1T24-25).[3/]

5. Paul Bosinia followed Lord as the Association's representative for the six or seven custodians employed by the Board (1T19-6 to 1T19-10; 1T25-5 to 1T25-14). He had also been active in supporting the admittance of custodians into the unit represented by the Association. Bosinia held the position for four years until his contract was not renewed. (1T25-10 to 1T26-25). Three other custodians who did not hold Association positions were also let go at the same time (1T43-5 to 1T43-17).

6. Following Bosinia's departure, Robert Severidge informally served as the custodians' Association representative. He is no longer employed by the district (1T19-11 to 1T19-16).[4/]

3/ Association president Rose Holz was not sure whether an unfair practice charge had been filed after Lord's termination. She could not recall the circumstances of Lord's re-employment (1T53-16 to 1T53-22).

4/ Business Manager Michael Leary testified that four custodians were terminated in 1997 (2T114-17 to 2T115-2). The record is not clear as to whether Bosinia or Severidge was among this group.

7. After Lord, Bosinia and Severidge each left the district, there was no custodial representative for various time periods. The post was vacant for at least a year until D'Aurizio took the position in October 1998 (1T39-25 to 1T40-22). After D'Aurizio's termination, Association leaders asked five custodians to serve as the custodians' Association representative. All of them declined (1T32-6 to 1T33-22; 1T76-4 to 1T77-3). None of the custodians in Wood-Ridge have tenure (1T78-9 to 1T78-18).

8. D'Aurizio prepared for his post as representative by reviewing the contract to learn the respective rights of the Board and the employees. He also sought information from other Association officials (2T138-25 to 2T139-8). At least weekly he would raise concerns or identify problems about working conditions with Csigi, although none of the matters was formalized as a written grievance (1T143-1 to 1T144-3). He would frequently start discussions with Csigi by saying, "My guys got a problem." Sometimes Csigi would be receptive and other times the supervisor would not make an adjustment, but would acknowledge that D'Aurizio could take the issue to the next level, i.e. Business Manager Michael Leary (1T115-10 to 1T115-24).

9. Asked on cross-examination whether Csigi had "interfered" with his Association activities, D'Aurizio initially said yes because Csigi had occasionally said to him that unions

were of little value to employees. He then acknowledged that Csigi's statements and his own views amounted to a difference of opinion about unions. Noting that Csigi would respond "Do what you gotta do" when D'Aurizio would indicate he wanted to pursue an issue, D'Aurizio conceded that the supervisor did not interfere with his right to carry out his Association duties (1T161-2 to 1T162-10). Leary, who was Csigi's supervisor, described his talks with D'Aurizio on Association issues as cordial and businesslike (2T107-18 to 2T10722).

10. New Jersey Education Association Uniserv Representative Rose Ann Spina began working with the Association in January 2000. She and Association President Holz had an effective working relationship with Csigi and Leary. Their meetings were amicable and they were able to resolve most issues to the Association's satisfaction (1T44-22 to 1T45-25; 1T93-8 to 1T93-23; 2T71-17 to 2T72-6). The Association did not file unfair practice charges or start litigation while D'Aurizio was the custodial representative, although Holz commented that perhaps the Association should have formalized some of their complaints as grievances (1T46-1 to 1T47-22).

11. During 2000-2001, D'Aurizio's final year in the district, Spina came to the Wood-Ridge district on about a half-dozen occasions to assist custodians and attend meetings (1T68-15 to 1T69-12). On September 7, she met with the custodial staff to

discuss whether the night foreman should remain in the negotiating unit. On October 23, she discussed the distribution of overtime with Csigi and Leary. In January 2001 and on one other occasion she discussed the policy concerning the custodians' availability for snow removal (2T107-7 to 2T107-117). She also attended a meeting in December 2000 with D'Aurizio and Leary concerning D'Aurizio's personal work issues. D'Aurizio did not want Csigi at the meeting and the supervisor was not present (2T131-13 to 2T132-9). On December 13, Spina and D'Aurizio reviewed the contents of his personnel file (1T69-20 to 1T70-6).

Evaluations and work performance through June, 2000

12. D'Aurizio was assigned to the 3 p.m. to 11 p.m. shift and at times had work assignments in two separate buildings (1T108-8 to 1T108-14). Csigi normally worked a day shift so his hours did not usually coincide with D'Aurizio's except for a short time in the afternoon (2T98-10 to 2T98-17). Csigi periodically made spot checks in the evenings and on weekends (2T98-19 to 2T99-10). A night foreman was in charge of the shift that D'Aurizio worked (2T99-11 to 2T99-14).

13. Csigi normally issued uncomplicated evaluations with few subjective comments. The form used by the district asks for an acceptable or unacceptable rating in each category and provides space for approximately four lines of single spaced typed comments. Csigi also relied on letters or memoranda commending

or criticizing an employee when making his personnel recommendations (2T5-7 to 2T6-9). Csigi said he would give employees any letters he received about their work and might refer to them in an evaluation, but did not attach the documents to the form (2T58-18 to 2T59-5). The contract between the Board and the Association provides that when a non-teacher is evaluated, the building principal shall provide written input to the supervisor performing the evaluation (C-3, Article XIV.A.3). Leary testified that he relied completely on Csigi's evaluations of the custodial and maintenance staff and did not independently assess their work (2T120-7 to 2T120-25).

14. On March 31, 1998, Csigi evaluated D'Aurizio (J-2). He rated D'Aurizio acceptable in his ability to get along with fellow workers, administrators, teachers and students. He also checked off the acceptable column next to 18 other relevant categories and tasks listed on the form. Under comments Csigi observed that D'Aurizio is a "team player" and "always looks to do a good job." But he also noted that D'Aurizio needed to pay more attention to detail and should "talk less with his fellow employees during work time." D'Aurizio's signature acknowledged receipt of the review and that he had discussed it with Csigi.

15. During a two-week period prior to September 2, 1998, Csigi had advised the custodians as a group not to park in certain student loading and/or drop off areas (2T9-2 to 2T9-17).

He also spoke personally to D'Aurizio about the practice (2T9-18 to 2T9-23). On September 2, Csigi noticed that D'Aurizio's car was parked in the prohibited area. The supervisor issued a letter of warning admonishing D'Aurizio that if he persisted in parking in that location further discipline would result (R-3). D'Aurizio ceased the practice (2T10-2 to 2T10-25).

16. Csigi testified about his formal evaluations of D'Aurizio for March 1998 (J-2), March 1999 (R-4), August 1999, (J-4), October 1999 (J-3) December 1999 (J-5) February 2000 (J-6), March 2000 (J-7), December 2000 (J-8), March 2001 (J-11).

17. D'Aurizio's March 1999 evaluation (R-4) rated him unacceptable in ability to get along and cooperate with fellow workers and teachers and in demonstrating good judgment. He received an unacceptable rating in the specific tasks of dusting, cleaning of chalkboards and meeting (i.e. completing) his assigned work schedule. Csigi's comments noted that D'Aurizio followed directives to a "T" (i.e., too literally); that he must "...refrain from extensive talking with employees and staff during work hours," and that "...more attention is needed in accommodating the teachers and staff rather than being combative with unnecessary actions and comments".

18. The last of these comments was generated by an incident involving food left in classroom waste baskets. Csigi explained that, despite the principal's directive to the contrary, some

teachers would eat in the classroom and would also allow their pupils to do so as well (2T19-7 to 2T19-19). Csigi wanted D'Aurizio to resolve the problem directly with the classroom teacher, but the supervisor also spoke with the teacher. The problem abated, but only for a few days. When D'Aurizio told Csigi the food waste had returned, Csigi told him to "just leave it there." D'Aurizio responded by removing the non-food refuse and placing the partially emptied wastebasket, still containing food and drink waste, upright on top of the teacher's desk, provoking an angry reaction from the faculty member. Although the teacher got the message and stopped eating in class, Csigi said his comments on the evaluation reflected his dissatisfaction with D'Aurizio's approach to the problem and was also an example of what he meant when he commented that D'Aurizio's carried out instructions "to a T." (2T18-15 to 2T21-4).

19. On March 22, 1999, just prior issuing the evaluation, Csigi memorialized an event from the prior Saturday in which he visited a work site where D'Aurizio and others were painting on an overtime basis. Csigi wrote that he found D'Aurizio "in a non-productive state" (i.e. sleeping). The memo states that D'Aurizio would not receive overtime pay for two of his work hours that day. D'Aurizio asserted that the combination of a medication he was taking and the paint fumes caused him to doze off (1T167-12 to 1T168-8).

20. After issuing the March, 1999 evaluation, Csigi was inclined to recommend that D'Aurizio's contract not be renewed. He discussed the matter with Leary and they decided to recommend that D'Aurizio be given a six month contract running from July 1, 1999 through December 31, 1999. A similar arrangement had been used with another custodian, Pat Ryan (2T27-23 to 2T29-22).

21. On April 28, 1999, the Board voted to renew D'Aurizio for six (6) months, rather than the customary term of one (1) year. D'Aurizio was aware that Ryan had received a similar contract the previous year (1T174-24 to 1T174-25; 1T175-2 to 1T175-5). Leary viewed the six (6) month contract term as a "probationary period" for D'Aurizio (2T105-12 to 2T105-20).

22. A remediation agreement executed contemporaneously with the six month contract, (R-2) specified six specific areas for improvement. It also notified D'Aurizio that he would be directly supervised by Csigi during the summer and would work under the night foreman when the school year started.

23. During the term of the six-month contract D'Aurizio was formally evaluated in August 1999, (J-4), October 1999 (J-3) and December 1999 (J-5). All three reviews rated his work acceptable and observed that he had improved in his relationships with peers, faculty and staff. The August and October evaluations urged hm to continue to refrain from excessive conversations with co-workers, but the December 1999 review acknowledged that he had

improved his work habits over the past six months and noted that he would be re-employed. Both Csigi and Leary agreed that, while working under the six month agreement, D'Aurizio's work habits and the quality of his performance improved (2T 35-13 to 2T35-24; 2T105-21 to 2T106-12).

24. D'Aurizio was given a contract for the next six (6) months, through June 30, 2000. He was evaluated in February (J-6) and March (J-7). He received acceptable ratings and Csigi commented in February that he was continuing his progress in reducing excessive talking.

25. On June 8, 2000, Csigi sent D'Aurizio a note telling him to schedule and bring a representative to a meeting with Csigi and Leary about an incident that was described in an attached memorandum (R-6). The memo, dated May 31, 2000 and composed at Csigi's request[5/] by a secretary in the Guidance Department, recounted that the principal had told her that D'Aurizio had extracted and read a discarded document from her wastebasket. D'Aurizio had asserted that the document, which apparently praised the work of the clerical staff during the school year, should have also acknowledged the contributions of the buildings and grounds department. The secretary's memo expressed concern

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5/ The secretary first made a verbal complaint to Csigi who responded that he would address the problem only if the incident was described in writing. (2T36-15 to 2T36-25).

that D'Aurizio's activity could compromise privacy and detract from the task of cleaning the office. According to Csigi, D'Aurizio acknowledged reading the document but asserted that he saw it in the teacher's lounge and had not extracted it from the wastebasket. Csigi said the matter was amicably discussed and resolved at the meeting. He agreed that D'Aurizio's intentions about recognizing the buildings and grounds staff were excellent, but found his methods unorthodox and inappropriate (2T37-5 to 2T38-4). D'Aurizio asserted that the secretary was reluctant to write a memo critical of another Association member but was pressured by Csigi to prepare the document. I do not accept his explanation. Csigi testified credibly that he consistently told staff who had complaints about custodial issues that if they wanted him to redress the matter they should provide a written account of any incidents. The secretary had first made a verbal complaint without any prompting from Csigi (2T36-15 to 2T36-25).

26. At the end of the 1999-2000 school year Csigi recommended that D'Aurizio be renewed under a normal 12 month agreement. Csigi did not formally evaluate D'Aurizio again until December 2000 (J-8; 2T38-13 to 2T38-23).

27. In each of his evaluations of D'Aurizio, Csigi commented on how well or poorly D'Aurizio was controlling his natural tendency to talk to co-workers and other staff. Csigi did not want D'Aurizio's talkative nature to interfere with his work or

the work of other custodians. I credit Csigi's testimony that other custodians told him they did not want D'Aurizio to talk to them so much (2T42-2 to 2T42-23). Explaining the comments on the March 1998 evaluation, the supervisor said:

> In general Al would take conversations from a break or from lunch and carry them on with the employees. Employees had come to me and said, "I am trying to do my section and Al is there talking and kibitzing, and I would rather do my job and get the area done." I approached Al on several occasions saying, " Do your section, don't worry about it because I don't want things to become a problem in your section by you being with the others and talking. Let them do their jobs. I don't care what you are talking about, you can talk for a couple of minutes afterwards, but don't let it be extensive, we all lose track of time and you might be there fifteen or twenty minutes talking." (2T7-22 to 2T8-14).

A year later, D'Aurizio's talking continued to be problematic but in describing the custodian's habits, Csigi noted:

> Well, again, [his talking] was a constant, Al has a very good gift of gab and he is a very intelligent man and he likes to impart that on other people, so consequently he would do that (2T17-12 to 2T17-15).

Attempt to Remove the Night Foreman from the Association's Unit

28. D'Aurizio's work was overseen by Marino Marco, the night foreman. During most of D'Aurizio's employment with the Board, Marco was part of the negotiating unit represented by the Association. Beginning in March 2000, D'Aurizio began to assert that given Marco's job responsibilities and activities he was a de facto supervisor and should not in be the same negotiating unit as the other custodians. Holz and Spina concurred with

D'Aurizio's assessment, met with the other custodians and contacted an attorney to file a clarification of unit petition with the Commission to have Marco's status resolved (1T67-7 to 1T68-10; 1T91-16 to 1T92-6).

29. On November 20, 2000, the Association filed a clarification of unit petition (Docket No. CU-2001-013) seeking the removal of the night foreman from the unit.[6/]

30. The Commission did not issue a formal decision in the case as the dispute was resolved directly by the parties. D'Aurizio testified that Marco was removed from the unit late in 2000 or early in 2001 (1T142-11 to 1T143-25; 1T151-8 to 1T151-14).[7/] However Leary, the business manager, who was present during the talks about the night foreman's status, recalled that the matter was not completely resolved until after Csigi had left and D'Aurizio had been terminated. He indicated the night foreman's job was altered to remove supervisory responsibilities

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6/ I take administrative notice of the Commission's public docket solely to establish the filing date of the petition. The clarification of unit the petition was the subject of testimony from both Board and Association witnesses.

7/ D'Aurizio was incorrect in stating that the Association had received a favorable legal decision on the clarification of unit petition. The petition was withdrawn and the dispute was resolved informally. But it is undisputed that D'Aurizio first raised the issue and successfully convinced the Association to seek Marco's removal from the unit.

(2T115-7 to 2T117-7; 2T122-3 to 2T122-11). Csigi did not recall if the issue was resolved before he left (2T72-7 to 2T72-15).

31. D'Aurizio felt that Csigi resented his efforts to remove Marco because the supervisor and the night foreman were quite friendly (1T141-17 to 1T1424). He also claimed that after D'Aurizio raised the issue of Marco's status, the foreman received a reduced workload and his former assignments were given to the other custodians. D'Aurizio claimed that his workload increased by 30 per cent and that the redistribution provoked complaints from other custodians which he relayed to Csigi (2T143-1 to 2T147-7). The Association also complained that Marco was receiving an excessive amount of overtime. Holz and Spina met with Csigi and Leary about the overtime issue and reached an informal resolution (2T107-7 to 2T107-17). D'Aurizio noted that in January or February 2001, Marco's shift was altered so that he could leave work at 10 p.m. rather than 11 p.m. (2T155-18 to 2T158-3). D'Aurizio asserted that the change in hours posed a security problem since other custodians worked until 11 p.m. but only Marco had authority to secure the buildings.

The December 13, 2000 gym confrontation

32. In December 2000 D'Aurizio's work area included a gymnasium and locker rooms which were often used after school hours (2T43-7 to 2T43-8).

33. A schedule allocating gym use was made up and posted so that the custodial staff would know how long each group and activity would be using the facility (1T185-13 to 1T185-20). A copy of the schedule was also posted in the gym so the users of the facility would know when they had to leave (2T84-9 to 2T85-13). The schedule included a break between events so that custodians could clean and prepare the areas for the next group.

34. A basketball team regularly practiced in the gym. The coach had often kept the players in the gym past the end of their allotted time and D'Aurizio had trouble getting them to leave on schedule. He reported this problem to Csigi who told D'Aurizio that if it happened again, D'Aurizio should "throw [the coach] the ____ out." Csigi continued saying that the coach "was a piece of ____, was a bum when he was a student, was a troublemaker now and we are going to get him out of here." D'Aurizio asked Csigi if he was sure he wanted D'Aurizio to throw the coach out of the gym. Csigi repeated his profane instructions (1T183-22 to 1T184-14).

35. On December 13, 2000, a week or two after D'Aurizio and Csigi had discussed the problems with the coach, the gym schedule called for basketball practice to end at 6:00 p.m. and another event to start at 7:00 p.m. (1T185-17 to 1T185-20). D'Aurizio entered the gym at 6:00 p.m. and saw that the coach and his players were still practicing. D'Aurizio reminded the coach that

his team needed to leave because another event was coming into the gym. He told the coach he had some cleaning assignments upstairs and said the team could stay for a while longer.

36. When D'Aurizio returned at 6:30 p.m. the team was still using the gym. The custodian told the coach him he and the team had to leave because D'Aurizio had to prepare the gymnasium and locker room area for the next group. The coach refused and started raising his voice. D'Aurizio countered "You have to leave, you have to go! We had the problem last week, I spoke to my supervisor about this, you have to go!" D'Aurizio said he summoned Marco, the night foreman, to handle the problem. D'Aurizio then left the area. Marco was apparently able to persuade the coach to leave. D'Aurizio said he approached the problem in accordance with Csigi's instructions and denied using any abusive language toward the coach (1T186-8 to 1T187-5).

37. The next day, D'Aurizio and Marco each gave Csigi written reports about the incident (CP-4; R-10). D'Aurizio's account states that he showed the schedule to the coach, pointing out that his team's session was to end at 6:00 p.m. and that a recreational basketball program was to start at 7:00 p.m. D'Aurizio's memo states that with Marco present he told the coach that he would begin to shut off the gym lights and proceeded to do so. The memo says that Marco was also unsuccessful in convincing the coach to leave. D'Aurizio's report also refers to

the occasion earlier in December when the coach wouldn't leave. Marco's account is consistent with D'Aurizio's. It states that tempers began to rise and that D'Aurizio and the coach began to exchange words. It does not specifically assert that D'Aurizio was either loud or profane. Marco's report states that after D'Aurizio walked away, he was able to persuade the team to leave by telling the coach to take the issue up with his athletic director and promising that he would discuss the issue with Csigi. Marco's account concludes that D'Aurizio was right but had not properly handled the situation.

38. The coach sent a letter about the incident to the school principal which was received on December 18 (R-7). Csigi was given a copy of the memo. The coach acknowledged raising his voice and becoming angry, asserting that the custodian had been confrontational and disrespectful to him in front of his players. Referring incident earlier that month, the coach's memo claims that he was provoked because the December 13 incident was the second time that D'Aurizio had been disrespectful while asking the coach to end his practice. In the memo the coach asserts that he had been told he had the gym until 8:00 P.M. and accused D'Aurizio of putting his players in jeopardy by walking onto the court in the middle of a drill. Marco's statement concurs that D'Aurizio had walked on the court while the team was in action.

39. On December 19, 2000, Csigi issued a "Letter of Warning" to D'Aurizio, attaching D'Aurizio's, Marco's and the coach's written accounts. Csigi's memo (R-7) states:

> On Wednesday December 13, 2000, you were in a verbal confrontation with the high school boys basketball coach. You were absolutely right to have the coach end the scheduled practice based on the information I provided you that evening. You were absolutely wrong in the manner in which you conducted yourself with the coach.
>
> The verbal confrontation with the coach in front of the student athletes was uncalled for and must never happen again. Attached are copies of the letters received for which the action is taken.
>
> In the future all conflicts will be handled by a supervisor. . .

Although he had not yet received all of the written accounts, Csigi was aware of the details of the incident when he evaluated D'Aurizio on December 14, 2000 (2T44-8 to 2T44-16; J-8).

Vacation and Snow Removal

40. In August 2000, D'Aurizio, using a district form (J-9), asked to be on vacation from December 26, 2000 through January 2, 2001. To do this, he only needed two days of paid leave which, when combined with holidays and weekends, would allow D'Aurizio to be off for eight days.[8/] Csigi approved the request.

8/ In the 2000 holiday season Christmas Day and New Year's Day fell on Mondays. Thus December 23, 24, 25, 30, 31 and January 1 all fell on weekends or were legal holidays.

41. Following his return to work D'Aurizio received a written reprimand from Csigi chastising him for being unavailable for snow removal duty on December 31, 2000. (J-9; 1T165-17 to 1T166-21). It read:

> On December 31, 2000, you were not available for snow removal. We tried to contact you on Friday, December 29, 2000, but you could not be reached through any of your contact telephone numbers that you provided the district. Employees are mandated to report for snow removal. Official notification includes phone calls, answering machine, phone messages, phone pagers, verbal of written communications. Employees are required to provide the supervisor, Buildings and Grounds, with a current contact telephone number.
>
> If an employee is not contacted by the supervisor of buildings and grounds they must contact the supervisor for instructions. If there are any questions, please see me.

42. D'Aurizio was incredulous that he received the reprimand and asked Csigi for an explanation. Csigi told D'Aurizio that he was obligated to furnish a contact number, even if staying at a hotel, and be available if needed. (1T148-14 to 1T148-21).

43. D'Aurizio then contacted Holz and Spina who arranged a meeting with Leary and Csigi. An agreement was reached to rescind the rebuke and clarify that vacationing workers were not required to report for snow removal.

44. The record does not show if the policy described in the reprimand had been set prior to the incident and that employees had been made aware of it. Csigi could not recall if the details of the policy had been ironed out before or after the reprimand

was issued (2T70-6 to 2T70-22). Csigi's explanation of the incident and his reason for issuing the reprimand are inconsistent and contradictory. Csigi asserted that to constitute a "vacation" a leave must be at least one week long. The supervisor maintained that because D'Aurizio only used two days of leave, connecting it with his normal days off and school holidays, D'Aurizio was not really on vacation. Yet D'Aurizio was off for eight days and the form Csigi approved in August listed the precise dates (December 26 through January 2) that D'Aurizio would be away (2T67-12 to 2T68-15; 2T71-2 to 2T71-10).

December 2000 through March 2001

45. In early December 2000, D'Aurizio complained to Spina that he was being treated unfairly and picked on by Csigi (2T125-16 to 2T126-10). He also felt that Csigi told Marco to watch his every move (1T150-12 to 1T151-25). The custodian asked the NJEA representative to arrange a meeting with Leary to discuss these issues. D'Aurizio specifically requested that Csigi not attend the meeting, but was apparently comfortable discussing his work problems with Leary who he felt was trustworthy and could be objective (2T132-20 to 2T132-25). Spina would have preferred that the supervisor also be present (2T132-4 to 2T132-8). At the end of the meeting Spina advised Leary that she wanted to inspect D'Aurizio's personnel file. Leary and the Superintendent consented and she and D'Aurizio performed the inspection during

the afternoon of December 13 (1T69-21 to 1T69-25; 2T126-18 to 2T127-2). Spina placed her initials and the date at a corner of the documents she found in the file (1T70-16 to 1T70-19).

46. The next day, Csigi prepared an evaluation of D'Aurizio which rated him unacceptable in ability to get along with fellow workers and in attendance. All other categories and tasks were found to be acceptable. Csigi commented that D'Aurizio needed to be ready to work at scheduled times, to improve his attendance and improve his working relationship with the staff. D'Aurizio refused to sign the evaluation. Csigi testified that D'Aurizio would often show up at his job site ten to fifteen minutes late because he would frequently seek out and engage coworkers and teachers in conversations before reporting to his work assignment. Although Csigi acknowledged that D'Aurizio brought in doctor's notes when he was out sick, the supervisor said that he had already used all of his yearly leave (12 days) as of the date of the evaluation (2T39-5 to 2T40-7; 2T41-3 to 2T42-23).

47. The review was prepared by Csigi after he had heard about D'Aurizio's confrontation with the basketball coach, but before he had received the written accounts from D'Aurizio, the coach and the night foreman (2T44-8 to 2T44-16). The snow removal dispute had not yet occurred. There was no testimony as to whether Csigi prepared the evaluation knowing about either the recent meeting held among D'Aurizio, Spina and Leary, or of Spina

and D'Aurizio's review the previous day of the custodian's file. As the evaluation was to be placed in D'Aurizio's just inspected personnel file, which consisted primarily of documents prepared by Csigi to which Spina's initials had been added, I find that Csigi was probably aware the file had been inspected.[9/]

48. D'Aurizio asserted that after being transferred to the middle school he had been given too large a work area to complete during his shift and had a greater workload than his peers (1T147-6 to 1T147-22). He took his complaint to Csigi who asserted that the readjustments that had been made were based on time studies and that the supervisor felt that D'Aurizio's new assignments and the removal of some prior work assignments were "a wash" (2T60-6 to 2T60-13). Csigi also told D'Aurizio that he felt D'Aurizio was not giving his assignments the effort that was expected of him. He knew from D'Aurizio's past performance that he was able to do better. He told D'Aurizio that if he matched his previous efforts and the work could still not be completed, Csigi would have others assist him (2T60-24 to 2T61-22).

9/ The Association questioned whether all then-existing documents were in the file when it was inspected because some exhibits purportedly taken from the file and offered as exhibits did not contain Spina's initials. I find that all exhibits were adequately authenticated. Even as to documents that may not have been in the file, D'Aurizio conceded that he had been received copies at the appropriate time (1T117-14 to 1T117-18).

49. On Monday February 12, 2001, after receiving some minor complaints about the cleanliness of the gym locker rooms, Csigi conducted an early morning spot inspection of the middle school (2T47-2 to 2T47-9). At that time D'Aurizio was assigned to clean 90 per cent of that building (2T50-3 to 2T50-6). Csigi found several deficiencies including: burned out light bulbs; untidy locker rooms; dust under the bleachers and trash on them; dirty and/or dusty floors, stairwells and fountains; sinks and a toilet that needed cleaning (2T50-15 to 2T53-6). The supervisor memorialized his observations in a report (R-8).

50. On his copy of the inspection report, D'Aurizio wrote in the margins to rebut some of the allegations it made. He noted that some unclean areas were not assigned to him. On cross-examination, Csigi admitted that some of the disarray probably occurred over the weekend while the gym and locker areas were used for basketball or volleyball games. The supervisor conceded that weekends were not part of D'Aurizio's normal work schedule and that D'Aurizio had probably not been working that weekend (2T80-17 to 2T81-18).

51. Csigi issued a handwritten note (J-10) to D'Aurizio and another custodian, Pat Ryan, emphatically instructing them to complete their time sheets every day and fill in their actual reporting and departure times rather than their normal shift

hours.[10/] Attached to the exhibit were filled in time sheets for March 2001 for D'Aurizio and four other custodians. The non-overtime hours listed by each of the other custodians start and end, without exception, on the hour or half-hour; e.g., 7:00 a.m. to 4:30 p.m. Only D'Aurizio's sheet contains any odd clock readings; e.g., 3:03 p.m. to 11:25 p.m on March 8 and 6:42 a.m. to 3:45 p.m. on March 19. Also attached is D'Aurizio's time sheet from August 2000, which, with one exception, lists him as having reported and departed on the hour or half-hour.

52. Sometime during the first few months of 2001, most likely at the end of the basketball season, a letter was sent to Csigi from Tony Albro who was retiring as the girls basketball coach. The letter (CP-1) praises Csigi and his custodial staff for the job they had done in cleaning and maintaining the gym and locker room areas over the past five years. D'Aurizio was responsible for those areas during the basketball season which had just ended (1T127-6 to 1T128-9).

53. Csigi completed his last evaluation of D'Aurizio on March 13, 2001 (J-11). He received unacceptable ratings in ability to get along and cooperate with fellow workers, ability to keep work areas and equipment neat and clean and in the following tasks: dusting, cleaning glass, lavatories and

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10/ Ryan was the other custodian who had been issued a six month contract after he was rated less than satisfactory.

chalkboards. His attendance, rated unacceptable in December 2000, was now checked off as acceptable. Csigi commented that since the December evaluation D'Aurizio had slipped in cleaning his assigned areas and needed to improve. The evaluation does not refer to any of the gym and locker areas criticized in the inspection report prepared on February 14.

54. D'Aurizio submitted a rebuttal disputing the unacceptable ratings he was given by Csigi. D'Aurizio repeated the explanation given to Csigi after the February spot inspection which had criticized the condition of the gym and locker room, facilities that had been used during the weekend after D'Aurizio had finished his work week. D'Aurizio asserted that Csigi resented his pro-union mind set and noted that the evaluation did not contain input from the principal as required by the collective negotiations agreement.

55. In March 2001, Csigi evaluated six other custodians including George Lord, the former Association Vice President who was no longer in a leadership role. Those evaluations (J-12) rate each employee "acceptable" in every category. Csigi added no written comments to any of the six reviews.

56. D'Aurizio's last day of work was June 29, 2001. He asserted that when he attempted to return four days later to return some personal items to another employee, Marco told him that he would be arrested if he entered the school grounds.

D'Aurizio said that Marco had received those instructions from Leary (1T156-4 to 1T156-16). Although this testimony was uncontradicted, in the absence of other competent corroborating evidence, I decline to rely on this hearsay statement to find that Leary gave such instructions to Marco. Marco did not testify and Leary was not questioned or cross-examined about this alleged directive to Marco even though his testimony followed D'Aurizio's. He denied ever having threatened D'Aurizio (2T107-18 to 2T107-24). Such a threat does not fit with the testimony by Leary and Association witnesses establishing that they had a cordial and effective working relationship.

Midland Park

57. At about the same time as he received his March 13, 2001 evaluation, D'Aurizio began working part-time as a custodian in the Midland Park School District. D'Aurizio had replied to an advertisement for the job (1T199-19 to 1T200-7; 1T206-20 to 1T206-24).

58. D'Aurizio began working full-time in Midland Park during the 2001-2002 school year. He received a positive evaluation, written compliments(CP-4) and was reappointed for 2002-2003.

ANALYSIS

The complaint alleges that the employer engaged in conduct proscribed by N.J.S.A. 34:13A-5.4a(1),(3) and (4). In prosecuting its charge, the Association sought to prove

violations of each of these sections. The gravamen of the case was the discharge of Association representative Albert D'Aurizio which I analyze first.

The Board had dual motives for not renewing D'Aurizio's contract but his termination did not violate N.J.S.A. 34:13A-5.4a(3).

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates N.J.S.A. 34:13A-5.4a(3). 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 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.

It is undisputed that the employer was aware that D'Aurizio had engaged in protected activity. As the Association's custodial representative D'Aurizio regularly raised issues concerning the working conditions of custodians, as well as his own, with Csigi and sometimes with Leary. Association President Holz and Uniserv representative Spina assisted D'Aurizio and met with Csigi and/or Leary about custodial issues on a number of occasions prior to D'Aurizio's termination.[11/]

The record contains no direct evidence of hostility to D'Aurizio's protected activity. Csigi's opinions about unions are not evidence of hostility. The Act grants public employers the right to express opinions about unionism provided such statements are not coercive. Black Horse Pike Regional Bd. of Ed., P.E.R.C. No. 83-19, 7 NJPER 502 (¶12223 1981). Association

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11/ Although most of these discussions did not result in formal grievances they were protected by the Act. City of Somers Point, P.E.R.C. NO. 2003-40, 28 NJPER 586 (¶33182 2002).

President Holz and NJEA representative Spina were satisfied with how Csigi responded to and resolved workplace issues.

In his last year of employment, D'Aurizio participated in some more profound workplace complaints. He was the driving force behind the effort to remove Csigi's friend Marco, the night foreman, from the unit which culminated in the filing of a clarification of unit petition in November 2000. He also raised complaints concerning overtime distribution, excessive work load and building security. In December he went over Csigi's head to complain to Leary that the supervisor was picking on him and having Marco closely monitor his work. He then conducted, with the aid of his NJEA representative, an inspection of the documents Csigi had placed in his personnel file. D'Aurizio also successfully fought a reprimand Csigi gave him because he was on vacation and not available for snow removal.

I infer hostility from the juxtaposition of D'Aurizio's Association activities during the last few months of 2000 and the manner and content of Csigi's written reprimands and criticism of D'Arizio in early 2001.[12/] Contrary to his usual practice, Csigi precipitously issued these rebukes before giving D'Aurizio a chance to explain his actions.

12/ The effort to remove Marco from the unit began in March, 2000 but gathered steam and was formally pursued from September through December.

Most striking is the reprimand (J-9) D'Aurizio received on January 2, 2001, immediately upon returning from an eight day vacation. In August, Csigi approved D'Aurizio's written request for time off which specified the precise dates he would be on vacation.

In a similar vein is the report (R-8) which Csigi prepared based on a early Monday morning inspection of the Middle School, including the gym and locker areas which had been used over the weekend. D'Aurizio had last worked that Friday and Csigi did not discuss the inspection with him until after he issued the report which covered D'Aurizio's work areas and those of another custodian. On its face, the document does not acknowledge the division of work.[13/]

In contrast, Csigi had not issued any memorandum about D'Aurizio's heated December 2000 confrontation with the basketball coach until after he had received written accounts from D'Aurizio, Marco and the coach. Before making any written record or at the very least reaching a final conclusion about a disciplinary matter, Csigi would normally speak to D'Aurizio face to face. Csigi did so with respect to the parking problem, the dispute with the teacher over food in the wastebaskets, his

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13/ I do not infer hostility from the memorandum about the time sheets which was addressed to D'Aurizio and Pat Ryan, both of whom had worked under six months agreements while Csigi and Leary were in charge of the custodial staff.

dozing off while working overtime and his allegedly taking a discarded document from an office wastebasket. Another difference is that Csigi had no basis to criticize D'Aurizio for being unavailable for snow removal and for the condition of the gym and locker rooms following their weekend use. I conclude that Csigi's change in his method of dealing with D'Aurizio's alleged transgressions and performance deficiencies establishes hostility to D'Aurizio's protected conduct. See Bridgewater at 247 (deviation from established personnel practices may be evidence of anti-union animus).[14/] Moreover, Csigi had no cause to issue the snow removal reprimand and major portions of the inspection report discussed shortcomings for which D'Aurizio was not at fault.

But I do not find that this hostility rendered unreliable Csigi's December 2000 (J-8) and March 2001 (J-11) evaluations of D'Aurizio, the last reviews he received before his termination.

Csigi provided credible testimony as to why he rated D'Aurizio unacceptable in ability to get along with staff and fellow workers and in attendance on the December 2000 review,

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14/ D'Aurizio's rebuttal to his final evaluation complained that his reviews did not conform to the contractual requirement that the principal provide written input. However I do not find this to be evidence of hostility as it appears that Csigi was the only administrator who completed all formal reviews of the custodial staff, including the positive reviews that D'Aurizio received.

which D'Aurizio refused to sign. Csigi was already aware of the confrontation with the coach even though the written accounts of the incident were not yet in his hand. The custodian had past difficulties relating to staff, e.g., the food in the wastebasket confrontation, which had been documented and referenced in prior evaluations. Csigi noted that by December 2000, D'Aurizio had already used up his annual sick leave allotment.[15/] A comment about being prepared to work on schedule is consistent with D'Aurizio's well-documented tendency to speak with co-workers at times when he should have begun or resumed working.[16/] It was also the subject of a comment on the March, 1999 evaluation (R-4), which nearly led to D'Aurizio's termination. Instead he was given a probationary contract.

There is a marked difference between the December 2000 and March 2001 evaluations. The former review listed no deficiencies in D'Aurizio's cleaning, but the latter finds fault with several tasks: cleaning glass, lavatories, chalkboards, woodwork and dusting. Csisgi elaborated:

15/ Csigi conceded that D'Aurizio's absences were excused but asserted that he had the right to note the frequent use of sick leave. I do not infer hostility from this statement. Cf. Hazlet Tp. Bd. of Ed. 6 NJPER 191 (¶11093 App. Div. 1980)(evaluations may comment on use of sick leave).

16/ The record does not show that D'Aurizio was entitled to release time to perform his Association duties. Contrast Haddonfield Bd. of Ed., P.E.R.C. No. 80-53, 5 NJPER 488 (¶10250 1979).

> Since the [December] evaluation, Al has slipped in his cleaning of his area. Several inspections have found that numerous areas, i.e. stairwells, chalkboards, garbage receptacles, window glass, etc are not cleaned properly. Al needs to improve his cleaning skills.

Those deficiencies parallel, in part, the February 14 inspection report. Some of the unclean areas noted in that report were not assigned to D'Aurizio and the evaluation did not comment on areas outside his responsibility. But, some of the cleaning deficiencies were previously noted in his March 1999 evaluation (R-4) which rated him unacceptable in dusting and cleaning of chalkboards. Unlike the inspection report, the March 2001 review does not cite any problems with the gym and locker areas. It also gives D'Aurizio an acceptable rating in attendance. D'Aurizio's rebuttal to the evaluation mentions the unfair criticism of the condition of the gym, responds to the specific shortcomings and asserts that he has been targeted because of his pro-union mind set.

The praise and favorable ratings that D'Aurizio received the next year in his new job in Midland Park do not discredit the December 2000 and March 2001 evaluations or Csigi's testimony about D'Aurizio's work habits. Csigi's comments to the Midland Park supervisor that D'Aurizio had performance "peaks and valleys" reflects the custodian's work history in Wood-Ridge and would not be inconsistent with him performing well in a new job.

I conclude that the Board has proven, by a preponderance of the evidence on the entire record, that it would not have renewed D'Aurizio's contract even absent his protected conduct. I base this conclusion on the deficiencies in D'Arizio's performance during 2000-2001 which were identical or similar to problems that had been documented during previous years. These include the heated confrontation with the basketball coach, his persistent talking to other custodians which distracted them and delayed the performance of his assigned duties and his cleaning deficiencies. These problems nearly cost him his job in 1999. When they reemerged during the 2000-2001 school year, the Board was not required to give him another chance because he had engaged in protected activity while holding an Association office. Accordingly I will recommend that the Commission find that the Board did not violate N.J.S.A. 34:13A-5.4a(3).

The Board had dual motives for not renewing D'Aurizio's contract but his termination did not violate N.J.S.A. 34:13A-5.4a(4).

Hunterdon Cty. and CWA,116 N.J. 322, 334-335 (1989) applies Bridgewater to alleged violations of N.J.S.A. 34:13A-5.4a(4). Applying this analysis I reach the same conclusion. The Board was hostile to D'Aurizio's efforts to exclude the night foreman from the unit represented by the Association. Although no formal ruling was made, D'Aurizio's efforts also qualify as activity within the ambit of N.J.S.A. 34:13A-5.4a(4). See Randolph Tp.

Bd. of Ed., P.E.R.C. No. 82-119, 8 NJPER 365 (¶13167 1982) (after custodian was promoted he sought salary increase which Association backed up by filing unfair practice charge; employer violated Act when it reacted by returning custodian to former job and salary). But given the re-emergence of D'Aurizio's performance deficiencies, I conclude that the Board would not have renewed his contract even absent that activity and therefore did not violate N.J.S.A. 34:13A-5.4a(4)

The Association did not prove that the successive non-renewals of its custodial representatives violated N.J.S.A. 34:13A-5.4a(1)

An employer independently violates N.J.S.A. 34:13A-5.4a(1) if its actions tends to interfere with an employee statutory rights and lack a legitimate and substantial business justification. City of Somers Point, P.E.R.C. NO. 2003-40, 28 NJPER 586 (¶33182 2002); Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); See generally Hardin, The Developing Labor Law, 76 (3d ed. 1992); Gorman, Basic Text on Labor Law, 132-34 (1976). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983); Mine Hill Tp.

It was undisputed that the last three custodians who were Association officers or representatives had their contracts non-renewed by the Board.[17/] But, as the Association conceded, the custodians did not have any job security. The record establishes that Lord, Bosinia and D'Aurizio exercised rights protected by the Act while in their Association posts. The Board declined to renew their contracts while each was still an Association officer. After D'Aurizio was terminated the Association could not recruit a successor as five custodians declined the job.

These terminations, which occurred over a span of 10-12 years, may be more than mere coincidence. However, with respect to Lord and Bosinia, the record shows only that they engaged in protected activity and did not have their contracts renewed.[18/] When a union activist is terminated it is natural that other employees are likely to experience some measure of trepidation about exercising their protected rights. See Cumberland Reg Bd. Of Ed., H.E. No. 92-36, 18 NJPER 349, 350, n.4 (¶23150 1992)(even a lawful termination of a union official may be perceived as having a chilling effect); Cf. Oil City Brass Works v. NLRB, 357 F.2d 466, 470 (5th Cir. 1966)(any time an employee is fired for

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17/ I do not include Severidge in this chain of custodial representatives as he only served informally and there was no testimony about his activities or departure.

18/ Lord was later rehired and his March 2001 evaluation, which rates his performance satisfactory, is in the record (J-12).

union activity, rank-and-file employees are likely to fear retribution if they emulate his example). And, as Judge (later Justice) Blackmun noted in NLRB v. Council Mfg. Corp., 334 F.2d 161, 164 (8th Cir 1964), the mere discharge of an employee with or without reason is not evidence of intent to affect labor unions or the rights of employees.

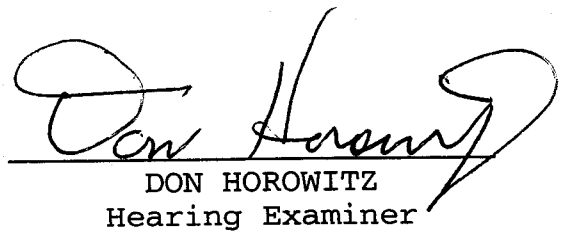
The Association could not have used its unfair practice charge to obtain a remedy for the former representatives who were terminated many years ago. However, more detailed testimony about their non-renewals would have been admissible. See West Orange Tp., P.E.R.C. No. 88-34, 13 NJPER 807 (¶18309 1987)(events outside limitations period cannot be unfair practices but can be evidence of discriminatory motivation and harassment leading to an event within the six month period). See also Bloomfield Tp., P.E.R.C. No. 88-34, 13 NJPER 807 (¶18309 1987), aff'd NJPER Supp.2d 217 (¶191 App. Div. 1989), certif. den. 121 N.J. 633 (1990). Accord, I.A.M. v. NLRB (Bryan Mfg. Co.), 362 U.S. 411 (1960). Such evidence would be relevant to the Association's charge that the board was not merely exercising a prerogative not to renew the contracts of non-tenured employees, but was instead hostile to protected activity by Association representatives and was part of a pattern of personnel actions aimed at discouraging custodial employees from exercising their rights.

Following D'Aurizio's termination and up through the close of the hearing, no custodial employee had filled the post of Association representative. The employer's brief suggests that the small number of custodians in the unit could be the reason. But given the responses to Holz' and Spina's recruitment efforts and the other custodians' warnings to D'Aurizio when he stated his intention to accept the post, I am unwilling to attribute the vacancy to a paucity of eligibles.

As discussed above, D'Aurizio's protected activity was a motivating factor in the Board's decision not to renew his contract, as was his declining work performance. Lord was still employed by Wood-Ridge and was favorably evaluated in March 2001. He did not testify at the hearing about his termination. Had the record established that the Board lacked lawful reasons not to renew the contracts of Lord and Bosinia, then that showing, combined with the Board's hostility to D'Aurizio's protected conduct, could have established that the Board had engaged in a pattern of discharging custodial representatives. Such conduct tends to intimidate, coerce or restrain employees in exercising protected rights. But, on this record I cannot recommend that the Commission find that the Board independently violated N.J.S.A. 34:13A-5.4a(1).

RECOMMENDATION

I recommend that the Complaint be dismissed.



DON HOROWITZ
Hearing Examiner

DATED: Trenton, New Jersey
July 3, 2003