

P.E.R.C. NO. 2012-2

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SADDLE BROOK BOARD OF EDUCATION,

Petitioner,

-and-

Docket No. CO-2010-137

SADDLE BROOK EDUCATION ASSOCIATION,

Respondent,

-and-

PATRICIA DOLAN,

Docket No. TI-2010-001

Respondent,

-and-

THERESA MARTIN,

Docket No. TI-2010-002

Respondent.

SYNOPSIS

The Public Employment Relations Commission adopts the decision of a Hearing Examiner finding that the Saddle Brook Board of Education violated 5.4a(3) and derivatively (1) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. by transferring Theresa Martin and Patricia Dolan in retaliation for Martin raising various complaints against the Director of Special Services. The Commission also holds that the Board violated N.J.S.A. 34:13A-25 when it transferred Theresa Martin from the Helen I. Smith School to the middle school for disciplinary reasons. However, the Board did not violate N.J.S.A. 34:13A-25 when it transferred Patricia Dolan.

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

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Appearances:

For the Petitioner, Jasinski, P.C., attorneys (Isabel Machado, of counsel and Anthony N. Gallina of counsel and on the briefs)

For the Respondent, Bucceri & Pincus, attorneys (Sheldon Pincus, of counsel)

DECISION

On October 20, 2009, the Saddle Brook Education Association ("Association") filed an unfair practice charge against the Saddle Brook Board of Education ("Board"). Count I alleged that

the Board violated 5.4a(1) and (3)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when it involuntarily transferred Theresa Martin, a special education teacher, from the Helen I. Smith Elementary School to the Middle School in retaliation for Martin's engaging in activity protected by the Act. Count II alleged that the Board violated 5.4a(1) and (3) when it involuntarily transferred Patricia Dolan, another special education teacher, from Martin's new position into Martin's previous position in retaliation for Martin and Dolan engaging in activity protected by the Act.^{2/}

On August 3, 2009, Martin and Dolan each filed a petition for contested transfer determination. The petitions alleged that

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

2/ The facts alleged in the charge referred to a June 19, 2009 e-mail from James Sarto, the principal of Saddle Brook Middle/High School, to Linda Marcus, the Association's president, in which Sarto asserted that teaching staff members were being insubordinate to Laurie Thoresen, the Board's Director of Special Services. But the charge did not assert that this communication itself violated the Act.

the Board violated N.J.S.A. 34:13A-25^{3/} when it transferred Martin and Dolan between schools for disciplinary reasons.

On August 21, 2009, the Board filed its Answers to the contested transfer petitions. The Answers asserted that the transfers were not disciplinary and were instead made for educational reasons and with the best interests of Dolan, Martin, and their students in mind.

On October 27, 2009, the Director of Unfair Practices consolidated the charge and petitions and ordered a hearing.

On November 6, 2009, the Board filed its Answer to the unfair practice charge portion of the Complaint. This Answer asserted that the transfers were not a retaliatory or disciplinary response to any protected activity, but were instead made for educational reasons pursuant to a managerial prerogative to transfer teachers.

Hearing Examiner Wendy L. Young conducted hearings on February 2, 3, and 4 and April 16, 19, and 22, 2010. The parties stipulated facts, examined witnesses, and presented exhibits. After the charging party/petitioners rested their cases, the Hearing Examiner denied the Board's motion to dismiss the Complaint for failure to establish a prima facie case of

^{3/} This section of the Act provides: "Transfers of employees by employers between work sites shall not be mandatorily negotiable except that no employer shall transfer an employee for disciplinary reasons".

illegality. The parties received extensions of time and filed post-hearing briefs and replies by October 21.

On March 8, 2011, the Hearing Examiner issued her 150-page report and recommended decision. H.E. No. 2011-8, 37 NJPER 84 (¶32 2011). She concluded that Martin and Dolan were both transferred in retaliation for Martin's protected activity and that their transfers thus violated N.J.S.A. 34:13A-5.4a(1) and (3). She also concluded that Martin's transfer was made for disciplinary reasons and thus violated N.J.S.A. 34:13A-25, but that Dolan's transfer was not based on disciplinary reasons and did not violate N.J.S.A. 34:13A-25. Finally, she concluded that the e-mail described in footnote 2 of this opinion independently violated N.J.S.A. 34:13A-5.4a(1). Given the violations found, the Hearing Examiner recommended an order requiring the Board to transfer Martin back to the Helen I. Smith Elementary School no later than the start of the 2011-2012 school year; to stop transferring or threatening employees in violation of N.J.S.A. 34:13A-5.4a(1) and (3) and N.J.S.A. 34:13A-25; and to post a notice setting forth its violations and the remedial actions taken. On March 16, 2011, the Board filed exceptions and a supporting brief. The Board excepts to 35 of the Hearing Examiner's findings of fact and to all her conclusions of law except the conclusion that Dolan's transfer did not violate N.J.S.A. 34:13A-25. The Board also excepts to the denial of its motion to dismiss.

On March 22, 2011, the charging party and petitioners filed their reply to the Board's exceptions and a cross-exception. Copies of their post-hearing brief and reply brief were attached and incorporated by reference. The charging party and petitioners assert that the Hearing Examiner's findings of fact and conclusions of law must be accepted because they are based on substantial credible evidence. The cross-exception requests that we order that Dolan not be transferred back to the middle school. The charging party and petitioners also ask that we expedite this decision so that Martin can be transferred back to her previous position before the 2011-2012 school year starts.

On March 30, 2011, the Board filed a response. It objects to: (1) the submission of the charging party/petitioners' post-hearing brief as an attachment to their response and cross-exception, and (2) the cross-exception seeking to prohibit the Board from transferring Dolan to the middle school.

The Board has requested oral argument. We deny that request. No novel legal issues have been presented; this case turns instead on a close study of the record as a whole and all the particular facts presented therein.

Findings of Fact

We begin with the standard we apply in reviewing the Hearing Examiner's findings of fact. We cannot review these findings de novo. Instead, our review is guided and constrained by the

standards of review set forth in N.J.S.A. 52:14B-10 (c). Under that statute, we may not reject or modify any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence. See also New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due fact-finder's "feel of the case" based on seeing and hearing witnesses); Cavalieri v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004).

Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Warren Hill Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006); Trenton Bd. of Ed., P.E.R.C. No. 79-70, 5 NJPER 185 (¶10101 1979); City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980); Hudson Cty., P.E.R.C. No. 79-48, 4 NJPER 87 (¶4041 1978).

The Hearing Examiner made comprehensive findings of facts (H.E. at 5-117). We have carefully reviewed the record to see if it supports her findings. As a rule, the Hearing Examiner's findings were tightly tied to the testimony of the witnesses and

were supported by precise citations to the record. Further, when she found that the testimony of the lay witnesses was inconsistent or implausible, the Hearing Examiner gave reasoned explanations as to why she was crediting one witness and discrediting another. We therefore adopt and incorporate all her findings of fact, except as specified in the ensuing discussion. Absent any compelling contrary evidence, we expressly adopt her factual findings based on her credibility determinations and her reasonable inferences flowing from those determinations.^{4/} We modify finding no. 46 to delete the second sentence of footnote 5. That sentence is incomplete. We add that the subject of footnote 5 is of minimal relevance to the main issues.

We accept the thrust of finding no. 47. That finding states that Harry Groveman, the Board's Superintendent, concluded that Martin and her former aide Madelyn Romaine were responsible for the large turnout of parents and staff at the June 10, 2009 Board meeting. These attendees turned out to protest the assignment of two part-time, uncertified aides on a rotating basis to Martin's classroom. Although Groveman viewed Romaine as the leader

^{4/} We reject the Board's objection to the charging party/petitioners' incorporating their post-hearing brief into their response to the Board's exceptions. Such incorporation by reference was a simple way to present their view of the facts and the evidence supporting their view. But we emphasize that our findings are based entirely on our review of the record, given the standards of review we have articulated.

(6T90), he believed that Martin was "certainly involved" in stirring up the parents (6T140).

We accept the thrust of finding no. 48. That finding states that at the Administrative Council meeting held the day after the June 10 Board meeting, Groveman discussed the protest with James Sarto and Caroline Gaynor, the principals of the middle school and the Helen I. Smith Elementary School respectively, and with Laurie Thoresen, the Director of Special Services, and then suggested to Gaynor and Sarto that they consider swapping Martin and Dolan between their schools. We add a citation supporting the finding that Groveman suggested that Sarto and Gaynor get together to discuss a swap by transfer of two employees perceived to be unhappy--Martin and Dolan (6T129-130).

We reject the statement in finding no. 49 that Gaynor recalled Sarto mentioning the June 10 Board meeting at a meeting Gaynor and Sarto had on June 11 or 12 to discuss swapping Martin and Dolan. The record citations (5T34-36) do not support this finding. But the citations do show that Sarto and Gaynor discussed "rumblings" among the special education staff about the same time as this meeting.

We adopt the Hearing Examiner's decision in finding no. 53 to discredit Sarto's testimony that the decision to transfer Martin and Dolan was basically made at the Administrative Council meetings in April or May (H.E. at 47). Regardless of whether

Sarto's testimony on this point is labeled precise or vague, it is self-serving and contrary to the testimony of Thoresen and Groveman (H.E. at 48-49). Both administrators testified that the Martin/Dolan transfers were not discussed at these meetings nor were any actions taken to put such transfers into motion until the day after the June 10 Board meeting. These transfers would not have happened without the train of events triggered by the June 5 assignment of the two uncertified aides to Martin's classroom, the ensuing protests at the June 10 Board meeting, and Groveman's displeasure with that protest and suggestion the next day that Sarto and Gaynor consider swapping Martin and Dolan.

We accept finding no. 92 and reject the Board's exception to the Hearing Examiner's conclusion that "[b]oth the 10:19 a.m. e-mail to Marcus and Groveman's explanation of its meaning suggest that Martin's activities and the activities of the Association regarding Thoresen were the basis for the transfer decision" (H.E. at 86). This e-mail (CP-15) stated:

Between what transpired at last week's board meeting, what is currently going on between my administrators and some of your members and the stirring up of parents who only know what some teachers want them to know, my patience with this issue is very thin. Personally, I think Theresa needs a change in environment.

This e-mail is an unmistakable expression of Groveman's displeasure with the activities of Martin and the Association and directly ties that displeasure to Groveman's belief that Martin

needed "a change in environment." While Groveman denied that he intended to punish Martin by transferring her, the Hearing Examiner reasonably declined to credit that denial in light of this e-mail as well as other evidence indicating his hostility.

For the reasons expressed in the preceding paragraph, we also accept finding no. 102 and the Hearing Examiner's decision not to credit Groveman's denial that the Association meetings about Thoresen factored into his desire to transfer Martin. Groveman explained that the e-mail's allusion to "what is currently going on between my administrators and some of your members" referred to "the meetings related to this vote of no confidence and Mr. Sarto's issue over what he was supposedly getting involved with" (6T90-91). Groveman was impatient and unhappy with the Association's contesting Thoresen's direction of the special education program as well as Martin's contesting the assignment of aides.

Evidentiary Rulings

The Board excepts to three evidentiary rulings. Before reviewing each ruling, we note that the Hearing Examiner conducted a well-run hearing, making multiple rulings that appropriately expedited the testimony and kept the record clean and comprehensible.

The Board excepts to the Hearing Examiner's decision (H.E. at 35-36, n. 7) to admit CP-18, a compilation of complaints made

by some special education staff who attended meetings critical of Thoresen. The Hearing Examiner properly declined to admit this document for the purpose of establishing the truth of the complaints alleged in it. Instead, she admitted the document for the limited purpose of supporting other evidence that Association officials were holding meetings and collecting complaints about Thoresen during the spring of 2009 and that administrators knew about these activities. The Hearing Examiner did not abuse her discretion in admitting this document for that circumscribed purpose. We add that while we have accepted CP-18 into evidence, we attach very little weight to it for the purpose of showing that Martin and others had complaints about Thoresen - the other evidence of such complaints is much more direct and significant. And we attach no weight to this document for the purpose of showing that the administration knew of the Association meetings and complaints -- the document was not sent to any administrators until after the transfers were approved and this litigation began.

The Board excepts to the Hearing Examiner's allowing testimony concerning an "off-the-record" meeting between Rose Ann Spina, an NJEA UniServe representative, and Groveman on June 17, 2009 (H.E. at 93, n. 17). The Board did not identify any privilege or compelling equitable reason warranting preclusion of such evidence. Further, the findings concerning this meeting are

peripheral to the main case and not prejudicial. Absent any precedent on point or prejudice in fact, we are not inclined to find that the Hearing Examiner abused her discretion in admitting this evidence.^{5/}

The Board excepts to the Hearing Examiner's decision (H.E. at 77-78, n. 13) to admit CP-19, a letter from Spina to Board members requesting a meeting with the full Board to discuss staff concerns about Thoresen. The Board objected to this letter on the grounds that the letter was not sent until after the transfers were approved. The Hearing Examiner noted that this argument went to the probative value and weight of the letter rather than its admissibility. The Hearing Examiner described the contents of the letter, but does not appear to have given it any weight. Nor do we - it is irrelevant to determining the chronology of events and the issues of motivation at the heart of this case.

Legal Analysis

The Standards for Determining Whether the Transfers Were Discriminatory in Violation of N.J.S.A. 34:13A-5.4a(1) and (3).

N.J.S.A. 34:13A-5.4a(3) makes it an unfair practice for a public employer to discriminate in regard to personnel actions to discourage employees from engaging in activity protected by the

^{5/} Testimonial privileges are strictly construed. Dixon v. Rutgers, The State University, 110 N.J. 432, 446 (1988).

Act. In re Bridgewater Tp., 95 N.J. 235 (1984), articulates the standards for determining whether a personnel action was discriminatory in violation of 5.4a(3). If a public employer is found to have violated 5.4a(3), it will also be found to have violated 5.4a(1) derivatively.

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 circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward that activity. Id. at 246.

If the employer did not present any evidence of another motive or if its explanation has been rejected as pretextual, there is a 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 motives are for us to resolve.

The Standards for Determining Whether the Transfers Were Disciplinary in Violation of N.J.S.A. 34:13A-25.

N.J.S.A. 34:13A-25 prohibits school boards from transferring employees between work sites for disciplinary reasons. A petitioner has the burden of proving its allegations by a preponderance of the evidence. Irvington Bd. of Ed., P.E.R.C. No. 98-94, 24 NJPER 113 (¶ 29056 1998). A transfer will be found to be predominately disciplinary when it is punitive and/or is not made for educational or staffing reasons. In determining whether a transfer violates N.J.S.A. 34:13A-25, we will consider such factors as whether the transfer was intended to accomplish educational, staffing or operational objectives; whether the Board has explained how the transfer was so linked; and whether the employee was reprimanded for any conduct or incident which prompted the transfer. West New York Bd. of Ed., P.E.R.C. No. 2001-41, 27 NJPER 96, 98 (¶32037 2001).

The Application of These Standards to the Transfers of Martin and Dolan.

The first issue under Bridgewater is whether activity protected by the Act occurred. The Hearing Examiner concluded that Martin, Dolan, and other Association members engaged in

protected activities, including their complaints at the June 10 Board meeting about the planned replacement of a certified aide in Martin's classroom with two uncertified aides, discussions at a June 15 meeting about that issue and other problems between Martin and Thoresen, and several Association meetings involving complaints about Thoresen's direction of the special education program (H.E. at 119-121). The Board has not excepted to this conclusion of law. We adopt and incorporate it here.

We add that while school boards generally have a managerial prerogative to assign and reassign staff for educational reasons, Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), employees nevertheless have a right to seek to discuss and grieve mandatorily negotiable issues associated with such assignments and reassignments. In this instance, Martin was concerned that the assignment of uncertified aides to her classroom would prevent her from taking her contractually guaranteed preparation periods so she sought to have her majority representative address this issue with the Superintendent. Groveman, however, wrongly believed that there was nothing to discuss and became frustrated with the Association for bringing this issue up (6T85-86, 185).

We also note that Groveman had a mistaken impression that there could be nothing to discuss until after the assignment of the uncertified aides was implemented at the start of the next

school year and a grievance was then filed over a loss of preparation periods. Employees and their representatives have a protected right to seek to resolve potential problems before they turn into grievances. Cf. N.J.S.A. 32:13A-5.3 (Proposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established). Thoresen recommended and the Association requested such a meeting to discuss Martin's concerns about the assignment of the uncertified aides. If Groveman had granted that request, he might have been able to allay any concerns about Martin's losing her preparation periods.

The second question under Bridgewater is whether the administrators who decided to swap Martin and Dolan knew of their protected activity. The record contains abundant evidence, as detailed in the Hearing Examiner's findings, that Groveman, Sarto, and Gaynor knew of that activity, including the complaints registered at the June 10 Board meeting, the views expressed at the June 15 meeting attended by Martin, Spina, Thoresen, and Sarto, and the discontent expressed at various meetings of Association members concerning the special education program. For example, the June 16 e-mail sent by Groveman to Marcus and Groveman's testimony about that e-mail make clear that Groveman knew about that activity and was unhappy and impatient with it.

The third question under Bridgewater is whether the administrators who decided to swap Martin and Dolan were motivated by hostility to their protected activity rather than by legitimate educational reasons. This issue presents the contested crux of the unfair practice charge. It also presents the sole issue of the contested transfer petitions - if the transfers were motivated by a desire to punish protected activity, they were also disciplinary in nature. A close consideration of the chronology of events between June 5 and June 24, 2009 establishes that the transfers were motivated by hostility toward protected activity and a desire to discipline Martin for that activity.

On June 5, Gaynor met with Martin to discuss the annual evaluation (CP-1) Gaynor had prepared of Martin's teaching performance during the 2008-2009 school year. Gaynor rated Martin "highly successful" in all areas and praised Martin's leadership of several programs at the Helen I. Smith Elementary School: "Caught You Being Kind"; the school store; and LEARNIA. She also lauded Martin's "passion for teaching" as "evident in the success of her diverse learners." Gaynor admitted that the words of the annual evaluation would support a reasonable conclusion that Martin was doing "a fabulous job" and did not need a change in environment (5T68). Gaynor expressed no

concerns or criticisms of Martin during this meeting so Martin accepted and signed the evaluation.

According to Gaynor, she thought Martin was "unhappy" during and before the 2008-2009 school year and she discussed that unhappiness with Sarto at Administrative Council meetings in April and May 2009. According to Sarto, he also had an excellent but "unhappy" teacher in Patricia Dolan, who wished to have a different balance of resource room and collaborative teaching assignments and he discussed that unhappiness with Gaynor at the same meetings. However, even though transfers are usually planned at the April and May meetings, the idea of actually transferring Martin and Dolan was not discussed or decided upon at that time. To the contrary, arrangements for assigning classes, attending workshops, and ordering supplies went on as if these two teachers would remain in their assignments during the next year.

The swap of these two excellent and dedicated teachers who were functioning so well in their long-time school settings would never have occurred but for another issue raised for the first time at the June 5 meeting between Gaynor and Martin. That issue arose when Gaynor informed Martin that she would be losing her full-time certified classroom aide and that two part-time, uncertified aides would be assigned to rotate in her classroom. Martin objected to this change. She was worried that she would

not be able to leave her classroom or use her contractual preparation periods and she was concerned that her students would suffer from a lack of continuity and consistency in instruction. She told both Gaynor and Linda Marcus, the Association president, about these objections.

Sometime between June 5 and 9, Marcus and Teri Quirk, an Association building representative, met with Thoresen and Sarto to discuss concerns raised by the special education staff about Thoresen and Martin's concerns about her classroom aide situation. Sarto told Marcus that she should not assume that Association meetings were confidential; "in a small district, nothing's private" and "if something happens, you find out about it within 24 hours" (4T58-59). Thoresen suggested that Marcus meet with Groveman to discuss Martin's concerns.

On June 9, Marcus e-mailed Groveman to set up a meeting to discuss the aide situation in Martin's classroom. Believing that the Association and Martin had no right to discuss this issue, Groveman did not respond to Marcus even though Thoresen had suggested such a meeting.

On June 10, the Board held a public meeting. It considered several personnel actions, including the assignment of uncertified aides to Martin's classroom. Martin, other special education staff, and a great many parents came to the meeting to protest that assignment, but the Board approved it. Groveman

believed that Martin was "certainly involved" in stirring up this protest.

The next day, June 11, an Administrative Council meeting was held. For the first time, Groveman suggested to Gaynor and Sarto that they consider swapping their "unhappy" employees. It was Groveman, not Sarto or Gaynor, who initiated the transfer process leading to swapping Martin and Dolan.

Later on June 11 or on June 12, Gaynor and Sarto met pursuant to Groveman's suggestion. They discussed the rumblings among the special education staff regarding Thoresen and then agreed to recommend the swap suggested by Groveman. Although Thoresen is in charge of the Board's special education programs and holds a position equal in rank to Sarto and Gaynor, they did not ask Thoresen about the educational wisdom of this recommendation before agreeing to make it. Nor did they ask either Martin or Dolan if the swap would make them happier.

On June 12, Groveman spoke with Sarto and Gaynor. They informed him they were going to recommend transferring Martin and Dolan.

On the morning of June 15, Martin and UniServ representative Spina met with Sarto and Thoresen to discuss Martin's concerns about the assignment of aides and the possible loss of preparation time as a consequence and her complaints about Thoresen's allegedly inappropriate treatment of her. Sarto, the

new president of the Saddle Brook Administrators Association, attended the meeting to represent Thoresen. When asking Sarto to represent her, Thoresen told him about the Association meetings and the possibility of a no-confidence vote being taken.

On the afternoon of June 15, Association officers and some special education staff met to continue discussing whether a no-confidence vote against Thoresen should be taken. Similar meetings had been held earlier that spring. The June 15 meeting had been scheduled to be held in Gaynor's school, but Sarto persuaded Gaynor to rescind the permission she had granted. Gaynor reported that revocation to Groveman who told her it was fine. The meeting was held in a public park.

On June 15, at 2:49 p.m., Marcus forwarded her e-mail of June 9 to Groveman and asked him if he had received it. This e-mail triggered a series of e-mails between Groveman and Marcus the next morning, June 16.

At 8:51 a.m. that morning, Groveman responded to Marcus. His e-mail stated: "I will not be meeting with you or Theresa. The topic is not open for discussion and I am close to recommending that Theresa be transferred." At this point, Groveman had not yet received a written transfer recommendation from Sarto and Gaynor.

At 9:30 a.m., Marcus e-mailed Groveman and asked him what the harm would be in discussing the assignment of uncertified aides or at least explaining the change in policy.

At 10:19 a.m., Groveman responded that there was no need to meet since the assignment did not impact on the contract. He added, however, that he would copy Thoresen on his reply to see if she saw the matter differently. He then wrote the paragraph quoted in our findings of fact and repeated here because it is so important to analyzing this case:

Between what transpired at last week's board meeting, what is currently going on between my administrators and some of your members and the stirring up of parents who only know what some teachers want them to know, my patience with this issue is very thin. Personally, I think Theresa needs a change in environment.

This e-mail and Groveman's testimony establish that Groveman was upset with Martin for contesting the aide issue and for stirring up opposition to this change and the special education program and that his "very thin" patience with Martin had led him to believe that she should be transferred to a new environment.

At 10:32 a.m., Marcus responded. Her e-mail stated that both Sarto and Thoresen had referred her to Groveman and that the assignment did affect "prep and/or lunch time, and/or past practice" and thus affected the Association's members and the contract. Groveman did not respond to this e-mail.

As these e-mails were being exchanged, Gaynor and Sarto met in Sarto's office sometime between 9:30 a.m. and 11:00 a.m. to prepare a formal transfer recommendation. During that meeting, they called Thoresen to ask about Martin's qualifications to teach in the middle school. Thoresen told them that Martin could teach as one of two teachers in a collaborative classroom, but she was not sure that Martin, unlike Dolan, was qualified to be the sole teacher in a resource room. Thoresen also told them that she absolutely did not want the transfers given her concern that she would be blamed for them given the two meetings the day before. She correctly perceived that being transferred to a new school would make Martin unhappier and would cause a furor.

After speaking with Thoresen, Gaynor and Sarto typed up a transfer recommendation. The recommendation stated that they had spoken to Thoresen and that they felt the transfers were in the best interests of the students and staff. The recommendation appears to be somewhat misleading to the extent it implies that Thoresen may have believed the transfers were good for students or staff. In fact, Thoresen did not agree that the transfers would be good for the educational program (5T205).

Gaynor and Sarto hand-delivered their recommendation to Groveman that morning; he accepted it without any discussion. Indeed, at no point in the transfer process did Groveman inquire into any details about the alleged unhappiness of Martin and

Dolan or the educational justification for the transfers.

Groveman, however, sensed that the transfers would be contested because Martin and Dolan were strong and successful teachers; the transfers were being made very late in the school year; and the ongoing controversies could cloud acceptance of the transfers as being made for educational reasons.

On June 16 or 17, Groveman called Thoresen to ask whether Martin and Dolan had the proper certifications for their new assignments. Thoresen told him she was "dead set" against the transfers because she would be blamed for them. She also confirmed that while Martin could teach in the middle school, she could only teach in collaborative classrooms unless and until she became "highly qualified" in subject areas. In addition, we note that Martin had never taught in a collaborative classroom; Dolan had not taught in a self-contained elementary school classroom for many years; replacing Dolan with Martin diminished scheduling flexibility in the middle school; and replacing Martin with Dolan took away Martin's stewardship of the elementary school store. Groveman did not ask Thoresen for her point of view on the educational wisdom of the planned swap.

On June 17, Spina came to Groveman's office for an off-the-record discussion. Spina brought up the concerns of the special education staff and her unhappiness with Sarto's participation in the June 15 meeting with Martin and Thoresen. During this

conversation, Groveman told Spina he was considering transferring Martin and Dolan; Spina told him the swap would be a mistake because it would be purely disciplinary.

On June 18, Thoresen had two meetings: one with Groveman and the other with Sarto. The Hearing Examiner described what happened at these meetings (H.E. at 94-97). These meetings do not directly bear on the transfer recommendations so we do not discuss them further.

On June 19, Sarto e-mailed Marcus and an Association vice-president asking Marcus whether she was aware that her membership was holding meetings in which elementary school teachers were attempting to discredit, defame, and malign Thoresen. The e-mail said that if such meetings were occurring and continued, he would inform the Superintendent and Board of those meetings "as well as insubordinate behavior of staff members to their superiors."^{6/} Groveman received a copy of this e-mail. We note that this e-mail as well as other exhibits and testimony concerning Sarto's role in the transfer process demonstrate that he shared

^{6/} The Hearing Examiner found that this e-mail independently violated 5.4a(1) (H.E. at 139-141). However, the unfair practice charge did not allege such a violation and it has not been amended to do so. Nor can we say that the issue of an independent violation has been fairly and fully litigated given that the parties did not address such an issue in their post-hearing briefs. Contrast Willingboro Bd. of Ed., P.E.R.C. No. 2002-43, 28 NJPER 139 (¶33044 2002). Accordingly, we decline to consider whether this e-mail independently violated 5.4a(1).

Groveman's displeasure with Martin and other Association members and officials for their complaints against Thoresen.

On June 23, the last day of school, Martin went to Groveman's office to speak to him about the assignment of uncertified part-time aides to her classroom for the next school year. Martin did not know that Groveman was seeking her transfer and Groveman did not enlighten her. According to Groveman, he did not tell Martin because the Board might not approve the transfers and he did not want to cause her angst over something that might not happen. When Martin left, Groveman felt that Martin had shared with him that she would do her best to work with the uncertified aides.

On June 24, the Board held its last meeting of the 2008-2009 school year. The published agenda for that meeting included approval of Martin's attendance at an upcoming conference in Massachusetts that would be useful if she continued to teach in a self-contained classroom but not for a middle school assignment. The published agenda did not include the recommended transfers of Martin and Dolan.

Moreover, neither Martin nor Dolan received a "Rice" notice informing them that the Board would be considering their proposed involuntary transfers.^{7/} Regardless of whether Rice notices are

^{7/} Rice v. Union County Reg. H.S. Bd. of Educ., 155 N.J. Super. 64 (App. Div. 1977) certif. den. 76 N.J. 238 (1978).

legally required for involuntary transfers, the Board had issued such notices twice before. The departure from that practice suggests that Groveman knew that the transfers would be perceived to be retaliatory and punitive and that he wanted to avoid a public protest similar to the one at the June 10 Board meeting.

That concern would also account for the fact that neither Groveman nor Sarto nor Gaynor ever asked Martin or Dolan if the planned transfers would make them happier or not.

When the Board went into closed session, Groveman presented the recommendation to transfer Martin and Dolan. He said he supported his administrators' recommendation, but cautioned the Board that the transfers would likely be contested and that some issues could prove problematic. The Board decided to transfer Martin and Dolan without any basis for that decision other than the recommendation and reasons presented by Groveman.

The Board returned to public session and approved the transfers. Groveman read an agenda addendum announcing the transfers. Dolan was shocked. Martin was extremely upset and felt as if she had been hit in the stomach. Martin was predictably unhappy with a transfer to a position where she would not be the lead teacher in her own classroom.^{8/}

^{8/} The Board excepts to the Hearing Examiner's denial of its motion to dismiss after the charging party/petitioners had presented their case. We reject this exception. The documents we have just reviewed in setting forth the
(continued...)

Based on our review of the entire record and especially our consideration of the chronology of events and our acceptance of the Hearing Examiner's credibility determinations, we conclude that the decision to swap Martin and Dolan was motivated by Groveman's unhappiness with Martin's protected activity rather than Sarto's and Gaynor's perceptions about these teachers' unhappiness in their prior teaching roles.

While Sarto and Gaynor may have discussed the teachers' perceived unhappiness before June 5, 2009, they had not discussed transferring them and their alleged unhappiness had not affected their excellent teaching performance or Martin's passion for teaching in any way. There were no plans in progress to transfer them; to the contrary, scheduling, supply, and training plans were being made on the assumption they would continue to hold the same positions.

It was not until June 5, when Martin learned about the planned assignment of uncertified aides to her classroom, that the events leading to the transfers began. The protests at the June 10 Board meeting organized by Romaine and Martin triggered Groveman's unhappiness and lack of patience with Martin and his suggestion the next day that Gaynor and Sarto consider swapping

8/ (...continued)
chronology of events and the testimony of Martin, Dolan, and Spina concerning these documents provided ample evidence to support finding the alleged violations unless refuted.

Martin and Dolan. Sarto and Gaynor took Groveman's hint and gave him what he wanted without any input from Thoresen about the educational wisdom of swapping two teachers who were performing superbly in their current schools or any input from Martin or Dolan about their happiness or unhappiness in their present assignments. In fact, Groveman, Sarto, and Gaynor all must have known that the transfer would make Martin very unhappy and would create the furor that Thoresen feared. It did.

We thus conclude that the transfers were a retaliatory and disciplinary response to the protected activity engaged in by Martin and by other Association members and officers. We hold that the Board violated N.J.S.A. 34:13A-5.4a(1) and (3) and N.J.S.A. 34:13A-25 when it accepted Groveman's illegally motivated recommendation to make these transfers.

The Hearing Examiner did not find that Groveman, Sarto, or Gaynor bore any animus toward Dolan herself or to her protected activity (H.E. at 132, n. 24). Nor do we. Dolan was transferred only because Martin was. Someone had to be transferred to make room for Martin in a new position and to replace Martin in her old position; Dolan was the one chosen. But because Dolan's transfer was motivated by a desire to discipline Martin for her protected activity, it must also be considered to be disciplinary in nature and thus to violate N.J.S.A. 34:13A-25.

By way of remedy, we order that Martin be transferred back to her previous position at the Helen I. Smith School by the beginning of the school year about to begin. We do not place any restrictions on the Board's power to decide where to assign Dolan. We decline the request of the Association and Dolan that we prohibit the Board from transferring Dolan back to the middle school. Sarto has not displayed any animus against Dolan or given us any reason to think he will not treat her fairly as her principal if the Board elects to transfer her back to her old school.

ORDER

The Saddle Brook Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly by transferring Theresa Martin and Patricia Dolan in retaliation for protected activity engaged in by Martin and other members and officials of the Saddle Brook Education Association;

2. Discriminating in regard to transfer decisions to discourage employees in the exercise of rights guaranteed to them by the Act, particularly by transferring Martin and Dolan in retaliation for protected activity engaged in by Martin and other Association members and officials;

3. Transferring employees for disciplinary reasons; particularly by transferring Martin to the Middle School and Dolan to the Helen I. Smith Elementary School as a punitive response to the protected activity engaged in by Martin and other Association members and officials.

B. Take the following actions:

1. Transfer Theresa Martin back to her previous position at the Helen I. Smith Elementary School before the start of the 2011-2012 school year;

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 and, after being signed by the Board'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; and

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Board has taken to comply with this order.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Eskilson, Krengel, Voos and Wall voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: August 11, 2011

Trenton, New Jersey

