P.E.R.C. NO. 96-45

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-271

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Middletown Township Board of Education violated the New Jersey Employer-Employee Relations Act by threatening and disciplining employees who were Middletown Township Education Association officials in retaliation for their protected activity and when its principal told a teacher not to speak to an Association representative about a work-related incident. Other allegations were dismissed or deferred to binding arbitration.

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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-and- Docket No. CO-H-94-271

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Kalac, Newman, Lavender & Campbell, attorneys (Francis J. Campbell, of counsel)

For the Charging Party, Zazzali, Zazzali, Fagella & Nowak, attorneys (Kenneth I. Nowak, of counsel)

DECISION AND ORDER

On March 7 and April 8, 1994, the Middletown Township Education Association filed an unfair practice charge and amended charge against the Middletown Township Board of Education. The charge, as amended, alleges that the employer violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),[1/] by threatening and disciplining employees who were Association officials in retaliation for their protected activity. The charge, as amended, also alleges

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

that a principal told a teacher not to speak to an Association representative about a work-related incident and refused to allow unit employees to be represented at meetings in which "discipline is a potential outcome."

On August 3, 1994, a Complaint and Notice of Hearing issued. On August 22, the Board filed an Answer denying every allegation.

On November 29 and 30 and December 8 and 19, 1994, Hearing Examiner Jonathon Roth conducted a hearing. The parties examined witnesses, introduced exhibits, and filed post-hearing briefs.

On May 9, 1995, the Hearing Examiner issued his report and recommended decision. H.E. No. 95-23, 21 NJPER 203 (¶26131 1995). He found that the Board, through its agents and representatives, had violated the Act by reprimanding an Association representative for making controversial remarks concerning an unnamed administrator at a public Board meeting, for delivering a letter to a principal at a faculty meeting and for allegedly leaving the meeting early; by reprimanding another Association representative for distributing a memorandum not on Association letterhead; by removing a posted copy of an unfair practice charge from an Association bulletin board; and by advising a unit employee not to contact an Association representative regarding a work-related incident. The Hearing Examiner recommended dismissing the allegation that the Board had refused to allow unit employees to be represented at meetings in which discipline is a "potential outcome."

On May 24, 1995, the Board filed exceptions. Our analysis will address the issues raised by the exceptions.[2/]

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact.[3/] We summarize those findings.

Frank D'Alessandro is the Association's grievance co-chairperson. He had been the Association's president and vice-president. On August 31, 1993, he addressed the Board at a "heated and intense" public meeting. A large audience heard about the breakdown in negotiations and audience members were invited to address the Board.

D'Alessandro began his remarks by addressing the Board's annual report on Vandalism, Violence and Substance Abuse. He stated, in part:

> Ah, yes there are ... lies, there are damnable lies and there are statistics.[4/] This is all three and whoever made up these statistics and wrote these down is nothing but a lying scuzzball. There are 108 fights listed for the entire district, for the entire year. You are dreaming. That's 11 fights per month from the entire district. In a good week, we have 11 fights in this building....

He then criticized a perceived conflict of interest that he claimed disqualified a Board member from participating in negotiations.

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2/ We deny the Board's request for oral argument. The issues have been fully briefed.

3/ Finding 24 is modified to reflect that Ronald Bolandi was an assistant superintendent.

4/ D'Alessandro testified that the statement about lies and statistics was from Mark Twain or Oscar Wilde and that he was updating it by using current vocabulary.

D'Alessandro had hoped that the Board would table the report and review the statistics. He denied that his comments were addressed to a particular person, although the superintendent's name appears on the report. Dennis Jackson, an assistant superintendent, claimed that it was common knowledge that he prepared the report, although his name does not appear on it.

In June 1993, Alan Feuer became principal of Middletown High School North. In November 1993, D'Alessandro and Feuer met with a grievant. A few days later, the grievant complained to D'Alessandro about a memorandum he received from Feuer that was to be placed in his personnel file.

D'Alessandro wrote a response and, on November 23, 1993, gave it to Feuer in a sealed envelope at or near the end of an after-school faculty meeting. The guest speaker had concluded his remarks and was answering questions. Feuer testified that D'Alessandro handed him the envelope "ceremoniously" before he concluded the meeting so as to harass or embarrass him. The Hearing Examiner found no facts suggesting anything "ceremonious" in D'Alessandro's delivery of the sealed envelope.

Also in November 1993, Ray McLoughlin, a teacher and member of the Association's executive committee and negotiations team, distributed copies of a signed letter by placing them in teacher mail boxes. The letter, approved by the Association's president but not printed on Association letterhead, concerned McLoughlin's non-reappointment as a coach. The letter stated, in part:

> The matter is being grieved by MTEA, so I didn't want to get into specifics, but I do want to inform you and pass on some advice....

On November 29, 1993, Feuer requested a meeting with McLoughlin concerning this letter and advised him that he was entitled to representation since it was potentially a disciplinary matter. That same day, D'Alessandro received a letter dated November 24 (the day after the faculty meeting) from assistant superintendent Ronald Bolandi requesting a meeting with D'Alessandro about his August "lying scuzzball" remark. He warned that disciplinary action might result.

On November 30, 1993, Feuer requested a meeting with D'Alessandro to discuss the delivery of the letter at the faculty meeting. Feuer wrote that D'Alessandro was entitled to representation as the meeting might result in disciplinary action. On December 9, Feuer met with D'Alessandro, McLoughlin and an NJEA representative. Feuer criticized D'Alessandro for conducting Association business in front of the staff. He criticized McLoughlin for not typing his letter on MTEA letterhead. He believed that McLoughlin's letter created dissension and controversy in the school building.

On December 14, 1993, Feuer issued reprimands to D'Alessandro and McLoughlin. D'Alessandro's reprimand states, in part:

> If a teacher with no other 'title' [i.e., MTEA official] had given me a letter, imaginations would not be working overtime and speculation or rumor would not abound. I believe your dual role

> creates the necessity for you to be doubly prudent before acting. I also stressed that MTEA business should neither be conducted in public nor on school time.

McLoughlin's reprimand states that his use of the mail boxes violated Articles 17.5 and 17.6 of the collective negotiations agreement.[5/] Feuer recommended that copies of the reprimands be placed in the employees' personnel files.

After a December 15, 1993 meeting to discuss the "lying scuzzball" remark, Bolandi stated that he considered the matter closed and that he would recommend taking no further action. Bolandi left the district by January 1994.

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5/ Those articles provide:

> 17.5 The Association shall have in each school building the exclusive use of a bulletin board in each faculty lounge or teacher's dining room. The Association shall also be assigned adequate space on the bulletin board in each school's central office for informational notices of the Association. The location of Association bulletin boards in each room shall be designated by the Association. Copies of all materials to be posted on such bulletin boards shall be given to the building principal, but no approval for their posting shall be required.
>
> 17.6 The Association shall have the right to use the inter-school mail facilities and school mail boxes as it deems necessary. The faculty representatives shall be responsible for distribution within his/her school building including the right to place mail in the school mail boxes. All materials placed in the inter-school mail facilities by the Association shall be identified as Association material by having the Association name affixed thereto.

Also on December 15, 1993, D'Alessandro issued a memorandum reprinting Article 32 (Maintenance of Classroom Control and Discipline) of the contract. Feuer believed that D'Alessandro's memorandum undermined a memorandum he had issued two days earlier.

On January 21, 1994, the superintendent notified the Association that the reprimands would be placed in D'Alessandro and McLoughlin's personnel files.

In February, Feuer approached John DeGenito, a teacher and basketball coach, about a "spitting" incident during a practice session. Feuer told the coach not to be alarmed. The coach stated that if a meeting was necessary, he would call in D'Alessandro. Feuer responded, "Don't bring D'Alessandro in. He has a way of overreacting, of blowing things out of proportion."

On March 7, 1994, an Association executive committee member asked an assistant principal to identify an area for MTEA postings on the bulletin board in the central office of High School North. Article 17.5 of the contract provides, in part: "The Association shall also be assigned adequate space on the bulletin board in each school's central office for informational notices of the Association." The bulletin board in High School North is near a counter where teachers sign in. A space on the board was cleared and marked. The next day D'Alessandro advised Feuer in writing that he intended to post a copy of an unfair practice charge. Feuer responded that until further notice, D'Alessandro was prohibited from posting the charge on the MTEA bulletin board in the main

office. The charge was posted and Feuer removed it because he did not feel it was something that should be seen by members of the community or students. The charge was reposted twice and Feuer removed it twice more.

On March 7, 1994, the Association filed this unfair practice charge.

On March 17, 1994, a grievance meeting attended by D'Alessandro ended after the Association's president yelled at Feuer during a dispute over which administrators should attend the meeting.

On April 8, 1994, the Association amended its unfair practice charge.

On April 27, 1994, the superintendent issued a letter to D'Alessandro advising that he had completed his investigation of the "lying scuzzball" speech. The superintendent wrote that D'Alessandro's conduct was "intentionally and needlessly insulting," the term was intended to be "pejorative and offensive" and a copy of the letter would be placed in D'Alessandro's personnel file.

The Hearing Examiner began his analysis by examining the case law separating permissible and impermissible employer criticism of union conduct. In Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981), we explained:

> The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer

> which would discourage employees from engaging in organizational activity.

While "sympathetic to his [Assistant Superintendent Jackson's] feeling and believing the term [lying scuzzball] to be stupid," the Hearing Examiner concluded that D'Alessandro's speech was nonetheless protected by the Act. We agree with the Hearing Examiner that D'Alessandro had a right to criticize the violence report at the public Board meeting, and we agree with the Hearing Examiner's conclusion that by issuing a reprimand eight months later, but just two weeks after the Association filed its amended unfair practice charge, the superintendent interfered with D'Alessandro's right to engage in protected activity and reflected the administration's intent to retaliate against the Association.

The Board claims that D'Alessandro's remarks were not protected by the Act because they did not concern negotiations and that D'Alessandro's role as an Association leader cannot immunize such conduct. It relies on Pietrunti v. Brick Township Bd. of Ed., 128 N.J. Super. 149 (App. Div. 1974), certif. den. 65 N.J. 573 (1974) and Atlantic Cty. Judiciary, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992) aff'd 21 NJPER 321 (¶26206 App. Div. 1994). Both cases are distinguishable.

Pietrunti upheld the dismissal of a teacher and Association president after she made "intemperate" and "venomous" remarks about the administration at an orientation meeting. Atlantic Cty. Judiciary involved an individual court employee who, without provocation, challenged the authority of the trial court

administrator in front of a large group of co-employees.[6/] Neither case involved remarks by a union official during a school board's public comment period. And Pietrunti recognized that strongly worded criticisms leveled by a public employee can be protected, in that case by the First Amendment.[7/] Finally, neither case involved discipline that was meted out months after the alleged misconduct in retaliation for some later protected conduct.

D'Alessandro delivered his remarks at a Board meeting punctuated by jeers and cheers. Some of his comments were harsh and may have offended some listeners. But they were unquestionably addressed to issues of both public and Association concern -- school violence and vandalism, and an alleged conflict of interest. That neither of these issues was the subject of negotiations between the Board and the MTEA does not alter our analysis. Many issues either are not or cannot be the subject of mandatory negotiations, but they intimately and directly affect the

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6/ In Atlantic Cty. Judiciary, we found that other allegedly disparaging comments by the employee were a legitimate part of a dialogue protected by the Act.

7/ Pietrunti cited Pickering v. Bd. of Ed., 391 U.S. 563 (1968), which found constitutionally protected a teacher's letter to a newspaper editor charging the board with "trying to push tax supported athletics down our throats," and the superintendent with creating a climate of "totalitarianism." Noting that the letter in Pickering addressed public issues, the Pietrunti Court contrasted the facts before it since the employee had chosen "to ignore those issues as a matter of public concern and distorted them into a vehicle to bring scorn and abuse on the school administration in general and the superintendent of schools in particular." 128 N.J. Super. 168.

work and welfare of public employees and can properly be the subject of Association comment at public meetings, e.g. promotions, transfers, tenure, and, as in this case, violence and vandalism in the schools. See West Windsor Tp. v. PERC, 78 N.J. 98, 113-114 (1978) (when issues are not mandatorily negotiable terms and conditions of employment, public employee access to public employer is through political process not labor relations process).

The Board also claims that Association activity cannot be inferred from D'Alessandro's remarks. The record supports the Hearing Examiner's conclusion that it could be. D'Alessandro first addressed the report on violence and vandalism and then argued that one Board member had a conflict of interest and should not be participating in negotiations. Given D'Alessandro's history as Association president and vice-president, given his current position as grievance chairperson, and given the totality of his remarks, it was proper for the Hearing Examiner to infer that D'Alessandro was speaking as an Association representative.

The Hearing Examiner independently found that the reprimand, issued eight months after the incident, was motivated by hostility to subsequent Association activity. The Board excepts to the significance that the Hearing Examiner attributed to the timing of the decision to discipline D'Alessandro. However, the record does not indicate that any Board representative considered disciplining D'Alessandro for his August 31, 1993 speech until November 24, 1993, almost three months later and just one day after

D'Alessandro delivered the letter to Feuer at a faculty meeting. The speech incident was then considered closed after a December 15 meeting with an assistant superintendent. However, on April 27, 1994, a little more than two weeks after the Association filed its amended charge, the superintendent advised D'Alessandro that an investigation had been completed and that a formal reprimand would issue and be placed in his personnel file. The superintendent's letter came four months after D'Alessandro had been told by an assistant superintendent that he would recommend no further action on the incident, and eight months after D'Alessandro's presentation to the Board. The Hearing Examiner properly concluded that the Board had not presented any evidence of an ongoing investigation or a satisfactory explanation for the eight-month delay in issuing the reprimand. Under all the circumstances, we hold that D'Alessandro's speech was protected by the Act and that any criticism of his conduct as an Association representative should not have been placed in his personnel file. We also find that even if the remarks were not protected, the Board would not have issued a reprimand eight months later absent its hostility to intervening Association activity. In re Bridgewater Tp, 95 N.J. 235 (1984). We order the Board to remove the reprimand from D'Alessandro's personnel file.[8/]

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8/ Our holding does not preclude the Board from criticizing Association conduct through appropriate channels. See Hopatcong Bd. of Ed., P.E.R.C. No. 89-51, 14 NJPER 694 (¶19296 1988) (superintendent free to criticize Association president, but went too far by placing reprimand in personnel file).

The Board's only exception regarding D'Alessandro's reprimand for delivering a letter to Feuer at a faculty meeting concerns assistant superintendent Jackson's role. We need not address Jackson's role because no evidence suggests that the means of delivery disrupted the faculty meeting. The letter punishes D'Alessandro as an employee for his protected conduct as a union representative and should be removed from his personnel file. Black Horse Pike. See note 2 supra.

We also adopt the Hearing Examiner's recommendation that the Board be ordered to remove the reprimand from McLoughlin's personnel file. The Hearing Examiner found that Feuer issued the reprimand because he believed McLoughlin's letter caused "more dissension than what I believed to be good for the school building," and because he saw "no necessity to stir the pot." The Hearing Examiner concluded that this hostility to the exercise of protected rights motivated issuance of the reprimand. The Board acknowledges that issuing a written reprimand was not consistent with a prior incident where Feuer spoke to a teacher but did not issue a written reprimand. Given these facts, we conclude that Feuer would not have issued the reprimand absent his criticism of the content of the letter. We order it removed from McLoughlin's personnel file.

The Board contends that Feuer's advice to a coach not to bring in D'Alessandro because he has a way of overreacting did not violate the Act. The Board suggests that no representation was needed because Feuer did not contemplate disciplining the coach.

Feuer's remarks, however, did not go to the issue of representation in general, but to the character of D'Alessandro's representation. We adopt the Hearing Examiner's conclusion that those remarks tended to interfere with the exercise of rights guaranteed by the Act.

Finally, the Board contends that we should defer to a pending grievance arbitration the issue of whether it violated the Act by removing copies of an unfair practice charge that were posted on the Association's space on a central office bulletin board. It contends that the contract provision permitting "informational" notices to be posted should be interpreted by the arbitrator, not the Hearing Examiner. The Association responds that the matter has been withdrawn from arbitration. Given the nature of this unfair practice allegation and the related contractual issues, we agree that this issue should be deferred to arbitration. Contrast State of New Jersey (Dept. of Transportation), P.E.R.C No. 90-114, 16 NJPER 387 (¶21158 1990).

We adopt the Hearing Examiner's recommendation to dismiss the remaining allegations in the Complaint.

ORDER

The Middletown Township Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.,

particularly by reprimanding MTEA representative D'Alessandro for speaking out about vandalism and violence and negotiations at a public Board meeting; reprimanding MTEA representative D'Alessandro for giving a letter concerning employment conditions to principal Alan Feuer at a faculty meeting; reprimanding MTEA representative McLoughlin for distributing a letter concerning employment conditions; and admonishing John DeGenito not to speak to Association representative D'Alessandro about terms and conditions of employment.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding MTEA representative D'Alessandro for speaking out about vandalism and violence and negotiations at a public Board meeting; reprimanding MTEA representative D'Alessandro for giving a letter concerning employment conditions to principal Alan Feuer at a faculty meeting; and reprimanding MTEA representative McLoughlin for distributing a letter concerning employment conditions.

B. Take the following affirmative action:

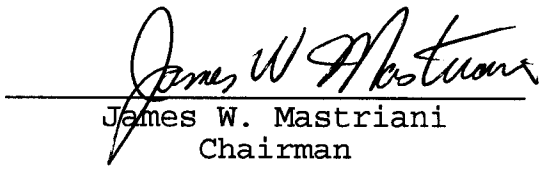
1. Remove the December 14, 1993 and April 27, 1994 reprimands from Frank D'Alessandro's personnel file.

2. Remove the December 14, 1993 reprimand from Raymond McLoughlin's personnel file.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and 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.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioner Boose abstained from consideration. Commissioner Wenzler was not present.

DATED: December 21, 1995
Trenton, New Jersey
ISSUED: December 21, 1995

# NOTICE TO EMPLOYEES

## PURSUANT TO
### AN ORDER OF THE
## PUBLIC EMPLOYMENT RELATIONS COMMISSION
### AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
## NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
### AS AMENDED,

**We hereby notify our employees that:**

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by reprimanding MTEA representative D'Alessandro for speaking out about vandalism and violence and negotiations at a public Board meeting; reprimanding MTEA representative D'Alessandro for giving a letter concerning employment conditions to principal Alan Feuer at a faculty meeting; reprimanding MTEA representative McLoughlin for distributing a letter concerning employment conditions; and admonishing John DeGenito not to speak to Association representative D'Alessandro about terms and conditions of employment.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding MTEA representative D'Alessandro for speaking out about vandalism and violence and negotiations at a public Board meeting; reprimanding MTEA representative D'Alessandro for giving a letter concerning employment conditions to principal Alan Feuer at a faculty meeting; and reprimanding MTEA representative McLoughlin for distributing a letter concerning employment conditions.

WE WILL remove the December 14, 1993 and April 27, 1994 reprimands from Frank D'Alessandro's personnel file.

WE WILL remove the December 14, 1993 reprimand from Raymond McLoughlin's personnel file.

Docket No. CO-H-94-271

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION
(Public Employer)

Date: _____ By: _____

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

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

APPENDIX "A"

d:\percdocs\notice 10/93

H.E. NO. 95-23

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

In the Matter of

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-H-94-271

MIDDLETOWN TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that the Middletown Township Board of Education violated subsections 5.4(a)(3) and (a)(1) of the Act by reprimanding two Association representatives for engaging in protected activity. The Board reprimanded one employee, in part, for saying "lying scuzzball" (referring to an unnamed Board representative) in his remarks at an open public meeting. It unlawfully reprimanded the same employee for delivering a letter to a building principal at a faculty meeting and for allegedly leaving the meeting early. It reprimanded another employee representative for distributing a memorandum not on Association letterhead.

The Hearing Examiner also found that the Board violated 5.4(a)(1) of the Act by removing a posted copy of an unfair practice charge from an Association bulletin board and by advising a unit employee not to contact an Association representative regarding a work-related incident which had been investigated by a building principal.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 95-23

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

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MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,

Respondent,

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Charging Party.

Appearances:

For the Respondent
Kalac, Newman, Lavender & Campbell, attorneys
(Francis J. Campbell, of counsel)

For the Charging Party
Zazzali, Zazzali, Fagella & Nowak, attorneys
(Kenneth I. Nowak, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 7 and April 8, 1994, the Middletown Township Education Association filed an unfair practice charge and amended charge against the Middletown Township Board of Education. The charge alleges that on November 29, 1993, Association grievance co-chairperson Frank D'Alessandro received a letter from the Board threatening disciplinary action, including salary increment withholding, because at a public meeting he expressed dissatisfaction with a school district report on violence; that on December 14, 1993, Alan Feuer, Principal, wrote a letter of reprimand to D'Alessandro for handing him a letter at the conclusion of a staff meeting (the letter concerned a meeting with the

principal in which D'Alessandro represented a teacher); also on December 14, Principal Feuer wrote a letter to Ray McLoughlin, another teacher and member of the Association Executive Board and negotiations committee, reprimanding him for distributing in teacher mailboxes a cautionary letter regarding his non-reappointment as basketball coach; that on January 21, 1994, the Board Superintendent advised that letters of reprimand were being placed in the two representatives' personnel files; and that on or around February 21, 199[4], Principal Feuer told a teacher who questioned an "administrative action","not to speak to D'Alessandro about this,".

The amended charge alleges that retaliation against the Association "is continuing..." by threats to Association officers attempting to post "Association matters" on its bulletin board and by the tearing down of lawful Association postings. Finally, it alleges that Principal Feuer has refused to allow unit employees to be represented at meetings in which "discipline is a potential outcome." These actions allegedly violated subsections 5.4(a)(1) and (3)[1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

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

On August 3, 1994, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On August 22, 1994, the Board filed an Answer denying every allegation.

On November 29 and 30 and December 8 and 19, 1994, I conducted a hearing at which the parties examined witnesses and presented exhibits. Post-hearing briefs were filed by March 23, 1995.

Upon the record, I make the following:

FINDINGS OF FACT

1. The Middletown Township Board of Education is a public employer within the meaning of the Act. The Middletown Township Education Association is a public employee representative within the meaning of the Act and represents all professional employees and secretarial employees of the Board.

2. The parties' applicable collective negotiations agreement ran from July 1, 1990 - June 30, 1993 (J-1).[2/]

Article XVII, "Association Rights", states in a pertinent portion:

> 17.5 The Association shall have in each school building the exclusive use of a bulletin board in each faculty lounge or teacher's dining room. The Association shall also be assigned adequate space on the bulletin board in each school's central office for informational notices of the Association. The location of Association bulletin boards in each room shall be designated

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2/ "J" represents joint exhibits, followed by the number given the exhibit. Similarly, "CP" represents charging party exhibits and "R" represents respondent exhibits.

> by the Association. Copies of all materials to be posted on such bulletin boards shall be given to the building principal, but no approval for their posting shall be required.
>
> 17.6 The Association shall have the right to use the inter-school mail facilities and school mail boxes as it deems necessary. The faculty representatives shall be responsible for distribution within his/her school building including the right to place mail in the school mail boxes. All materials placed in the inter-school mail facilities by the Association shall be identified as Association material by having the Association named affixed thereto.

Article XIX A, "Teaching Hours and Teaching Load", states in a pertinent part:

> 19.6 a. Building based professional employees may be required to remain after the end of the regular workday, without additional compensation, for the purpose of attending building, faculty or other professional meetings no more than eleven (11) days each year, scheduled no more than three (3) days in any one (1) month. Such meetings shall begin no later than fifteen (15) minutes after student dismissal time and shall run no more than forty-five (45) minutes, except in case of emergency involving the health and safety of students and/or professional employees. Three (3) of the meetings shall run no more than seventy-five (75) minutes.

Article XXXIV, "Complaint Procedure" states in a pertinent part:

> 34.2 Prior to taking any disciplinary action predicated upon a complaint by a parent, student, or member of the public, the complaint shall have an opportunity to respond to and/or rebut such complaint and shall be entitled to representation provided by the Association.

3. On August 31, 1993, Frank D'Alessandro rose to address the Middletown Township Board of Education at a well-attended public

meeting. A large audience was hearing about the breakdown of collective negotiations on a successor agreement because of health benefits issues. Members of the audience were invited to address the Board and their comments were met with derision or applause from the crowd (R-2). The atmosphere was "heated and intense" (1T17).[3/]

D'Alessandro taught mathematics in the district for many years and in the 1980's was president and then vice-president of the Association. Now he was grievance co-chairperson (1T14). Speaking into the microphone, he began:

> Speaking of...I'm Frank D'Alessandro...speaking of statistics, the annual report of Vandalism, Violence and Substance Abuse - Ah, yes there are...lies, there are damnable lies and there are statistics. This is all three and whoever made up these statistics and wrote these down is nothing but a lying scuzzball. There are 108 fights listed for the entire district, for the entire year. You are dreaming. That's 11 fights per month from the entire district. In a good week, we have 11 fights in this building.... [R-2;[4/] R-4].

D'Alessandro went on to criticize a perceived conflict of interest in a Board member's occupation and presence on the Board (R-4).

4. D'Alessandro is somewhat familiar with the compilation of "violence and vandalism" statistics because he had discussed a previous report years ago with a superintendent (1T47). He

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3/ "1T" represents the first day of the transcript, after which appears the page number. "2T" represents the second day of transcript, etc.

4/ R-2 is an audiotape recording.

contended that those statistics were underreported (1T18). He was now concerned that 300 reported fights in the previous school year dropped to 6 in the current year (1T52). He hoped that the Board would "table" the report and "review the statistics" (1T53). D'Alessandro denied he had any "particular person in mind" when he referred to the author as a "lying scuzzball" (1T20).5/ He conceded that the superintendent's name appears on the report (1T54).

5. Dennis Jackson is an assistant superintendent and claimed that it was "common knowledge" that he prepared the violence and vandalism report which D'Alessandro excoriated (2T130). Jackson had been assigned the task in 1991 at a public board meeting (2T133). Jackson also testified that D'Alessandro "made eye contact" with him while addressing the Board. He conceded that his name does not appear on the report (2T143).

6. In June 1993, Alan Feuer, new to the school district, became principal of Middletown High School North (3T59). He had no role in collective negotiations (3T79). Feuer soon solicited administrator and teacher volunteers for committees to review student discipline policies (3T86). The gist of this testimony is that Feuer sought a consensus among professionals (3T90-3T98).

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5/ Although he could neither define nor spell "scuzzball", D'Alessandro testified he was "...bringing Mark Twain's quote [about statistics] up into the '90's vocabulary" by using "language which was necessary but which was maybe eye-opening" (1T20, 1T39, 1T53, 1T57).

Sometime in early to mid-October 1993, Feuer met with NJEA representative John Molloy, Association executive committee member James Vecchione and D'Alessandro (2T18, 3T111). The topic was unit employee rights to union representation at meetings with administrators -- particularly, Feuer (3T112, 2T18). Prompting the discussion were meetings Feuer had with a secretary and later, a custodian, who were not told their "rights" (3T112, 3T114). Later in October, the Association wrote about the "right to representation" in its periodic bulletin, "MTEA News & Views" (R-7).

7. On or about November 17, 1993, D'Alessandro and Feuer met with a grievant who had been formally advised of "allegations of corporal punishment" (1T23). A couple of days later, the grievant complained to D'Alessandro about a memorandum he received from Feuer summarizing the meeting and advising that it (the memo) was to be placed in his personnel file (1T24).

D'Alessandro disagreed entirely with Feuer's version and "wrote [his] own memo..., explaining what took place at that meeting and what didn't take place....And then [he] gave the letter to Mr. Feuer" (1T24).

8. D'Alessandro actually gave the letter in a sealed envelope to Feuer on November 23, 1993, at or around the conclusion of a faculty meeting. Earlier that day, Feuer asked Vecchione, a teacher and Association representative, how late the meeting could start because a videotape was to be shown and he wanted everyone to

arrive beforehand (1T106, 1T109). Feuer was concerned about how late the meeting could run because a previous meeting had "evidently run overtime" (4T17). Vecchione advised that the meeting could begin no later than 2:30 p.m. (1T106). No notices of the start-time were posted or distributed.[6/]

The last class ends at 2:12 p.m. and teachers assembled for the faculty meeting between 2:15 and 2:30 p.m. (3T124). Feuer called the meeting to order at around 2:30 p.m., when a "sufficient number" of staff had arrived. During the meeting, which included remarks by a guest speaker, Feuer asked Vecchione, "When are we supposed to end"?, to which the representative answered, "3:15" (4T19). Feuer did not announce an end-time at the meeting (4T27).

D'Alessandro arrived for the meeting a few minutes late,[7/] and listened to the guest speaker's formal remarks. About 3:10 p.m., D'Alessandro walked over to Feuer, handed him a sealed envelope, saying quietly, "Mr. Feuer", and left the room (1T27, 1T73). Feuer was standing at a counter about 18 feet from the podium, while the speaker was answering questions from the audience (4T27).

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6/ High School North "Daily Notices" distributed to all faculty in September 1993, state that that month's faculty meeting would begin at 2:15 p.m. (CP-15). November "Daily Notices" state only that "there will be a faculty meeting on Tuesday, November 23 in the library..." (CP-16). Monthly calendars distributed in September for the entire term state that the meetings begin at 2:15 p.m. (CP-17).

7/ D'Alessandro is one of two Association representatives who are contractually relieved of non-teaching duties and ostensibly would not have to attend faculty meetings (4T129-4T130).

Mary Killmer, a High School North teacher attending the faculty meeting, observed D'Alessandro's departure. She testified:

> ...that particular day I was aware that when the speaker paused for people to leave who wanted to leave, that Frank [D'ALessandro] as I call him, approached Mr. Feuer who was standing to the left of the podium, and handed him an envelope, and I would say very unobtrusively handed him an envelope and left.
> [3T125]

She also testified that some teachers left and others remained, asking questions because "it gets more casual at the end" (3T134). D'Alessandro thought that the meeting "should have been over" at 3:10, when he left the room.

Feuer testified that D'Alessandro handed him the envelope "ceremoniously", attempting to "harass or embarrass" him, and left before he "concluded the meeting" (4T31, 4T37). Feuer did not believe that any other teachers left the room, specifically disagreeing with Killmer's version of events. Elaborating his disagreement, Feuer testified about his "fanatical" reverence for the precise time and emphasized that he ended the meeting at 3:15 p.m. (4T37).

Assistant Superintendent Jackson, attending the meeting to observe Feuer, agreed that D'Alessandro left the room before the meeting ended and acknowledged that two other teachers walked out but promptly returned (2T119, 2T157). Jackson opined that the "audience could see what was happening, and in my judgment seemed out of place to present anything to the principal...during the time he's conducting a formal faculty meeting" (2T124).

The testimony reveals no facts suggesting anything "ceremonious" in D'Alessandro's delivery of the sealed envelope. Only Feuer denied that anyone else left the room before 3:15 p.m., when he ended the meeting.[8/] Even if two teachers left and promptly returned, as Jackson testified, it supports Killmer's testimony that the speaker "paused", giving occasion to those wishing to leave. (No one denies that the formal presentation was completed).[9/] I do not credit Feuer's or Jackson's characterization of D'Alessandro's actions at the November 23, 1993 faculty meeting.

9. Feuer immediately opened the plain envelope and read the letter (4T27, 4T29).

D'Alessandro wrote that he was "shocked and dismayed" by Feuer's memorandum to the teacher; that only "a radical change of heart and mind on you[r] part or legal superiors would cause that memo to result from that conference" and he asked Feuer to "correct the distortions which abound in your memo" (CP-2).

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8/ Feuer conceded that other teachers left other faculty meetings before their conclusion and were not disciplined (4T47). He testified that if teachers do not explain their departures, he "attempts to address it [himself]" (4T102-4T103).

9/ I credit Killmer's version - except for her recollection of the time D'Alessandro left the meeting. When asked on cross-examination if she maintained that he left at 3:15 p.m. when he testified leaving at 3:10 p.m., she answered, "Then I would say that I was mistaken; I said I wasn't a clock watcher..." (3T135). Her directness is evident throughout her testimony.

Feuer then gave the letter to Jackson, who also read it while the question-answer portion of the faculty meeting continued (3T126, 4T27-4T28).

Some minutes later, after Feuer ended the meeting, Jackson talked with him

> ...we talked about the order. And I told him I was concerned frankly, about being presented with a letter while the meeting was in session. And that maybe it might be a good idea for him [Feuer] to ask why it took place.... [2T157]

Jackson denied knowing if Feuer "followed through" on his suggestion or whether D'Alessandro was ever disciplined (2T157, 2T158).

10. On November 24, 1993, Ray McLoughlin, a teacher at High School North and member of the Association executive committee and negotiations team, distributed a signed letter in all high school teacher mail boxes (1T104, 1T110). The letter, approved by Association President Diane Swaim, and <u>not</u> printed on Association letterhead, concerned McLoughlin's non-reappointment as boys varsity basketball coach (CP-8; 2T85).

> ...The matter is being grieved by MTEA, so I didn't want to get into specifics, but I do want to inform you and pass on some advice.... [CP-8].

The "advice" was to be careful about parental complaints which are not addressed quickly. McLoughlin's Association title does not appear in the letter.

11. On November 29, 1993, immediately after the Thanksgiving recess, Principal Feuer issued a brief letter to

McLoughlin, requesting a meeting the next day "regarding [his] letter to staff and the head coaching position for basketball this season." The letter also advised that "inasmuch as this is potentially a disciplinary conference, you are entitled to representation" (CP-9).

12. Also on November 29, 1993, D'Alessandro received a letter dated November 24, from Ronald Bolandi, an assistant superintendent, advising that on August 31, 199[3], "you referred to the author of the [Annual Report of Vandalism, Violence and Substance Abuse] as nothing but a lying scuzzball" (1T22; CP-1). Further advising that the report's author was Assistant Superintendent Jackson, Bolandi wanted a meeting and warned that "disciplinary action", which could "adversely affect the continuation of your employment or your salary adjustment increment for the 1993-94 school year", might result (CP-1).

13. On November 30, 1993, D'Alessandro received a letter from Feuer, asking to meet on December 3 to discuss the letter (CP-2) he gave Feuer at the faculty meeting. Feuer wrote that D'Alessandro was "entitled to representation inasmuch as the conference may result in disciplinary action" (CP-3).

14. On December 9, 1993, after an apparent rescheduling, Feuer met with D'Alessandro, McLoughlin and NJEA representative Molloy to discuss D'Alessandro's presentation of his letter at the faculty meeting (1T111-1T114; CP-5) and McLoughlin's "non-reappointment" letter distribution.

Feuer said that D'Alessandro was conducting Association business in front of the whole staff (1T112). D'Alessandro asked Feuer if he would be upset if someone else had given him the letter, to which Feuer answered, no. "He said my actions had to be interpreted differently from another teacher's actions...because of my position as Association representative" (1T30-1T31). Feuer testified that D'Alessandro's act "...just wasn't the way to conduct what I felt was business of the administration and MTEA because relations should not appear to be strained...[there] should not be the perception of acrimony" (3T80).

Feuer also said at the meeting that McLoughlin's letter should have been typed on MTEA letterhead or been approved by the administration before distribution (1T113). Feuer testified that the distribution caused "dissension and controversy in the building" and he was opposed to "air[ing] anything publicly, you don't air your dirty laundry..." (3T80). When pressed on direct examination to repeat that his objection to the letter was that it did not appear on MTEA letterhead, Feuer responded, "That was one objection, the second as I stated before, was that it created more dissension than what I believed to be good for the school building" (3T81).

On cross examination he reiterated;

> ...there was no necessity to stir the pot...and if it was an MTEA issue, then it should be identified as an MTEA issue as opposed to a personal issue which you know, is something different and this was clearly an MTEA issue.... [4T70]

15. Feuer could not recall when or how in the 1993-94 school year he learned that McLoughlin was an Association building representative (4T69-4T70). Nor did he "believe" he knew McLoughlin's status when the "non-reappointment" letter was distributed (3T64, 3T65). Feuer testified that he became aware of McLoughlin's membership on the negotiations team after the early December meeting (3T79).

McLoughlin testified on cross examination that Feuer once commented to him in passing, "I didn't know you were on the negotiating team." When pressed for the approximate date of the comment, McLoughlin stated it was prior to the early December meeting with Feuer (1T138-1T139). Recalled to testify in rebuttal, McLoughlin remembered their conversation occurring in an area between the central office and elevators, and that Feuer remarked that he had seen his name on a list of Association negotiators. McLoughlin testified:

> I can't pinpoint the exact date, but I know in relation to the events that were happening that year, that it was probably in October or at latest, very early November because my other dealings with Mr. Feuer happened to involve the basketball position and I know that in fact it made an impression on me that this topic [i.e., position on the Association negotiating team] would come up while the basketball decision, the final decision had to be made. [4T133]

Although Feuer did not know the identity of building representatives, he did not rebut, and was not asked to rebut McLoughlin's testimony about the "negotiations team" comment (4T121).

I credit McLoughlin's testimony on rebuttal examination. His specific memory of the location and of the words exchanged in the context of an issue affecting him personally, makes his testimony credible, notwithstanding Feuer's vague recollection. I therefore find that Feuer knew of McLoughlin's membership on the Association negotiations team when he issued his November 29, 1993 letter (CP-9).

16. McLoughlin testified that everyone in High School North knew his position on the Association executive committee and using letterhead "did not occur to [him]" (1T129).

Association President Swaim offered unrebutted testimony that in the district's seventeen school buildings , some issues were relevant only to a particular school and that a building representative's correspondence on those issues was "not usually" on MTEA letterhead (2T85). On cross-examination, she distinguished "intra-school" correspondence from "inter-school", the latter being deposited in the central office by the MTEA for delivery to each school building (2T91). Of the former, she cited written summaries of MTEA representative council meetings as an example, with building representative signatures as the identifying source (2T96). This correspondence, like McLoughlin's, is distributed in one school only.

A teacher who distributed a solicitation on a referendum in a general election was warned verbally not to do it again (4T68). Feuer acknowledged that notices for parties, births, etc., do not

need to be on letterhead (4T71). His reading of the collective agreement is that "all materials placed in the inter-school mail facilities (i.e., including mailboxes as the terminus) shall be identified as Association material" (4T120).

17. On December 14, 1993, Feuer issued written reprimands to D'Alessandro and McLoughlin (CP-5; CP-10). The reprimand to D'Alessandro about the "letter presentation" at the faculty meeting advises;

> If a teacher with no other 'title' [i.e., MTEA official] had given me a letter, imaginations would not be working overtime and speculation or rumor would not abound. I believe your dual role creates the necessity for you to be doubly prudent before acting. I also stressed that MTEA business should neither be conducted in public nor on school time.
> [CP-5]

Calling D'Alessandro's actions "self aggrandiz[ing]" and "rude", Feuer wrote that if meetings were too long, the proper procedure requires the filing of a grievance. He "recommended that a copy of the letter be placed in [his] personnel file...." (CP-5).

The reprimand to McLoughlin states that "the manner of distribution" violates Articles 17.5 and 17.6 and that McLoughlin "used poor judgment" and the action was "self-serving and inappropriate." Feuer wrote that "staff mailboxes are for official, school business or official MTEA communications and are not a suitable forum for airing personal opinions...." Feuer also recommended that a copy of the letter be placed in McLoughlin's personnel file (CP-10).

Feuer testified that he issued the letters because their behavior ran "counter to what I believed to be a good running organization in the school building...." (3T80).

Also on December 14, Feuer wrote to D'Alessandro, responding to the substance of the letter delivered at the faculty meeting. Feuer wrote that D'Alessandro's letter was "fallacious and replete with speculation" (CP-4).

18. On December 15, 1993, D'Alessandro attended a meeting with President Swaim, counsel for the Association, and Assistant Superintendent Ronald Bolandi (1T39). They discussed the "lying scuzzball" remark. Bolandi, responsible for district "personnel" and "business" matters, stated that he would recommend "no further action" on the incident (2T140, 1T39). Bolandi left the district by January 1994 (2T141).

Assistant Superintendent Jackson recalled no Board meeting in the 1993-94 term at which D'Alessandro's remarks were discussed (2T177).

Also on December 15, D'Alessandro issued a memorandum to "High School North colleagues" (on MTEA letterhead), reprinting Article 32 (Maintenance of Classroom Control and Discipline) of the agreement. D'Alessandro underscored "particularly relevant phrases" which vest in teachers the authority to send disruptive students to the principal (R-6).

Feuer testified that R-6 undermined a memorandum he issued two days earlier. It "contradicted steps that should be followed by

a teacher prior to referral to the principal" as established by the "discipline committee" work in the summer (4T10-4T11).

19. On January 21, 1994, School Superintendent Peter Merluzzi sent a letter to President Swaim (responding to her inquiry), writing that Feuer's letters of reprimand will be placed in D'Alessandro's and McLoughlin's personnel files (CP-13).

20. In February 1994, teacher and freshman basketball coach John DeGenito was approached by Feuer in the gym after a basketball game (1T92). Feuer is DeGenito's supervisor for his coaching responsibilities. DeGenito had been informed by a parent of one of his players that another parent(s) complained to Feuer about a "spitting" incident in a practice session (1T90).

DeGenito enjoys coaching and was sensitive to criticism, especially in light of McLoughlin's "non-reappointment" to the varsity job. Feuer told him not to be alarmed because no "major investigation" was being conducted on the incident. DeGenito said that if a meeting was necessary he would call in D'Alessandro, to which Feuer responded, "Don't bring D'Alessandro in. He has a way of overreacting, of blowing things out of proportion" (1T14). Feuer also told him not to be concerned.

DeGenito was not disciplined.

21. On March 2, 1994, teacher Linda Hodgins received a slip of paper from Feuer's secretary asking her to visit the principal on March 4 (4T64; CP-18). Feuer had received a complaint that Hodgins was not adequately preparing her students to pass an

advanced placement examination in English (4T59). Feuer had "no idea" if she had any notice of the issues to be addressed at the meeting (4T65). The meeting, attended by another employee, (perhaps the department chairperson) did not result in any discipline (4T66).

President Swaim testified that unit employees must be given notice of "the nature" of administrator and unit employee meetings (2T87). She was also told of "several cases" in which teachers had been verbally reprimanded for their performance and "had not been given opportunity to get representation" (2T88).

Feuer testified that he always allows an MTEA representative attend meetings he calls with unit employees at which discipline may result (3T73, 4T53). He also tries to provide notice of the substance of a scheduled meeting (4T53).

These testimonies are not inconsistent with each other because the parties' understanding of which occasions "may result" in disciplinary action differ.

22. On or about March 7, 1994, Vecchione asked Assistant Principal Peter Smith to specifically identify an area for MTEA postings on the bulletin board in the central office of High School North (2T43). The board is near a counter where teachers must sign in every morning. Visitors to the school also enter the central office. A space was cleared and covered with red or orange construction paper, above which was placed an MTEA logo (2T44). A similarly situated space had been used previously for MTEA postings.

The next day, or day after, perhaps, D'Alessandro advised Feuer in writing that he intended to have posted a copy of the unfair practice charge on the central office MTEA bulletin board (1T69, 4T75). At or around this time, Feuer had received a copy of the charge. On March 10, Feuer wrote a brief letter to D'Alessandro and had it delivered to him during one of his classes. The letter states:

> I am in receipt of a copy of the unfair practice charge that you submitted to PERC. Please be advised that until further notice you are prohibited from posting this on the MTEA bulletin board in the main office.
> [CP-6].

The charge was posted and Feuer removed it from the bulletin board (4T81). He testified that the charge was "not something that should be seen by members of the student body, members of the community" (4T76). Much testimony belabored the exact whereabouts of the bulletin board in the central office.

The charge was posted again, then removed by Feuer, "[he] thinks", posted again a week later, by President Swaim, this time with Feuer's name highlighted in yellow marker (4T82, 2T83). It was removed again.

23. On March 17, 1994, President Swaim and Association Officers D'Alessandro, Vecchione and Wesley Brown entered Feuer's office for a grievance meeting. Assistant Principal Mark DeMareo was already in the principal's office on Feuer's invitation. Feuer wanted him to take notes of the meeting (3T15, 3T31, 3T32).

Feuer asked Swaim if she objected to Assistant Principal Peter Smith's attendance at the meeting. She objected. He asked about DeMareo's attendance. She said, "This grievance has to do with the principal; you're the principal aren't you?" He answered, yes. She said, "You're not entitled to representation." He said, "DeMareo is not here to represent me. If he doesn't stay, I won't." She said, "You're not entitled to representation." He said, "Don't yell at me." She pointed her finger at him and said, "Listen, I can yell at you and I will." He said, "This conference is over" (3T31; R-5).

I credit DeMareo's version of the incident because he was present, took notes, was not a direct participant, testified calmly, deliberately and was unequivocal. I specifically find that Swaim yelled at Feuer during the incident.

24. On April 27, 1994, Superintendent Merluzzi issued a letter to D'Alessandro advising of his "completed investigation" of the "lying scuzzball" speech. While acknowledging the meeting with then-Assistant Principal Bolandi, Merluzzi wrote that his conduct was "intentionally and needlessly insulting"; that the term was intended to be a "perjorative and offensive" reference to the "administrator" [i.e., Jackson] and finally, that a copy of the letter will be placed in D'Alessandro's "permanent personnel file" (CP-7).

ANALYSIS

Blackhorse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981) drew the line separating permissible and impermissible employer criticism of union conduct. The Commission stated:

> A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are inconsistent with that goal. However, as we have held in the past, ...the employer must be careful to differentiate between the employee's status as the employee representative and the individual's coincidental status as an employee of that employer. See, In re Hamilton Township Board of Education, P.E.R.C. No. 79-59, 5 NJPER 115 (¶10068 1979) and In re City of Hackensack, P.E.R.C. No. 78-30, 4 NJPER 21 (¶14001 1977).
>
> When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. If either acts in an inappropriate manner or advocates positions which the other finds irresponsible criticism may be appropriate and even legal action, as threatened here, may be initiated to halt or remedy the others action. However, ...where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment.
>
> * * *
>
> The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to

> occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity.

The Association was free to engage in protected activity. N.J.S.A. 34:13A-5.3. The Board was free to criticize that activity, but had to do it appropriately.

The Board argues that the "lying scuzzball" remark is "offensive and unprofessional", reflecting a "total lack of decorum" and must therefore be considered "unprivileged" (post-hearing brief at p. 8). It urges that the reprimand is a "measured response."

I disagree. A public Board of Education meeting with an open microphone had been called to address, among other things, unresolved collective negotiations issues. This context differs significantly from the one in Pietrunti v. Bd. of Ed. of Brick Tp., 128 N.J. Super. 149 (App. Div. 1974), cited by the Board. There, an association president used an orientation meeting for new teachers to speak against the school administration in general, and against the superintendent in particular. In sustaining the discharge of the teacher, the Appellate Division emphasized that "labor negotiations were not the subject matter of these proceedings." Id. at 162.

Some statements by association representatives are not protected by the Act. For example, obscenities and profanities may properly be regarded as insubordination. See N.J. Transit Bus Operation, Inc., P.E.R.C. No. 86-31, 11 NJPER 586 (¶16205 1985); Atlantic Cty. Util. Auth., P.E.R.C. No. 94-97, 20 NJPER 195 (¶25091 1994). Similarly, derogatory and disruptive comments by unit

employees are not protected conduct. Atlantic Cty. Judiciary and Derek Hall, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd App. Div. Dkt. No. A-3290-92T1 (10/28/94).

D'Alessandro, acting as an association representative, was complaining in an open forum about underreported statistics on school violence and vandalism. Insofar as the remarks concerned a safety issue in general, they are protected conduct advocating change over (or at least, accuracy in reporting) a mandatorily negotiable subject. Maurice River Tp. Bd. of Ed., P.E.R.C. No. 87-91, 13 NJPER 123 (¶18054 1987); City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶2096 1978), aff'd App. Div. Dkt. No. A-3562-77 (3/5/79).

Webster's Collegiate Dictionary (10th ed. Merriam-Webster, 1993) defines "scuzzy" as "dirty, shabby or foul in condition or character." No noun form appears - to the extent one imagines it, it must be of like, but indeterminate quality. Of course, "lying" is perjorative, but it merely shades the impression created by "scuzzball." The term is not an obscenity. Its use did not disrupt an already tumultuous gathering at which strongly held and worded points of view were expressed. Finally, nothing in the record confirms Assistant Superintendent Jackson's opinion that his authorship of the annual report was "common knowledge", especially in view of his being assigned the task just two years before. While sympathetic to his feeling and believing the term to be stupid, I must find that D'Alessandro's remark is protected by the Act.

The Board's use of the incident three months later and the reprimand itself coming five months after that, demonstrates hostility, a necessary component of the Association's allegation that the Board violated subsection 5.4(a)(3). This subsection prohibits public employers from "discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of rights guaranteed them by this act." Among those rights is:

> The right, freely and without fear of penalty or reprimand, to form, join and assist any employee organization or to refrain from any such activity.... [N.J.S.A. 34:13A-5.3].

Under In re Bridgewater Tp., 95 N.J. 235 (1984), 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 first resolved by the hearing examiner.

Timing is an important factor in assessing motivation. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). By its admission, the Board never considered discipline until November 24, 1993, almost three months after the speech, but one day after D'Alessandro delivered a letter to Feuer near the conclusion of a faculty meeting. That letter, critical of Feuer and complaining (with typical hyperbole) about a memorandum he issued to a unit employee, inescapably prompted Assistant Superintendent Bolandi's November 24 letter to D'Alessandro, warning of discipline for his August 1993 remarks.

Bolandi considered the incident closed at the conclusion of a December 15, 1993 meeting with Association representatives. That it remained until April 27, 1994, (long after Bolandi left the district), when the superintendent, advising of his "completed investigation", declared the remark "needlessly insulting" and formally reprimanded D'Alessandro. A little more than two weeks before the superintendent issued the reprimand, the Association had filed its amended unfair practice charge.

The Board presented no evidence of an "investigation" after December 15, 1993, or a reason for reversing Bolandi's recommendation. Nor has it offered an explanation for the eight-month incubation of the reprimand. The Board displayed its discipline hammer when D'Alessandro acted in a way it deemed inappropriate in November, hid it from view between December and April, and then brought it down soon after the amended charge was filed.

Accordingly, I find that the reprimand crosses the line separating permissible and impermissible employer criticism of union conduct. The Board converted criticism into discipline for protected conduct, conduct which is unrelated to D'Alessandro's performance as an employee. Furthermore, the hostility evident in the delay, threat and issuance of the reprimand taints some business justifications offered in defense of other alleged acts of retaliation.

One of them is Feuer's December 14, 1993 reprimand to D'Alessandro for the letter he gave Feuer near the end of the faculty meeting. D'Alessandro was disciplined for presenting the letter during the meeting and for leaving before it ended. The reprimand is also laced with references to D'Alessandro's role in the Association.

The Board might have disciplined D'Alessandro for leaving the meeting early, as it could have disciplined any teacher for that infraction, because Feuer had reached an accommodation with

Association representative Vecchione that the meeting could end at 3:15 p.m. It is of no consequence that D'Alessandro may not have been required to attend the meeting. Choosing to attend as a teacher obligated him to follow the same work rules and contract provisions that apply to others.

But the reprimand itself belies the certainty of any rule requiring the principal to formally declare a meeting's end. Feuer wrote, "Rather than quibble about several minutes, I believe we should collaboratively work out exact meeting times." Feuer was also new to the district, overseeing his second or at most, third faculty meeting. Killmer credibly testified about the teachers' election to leave after formal remarks ended. No Board representative testified about a history to the contrary.

Beyond this "quibble about several minutes" is the stir caused by D'Alessandro's presentment. Considering the Board's continuing anger for D'ALessandro's "lying scuzzball" speech, I attach significance to Jackson's attendance at the faculty meeting. Not only did the assistant superintendent claim to be the target of D'Alessandro's aspersive rhetoric in August 1993, he was also Feuer's supervisor. Minutes after reading D'Alessandro's accusatory letter about the "corporal punishment" meeting - a letter implicating Jackson as a "legal superior", the assistant superintendent advised Feuer that "...maybe it might be a good idea" to ask D'Alessandro why the "presentation" took place.

The tentativeness of Jackson's suggestion feels too measured for the occasion of being called essentially, a manipulator by the same person who, three months before, called him (indirectly) a "lying scuzzball" and who, just three weeks before was warned he might be disciplined for that remark. For the same reason, Jackson's focus - which in turn was Feuer's focus - on the "presentation" - seems pretextual. I cannot accept the notion that if D'Alessandro had given Feuer (and Jackson) a letter advising of an innocuous Association matter rather than a diatribe over a grievance meeting, the reaction would have been the same.

Nor do I find that the reprimand is entirely consonant with permissible employer criticism delineated in Black Horse Pike. Even if Feuer properly reprimanded D'Alessandro for conducting Association business on work time and for leaving early, he was not free to reprimand him, as he has, for acting inappropriately as an Association representative, one who causes "speculation or rumor to abound" and who must be "doubly prudent before acting." Under all these circumstances, I find that the December 14, 1993 reprimand to D'Alessandro violates the Act.

I turn next to the December 14 reprimand of McLoughlin for distributing a letter not on Association letterhead. The letter, a warning to teachers to beware of parental complaints which are not promptly addressed, concerns terms and conditions of employment. It must be considered protected conduct, notwithstanding its appearance on plain paper.

The Board failed to rebut the Association's testimony distinguishing "intra-school" from "inter-school" mail.[10/] The Board acknowledged at least one other contemporaneous distribution not on letterhead, for which Feuer issued a verbal warning.

Even assuming that McLoughlin's distribution violated Article 17.6 of the agreement, I turn to Feuer's other reason for issuing the reprimand. He conceded that the letter caused "more dissension than what I believed to be good for the school building." He saw "no necessity to stir the pot...." Whether censorious, paternalistic or both, these sentiments might apply equally to other issues on which the Association has a right to articulate a point of view, even at the risk of "causing dissension."

Feuer knew McLoughlin's position on the negotiations committee before he issued the November 29 warning (see findings 11 and 15). Indifferent to that fact, and mistakenly assuming that McLoughlin's letter was not or would not be approved by the Association, Feuer wrote that the letter demonstrated "poor judgment and...appears self-serving and inappropriate." Under these circumstances, I find that Feuer's "second" motive is a substantial

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10/ I do not agree with Feuer's reading of Article 17.6 of the agreement. The provision specifies the Association's right to use "inter-school mail facilities and (my emphasis) school mail boxes as it deems necessary." It directs that "all materials placed in the inter-school mail facilities by the Association shall be identified as Association material..." I believe that the deletion of "school mail boxes" in the latter sentence supports the Association's position.

factor in his decision to reprimand and is legally indistinguishable from hostility. The reprimand violates subsection 5.4(a)(3) and derivatively (a)(1) of the Act.

Two uncontested acts by Principal Feuer - his admonition to unit employee DeGenito not to speak to D'Alessandro and twice removing the unfair practice charge posted on the MTEA bulletin board, are separate, independent violations of 5.4(a)(1) of the Act.

"An employer violates subsection 5.4(a)(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification." N.J. Sports and Expo. Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979); UMDNJ, Rutgers Med. School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987). The tendency of the employer's conduct, and not its result or motivation, is the threshold issue. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-26, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Dkt. No. A-1642-82T2 (1983).

The business justification offered for the admonition is that no discipline for the "spitting" incident was to be issued. Inasmuch as the context of Feuer's conversation with DeGenito concerned an investigation which might have resulted in discipline, DeGenito's response was appropriate, given the recent replacement of the varsity basketball coach. (The Commission considers the total context of the situation and evaluates the issue from the standpoint

of employees over whom the employer has a measure of economic power. Mercer Cty. and PBA Local 167, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985)).

Even if DeGenito did not have a reasonable belief that the discussion with Feuer could result in discipline, Feuer's "suggestion" has a tendency to interfere with an employee's legitimate interest in seeking union representation.

The Association has a bulletin board in the central office, and testimony confirms that the Board knew of and agreed to that space. It is axiomatic that an Association's unfair practice charge is "newsworthy" for its members, at least.

It was not part of any agreement that the Association could use the space for informational purposes, except if the Board disagreed with the contents of the posting (my emphasis). Feuer's reason for removing the posted charge, that he did not want parents or students reading it, may concern the location of the bulletin board. It does not justify his action.

Accordingly, I find that Feuer's statement to DeGenito and removing the charge from the Association bulletin board violate 5.4(a)(1) of the Act.

A public employer also violates subsection 5.4(a)(1) when it denies an employee's request for union representation at an interview which the employee could reasonably believe might result

in discipline. East Brunswick Bd. of Ed., P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979), aff'd in part, rev'd in part, App. Div. Dkt. No. A-280-79 (6/18/80); see NLRB v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 689 (1975).

The Association's final allegation is that the Board refused to allow unit employees to be represented at meetings in which discipline is a "potential outcome." The Association offered only sketchy and hearsay testimony about isolated incidents in which two or more unit employees were verbally reprimanded. This evidence fails to establish a violation of the Act. Accordingly, I dismiss that allegation.

## RECOMMENDED ORDER

I recommend that the Middletown Township Board of Education:

A. Cease and desist from:

1. Interfering with, restraining or coercing teachers and other unit personnel in the exercise of rights guaranteed them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by interfering with MTEA representative D'Alessandro's right to speak on terms and conditions of employment at a public Board meeting on August 31, 1993; interfering with MTEA representative D'Alessandro's right to give a letter concerning terms and conditions of employment to Principal Alan Feuer; interfering with MTEA representative McLoughlin's right to distribute a a letter concerning terms and conditions of employment

to unit employees in High School North on November 24, 1993; coercing unit employee DeGenito by admonishing him from speaking to Association representative about terms and conditions of employment in February 1994; and by interfering with and restraining Association representative rights to post copies of an unfair practice charge on the MTEA bulletin board in the central office in March 1994.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding Association representative D'Alessandro for remarks concerning terms and conditions of employment at a public Board meeting on August 31, 1993; and by reprimanding him for presenting a letter concerning terms and conditions of employment to Principal Alan Feuer on November 23, 1993; and for leaving a faculty meeting "early",; reprimanding Association representative McLoughlin for distributing a letter concerning terms and conditions of employment on November 24, 1993.

B. Take the following affirmative action:

1. Remove from the personnel file of Frank D'Alessandro letters of reprimand dated April 27, 1994 and December 14, 1993.

2. Remove from the personnel file of Raymond McLoughlin a letter of reprimand dated December 14, 1993.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and 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.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

I recommend that the remaining allegations in the Complaint be dismissed.

Jonathon Roth
Hearing Examiner

Dated: May 9, 1995
Trenton, New Jersey

Recommended Posting
Appendix "A"

# NOTICE TO ALL EMPLOYEES

## PURSUANT TO

AN ORDER OF THE

## PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

## NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

**We hereby notify our employees that:**

**WE WILL NOT** interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by interfering with MTEA representative D'Alessandro's right to speak on terms and conditions of employment at a public Board meeting on August 31, 1993; interfering with MTEA representative D'Alessandro's right to give a letter concerning terms and conditions of employment to Principal Alan Feuer; interfering with MTEA representative McLoughlin's right to distribute a a letter concerning terms and conditions of employment to unit employees in High School North on November 24, 1993; coercing unit employee DeGenito by admonishing him from speaking to Association representative about terms and conditions of employment in February 1994; and by interfering with and restraining Association representative rights to post copies of an unfair practice charge on the MTEA bulletin board in the central office in March 1994.

**WE WILL NOT** discriminate in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by reprimanding Association representative D'Alessandro for remarks concerning terms and conditions of employment at a public Board meeting on August 31, 1993; and by reprimanding him for presenting a letter concerning terms and conditions of employment to Principal Alan Feuer on November 23, 1993; and for leaving a faculty meeting "early",; reprimanding Association representative McLoughlin for distributing a letter concerning terms and conditions of employment on November 24, 1993.

**WE WILL** remove from the personnel file of Frank D'Alessandro letters of reprimand dated April 27, 1994 and December 14, 1993.

**WE WILL** remove from the personnel file of Raymond McLoughlin a letter of reprimand dated December 14, 1993.

**Docket No.** CO-H-94-271 Middletown Tp. Board of Education
**(Public Employer)**

**Dated**_____ **By**_____
**(Title)**

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

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