

P.E.R.C. NO. 97-126

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MENDHAM BOROUGH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-93-373

MENDHAM BOROUGH EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint against the Mendham Borough Board of Education. The Complaint was based on an unfair practice charge filed by the Mendham Borough Education Association. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act by terminating Margaret (Robin) Porter in retaliation for her Association activities. The Commission finds that the Association did not prove that protected activity was a substantial or motivating factor in the decision to deny Porter tenure.

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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Charging Party.

Appearances:

For the Respondent, Schwartz, Simon, Edelstein, Celso & Kessler, attorneys (Nicholas Celso, III, of counsel and on the brief; Joseph R. Morano and Ken Iwama, on the brief)

For the Charging Party, Klausner & Hunter, attorneys (Stephen B. Hunter, of counsel)

DECISION AND ORDER

On April 19, 1993, the Mendham Borough Education Association filed an unfair practice charge against the Mendham Borough Board of Education. The Association alleges that the Board violated the New Jersey Employer-Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1) and (3),^{1/} by terminating Margaret (Robin) Porter in retaliation for her Association activities.

^{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 June 10, 1993, a Complaint and Notice of Hearing issued. The Board filed an Answer admitting that it terminated Porter, but denying that it did so because of her Association activities.

On April 14 and 15, July 26 and July 27, September 20, 21, 22 and 23, 1994, and February 21 and 22 and March 7, 1995, Hearing Examiner Stuart Reichman conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On July 19, 1996, the Hearing Examiner recommended dismissing the Complaint. H.E. No. 97-4, 22 NJPER 302 (¶27160 1996). He found that the Board was not hostile to Porter's activity as the Association's co-president and that her activity was not a substantial or motivating factor in the decision to terminate her. He also found that her discharge did not independently violate N.J.S.A. 34:13A-5.4(a)(1).

On August 22, 1996, the Association filed exceptions. ^{2/}
On October 16, 1996, the employer filed a brief opposing the exceptions.

^{2/} We note the Association's complaint that many of the Hearing Examiner's findings of fact were not supported by transcript references. The Board counters that the charging party has not properly supported its factual assertions with record citations. It appears to us that both parties complied with the Hearing Examiner's directive that any proposed findings be supported by transcript references. While the Hearing Examiner's findings could have contained more transcript citations, we reject the Association's contention that a remand is warranted for that purpose.

The Association advances four general exceptions. First it objects to certain findings of fact. Second, it asserts that the Hearing Examiner erred by concluding that Porter's termination was not a response to her Association activities. Next, it maintains that the Hearing Examiner's application of the standards governing cases of anti-union discrimination was flawed. Finally, it postulates that Porter's discharge independently violated subsection 5.4(a)(1).

The employer urges us to affirm the Hearing Examiner's recommended findings and conclusions and makes specific responses to the Association's exceptions.

We have reviewed the record.^{3/} We adopt the Hearing Examiner's findings of fact (H.E. at 3-70) with modifications footnoted in this factual summary. The charging party made objections and comments regarding these findings: 6, 10-15, 19-25, 32, 33, 35, 36-39, 43, 46, 48, 51, 56, 59, 61, 68-70, 72-74, 91-96, 99, 100, 102-105, 109-126 and 131. Unless discussed in this decision, the charging party's exceptions to these factual findings are rejected.

Porter, a music teacher, was hired on March 5, 1990 and taught during the 1990-1991 and 1991-1992 school years. At meetings held on April 13 and 27, 1992, the Board discussed Porter's continued employment. The Board members knew that Porter would

^{3/} We follow the citation key used by the Hearing Examiner for referring to the record.

acquire tenure on March 6, 1993 if she continued teaching. Porter's principal, Robert Marold, supported her for reemployment and tenure, as did Edith Von der Heiden, principal of the special education school where Porter taught one day a week, and superintendent David Ottaviano. Board members were not (as was the practice in the district) given copies of Porter's formal observations and evaluations which were favorable nor did they ask to see them. Some Board members were skeptical of Marold's staff evaluations, believing that he would recommend for tenure or renewal teachers who were not worthy even though he had also recommended against granting tenure to some teachers or renewing some contracts.

The Board members' reservations about Porter were based on complaints from parents and students. These complaints, save a few, were not raised with Porter. Some of the reservations were based on student conversations overheard by Board president Moore while she was driving groups of students to community service projects. Most concerned extracurricular productions staged by Porter and some, including concerns about chorus enrollment, were inaccurate.^{4/} Porter was perceived as unenthusiastic about teaching instrumental music (particularly strings) and some Board members thought that Porter's insistence on pulling students out of academic classes for

^{4/} We add to finding 46 that enrollment in the all school chorus rose from 77 students to 105 or more while Porter was employed. Moore acknowledged that the Board had no first-hand knowledge as to the accuracy of many complaints (10T124-19 to 10T125-1).

scheduled instrumental lessons caused problems, even though the "pull out" program was standard practice and was followed by other instrumental music teachers. Concerns were also raised about the music and costumes Porter chose for some school shows and about her perceived favoritism of some students in casting musical productions.

At the Board meeting in April 1992, Marold cautioned against deferring a decision on Porter's tenure until the middle of the 1992-1993 school year. He wanted to avoid disrupting the music program, as had occurred just before Porter's hiring. He told the Board that it should either not renew Porter or give her a contract with the expectation that she would become tenured in March 1993.

On April 27, 1992, by a vote of 5-3, the Board renewed Porter's employment contract for the 1992-1993 school year. Moore and Brown, the Personnel Committee Chair, voted with the majority.^{5/} Some Board members still had reservations about the strings and chorus programs.^{6/} They desired some follow-up.^{7/}

^{5/} We add to finding 43 that Board member Geraldine O'Connor, who had complained about her child being "pulled out" of an academic class for music lessons, voted against Porter's contract renewal for 1992-1993.

^{6/} We clarify finding 51 to reflect Donald Cucurello's testimony that after Porter addressed the concern over the strings program at a July 1992 curriculum committee meeting, he was unsure whether other Board members left satisfied with her responses.

^{7/} We clarify and modify finding 35. We are unable to conclude that Marold had ever been asked to maintain a formal log of complaints about Porter. The Hearing Examiner does not state when Marold was told to keep this log and this finding is not supported by transcript references.

About a month before the April 27, 1992 meeting, the Board and Association had reached an agreement on a contract to succeed the one that had expired at the end of the 1990-1991 school year. The negotiations had been difficult and were marked by unprecedented Association activity including demonstrations and leafletting and cancellation of a popular extracurricular competition. At that time Porter did not hold any Association position or take any visible role in the negotiations.

On April 29, 1992, Ottaviano sent Porter a letter (CP-13). It stated:

The Board of Education at its April 27, 1992 meeting voted to extend you tenure.

Congratulations! Your exemplary performance and service to the district is appreciated.

Porter showed the letter to Marold, who expressed surprise since he had been at the Board meeting and thought that the Board had not granted her early tenure. Believing she was now tenured, Porter, in June 1992, agreed to become Association co-president with another teacher, David Garrison. The co-presidency was decided upon so that Garrison, who was an athletic coach during the early part of the year, and Porter, who had musical productions scheduled later in the year, could each attend to their extracurricular obligations at times when the other leader could see to Association business.

In November 1992, Frank, the new superintendent, saw the tenure letter in Porter's file. Because her length of service did not show three full years, Frank talked separately to Marold and

Moore about the letter. Marold told Frank that he had seen the letter and had discussed it with Porter. Moore informed Frank that Porter did not have tenure. Moore asked Frank to have Porter evaluated and also asked him to check on what had to be done to make a decision on tenure for a teacher with a mid-year acquisition date. Marold observed Porter on November 2 and issued a written report. Also in November 1992, Frank had a similar conversation with Brown. In late December 1992, Frank separately reported to Brown and Moore that he had consulted with the New Jersey School Boards Association and had been told that the teacher could be terminated prior to tenure acquisition if 60 days notice was given as required by her individual teaching contract. Because of the winter vacation, Brown and Moore doubted that a meeting with adequate public notice could be held in time and concluded that the issue of whether Porter would acquire tenure had become a moot point. The two Board members testified that they were annoyed or frustrated with Frank's mishandling of the issue but they did not tell other Board members about it at that time.^{8/}

^{8/} We modify finding 101 to state that before February 8, 1993, only Brown and Moore, not the entire Board, had been told by Frank that Porter could not be terminated without 60 days notice in advance of her tenure acquisition date. There is no evidence that Brown and Moore contacted other Board members about holding an emergency meeting, which would have involved disclosure of the reason to meet. Cucurello's testimony (10T32-9 to 10T32-3) that he was not surprised to see Porter's tenure status on a mid-year agenda casts doubt that Frank's opinion was relayed to the entire Board.

Porter began her activity as Association president at the start of the 1992-1993 school year, but the bulk of her dealings with the Board, through Brown and Moore, took place after the new year. Before December 31, 1992, Porter had raised Association objections to a new evaluation form with Frank and had worked with him to correct the form. She had also relayed concerns to Frank about teachers having to use personal days for religious holidays and about parent complaints made during parent council meetings. As set forth in finding 69, Frank was himself troubled by the manner in which parents, including Board members, made and received complaints about the faculty without first raising them with the teachers involved. He tried to have such comments properly channeled.

Before Thanksgiving, Porter talked to Brown and set up an informal, pre-negotiations meeting among the two Association leaders and Board members Brown and Moore. That meeting was held on January 7, 1993 at Porter's home. In a cordial, businesslike atmosphere, Porter stressed the need for an early start to the negotiations and raised the possibility that if negotiations were not concluded before the new school year, the Association might engage in activities similar to those the year before. On January 26, 1993, Porter repeated this statement to Brown who had come to her classroom to schedule negotiations dates, the first of which was to be February 25, 1993.

On February 1, 1993, Porter gave Frank a written grievance, the first one filed by the Association, alleging that an earlier

change in health carriers had reduced benefits. At a February 8, 1993 Association meeting, Porter urged that teachers omit from their Professional Improvement Plans for the next school year any activity that might call for work after the contracted work day because she planned to have Association members "work to rule" if a new contract had not been reached by the time school opened. Porter's posture produced considerable consternation among Association members and on February 10, an emergency meeting was held at which Association members voted 45-1 to back her strategy. In between the meetings, Marold told Porter that details of the first meeting had been leaked and that Marold was upset that Porter had used his name during the meeting.

Frank reported the grievance to the Board at its February 8, 1993 meeting. Brown was given responsibility for responding, and after the meeting, but before February 12, she called the Board's labor counsel about the grievance.^{9/} Brown learned that Frank's view of their limited options about Porter's tenure was erroneous and that a non-tenured teacher could be terminated at any time before her tenure acquisition date, though the contract's notice

^{9/} The Hearing Examiner ultimately ruled that the conversation between Brown and the labor counsel was privileged.

provision might obligate the Board to pay her salary for the full notice period.^{10/}

Brown then told Moore that the Board could still make a decision on Porter's tenure. Moore instructed Frank to send Porter a "Rice" letter needed to give notice that her employment status would be reviewed at the Board's February 22, 1993 meeting. Before the letter was mailed, Frank called Porter and told her about the meeting. Porter was surprised, telling Frank she already had tenure. Frank responded that the Board's attorney did not think she had validly been granted tenure. On the day of the meeting, Porter found a copy of an interim evaluation which had been prepared by Marold in her mailbox.^{11/}

^{10/} The Association points to Brown's consultation with labor counsel as undercutting findings 72 through 74, in which the Hearing Examiner credited testimony that Brown and Moore solicited and accepted Frank's opinion on the Board's lack of recourse regarding Porter's tenure. We do not find these actions to be inconsistent. It is not implausible that Board members would ask a superintendent about deadlines for possible Board action regarding a teacher whose tenure date was approaching and separately ask its labor counsel about a grievance. Moreover, the Board's not discussing Porter's employment status at either its January meetings or its February 8 session is consistent with Moore and Brown's belief, as of December 22, 1992, that the window of opportunity to act on Porter's continued employment had passed.

^{11/} We clarify and add to finding 25. We find that Frank did not instruct Marold to prepare an interim evaluation of Porter before his meeting with Moore, which occurred after the Board's February 8, 1993 meeting. Marold was not certain when the evaluation (CP-11) was prepared and the

At the Board's February 22 meeting, NJEA representative Diane Spear spoke on Porter's behalf and presented the Board with a packet of documents, including Porter's written evaluations and the April 29, 1992 letter from the former superintendent stating that Porter had been granted tenure. After hearing from Marold and Von der Heiden, who both recommended that Porter receive tenure, the Board met in private session to discuss Porter's status. They did not discuss her Association activities.^{12/} After the session, the

11/ Footnote Continued From Previous Page

unsigned document is ambiguous as to the date it was sent to Porter and the date listed for a conference. Porter's testimony that she received it on February 22, 1993 is uncontradicted (3T16-9 to 3T16-19). As set forth in findings no. 20 and no. 22, Porter received her interim evaluations in January the two prior school years. The record also shows that before the Christmas recess in both prior school years, Porter had already received two classroom observations (CP-42, CP-2, CP-4, CP-5). Before Frank told Marold to prepare an interim evaluation of Porter, one other non-tenured teacher, Valerie Negra, had received both an interim evaluation and a "Rice" letter from Frank, dated February 4, 1993 (CP-50), advising that the Board would be reviewing her mid-year progress at its February 22, 1993. Negra, who expected to get tenure but resigned, had a tenure acquisition date of September 1993, six months later than Porter (4T192-19 to 4T192-22; 4T193-23 to 4T195-13). We find that Porter received her "Rice" letter before her interim evaluation and that by the Christmas recess in the 1992-1993 school year, she had been observed fewer times than at the corresponding points of the prior two school years.

12/ The Association notes that the Hearing Examiner found (finding 109) that the discussion of Porter lasted for 30 minutes. It asserts that finding is inconsistent with

Footnote Continued on Next Page

Board voted 8-1 to terminate Porter's employment, thus denying her tenure. By letter dated February 26, 1993, Frank responded to Spear's request for a statement of reasons for the tenure denial by stating: "Ms. Porter was terminated because the Board felt it could secure a better teacher."

Following her termination, Porter received expressions of support from her colleagues and parents of students, many of whom attended the Board's March 8, 1993 meeting seeking to have the Board reconsider its decision (3T20-11 to 3T21-21; CP-29).

Under In re Bridgewater Tp., 95 N.J. 235 (1984), no violation of subsection 5.4(a)(3) will be found unless the charging party has proved, by a preponderance of the evidence, that protected

12/ Footnote Continued From Previous Page

findings 110 through 125 in which the Hearing Examiner gives the details of numerous parent and student "concerns" that had been made known to Board members and finds that the Board discussed these issues in its closed session. The charging party contends that it would have been impossible to discuss these matters, only one of which (the seating problem at the Nutcracker performance) involved an incident occurring during the 1992-1993 school year, in only 30 minutes and urges we reject these findings. We decline to do so. We note that Moore testified that the Board "revisited" prior complaints which had been discussed in April 1992, just mentioning them again in the February 22, 1993 meeting (10T124-8 to 10T124-18; 10T132-20 to 10T133-3). As the charging party points out, because only one or two of the complaints were new and the Board had previously discussed the other incidents in April 1992, we infer that the old complaints were probably not recited again in the same detail they appear in the Hearing Examiner's report. We therefore adopt his finding that the Board discussed these matters.

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

This record shows that Porter engaged in Association activity immediately before her termination and that the activity was known to the Board. However, we agree with the Hearing Examiner's conclusion that in this lengthy record there is no direct evidence of hostility toward this activity. The Hearing Examiner accepted the testimony of Board members that the Board did not

discuss her activities in particular or those of the Association in general at any of its meetings where Porter's employment status was under consideration and that they were not upset by these activities.

The Association contends that the timing of Porter's discharge establishes hostility. But in April 1992, when Porter was not an Association officer and the Board had no knowledge of any Association activity by her, she avoided termination of her employment by a narrow margin. Further, when the Board took that vote, it believed that it was not giving her tenure and would have another chance during the next school year to decide if she should become a tenured teacher.

In many cases, where the timing of a personnel action establishes hostility toward protected activity, the personnel action is often unanticipated and is taken at a time or in a manner inconsistent with the ordinary course of business. In Bridgewater, a recently promoted employee was transferred and demoted, without advance notice, soon after he protested a unilateral change in wages. In Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985), the employer improved benefits for unrepresented employees just after a contentious negotiations session with the majority representative of another employee unit. The unrepresented employees, who had always received the same benefits as represented employees, had not pressed for the benefit upgrade. In both cases, we found that these unorthodox actions were "reactions" to protected activity and satisfied the charging party's obligation to prove

anti-union discrimination. The Hearing Examiner distinguished these and other similar cases and we conclude that he had a valid basis to do so.

We recognize that the termination occurred just after Porter: (1) filed the Association's first grievance (2) told the Board's president and its negotiations chair that Association activities of the type that had occurred less than a year earlier could be repeated absent a new agreement by September; and (3) outlined and won resounding support for a possible "work-to-rule" negotiations strategy which reflected what she had told Moore and Brown. Nevertheless, as we stated at the outset of our analysis, Porter, for reasons divorced from this Association activity, was barely renewed for employment for the 1992-1993 school year and the Board's 5-3 vote to reemploy her did not represent a pledge to grant her tenure, either in the minds of the Board members or under the education laws.

A year later, when the Board became aware that it still had time to decide whether or not to grant Porter tenure, it met and considered complaints and concerns from parents, including Board members, about the way Porter ran her curriculum and extracurricular music programs and the way she cast, choreographed and costumed her musical productions. Given the Hearing Examiner's credibility determinations, we must conclude that it was these complaints and

concerns, not Porter's Association leadership, that motivated the Board's decision to deny her tenure.^{13/}


In sum, because protected activity was not a substantial or motivating factor in the decision to deny Porter tenure, a violation of N.J.S.A. 34:13A-5.4(a)(3) has not been established and we must dismiss this count of the Complaint.

We also agree with the Hearing Examiner that the tenure denial did not independently violate subsection 5.4(a)(1). Because Porter's termination was not based on her protected activity but instead was based on the Board's feeling that "it could secure a better teacher," we dismiss this count of the Complaint as well.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


Millicent A. Wasell
Chair

Chair Wasell, Commissioners Buchanan, Finn, Klagholz and Ricci voted in favor of this decision. None opposed. Commissioners Boose and Wenzler were not present.

DATED: April 24, 1997
Trenton, New Jersey
ISSUED: April 25, 1997

^{13/} We recognize that the Association has raised substantial questions about the legitimacy of the complaints. However, we do not have jurisdiction to resolve such questions once we have determined that hostility to protected activity did not motivate the tenure denial.

H.E. NO. 97-4

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

In the Matter of

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-and-

Docket No. CO-H-93-373

MENDHAM BOROUGH EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission found that the Mendham Borough Board of Education did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., by terminating Margaret Porter. The Hearing Examiner found that although Porter was co-president of the Mendham Borough Education Association, the Board was not hostile to the exercise of her protected rights and her Association activity was not a substantial or motivating factor in the decision to terminate her.

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

H.E. NO. 97-4

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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In the Matter of

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Appearances:

For the Respondent, Schwartz, Simon, Edelstein, Celso & Kessler, attorneys (Nicholas Celso, III, of counsel)

For the Charging Party, Klausner & Hunter, attorneys (Stephen B. Hunter, of counsel)

**HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION**

On April 19, 1993, the Mendham Borough Education Association ("Association" or "Charging Party") filed an unfair practice charge (C-4) with the Public Employment Relations Commission ("Commission") against the Mendham Borough Board of Education ("Board" or "Respondent").^{1/} The Association alleges

^{1/} Exhibits received in evidence marked as "C" refer to Commission exhibits, those marked "CP" refer to Charging Party exhibits and those marked "R" refer to Respondent exhibits. Transcript citations 1T1 refers to the transcript developed on April 14, 1994, morning session at page 1. 2T, 3T, 4T, 5T,

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that the Board violated the New Jersey Employer-Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically sections 5.4(a)(1) and (3),^{2/} by terminating Margaret (Robin) Porter in retaliation for exercising rights protected by the Act.

On June 10, 1993, the Director of Unfair Practices issued a Complaint and Notice of Hearing (C-1). On June 17, 1993, the Board filed its answer (C-2), and on August 11, 1993 an amended answer (C-3), generally denying the allegations contained in the charge. Hearings were conducted on April 14, April 15, July 26, July 27, September 20, September 21, September 22, September 23, 1994, February 21, February 22 and March 7, 1995 at the Commission's offices in Newark, New Jersey. The parties were afforded the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. At the conclusion of the hearing, the parties waived oral argument and established a briefing schedule. Briefs were filed by August 25, 1995.

1/ Footnote Continued From Previous Page

6T, 7T, 8T, 9T, 10T, 11T and 12T refer to the transcripts developed on April 14, afternoon session, April 15, July 26, July 27, September 20, September 21, September 22, September 23, 1994, February 21, February 22 and March 7, 1995, respectively.

2/ 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."

Upon the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated that the Board is a public employer, the Association is a public employee representative and that Robin Porter was a public employee within the meaning of the Act at all times relevant to this charge (1T11-1T12).

2. The Board operates and maintains an elementary school district consisting of three schools: the Hilltop Elementary School (grades K-3), the Mountain View Elementary School (grades 4-8), and the Regional Day School (RDS) which consists of a student population containing special education students from preschool to age 21.

3. The Board hired Robin Porter on March 5, 1990, pursuant to a standard employment contract issued to non-tenured teaching staff members (R-4). Porter's employment continued through academic years 1990-1991 and 1991-1992 (R-5; R-6). Porter also taught during calendar year 1992-1993, however, was terminated by the Board on February 22, 1993 (CP-36). David Garrison has been employed by the Board for approximately twenty-eight years at the time of the hearing as a health and physical education teacher. In June, 1992, Porter and Garrison were elected as the co-presidents of the Association and effectively took office in September, 1992 (1T10; 4T20-4T21). Eight years prior to his co-presidency with Porter, Garrison had served as Association President for a two year period.

Prior to Porter's election as co-president, she was a member of the Association but held no office or position. Marie Griffin served as Association President immediately preceding Garrison's and Porter's term.

4. The collective agreement expired on June 30, 1991; Griffin was Association President at the time. On March 25, 1992, the parties executed a Memorandum of Agreement which concluded negotiations for a collective agreement covering the period July 1, 1991 through June 30, 1993 (R-1). Until the Memorandum of Agreement was signed, Association members worked without a contract. Neither Porter nor Garrison had a role in the negotiations process for the 1991-1993 successor agreement. While Porter supported the Association's negotiations efforts by wearing buttons, her verbal expressions of support were limited to inside the private confines of the Association. As a non-tenured teacher, she tried to make herself less visible (2T7).

5. In the fall of 1990, the parties entered into initial negotiations for the successor agreement (7T24-7T26). Initially, the parties anticipated that they would not use professional negotiators, consequently, the Board expected to be represented at the negotiations table by Board member Carol Brown, Personnel Committee Chair, and the Association would be represented by President Griffin. Face to face negotiations did not begin until April 1991. One reason for not beginning negotiations earlier was that the Board did not receive notification from the State

concerning the level of State aide it would receive until January, 1991. Also, the Board of Education decided to enter into a contract with the State to take over the Regional Day School. The accretion of RDS into the school district raised numerous additional issues in the negotiations such as seniority and layoff rights and resulted in an extended period of negotiations. In January, 1991, with the addition of the RDS issues, the parties decided to obtain professional negotiators to assist them.

6. The Board's primary focus in the negotiations related to cost issues. The major cost components related to salary and health benefits. During the negotiations, the Board advised the Association that it wished to change its health benefits carrier yet maintain the current level of benefits. This was an issue of significant negotiations between the parties. The Board indicated that by changing the health benefits carrier, it could realize a savings even though the level of benefits would remain unchanged. The Board was eager to implement a change in the health benefits carrier as soon as possible since that would result in the largest savings to the Board. In December, 1991, the Board advised the Association that it would implement a change in the health benefits carrier notwithstanding the absence of the Association's agreement. In January, 1992, the Board unilaterally implemented a change in the health benefits carrier. Shortly thereafter, the Association filed an unfair practice charge with this Commission.

7. The parties engaged in lengthy negotiations regarding wages. The level of wage increase was among the final issues which the parties needed to resolve to conclude negotiations. With the Board offering a 6.5% increase in the first year of the contract and the Association demanding 8.5%, Board member Brown was confident that the Board would accept a compromise increase at 7.5%. However, the Board never offered 7.5%, and the parties ultimately agreed to a 7.1% increase for the first year of the agreement (school year 1991-1992) and a 6.89% increase for school year 1992-1993.

8. As the negotiations continued through the fall and into the winter of school year 1991-1992, the Association organized and executed a series of job actions. The first job action occurred in December, 1991, when teachers lined up in front of the main entrance to the Hilltop School and distributed leaflets to parents as they left a student holiday performance. Teachers wore buttons which said "Settle Now." The leaflets contained a statement reflecting the teachers feelings concerning the status of negotiations, but did not state details of what was occurring at the negotiations table (8T110-8T111). Although the parties had no written ground rules for the conduct of negotiations, Brown believed that there was an understanding that the parties would refrain from public comment upon the negotiations (9T124). Brown did not believe that the Association breached any confidentiality agreement when it handed out the leaflets (9T124).

9. In March, 1992, the Association issued a letter containing more specific details of their position regarding negotiations. The Board discussed the Association's letter and decided to issue a responsive letter to the community (8T48-8T49). Brown considered neither the Association's letter nor the Board's responsive letter to constitute a breach of negotiations confidentiality (8T111-8T112).

10. Some additional actions taken by Association members during the period of negotiations included wearing various buttons, displaying sun visors on members' cars calling for the settlement of the negotiations, meeting in the school parking lot to enter the school building together at a preset time, and, beginning in January, 1992, teachers began attending Board meetings en masse. No incidents or disruptions occurred as a result of teachers attending Board meetings. Once, teachers picketed in front of a drug store in Mendham's "down town" commercial district. A picture of the picketing teachers appeared in the local newspaper.

11. Annually, the district conducts the blue/gold games, a major fund raiser for the Home/School Association. Students are assigned to either the blue or gold team and engage in competitive events. The blue/gold games are put on as a cooperative effort between the Home/School Association and the Association. During the course of the negotiations, the Association decided that it would not participate in the blue/gold games. Consequently, the games were postponed. While Brown felt badly for the students affected,

she felt that since a notice of impasse had been recently jointly filed by the parties, such job actions were to be expected. Brown was not disappointed with the teachers since she was told that such actions were part of the negotiations process, and the teachers were merely doing what they had to do (8T39-8T41). Parents contacted Brown to discuss the blue/gold games. Parents expressed disappointment at the cancellation of the games because they served not only as a fund raiser but also as an important family activity. No parent suggested to Brown that the Board take action against the Association due to the cancellation of the games. Board President Anne Moore also spoke to parents, particularly of eighth graders, who had expressed their unhappiness with the Association because the games were cancelled. The cancellation was not officially discussed by the Board, although Moore had discussed it unofficially with various Board members. While Moore, personally, was disappointed with the cancellation of the games because of its impact on students, she, like other Board members, was not angry with the Association because of its decision to withdraw from the games. Moore believed that such job actions were common place in situations where teachers were working without collective agreements in place. Moore also believed that the games were not permanently cancelled but only postponed (10T76-10T77; 11T34-11T37). Board member Donald Cucurello, a member of the Personnel Committee and the Board's negotiations team, thought that the cancellation of the games was unfortunate.

12. Another job action employed by the Association called for all teachers to "work to rule." By "working to rule", teachers arrived at and departed from their schools precisely in accordance with the applicable terms of the expired collective agreement (1T5). While the "work to rule" action may have inconvenienced some students and affected some programs, it had no detrimental effect on the educational process. Under the contract, teachers were required to be available to students either twenty minutes before the start of the school day or twenty minutes after it ended. Teachers were careful to provide for the needs of the students. Thus, teachers were available to students who sought extra help even under the "work to rule" action.

13. All of the teachers (both tenured and non-tenured) participated in the job actions. No Board member ever approached Porter regarding the job actions, nor is she aware of any disciplinary action being brought against any teacher.

14. The issue of the job actions was never formally presented to the Board as a topic for discussion (10T16-10T17; 11T148). However, some Board members engaged in informal discussions among themselves regarding the job actions. Board members were concerned about the job actions, some expressing dismay over their occurrence (10T43-10T44). Generally, however, the Board's reaction to the job actions was one of acceptance. Job actions had occurred during previous contract negotiations (10T75). The Board was aware of teacher job actions taking place in other

districts and considered those conducted by the Association as "no big deal" (7T49). The Board hoped for a prompt resolution of the negotiations which, in turn, would end the job actions (10T44).

15. As noted above, the negotiations concluded with a Memorandum of Agreement on March 25, 1992 (R-1). Neither Garrison nor Porter were members of the Association's negotiations team for the 1991-1993 collective agreement. While negotiations sessions were long, tedious and tense, the demeanor of the parties toward each other was cordial and low key (4T21; 7T35; 10T11, 10T18). The general relationship between the Board and the Association during the course of the negotiations was business-like (10T78).

16. In late winter, 1992, with negotiations ongoing, Brown told Griffin that she thought it would be more likely for the voters to reject the proposed budget if there were no contract between the Board and the Association.^{3/} The Board was concerned that if the budget did not pass and the town council made additional budget cuts, the Board might be forced to layoff teachers (8T58-8T59; 9T104-9T106; 9T147-9T148).

17. Griffin's term as Association president concluded at the end of school year 1991-1992. In light of the history of the recently concluded negotiations, the Association had some difficulty recruiting a president to succeed Griffin (4T16-4T17). The Association leadership approached Porter and Garrison and asked if

^{3/} Brown does not remember whether she made these comments at the negotiations table or away from it.

they would serve as co-presidents. That idea appealed to Garrison. Porter would be available during the first half of the school year, when Garrison concentrated on his coaching responsibilities, and Garrison would be available during the second half of the school year, when Porter concentrated on her school stage performance responsibilities (4T19-4T20).

18. Tenured teachers are observed once each year. Non-tenured teachers receive a minimum of three formal classroom observations annually. Additionally, non-tenured teachers receive mid-term evaluations, generally completed in January or February and a final evaluation completed toward the end of the school year.

19. Porter was first observed on March 16, 1990, by Mountain View Principal Robert Marold. The observation form lists numerous categories to be reviewed by the observer. For example, under the general category of instruction, one subcategory is "evidence of adequate planning." The evaluator marks each subcategory with an "X", meaning that the teacher meets or exceeds performance expectations or a "C", meaning that improvement is needed or suggested or that a comment, not necessarily negative, has been written pertaining to that category (6T40; 6T46). The observer may also include written comments on the observation form. Porter's March 16, 1990 observation form shows all categories have been marked with an "X" (CP-40). All of the written comments on CP-40 are positive. In June, 1990, Marold completed Porter's annual performance report. Each of the listed categories was marked with a "X". Marold's comments were all positive (CP-41).

20. On October 22, 1990, Porter was observed by Superintendent David Ottaviano. All of the review categories were marked with a "X". All of Ottaviano's comments were positive (CP-42). On December 19, 1990 and March 4, 1991, Marold observed Porter. All of the review categories on the observation form were marked with an "X" and all of the comments were positive. In January and June, 1991, Marold prepared an interim annual performance report and an annual performance report, respectively (CP-8; CP-9). Each of the categories were marked with an "X" and all of the comments were positive. On November 4, 1991, Marold observed Porter (CP-4). The observation report contained two categories marked with a "C"; all of the other categories were marked with an "X". Under the general category teacher/student relationships, Marold marked a "C" next to the subcategory "teacher develops student interests, attitude, and concern for learning." In the comments section, Marold stated the following:

It would help to repeat comments/questions made during the lesson by students in the front of the room. Often they can not be heard in the back of the room letting student interest and attention drift.

Under the general professional responsibilities category, Marold marked a "C" next to the subcategory "teacher accepts responsibility for reports and procedures." In the comments section Marold stated the following:

Generally, written plans, etc. could be submitted in a more timely fashion.

All of the other comments made on CP-4 were positive.

21. On November 26, 1991, Marold again observed Porter (CP-5). All categories of the observation report were marked with an "X", except the subcategory "teacher display(s) in classroom related to unit being taught" was marked with a "C." In the comments section, Marold stated the following:

You do a fantastic job decorating for performances. Let's use some of that creativity to decorate and brighten up the classroom.

All of Marold's other comments on CP-5 were positive.

22. In January, 1992, Marold prepared an interim annual performance report (CP-10). All of the categories contained on the report were marked with an "X." Marold's written comment was positive.

23. On April 10, 1992, Marold conducted his third classroom observation of Porter (CP-6). Under the general category "Professional Responsibilities", the subcategory "teacher maintains appropriate relationships with parents" was marked with a "C." Marold commented as follows:

We need to again discuss a number of parental concerns recently being rumored. Many are similar to those discussed at the last parent council meeting.

All of the other categories contained on CP-6 were marked with an "X." All of Marold's other comments written on CP-6 were positive. In late April, 1992, Marold prepared the annual performance report for school year 1991-1992 (CP-12). All of the categories listed on

the annual performance report were marked with an "X" except for the professional responsibilities category which was marked with an "X/C". Marold commented as follows:

Mrs. Porter joined our staff in March of 1990 under somewhat difficult circumstances. At the time she exhibited a high degree of confidence and competence in pulling together a splintered music program. During the 1990-91 school year, established herself as a creative, energetic, positive staff member capable of working well with both boys and girls of all ages. Curriculum guide and classroom textbooks were revised. In 1991-92, Mrs. Porter became a full-time staff member as she began working at the Regional Day School at Morris on Thursdays. Mrs. Porter has also continued working well with her colleagues providing dramatic and musical assistance to grade level productions. Additional activities beyond her teaching responsibilities are listed below.

Preparation for christmas tree lighting (never took place due to inclement weather)

Fourth grade theme program (Only Love Is Spoken Here)

Fifth Grade theme program (Lets Hear It For America)

Sixth Grade theme program (I Like Music) (still in rehearsal at this date)

Chorus and orchestra, evening holiday program, daytime holiday program, forensics coach, forensics judge (two different evenings), joined eighth grade project with the librarian, helped with the eighth grade Shakespearian production, festival of the arts, graduation, and fourth graders to R.D.S. for graduation program.

24. For school year 1992-1993, the teacher observation form was changed.^{4/} On November 3, 1992, Marold observed Porter (CP-7). In the instructional environment category which contains a list of nine subcategories, Porter was rated satisfactory in all of the applicable categories. Satisfactory is defined in CP-7 as "meets or exceeds the requirements; adequate performance." Marold's comments in the "general comments" section were positive. In the "Strengths" section, Marold stated that "Mrs. Porter shows extraordinary enthusiasm, is inspirational to her students and her positive attitude give (sic) incentive to her colleagues." In the "Recommendations" section, Marold states the following:

Continue to incorporate part-singing into your coral presentations. Keep me advised as to the progress you are making with your strings students; orchestra. Please see me at your earliest convenience for a post-observation conference.

25. Porter had never objected to nor sought a change in an observation report. Porter refused to sign CP-11, the interim annual performance report dated February, 1993. Porter believed that other non-tenured teachers received their interim annual reports weeks earlier. Marold prepared CP-11 at the request of Superintendent William Frank.^{5/} Frank directed Marold to prepare

^{4/} I will further discuss the change in the teacher observation form below.

^{5/} David Ottaviano served as superintendent when Porter was hired. Ottaviano resigned in July, 1992. Frank was hired in August, 1992, to replace him.

CP-11 because Frank knew that the Board would be considering Porter's tenure in an upcoming February, 1993 Board meeting.

26. Porter also worked part-time at RDS. While Principal Edith Von der Heiden was not responsible for conducting formal written evaluations of Porter's performance at RDS, she did make annual oral presentations to the Board regarding RDS employees' performance. Von der Heiden's evaluation of Porter was based on informal "in and out of the classroom" observations along with her observation of Porter's involvement with RDS students in presenting a graduation ceremony in June, 1992, and an assembly concerning Election Day in November, 1992 (6T126-6T128). Von der Heiden kept no notes regarding her observation of Porter and expressed her evaluations to the Board on the basis of her recollections at the time of the Board meeting (6T128-6T129). Von der Heiden told the Board that although Porter was not a special education teacher, she did a very satisfactory job in dealing with special education students (6T120). Student participation overwhelmingly improved after Porter began teaching at RDS (6T120). No parent concerns were reported. Von der Heiden described Porter's student/teacher relationship adequate. However, she noted that it was difficult to describe a student/teacher relationship with a student body that does not relate to adults (6T122; 6T130). Von der Heiden stated that other teachers who worked at RDS could be described as less than adequate, and some as exemplary (6T130-6T131). Overall, Von der Heiden characterized Porter's teaching performance as satisfactory (6T121).

27. Over the years that Marold observed Porter, he made a number of comments relating to her teaching style and ability. Marold stated that Porter promoted student self-esteem, maintained a positive attitude toward children, had a cheerful and positive attitude, shaped children's behaviors through the use of positive and negative reinforcement, was creative in gaining student involvement in the music program, planned effectively for different grade levels, was creative, well organized and professional in her manner of teaching and dealing with students, was a leader in getting others to be open to new ideas, showed extraordinary enthusiasm, and so forth. Marold stated that these strengths were consistently present during the years Porter was employed by the Board.

28. Superintendents Ottaviano and Frank adhered to the policy of not providing the written teacher observations and evaluations to the Board for review. Consequently, the Board was advised of a teacher's performance only by way of oral presentation by an administrator. It was the Board's understanding that it was inappropriate for a Board member to review the written evaluation or observation of a teacher. The first time that the Board saw Porter's written evaluations and observations was when Association representative Diane Spear presented them to the Board on February 22, 1993.

29. It was standard operating procedure for the Board to make its decisions regarding non-tenured teacher renewals in the

spring of each school year. Teachers being considered for renewal would receive "Rice letters"^{6/} which advised the teacher that the Board intended to take a personnel action affecting them. Normally, such personnel actions are discussed by the Board in executive session. Pursuant to the Rice letter, however, teachers are advised of an option to have such personnel matters discussed in public session.

30. On April 13, 1992, the Board met in executive session in order to review its non-tenured teachers and decide whether or not to offer renewal contracts. As a non-tenured teacher, Porter was one of the teachers slated for review and received a Rice letter, as required (R-12). Marold presented the Board with an oral overview of Porter's instructional ability, teaching environment, personal and professional responsibilities and teacher/student relationship (6T69). Marold recommended that the Board renew Porter for school year 1992-1993. A number of Board members raised questions regarding the propriety of granting Porter a renewal contract for the next school year. Board members asked Marold about reports that the student enrollment in the stringed instrument program was declining. Board members expressed concerns that Porter might not be the right person to make the strings program viable.

^{6/} The Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., requires all school employees whose employment status may be discussed in closed session by a board of education to receive advance written notice of such action. Rice v. Union Cty. Reg. H.S. Bd. of Ed., 155 N.J.Super. 64 (App. Div. 1977).

Board members were also concerned about student comments that Porter did not like teaching strings. The Board was also concerned with a decline in enrollment in the chorus. Additionally, Board members asked Marold to respond to certain parental complaints which they had received regarding Porter. These complaints pertained to 8th grade girls appearing in slips during a production of "Guys and Dolls", which Porter directed, the showcasing of certain teachers' and administrators' children during performances, and an assignment to produce a music video. Although the Board discussed Porter's renewal for many hours, it could not arrive at a decision on whether to grant her a renewal contract for school year 1992-1993 (6T106-6T107; 10T81-10T86). Marold acknowledged that he was aware of the parental complaints, but offered the Board no additional explanation (7T184; 10T86-10T87). The Board directed Marold to obtain more detailed information regarding its concerns and report back to it at its next Board meeting on April 27, 1992. The Board took no action on Porter's renewal during its April 13, 1992 meeting.

31. On April 27, 1992, the Board again discussed Porter's renewal. Marold resolved one of the Board's questions regarding the circumstance under which Porter would obtain tenure. Marold clarified that although Porter was shown in the Board minutes (R-13) as a second year non-tenured teacher, since she was hired mid-year, she would receive tenure during school year 1992-1993 if renewed for the full year. Marold told the Board that there was nothing additional to report with respect to Porter (8T72). While Marold,

as Porter's principal, was most involved in the discussion, and most outspoken in his support of her renewal, Von der Heiden and Ottaviano also favored Porter's renewal. The Board again engaged in a discussion of Porter's renewal contract for several hours. Several Board members continued to express reservations about Porter's teaching methods. Marold suggested that if the Board had additional questions it should bring Porter in for a meeting and allow her to respond directly.

32. A number of options were discussed regarding Porter's renewal. The options included (1) not renewing Porter for school year 1992-1993, (2) extending Porter a full year renewal contract and monitoring her closely, (3) giving Porter a half-year contract and (4) simply extending a full year renewal contract to Porter. Marold took the position that Porter should either receive a full year contract for school year 1992-1993 or be terminated at the end of June, 1992. Marold opposed any option where Porter might not be retained for the full school year, since losing a teacher mid-year was administratively and educationally disruptive. In a 5-3 vote, the Board granted Porter a renewal contract for the full 1992-1993 school year. Marold understood this action to mean that Porter would work through the entire school year, obtain tenure during that time and would be under no special review (6T113). The Board engaged in no discussion of granting Porter early tenure in April, 1992.

33. Board members Brown, Moore and Cucurello voted in favor of granting Porter a renewal contract. Moore and Brown believed that by voting in favor of a full year renewal contract, the Board would still have the opportunity to review Porter again in February, 1993 when she reached her tenure acquisition date. The Board told Marold that although it was granting a renewal contract to Porter, it had serious reservations concerning her teaching. The Board told Marold to express those reservations to Porter and to work with her during the next school year to ensure improvements. Marold told Porter about the reservations expressed by Board members at the meeting (6T65). Marold told Porter that the Board had concerns about the decline in enrollment in the strings and chorus programs and criticism was expressed regarding certain theatrical aspects of the stage productions (3T44).

34. During the April 27, 1992 meeting, the Board never discussed the Association nor any aspect of the recently concluded collective negotiations which culminated in the 1991-1993 collective agreement. The Board did not discuss Porter's Association activities or her role in supporting the recently concluded negotiations.

35. Beginning in school year 1990-1991, the Board perceived problems with the manner in which Marold responded to Board directives and provided the Board with teacher evaluations. The Board directed Marold to create a log documenting parent comments and complaints. Ottaviano participated in developing the

idea of maintaining a log. The Board asked Ottaviano to assist Marold with the establishment of the parent log. However, it became evident to the Board that if Marold resisted Ottaviano's directives, Ottaviano would back down. After Ottaviano's resignation, the Board made a point of discussing Marold's professional development with prospective candidates for the superintendent's position. One of the reasons the Board hired Frank as superintendent was because it believed that Frank's background would be helpful in developing Marold's ability to follow through with Board directives and interact with parents. Frank was also unsuccessful in efforts to have Marold establish a parent complaint and comment log. Marold never implemented this Board directive.

36. The Board lost confidence in Marold's evaluations for teacher renewal. The Board considered Marold's teacher evaluations to be unbalanced and lack critical review. With some exceptions, the Board found that Marold's evaluations were almost always positive and concluded in a recommendation for renewal. Generally the Board believed that teachers had strengths and weaknesses and that a balanced and accurate teacher evaluation would indicate both. The Board felt that Marold's evaluations did not give a true picture of the teacher's strengths and weaknesses, and only presented strengths. The Board felt that until it pressed Marold for details concerning the teachers performance, it could not rely on his evaluation or recommendation.

37. Several incidents undermined the Board's reliance upon Marold's recommendations. The Board was considering Mimi Carman for tenure. The Board expressed certain reservations regarding Carman. Although Marold acknowledged the Board's concerns, he recommended she be granted tenure. Ultimately, on the basis of Marold's recommendation, the Board granted Carman tenure. At the next Board meeting, the Board again asked Marold about Carman's teaching ability. Marold stated that she was not a very good teacher and, when asked to identify a teacher that he would not keep, he identified Carman. However, the Board had already officially acted to grant Carman tenure, and it could not rescind its action.

38. Another incident arose involving the renewal of art teacher Sara Block. Marold initially recommended that the Board issue a renewal contract for the next school year. Marold told the Board that he thought Block was a good teacher with no problems. Board members disagreed with Marold's recommendation and pressed him for more information. Ultimately, Marold adopted the position that he probably would not recommend Block's renewal. Brown viewed the manner in which Marold handled the Block issue as demonstrating that, as to teacher renewals, Marold took the easier course of recommending that the teacher be renewed. Initially, Marold recommended Katie Paterson to receive a renewal contract. Marold characterized Paterson as being very enthusiastic (CP-48A). Again, after being pressed by the Board for greater detail, Marold reversed himself and agreed that there were a number of problems with

Paterson's teaching. Ultimately, Marold recommended that Paterson not be renewed and the Board concurred.

39. There were instances where Marold and the Board concurred regarding teacher renewals. Marold did not recommend a renewal contract for Yvonne Mathiz^{7/}. Marold recommended Vince Grayson and Lee Ann Gaugler for renewal and tenure. While the Board had some concerns regarding Gaugler, they followed Marold's recommendation and granted both teachers renewal contracts and tenure. Marold gave Deborah Cooper an excellent evaluation and recommended that she be rehired. The Board concurred.

40. As music teacher, Porter's responsibilities included teaching instrumental music and chorus. Porter taught students to play string instruments as a regular part of the curriculum. Chorus was an extra curricular activity for which Porter received an additional stipend in accordance with the collective agreement. The all-school chorus was open to all students, regardless of grade, on a voluntary basis, and already existed when Porter was hired. Beginning with the 4th grade, Porter established non-voluntary grade level choruses as part of the music curriculum. Porter began establishing grade level choruses in school year 1991-1992 and, at the time of her termination, had established grade level choruses in the 4th, 5th and 6th grades with the intention of adding the 7th grade chorus in school year 1993-1994 and the 8th grade chorus in

^{7/} Since Mathiz had become pregnant, she resigned. The Board did not have to "non-renew" her.

1994-1995. Porter prepared separate programs for the grade level choruses and the all-school chorus. Marold approved the creation of the grade level choruses.

41. Another music teacher, Frank Marrapodi, taught instrumental music at the Mountain View School. Marrapodi also worked with the band students. Students taking instrumental music were "pulled out" of their regular academic classes during the school day to receive instruction. The "pull-out" system for instrumental music instruction was sanctioned Board policy. Marrapodi and Porter used the "pull out" program to provide instruction to instrumental music students. The pull out program created a problem for both students and teachers. Students were reluctant to miss the academic class. Some academic teachers were uncomfortable with having students miss instruction, tests or assignments while pulled out for music.

42. Porter felt strongly that the student must make a commitment to the instrument and attend instruction regularly. Although students told Porter that in the past they were not required to attend instrumental music instruction, Porter insisted that the student could not continue receiving instruction from her if the student did not appear for class. Although previously, students were not required to know the notes and the names of the strings, Porter advised one student that if she didn't learn those things during the summer, she could not continue with instrumental music instruction in September (3T32).

43. Prior to school year 1992-1993, an incident occurred involving Board member Geraldine O'Connor's child. The child was lax in preparing for and attending instrumental music class. Porter believed that since the Board was paying her to provide instrumental music instruction at the scheduled times, it would be inappropriate for her not to be engaged in that activity, simply because the student chose not appear for the lesson. Consequently, as was her practice, Porter went to the student's academic classroom and pulled the student out for instrumental music instruction if the student did not appear as scheduled. Porter went to student O'Connor's classroom to pull her out for instruction. Porter told the student that she has to come to class and make a commitment to the instrument if she wants to continue in the strings program. Porter told the student that she would write a "progress report" if she failed to appear for instruction. Mrs. O'Connor called Porter and told her (Porter) that her child did not appear for music instruction because she did not want to miss her academic class. Porter reminded O'Connor that the pull out program was Board policy. Porter told O'Connor that she felt strongly that if the child does not make a commitment to the instrument, the child should not be in the program. O'Connor said that her child would not continue because she did not want her child to be penalized academically. Porter told O'Connor it was up to her (O'Connor) to make that choice.

44. Under the pull out program, a class of advanced instrumental music students would consist of about five pupils, and a class of beginners would contain two or three. Beginners do not play in the orchestra until they have received strings instruction for one year. Porter believes that unprepared students attending class take time away from the prepared students because she must then review material from the last lesson with the unprepared students, while the prepared students sit and wait. Students who do not practice between class meetings are not prepared and cannot do well.

45. Porter has never said to students or community members that she dislikes teaching strings. She may have said that it is difficult to teach strings because there is often a lack of commitment on the part of the student. As a vocalist, Porter admitted that she may have said that she prefers teaching vocal music more than teaching instrumental music (3T57).

46. In school year 1990-1991, the all-school voluntary chorus contained about 77 members.^{8/} Between school years 1990-1991 and 1992-1993, the number of boys in the all-school voluntary chorus went from 7 to 26 or 27. During school year 1991-1992, there were approximately 85 to 90 students in the all-school voluntary chorus (1T65).

^{8/} During her direct testimony, Porter stated that there were between 80 and 85 student members in the all-school voluntary chorus in school year 1990-1991 (1T45-1T46). On rebuttal, Porter testified that she rechecked her records and found chorus membership at 77 students (12T17).

47. During school year 1990-1991, the orchestra included a membership of 16 or 17 students. All members of the orchestra were strings players (1T45-1T46). In school 1992-1993, the orchestra had expanded to include clarinet and flute players (3T15). Clarinet and flutes students continued to be members of the band and were taught by Marrapodi. However, they would also play with the orchestra when concerts were presented. In school year 1992-1993, there were 13 strings students. Seven of the strings students began instrumental music instruction during school year 1991-1992 or in school year 1992-1993 (3T15). Thus, approximately six students continued in the strings program from school year 1990-1991 to school year 1991-1992. One explanation for the decrease in strings players between school years 1990-1991 and 1991-1992 is that as students graduated from 8th grade to 9th grade they left the Mountain View School to go to the high school.

48. Beginning in school year 1991-1992, Board members began receiving calls from parents complaining about the strings program. While Brown never received phone calls directly from parents indicating that their children did not wish to take strings with Porter, she heard that such was the case (9T135). Also, Brown heard of some students complaining that Porter discouraged them from taking strings (9T123). During the April, 1992, Board meetings discussing Porter's renewal, some Board members expressed reservations about Porter's ability to advance the music program. Board members were concerned that the strings program was not as

complete as it could have been and that the students were not being motivated to enroll (10T19-10T20). Parents were complaining to the Board that the number of strings students was dropping (10T86).

49. Marold spoke to Porter during the later part of school year 1991-1992 regarding the concerns raised by Board members about declining strings enrollment. Porter told Marold that she was also concerned about the strings enrollment level. During a conversation with Ottaviano in June, 1992, after graduation ceremonies, Porter asked Ottaviano if she could talk with Board members about the declining strings enrollment issue. Ottaviano arranged a meeting with the Board's Curriculum Committee.

50. Porter was never criticized by her supervisors or administrators about the declining strings enrollment. Although the Board asked Marold to follow up on the strings enrollment problem, it never contacted Porter directly regarding that issue. The Board was never informed of the number of strings players graduating, thus resulting in a decline in enrollment, nor were they ever informed of the number of beginning strings students who would, in later years, be included in the orchestra after the requisite one year instruction period.

51. On July 7, 1992, at Porter's request, Ottaviano arranged for Porter to meet with the Board's Curriculum Committee. The meeting was for the purpose of providing Porter with an opportunity to address the issue of declining enrollment in the strings program. Porter, Marold, Von der Heiden, Cucurello, Mulcahy

and, perhaps, other Board members attended the meeting. Although Brown was a member of the Curriculum Committee, she did not attend that meeting. Porter explained her philosophy of instrumental music instruction to the members of the Committee. She told the Committee that she expected instrumental music students to practice their instruments. She indicated that she would not keep student numbers in the program up simply for the sake of the numbers (1T84). She stated that she requires students to attend their lesson even if the student did not wish to come. Porter outlined steps that she would take to increase the number of strings students. With the exception of the flute, which Marrapodi taught, she would include other instruments into the strings program. The Curriculum Committee meeting with Porter lasted between 30 and 40 minutes and was conducted in a question/answer format. Board members made their concerns regarding the strings program known to Porter. Porter acknowledged the Board's concerns (10T52). While Cucurello thought that Porter thoroughly outlined her job and the programs that she was initiating to improve the level of strings enrollment, other Board members left the meeting without being totally satisfied with Porter's answers (10T30; 10T52).

52. After the July 7, 1992 meeting, the Curriculum Committee gave the Board a very brief report concerning its meeting with Porter. Cucurello, as chairman of the Committee, reported to the Board that they reviewed the strings curriculum with Porter and discussed the enrollment problem. Cucurello told the Board that

Porter had ideas to try to resolve the problem and that it looked like things would move forward and the Board would be happy with the results (10T117). There was no discussion among the Board members of the specific elements of Porter's plan to improve the strings enrollment level. Neither Marold nor any other administrator met with Porter to discuss the implementation of her plan or follow up in any other way. After the Curriculum Committee meeting, Porter thought that the strings enrollment issue was put to rest. Shortly after the meeting, Porter saw Von der Heiden who told her that this issue would "never be revisited" (1T87).

53. In September, 1992, Porter incorporated a few other instruments in the strings program and added five or six new students. The new students were not included in the orchestra because, as new students, they were not yet ready to play at that level. New students go into orchestra the school year after they enroll in the strings program (1T86).

54. On April 29, 1992, Ottaviano sent Porter a letter stating that the Board had voted to grant her tenure during its April 27, 1992 meeting (CP-13). CP-13 is typical of the form letter sent to teachers by Ottaviano who had acquired tenure by Board action. Geraldine Gesell, Administrative Assistant to the Superintendent, prepared such letters. After the April 27, 1992 Board meeting, Ottaviano directed Gesell to prepare tenure letters for all teachers who were to be reviewed for tenure in school year 1992-1993. Gesell found a list of teachers in the file and prepared

tenure letters for each of them. Porter's name was on the list. Ottaviano did not specifically ask Gesell to prepare or send a tenure letter to Porter. Gesell prepared three or four letters and gave them to Ottaviano for signature. Ottaviano signed the letters and returned them to Gesell without further instruction. Gesell put a copy of the letter in each teacher's file and mailed the original to the teacher. A copy of the letter was not sent to the Board. On the basis of CP-13, Porter believed that she acquired tenure.

55. After Porter received CP-13, she showed Marold a copy. Marold expressed surprise that she received early tenure. He told Porter that he had attended the Board meeting on April 27, 1992, and he was aware that the Board agreed to renew her contract for school year 1992-1993. However, he did not remember the Board officially acting to grant her tenure.

56. In September, 1992, Marold, and newly elected co-presidents Garrison and Porter met for the purpose of discussing various matters, including class coverage for Garrison and Porter at those times when they needed to meet with teachers in other buildings. Marold was cooperative with regard to accommodating Garrison's and Porter's needs. During the meeting, Marold asked Porter if she was sure that she wanted to serve as co-president. Porter, answering affirmatively, pointed out that she had Ottaviano's letter granting her tenure. Marold pointed out that it was questionable whether her tenure was actually effective. Marold told Porter that it was his understanding that tenure could only be

granted through Board resolution which would then appear in the minutes. Marold stated that the Board never resolved to grant Porter tenure and that it was his understanding that she did not have tenure at that time. Marold, nevertheless, told Porter that he would treat her as if she were a tenured teacher.

57. The Board did not instruct Marold to talk to Porter regarding her tenure status during the September, 1992 meeting. Marold was not opposed to Porter becoming co-president of the Association. His only interest in raising the tenure issue was to ensure that she knew that CP-13 may not be accurate. Marold met with Frank for the purpose of discussing Porter's tenure status, however, Marold did not raise the issue directly with the Board, nor is there any evidence showing that Frank raised the issue with the Board. The first time the Board, as a whole, saw CP-13 was on February 22, 1993, when NJEA Representative Diane Spear included it in a packet of materials submitted to the Board for the purpose of convincing the Board to retain Porter (10T93-10T94).

58. Neither Brown nor Moore recall any occasion when the Board granted early tenure to a teacher (8T150; 11T99). The Board never discussed granting Porter early tenure (7T187; 10T30). Ottaviano never discussed CP-13 with Moore when they met after the April 27, 1992 meeting (10T93).

59. A few days after the April 27, 1992 Board meeting, either Moore or Brown had the idea to reassign Porter. Since most of the complaints concerning Porter were coming from students and

parents at the Mountain View School, Porter could be reassigned to the Hilltop School which went from kindergarten to third grade and continue at RDS where she was doing an excellent job. The reassignment was not punitive. Moore thought this action would allow Porter to succeed. Under the reassignment idea, Porter would no longer be responsible for teaching strings.

60. The superintendent was responsible for staff reassignments. Moore spoke to Ottaviano about the reassignment idea within a few days after the April 27, 1992 meeting. Ottaviano said he would discuss the idea with Marold and Porter. No further action concerning the reassignment occurred until May or June, 1992. At that time, Ottaviano told the Board that he was recommending it hire a new teacher for the music program at Hilltop and that Porter would not be reassigned to that position. Ottaviano told the Board that either Porter would not accept the reassignment or that Marold would not agree to it (10T94-10T95; 10T97). Since Ottaviano would not support Porter's reassignment, the Board agreed to hire a new music teacher for Hilltop and no longer considered the reassignment idea. The Board never considered involuntarily transferring Porter (11T98).

61. Porter was never told of the Board's idea to reassign her to Hilltop and remove from her the responsibility to teach strings. After the graduation ceremony at RDS, Ottaviano congratulated Porter for a job well done and told her that he was faced with a dilemma. He indicated that the principal at each of the three schools in the district wanted her in their school. That

comment was Ottaviano's only reference to a reassignment. Ottaviano never told Porter that the Board suggested the possibility of a reassignment.

62. Within two weeks after school began in September, 1992, Marold gave Porter a sample of a new teacher observation form which Frank wanted to use in the district (CP-7). Frank had developed the form before he was hired by the Board. The Board did not direct Frank to develop a new observation form nor did it know that Frank intended to introduce this form. Porter showed the form to Garrison, and together they shared it with the Association membership. The form contained an "outstanding" category and a column for attendance. The teachers expressed concern that the form was intended to be used as a vehicle to discipline and/or remove them through more precise evaluation reviews.

63. In September, 1992, Porter and Garrison met with Frank, in their first official meeting as co-presidents, to discuss the new observation form. Porter told Frank that the teachers had problems with the new form. Porter and Garrison told Frank that they were concerned that the new form would be used as a vehicle to discipline or terminate teachers. Frank told the co-presidents that the form was not intended for that purpose. Frank was asked to attend a meeting with the staff in order to "put their minds at ease." Frank attended an Association meeting and took questions from the teachers. Ultimately, Frank revised the form, eliminating the "outstanding" rating and the attendance column. With those modifications, the Association agreed to the use of the new form.

64. During Frank's meeting with Porter and Garrison, Porter related some of the details of prior negotiations. Porter told Frank that the Association and the Board were on different sides of the spectrum regarding many issues. Porter told Frank that the teachers viewed him as a hatchet man brought in by the Board. Porter described Frank as congenial in the meeting.

65. Frank told the Board that he had an observation form which he brought with him from his old district. He told the Board that he wanted to use this form in Mendham and that he would talk to the teachers regarding it. Subsequently, Frank returned to the Board and told it that he had obtained the Association's agreement to use it. Frank never showed the Board the observation form from his old district nor the modified version agreed to by the Association. The observation form was an administrative matter with which the Board did not become involved. Frank never told the Board about his meetings with the co-presidents or the Association membership, however, he did express that he was very pleased that the new form was adopted with the cooperation of the Association. Frank told Brown that he worked with Porter to develop the new observation form. Frank never told the Board that the Association thought that he was hired as a hatchet man or that Porter ever referred to him in that manner (8T121). The Board was pleased that the matter was resolved amicably.

66. In the latter part of September, 1992, Garrison called Moore to set up a "get acquainted" meeting. One day when Moore was

in the school building, she dropped in on Porter and Garrison, both of whom were not scheduled with a first period class. The meeting was very brief, yet Porter describes it as cordial (2T24). Porter raised the new observation form. Porter told Moore that the Association had concerns about the proposed form. Porter also stated that Frank was a likable person and appeared willing to listen to teachers to alleviate their fears regarding the form. (2T24). Moore told the co-presidents that Frank had a great deal to do and they should not worry about a new observation form. Moore said she would talk to Frank. Moore was happy that Porter raised the observation form issue with her (10T104). Porter told Moore that she had already met with Frank and that the teachers concerns with the form were resolved (3T66-3T67).

67. In November 1992, Frank went to the Board with the idea of establishing a Staff Advisory Council. The Staff Advisory Council would be comprised of the Association co-presidents, one Association representative from each of the three schools, and administrators including the superintendent. The purpose of the Staff Advisory Council was to provide a means for open communication between staff and administration. Since it was in favor of open communications, the Board approved of the idea.

68. The first meeting of the Staff Advisory Council took place on November 17, 1992.^{9/} In attendance were Frank, Porter,

^{9/} The November 17, 1992, Staff Advisory Council meeting was the only counsel meeting which took place before Porter's termination.

Garrison, and one teacher representative from each school building.^{10/} Several issues were discussed. Porter indicated that some teachers were required to charge personal days for the Jewish holidays. They also discussed the role of the "teacher in charge" which arose when the principal left the school building. Porter also told Frank that a problem existed with Board members' children harassing their classroom teachers. Porter also mentioned that parents were lodging complaints against teachers during Parent Council meetings thus depriving teachers of the opportunity to know who was raising the problem.^{11/}

69. Frank had strong feelings regarding the chain of command. He felt that parents wishing to discuss any issue relating to their child should initially contact the teacher and, if dissatisfied, then move up the chain of command to the principal, superintendent and finally the Board. Likewise, he felt that Board members who had a problem with an administrator or teacher, should first contact the superintendent. Frank, unilaterally, had a statement included in the minutes of each Board meeting indicating that parents wishing to raise an issue, should proceed through the chain of command by first contacting the teacher and not the Board. When the Board inquired as to why this statement was now being

^{10/} Garrison stayed for only a short time.

^{11/} The Parent Council was comprised of designated parents who met with administrators and board members to discuss issues related to the schools.

included in the minutes, Frank's response was that parents should follow the chain of command. Frank never ordered Board members not to take calls from parents or listen to their concerns, however, he urged Board members to advise parents that their concerns should initially be addressed to the teacher.

70. Frank did not disclose to the Board any of the issues raised during the Staff Advisory Council meeting or the identity of the teacher raising an issue. Frank never told the Board about the Association's concern with certain Board members' children, the "teacher in charge" issue, the Jewish holiday issue, or the concern regarding the chain of command. Thus, while Frank acted on the chain of command issue, the Board was not aware that his concern emanated from the Staff Advisory Council.

71. In November, 1992, Garrison and Porter had a meeting with Jim Frendak, NJEA Representative assigned to the Association as advisor. During the meeting, Frendak was told that the Association decided not to use a professional negotiator in the upcoming negotiations with the Board. Frendak was also told that the Association had some concerns regarding the recent change in the health benefits program. Apparently, some of the family coverage benefits were not the same under the newly instituted State Health Benefits Plan when compared with the previous plan. Frendak suggested that the Association file a grievance on the alleged level of benefits change with the Board. Frendak pointed out that if the Association wished to obtain binding arbitration in a future

collective agreement, it should periodically file some grievances. The co-presidents agreed with Friendak's suggestion and presented it to the membership at a subsequent Association meeting. Ultimately, the Association adopted Friendak's suggestion and prepared a grievance.^{12/}

72. In early November, 1992, Frank was preparing a scattergram^{13/} of teacher salaries for an upcoming meeting with the New Jersey School Boards Association (School Boards Association). The Board customarily met with the School Boards Association to prepare for successor negotiations. The scattergram would also be used in the successor negotiations with the Association. Frank was reviewing teachers' files to obtain necessary information for the scattergram and to prepare for teacher evaluations. While reviewing Porter's file, he found Ottaviano's letter (CP-13) granting her tenure.^{14/} Confused by the letter, Frank sought clarification from Moore. Frank told Moore that Porter, as a third year teacher, had not yet acquired tenure. Moore said Ottaviano's letter must have been a mistake. Frank told Moore he would take care of the matter by speaking with Marold and Porter. Frank told Marold that Porter did not have tenure (6T32).

^{12/} I will discuss the presentation of the grievance to the Board below.

^{13/} A scattergram shows teachers' salaries based on years of service.

^{14/} Frank never raised the existence of CP-13 to the Board, as a whole (10T107).

Marold already knew that Porter did not have tenure. There is no evidence in the record that Frank ever spoke to Porter regarding her tenure status. Moore told Frank that Porter's evaluation would have to be done early because her tenure acquisition date was March 6, 1993. Consequently, Frank directed Marold to complete an interim evaluation of Porter (6T77; CP-11). Moore asked Frank to investigate the procedure to be followed for reviewing a teacher whose tenure eligibility date is in the middle of the school year. Shortly before Thanksgiving, Moore asked Frank whether he had obtained information concerning Porter's mid-term tenure acquisition situation. Frank said he had forgotten about the matter but would look into it immediately and talk to an attorney regarding the process.

73. Frank had a similar conversation regarding Porter's tenure with Brown. Frank told Brown that as a result of his preparation of a scattergram, he found that Porter was a non-tenured teacher. Brown responded that it was the Board's understanding that Porter was non-tenured. Brown also asked Frank to investigate the Board's options regarding Porter's tenure acquisition.

74. On December 22 or 23, 1992, Frank responded separately to Moore and Brown, advising each of them of essentially the same information. Frank indicated that he was advised that it was too late for the Board to act on Porter's tenure acquisition, since, pursuant to Porter's employment contract, she must be given sixty (60) days advance notice if the Board decided to terminate her

rather than grant her tenure. Frank indicated that a Board meeting would have to be conducted by January 4, 1993, in order to comply with the advance notice requirement. It appeared impossible to have a Board meeting by January 4, since the district would not yet be back from vacation and Board members would not be available. Also, Frank would be away on vacation during that time. Frank also indicated that it would be difficult to provide adequate public notice of a Board meeting if the Board wished to hold an emergency meeting before Christmas. Brown was frustrated at the fact that the requisite time elements made it so difficult for the Board to undertake a personnel action. Moore was annoyed with Frank because she asked him early on to investigate the procedure involved in reviewing a mid-year grant of tenure, and now it was too late. Moore considered any further review of Porter's tenure acquisition to constitute a "moot point." Further, Moore did not know whether the Board would vote to grant Porter tenure, anyway, or terminate her.

75. Sometime around Thanksgiving, 1992, Brown and Porter spoke about meeting informally to discuss the upcoming successor negotiations. It was agreed that Brown, Moore, Garrison and Porter would meet informally at Porter's home. The meeting lasted approximately one hour. Porter characterized the tenor of the meeting as business-like, Garrison said it was very cordial and Brown described it as pleasant (3T70; 4T40; 7T78). Moore thought the meeting was a good idea, since it might expedite the

negotiations process. One of the issues discussed during the meeting was the establishment of a date to begin formal negotiations. Brown indicated that the Board's negotiations team had not yet met, but she would raise the issue of negotiations dates with the Board and get back to Porter with some suggested times. Porter said the predecessor negotiations were rough and that teachers distrusted the Board. Porter suggested that the parties not prepare demand packets, and limit negotiations to the money issue. Porter stated that the parties should try to find a way to expedite the negotiations process in order to raise the trust level between the parties. Porter indicated that the Association was looking for a salary increase of approximately 7%. Brown indicated that she could not respond to the Association's salary demand at that time because the Board had not yet received any State funding information, nor had the Board considered the salary issue. However, Brown indicated that she believed a 7% salary increase was a bit too high.

76. The parties also discussed whether the Association and the Board would be represented at the negotiations table by professional negotiators. It was agreed that neither side would use professional negotiators, since it was believed that the parties would more quickly conclude negotiations by representing themselves. Both sides expressed an intention to expedite the negotiations process in order to achieve an early resolution to the contract talks. Both parties believed that the upcoming

negotiations involved fewer issues than the predecessor negotiations, which involved the Board's takeover of RDS, thus these negotiations would be simpler, easier and more quickly concluded.

77. During the January 7 meeting, Porter told Brown and Moore that the teachers were opposed to going beyond the end of the school year without a successor agreement in place. Porter and Garrison stated that if the parties had not agreed to a contract by September, 1993, the teachers would "work to rule." Neither Brown nor Moore considered the "work to rule" statement as a threat. They understood this statement to be informational. Brown and Moore were of the view that negotiations would be "short and sweet" and concluded before the end of the 1992-1993 school year. Consequently, they never believed that the "work to rule" issue would ever arise.

78. Neither Brown nor Moore told any other Board member that a meeting occurred on January 7, 1993 with Garrison and Porter, nor did they disclose what was discussed during the meeting. Moore and Brown testified that the participants agreed that the meeting was confidential. Porter testified that there was no such agreement regarding confidentiality. Prior to January 7, Porter told Association negotiations team members Schuler and Manahan that a meeting with Brown and Moore was scheduled for January 7. However, Porter never updated Schuler or Manahan concerning what transpired during the meeting, nor did Porter disclose to the Association membership that the meeting took place. Association membership

meetings were held on January 11, February 8 and February 10, 1993, yet neither Porter nor Garrison informed the Association membership of the January 7 meeting. Porter conceded that neither Brown nor Moore made any threats toward her, Garrison, or the Association during the January 7 meeting.

79. In response to Porter's "work to rule" comments, Brown stated that such action would not be well received by the community. Brown made this comment on the basis of her perception from the predecessor negotiations that there was a change in community feeling toward the teachers after the job actions had begun. Brown felt that community support for the teachers diminished after they began "working to rule." However, Brown, personally, did not share the community's view. Brown felt that as a Board member, she had more information and knowledge of the negotiations process than the community at large. Consequently, she knew that negotiations required the parties to go through a process and that the teachers had to do what they believed would move them toward accomplishing their goal (8T109).

80. After the meeting concluded, Brown and Moore never discussed the "work to rule" comments since the comments did not represent embody the real spirit of the meeting. Further, Brown was convinced that the negotiations would be quickly concluded and the "work to rule" issue would never arise.

81. Porter's tenure status was not raised during the January 7 meeting. Based on Frank's information, Brown understood

that the Board could not address Porter's tenure status since there was insufficient time prior to her tenure acquisition date to provide her with the requisite 60 day notice. Thus, Brown considered the question of voting on Porter's tenure as a dead issue at the time of the January 7 meeting.

82. In January, 1993, Frank asked Porter, as Association co-president, if she would organize the teachers to help get the school budget approved. Frank asked Porter to contact the County to obtain a list of registered voters and recruit teachers to call the voters and encourage them to vote in favor of the budget. Porter obtained a list of voters and raised the issue at an Association meeting. The Association membership opposed the idea on the grounds that contacting voters would appear to the community as a political activity. The teachers were concerned that since the budget provided for the payment of their salaries, having teachers actively supporting the passage of the budget might backfire. Porter told Frank that the Association would not assist in the budget approval process. Frank told Porter that he completely understood and asked if she could get other teachers not employed by the Board, but who lived in the district, to help support the budget. Porter indicated that she did not see a problem with that idea (5T23-5T24).^{15/}

^{15/} Porter's version of what transpired differs somewhat from Frank's. Porter stated that the Association took no final vote on Frank's request. Porter states that she never responded to Frank. I need not resolve this conflicting testimony. The important and undisputed fact here is that the Association did not call residents to urge them to vote in favor of the budget.

83. Frank told the Board that he would try to obtain the assistance of the Home/School Association and the teachers in his effort to get the budget approved. Frank never told the Board that the Association decided not to assist. The budget passed.

84. In the fall, 1992, Moore, pursuant to the collective agreement, sent the Association a letter indicating that the Board wished to engage in successor negotiations. The Association sought members willing to volunteer for the negotiations team. The Association encountered some difficulty in recruiting members to serve on the team because of the protracted round of negotiations for the 1991-1993 collective agreement. The Association team was formed and consisted of four members: Manahan, Schuler, Garrison and Porter. Since Porter had previous negotiations experience, she was selected to be chairperson. Porter's designation as chairperson of the Association team was never communicated to the Board. The Board assumed that since Garrison was also on the team he served as co-chair along with Porter. NJEA Representative Friendak would advise the team. In or about January, 1993, the Association began compiling its negotiations packet. The team met to review the old agreement and asked teachers for suggestions to be presented in the negotiations. The Board did not interfere with the Association's negotiations preparation. One of the Association's objectives was to mend fences with the Board and achieve a quick settlement.

85. The Board also began preparing for successor negotiations. As already noted, during the fall, 1992, the Board

contacted the School Boards Association in order to schedule a meeting for the purpose of having one of its representatives review the current collective agreement. That meeting took place in January, 1993. Porter was not mentioned during the meeting with the School Boards Association representative.

86. At the conclusion of the January 7, 1993 meeting, Brown told Porter that she would get back to her with a date to begin negotiations. The next Board meeting was January 13, 1993. It was during that meeting that the Board met with the School Boards Association representative to review the contract. Since the Board meeting ran late, Brown felt it would be best not to ask the Board to address negotiations issues at that meeting, but to simply ask the Board to be prepared to discuss salary and other contract issues at the Board meeting scheduled for January 25, 1993. Shortly after January 13, 1993, Porter called Brown to inquire whether the Board was prepared to set negotiations dates. Brown told Porter that the meeting ran late and negotiations dates were not discussed. Porter reminded Brown that if the negotiations were not concluded by September, 1993, the teachers would "work to rule". Brown said the Board would address negotiations at its next meeting on January 25. Brown never told anyone that Porter had called her or about the contents of their discussion. At the January 25 meeting, the Board engaged in some initial discussions concerning negotiations.

87. On January 26, 1993, Brown went to Porter's classroom and told her that she was prepared to establish negotiations dates.

Because of scheduling conflicts and a one week school vacation, the first negotiations date was set for February 25, 1993. Since the Board had not yet received its State funding numbers, Brown told Porter that the Board might not yet be prepared to present its demand packet that night. Porter again reminded Brown that if there was no contract in place by September, the teachers would "work to rule". Brown never told anyone that Porter mentioned "working to rule" during their discussion.

88. On February 1, 1993, Porter and Garrison met with Frank to deliver a grievance.^{16/} During the meeting, they discussed the predecessor negotiations and the upcoming successor negotiations. Since Frank was new to the district, he did not know what his role would be in the negotiations process. Porter told Frank that if the parties could not conclude a contract by September, 1993, the teachers would "work to rule". Frank indicated that he hoped that negotiations would move along quickly. Porter did not feel that Frank was hostile toward the negotiations process.

89. During a February 8, 1993 Association meeting, a question was raised concerning the upcoming negotiations. Porter advised the membership that the first negotiations date was set for February 25, 1993, however, the Board's demand packet would not be ready for submission at that time. Teachers commented that they

^{16/} I will discuss this grievance in greater detail below.

believed the Board was stalling, but Porter responded that she did not know that to be the fact.

90. The Association conducted periodic membership meetings. The meetings were held at one of the three district schools. The Association was not required to obtain permission to use the school facilities nor did it advise the Administration or Board that it intended to call an Association meeting. The Association never experienced a problem in gaining access to a school in order to conduct a meeting. Most of the contact that the Board had with the Association was during the course of negotiations, through its negotiators. Other than the communications which took place during negotiations, the Board did not know much about the Association or its activities.

91. The co-presidents called an Association meeting for February 8, 1993. Porter presided over the meeting; Garrison did not attend. Among other issues, Porter told the teachers to be careful in preparing their personal improvement plans (PIP) for the 1993-1994 school year so as to not include anything that would require the teacher to remain after school hours. Porter told the teachers that if no successor agreement was in place by September, 1993, the Association would call a "work to rule" job action. Porter told the teachers that they would not exhibit signs or wear buttons in protest of no contract in these negotiations, but rather proceed directly with a "work to rule" action. During the meeting, Porter also discussed Frank's idea to have an open door policy for

parents to visit the classrooms at any time. Porter told the teachers that Marold did not favor this sort of open door policy for parents but wanted a more controlled situation.

92. On or about February 10, 1993, Porter was involved in a team-teaching meeting involving the related arts teachers. In front of the other teachers, Marold told Porter that he heard that she had used his name during the February 8 Association meeting. He was displeased. Porter asked Marold how he knew what was said in an Association meeting. Marold replied that he knew what went on in the meetings probably before the teachers left the building. Marold opined that Frank and the Board were probably aware of what occurred in Association meetings as well.

93. During the February 8, 1993 Association meeting, many teachers expressed concern that Porter was discussing "work to rule" job actions so early in the negotiations process. That evening, one of the teachers who attended the February 8 Association meeting called Garrison to complain about the "work to rule" issue. The teacher expressed her view that the Association's negotiations team was moving too quickly and drastically, forcing the Association to become splintered. Garrison learned that the "work to rule" discussion was creating tension among the teachers, particularly at the Hilltop School. Teachers attacked Porter and said that she was out of control. Teachers urged Garrison to become more involved. Association negotiations team member Schuler, a teacher at the Hilltop School, contacted Porter and told her that she was being ostracized because she was a member of the team.

94. On February 9, 1993, Porter and Garrison spoke about the meeting conducted the day before. Porter indicated that she was very annoyed about the information leak. Garrison took the position that if the membership would not support the negotiations team, then the membership should get itself a new team. Garrison decided to call an emergency meeting for February 10, 1993. Garrison and Porter were very unhappy that the Association was not united and that information was being leaked to the Administration.

95. On February 10, 1993, Garrison chaired the Association meeting. Garrison told the teachers that they had to support their negotiations team and the co-presidents if they wished the team to effectively negotiate on behalf of the membership. Garrison offered to step aside if the Association was not supportive. Garrison asked the membership for a vote of confidence for him and especially for Porter as chief negotiator. Garrison also appealed to the membership to ensure that the information leaks would not continue. Garrison indicated that Porter was expressing the unified position of the co-presidents. Garrison reiterated that if the successor negotiations were not concluded by September, the Association must support a "work to rule" job action. The Association voted 45-1 to support its leadership and to "work to rule" in September if directed.

96. The Board was not aware of the Association's internal turmoil regarding the upcoming negotiations. Brown never received information from Marold regarding things that were said or done

during Association meetings. Neither Frank nor Marold complained to the Board about anything that was said about them during Association meetings. The Board received no teacher complaints regarding internal Association problems or about the possibility that teachers would "work to rule" if there was no contract settlement by September, 1993. Moore did not receive information concerning the Association from information leaks. The Board did not know when the Association conducted its meetings. The Board was not aware of the incident involving Porter and Marold regarding his telling her not to use his name during Association meetings. Garrison has no firm information that the information leak was transmitted to either the Superintendent and/or any Board member.

97. At the time that the Board changed the health benefits carrier, the employees were told that there was no change in the level of benefits. Over time, the Association became aware of incidents demonstrating a change in the level of benefits provided by the new carrier. The Association discussed this problem with NJEA representative Frendak and he advised them to file a grievance. On January 11, 1993, the Association voted to file a grievance with the Board regarding a change in the level of health benefits provided by the new carrier (CP-23). The grievance was unsigned, however, it showed Garrison's and Porter's names typed on the bottom of the page as co-presidents. CP-23 is the first grievance ever filed by the Association.

98. On February 1, 1993, Porter and Garrison met with Frank for the purpose of submitting CP-23 and to discuss other matters. Porter and Garrison briefly discussed the grievance with Frank. Frank did not respond to the grievance.

99. The Board met on February 8, 1993. Not knowing what to do with the grievance, Frank gave it to Moore during the Board meeting. Frank did not tell Moore about the grievance prior to the meeting. That evening, Moore gave Brown the grievance and asked her to look into it. Moore and Brown were somewhat confused by the grievance, since they believed that the health benefits issue had been resolved in the prior negotiations when the Association withdrew its unfair practice charge. Moore and Brown decided that Brown would contact the Board's attorney regarding the grievance. Brown never discussed the grievance with Porter or Garrison. Brown did not know that Porter was the Association's designated grievance chairperson.

100. During the February 8, 1993 Board meeting, the Board was told that there might be a grievance (8T105). Neither Brown, Moore nor any other Board member conducted any further discussion regarding the grievance (8T105). Board members were not given a copy of the grievance (8T106). Brown never told the Board whose

names were on the grievance (9T40).^{17/} Porter had no face to face interaction with any Board member regarding the filing of the health benefits grievance.

101. Porter's tenure status was not discussed during the February 8, 1993 board meeting. Brown and the Board were still under the impression that nothing could be done concerning Porter's tenure because it could not comply with the 60 day notice requirement contained in Porter's employment contract. By February 8, 1993, all members of the Board knew that Porter was the Association co-president.

102. Sometime between February 8 and 12, 1993, Brown contacted the Board's attorney seeking assistance with the preparation of a response to the grievance. The attorney believed that the underlying issue contained in the grievance was resolved during the predecessor negotiations. He told Brown to prepare a letter indicating that the grievance was not grievable, but that the Board would be willing to meet and discuss the Association's concerns. Brown drafted a response but never issued it to the Association. Brown was unaware that the contract contained timeframes within which the Board was required to respond to

^{17/} Moore testified that the Board was not aware that the Association had even filed a grievance. However, Brown testified that the Board was told on February 8, that the Association might have filed a grievance. Minutes from the Board's executive session on February 8, 1993 show that the Board discussed the possibility of a medical grievance (CP-49). I find that CP-49 supports Brown's version of what the Board knew on February 8.

grievances. She intended to present her response at the first negotiations session scheduled for February 25, 1993. During her conversation with the Board's attorney, Brown was informed that Frank's information regarding the application of the 60 day advance notice clause in Porter's employment contract was wrong. Brown learned that the Board could act upon Porter's continued employment at any time prior to her March 6, 1993 tenure acquisition date. If the Board decided to terminate Porter's employment, and such decision were made less than 60 days before her tenure acquisition date, it would be required to pay her 60 days' salary, in lieu of notice, pursuant to her employment contract. Brown told Moore of this information. Moore decided to have Porter reviewed by the Board at its next meeting scheduled for February 22, 1993. Moore told Frank to issue Porter a "Rice" notice informing her that her employment would be formally reviewed during the Board's February 22, 1993 meeting.

103. Shortly before Frank sent Porter the Rice notice, Frank called Porter and told her that the Board intended to discuss the possibility of her termination at its meeting on February 22, 1993. Porter was surprised by the call. She told Frank that she already had tenure. She also told Frank that she might not be able to make the February 22 Board meeting. Frank responded that the Board's attorney did not believe she was validly granted tenure. In response to Porter's claim that under her employment contract she must be provided with 60 days advance notice of her termination,

Frank indicated that the Board was only obligated to provide her with 60 days pay in lieu of notice. Frank told Porter that she should attend the meeting and bring representation.

104. On or about February 12, 1993, Porter received a letter from Frank advising her that the Board intended to consider her continued employment and "...may take action which could result in the termination of your employment" (CP-35). The Rice notice indicated that Porter could request that such discussion take place during the public session. She was advised that she could be represented at the meeting.

105. Although Frank had written other Rice letters advising teachers that the Board intended to review their mid-term evaluations in closed session (CP-50), CP-35 was Frank's first Rice notice sent to a teacher concerning the issue of renewal. Other than the review of mid-year evaluations, no specific employment action was taken by the Board pursuant to the CP-50 type of Rice notice. However, when Frank drafted CP-35, he was aware that the Board would be voting on whether Porter would be retained, and thereby acquire tenure, or be terminated. After Moore read Frank's draft Rice notice, Moore felt that Frank's letter was too long and negative. Moore helped Frank revise the notice. Moore did not change the substance of the letter, she just tried to shorten it and make it less negative. Frank thought it was important to tell teachers whether the Board was merely going to discuss the teacher or would vote on a particular personnel action. Frank developed two

types of Rice notices indicating when no Board action would be taken and when the Board intended to take action (11T18; 12T125-12T126).

106. After receipt of the Rice notice, Porter contacted Garrison, her attorney, and NJEA representative Spear. Spear accompanied Porter to the executive session of the February 22, 1993 Board meeting. Spear prepared a packet of materials to distribute to Board members. The packet contained Porter's observations and evaluations and other materials. During her presentation, Spear told the Board that it should accept the recommendation of its administrators. Spear pointed out that Ottaviano had already sent Porter a letter granting her tenure.^{18/} Spear's presentation lasted between 10 and 15 minutes. The Board asked no questions. Spear related Porter's accomplishments and concluded by telling the Board that a decision to terminate Porter could only relate to the fact that Porter was Association co-president.

107. Marold appeared before the Board next. Marold's presentation consisted of an oral statement generally summarizing Porter's interim annual performance report which he had recently prepared (CP-11). Marold did not distribute CP-11 to the Board members. Marold told the Board that Porter was knowledgeable in her subject area, well organized, productive and enthusiastic. Marold told the Board that he had nothing new to say nor had anything

^{18/} As stated above, except for Moore, the Board had not previously been made aware of Ottaviano's letter granting Porter tenure.

changed since his previous comments made in April, 1992, when the issue of Porter's renewal was last discussed (6T30; 6T79; 8T24). Marold recommended that the Board vote to retain Porter.

108. Von der Heiden spoke to the Board next. She recommended that Porter be retained.

109. The Board then entered into private deliberations regarding Porter for approximately thirty minutes. Porter's employment action was the only matter on the Board's agenda.

110. During school year 1992-1993, Board members continued to receive parent and student complaints concerning Porter. The complaints were of the same nature received previously and discussed by the Board during the April, 1992 Board meetings. The Board had a continuing concern regarding the decline in enrollment in both the strings and chorus programs. Brown attended a performance where there were only five strings players. Since Brown had not attended the Curriculum Committee meeting on July 7, 1992, nor heard the Committee's brief report to the Board, she was unaware of any attempt to increase the number of strings students. Although Moore did not specifically ask about the status of the strings program, she understood Marold's comments that nothing had changed since April, 1992, to mean that the number of strings students had not increased (11T68-11T69). The Board also had a continuing concern regarding a decline in the number of students in the all-school voluntary chorus. The Board was never advised that the enrollment in the all-school chorus increased (8T85).

111. Brown raised an incident regarding an 8th grade special needs student. Brown attended a chorus performance where the all-school voluntary chorus and grade level chorus sang. When Porter called up a grade level chorus to perform, Brown saw the student remain seated appearing confused, saddened and crying. Porter does not remember any problem arising with this particular student. However, as an 8th grader, she would not perform in a grade level chorus, since the 8th grade chorus did not yet exist. The student participated in the all-school chorus as planned. Nevertheless, the Board's only information regarding the incident was based upon Brown's version of events, and the Board was disturbed by it.

112. Another incident the Board discussed during its February 22 meeting concerned a choral performance presented in May, 1992, under Porter's direction. The performance included a "rock history" song medley. The medley featured a number of solo student performances. The medley was performed by students in either the 6th or 7th grade.^{19/} Two of the songs included in the medley were "Where The Boys Are" popularized by Connie Francis and "Material Girl" by Madonna. In order to select the soloists, Porter conducted student auditions. Since some of the songs in the medley were unfamiliar to the students, Porter told the students to select a

^{19/} Porter did not recall whether the 6th or 7th grade performed the song medley (12T73). Moore testified that one of the soloists was a 4th grade girl (10T130). I credit Porter's testimony. Moore did not attend the performance (11T80).

song which the students would be comfortable singing in the audition. The students selected "Material Girl." Moore received a call from a parent complaining that Porter was having the students sing the Madonna song "Like a Virgin" in the auditions. Based on Moore's information, when the Board discussed Porter on February 22, the Board understood that the students used Madonna's "Like a Virgin" during auditions, and that parents complained about it.^{20/}

113. Moore also received complaints from parents whose children sang "Where The Boys Are." Parents did not think that song was appropriately sung by children in that age group. This complaint was raised and discussed during the February 22 Board meeting.

114. In December, 1992, Porter was responsible for the student presentation of "The Nutcracker." Between 110 and 120 students performed in the show. During rehearsal, Porter instructed the students in the chorus to stand between the seat rows in the auditorium. In between each row of seats were two rows of students. Several seat rows were needed to fit the students. Prior to the performance, the several rows of seats to be used by the

^{20/} Porter was aware that a question had been raised regarding the Madonna song. Shortly after the auditions, Marold told Porter that her name had been raised once or twice at a Parent Council meeting and that something had been said about the song the students were singing during auditions. Porter asked Marold if there was really a major complaint; Marold said that there was not. Marold never told Porter that parents were calling and complaining (12T35; 12T97-12T98).

chorus were cordoned off with tape. About 5 minutes before the start of the production, Porter went back stage to tune the orchestra. Without her knowledge, Frank removed the tape from the seats reserved for the chorus and allowed parents to sit there. Shortly before the start of the show, Marold told Porter what Frank had done. Porter then had to find a new place for the chorus. The new arrangements created a great deal of confusion. The performance started fifteen minutes late.

115. Moore did not attend the performance of "The Nutcracker." Shortly after the performance, Moore was told that there was a great deal of confusion at the show and that it started late. Moore asked Frank what caused the confusion. Frank told her that balloons used in the performance fell at the wrong time. Frank never told Moore that his actions were responsible for the problems. During the February 22 Board meeting, the difficulties experienced with the presentation of "The Nutcracker" were discussed. The Board understood that the confusion was caused by balloons falling at the wrong time.

116. The Board again discussed the "Guys and Dolls" presentation for which Porter was responsible in May, 1991. The Board focused on the fact that one scene included a number of girls wearing slips on stage.

117. The Board also revisited Porter's music video assignment and, although the school library's video camera was made available to students, the assignment generated parent and student

complaints. Moore had heard from parents and students that Porter said everyone in Mendham has a video recorder. Moore was concerned that Porter had made such a statement.

118. The Board discussed parent complaints concerning Porter "showcasing" other teachers' and administrators' children during performances. Brown told the Board that certain parents complained to her that they thought it was inappropriate for Marold's daughter to be selected as master of ceremonies of a concert in which the chorus performed in 1993. Additionally, Marold's daughter was a featured dancer during a Mexican program. Porter's daughter played a leading role in the "Guys and Dolls" production and also served as one of the choreographers.

119. Casting for the "Guys and Dolls" production was handled by 10 to 12 teachers. Casting decisions were made on a group basis. Although Porter directed "Guys and Dolls", she was not in charge of casting. Porter removed herself from the casting decisions pertaining to her daughter. Porter had no involvement in the Mexican program except to teach the 8th grade a couple of Mexican folk dances. On the basis of Porter's review of the playbills for various productions and her recollection, she had never featured the same student as a soloist more than once. Nonetheless, Brown stated that there was a perception in the community that Porter showed favoritism to administrators' and other teachers' children by awarding them featured roles in performances and conveyed that perception to the Board during its February 22 meeting.

120. Each month for ten months, Moore transported four students from Mendham to do volunteer work at a soup kitchen in Morristown. Usually, different students volunteered each month. Moore was also active in driving students to sporting events. Moore estimated that during Porter's term of employment, she had driven more than 200 school children to various activities. Generally, the children initiated conversations among themselves and, frequently, talked about school related matters involving one teacher or another. Over time, Moore realized that the children's topic of discussion often concerned Porter. On those occasions when the students did not engage in conversation, Moore might ask an open-ended question such as what the children did or did not like about school. Moore never specifically asked about Porter. Moore listened to the children's discussions.

121. The children complained about the music video project. Since it was a group project, students had to meet in order to work together. They complained that it was difficult to schedule such meetings. The children said that Porter yelled all the time. Moore overheard children indicating that they remained in their math class rather than attend their scheduled music lesson. When Porter came to the math class to retrieve the students, the children said that they could hear the math teacher and Porter yelling at each other outside of the classroom. The children complained about a project where food was glued on a poster and it drew ants. One student said that music was unnecessarily boring and

that children didn't want to select music in the high school (10T126-19T130). The children complained about an activity involving the "Grand Canyon Suite". The students listened to the music while Porter referred to the names of various portions of the suite. The students were told to envision themselves standing in the Grand Canyon and were then instructed to write a story based upon what they thought the music was saying. Moore overheard the students say that Porter would tell them that their interpretation of the music was wrong and that the music meant something else (10T128).^{21/} Moore was concerned that if the students were told that their interpretations were wrong, their creativity might be stifled. Moore concluded that the students did not understand the assignment.

122. Elizabeth Nykun served as a member of the Board during school year 1992-1993. She served on the Communications Committee and was responsible for the newsletter. She was not involved in any matters arising between the Association and the Board, nor was she involved with the upcoming negotiations. Several parents approached Nykun and complained about the music program at

^{21/} Porter testified that she never told students that their musical interpretation was incorrect. There is nothing specific in the record that resolves the conflict between Porter's testimony and Moore's testimony regarding the students' comments. Since Porter's testimony is direct, it is more reliable. However, the important issue is what Moore came to believe from the students' conversations and not whether Porter, in fact, told the students that their interpretations were incorrect.

Mountain View School, where Porter taught. The parents expressed concerns about the strings program, the high level of stress in the classroom and the "showcasing" of certain students. Although Nykun never personally investigated any of the parent complaints, nor did she raise any of them with the administrators, she considered the complaints to be accurate. During the latter part of January, 1993, Gail Giblin told Nykun that her 6th grade son often complained that music was boring and the teacher yelled all the time (11T85). Giblin's son complained that the only thing they did in music class was to sing songs and sing "ti-ti-ta-ta". During school year 1992-1993, Porter was Giblin's general music teacher and Marrapodi was his band teacher. The teaching technique involving "ti-ti-ta-ta" is known as the Kodaly Method and is used to teach rhythm and notation to young children. Porter did not teach the Kodaly Method in grades 4 and above.

123. During the time that Porter was employed by the district, Moore received between 50-75 calls from parents regarding Porter. Most of the calls were of a negative nature. Moore does not know whether any of the parents who called her ever raised their concerns with Marold, Ottaviano, Frank or directly with Porter (11T199-11T200). Ottaviano told Moore that he had received between 5 and 10 negative calls from parents. While Ottaviano should have raised those matters with Porter, Moore does not know whether he did. Frank has talked to Moore about having received between 5 and 10 parent calls complaining about Porter (11T201). Frank did not

tell Moore whether he ever spoke to Porter about any of those calls (11T201).

124. In deciding how to vote on February 22, 1993, Brown thought that the concerns raised during the Board's discussion of Porter in April, 1992, were still present. Brown thought that the concerns and complaints from parents and students should be taken into consideration along with the principal's observations and evaluations. However, Brown believed that the teacher observations reflected only a snap shot of the teachers performance. Additionally, Brown had no faith in Marold's recommendations. Brown concluded that the complaints that she heard concerning Porter were numerous and reflected a pattern.

125. Parent and student comments influenced Moore's vote. Moore believed that if parents and students were upset by a teachers action, e.g. a song selection, such action becomes relevant in a teacher renewal decision. Moore did not believe that she had to reach a definitive conclusion regarding the truth of every allegation she heard concerning Porter in order to make her decision. Moore believed that if so many concerns were being raised by parents and students regarding Porter, it would be wrong to vote in favor of tenure. Moore considered tenure as granting a teacher a job for life. Notwithstanding the questionable accuracy of the allegations raised concerning Porter, Moore felt that she was in a position to judge whether the children were happy with the music program, and concluded that they were not (11T171).

126. In arriving at her decision, Nykun considered Marold's oral recommendation, the written evaluations and observations which she read during the February 22 meeting, and the parent complaints. Nykun believed that tenure was granted to a teacher for excellence in teaching. Nykun had concerns that Porter was not an excellent teacher and that the Board could obtain such excellence by bringing in someone new.

127. In reaching teacher renewal decisions generally, Cucurello relied heavily on recommendations by the superintendent and the principal. Regarding Porter, Cucurello did not have personal knowledge of the concerns and reservations some Board members expressed during the meeting. Porter taught Cucurello's son in the 7th and 8th grades. Cucurello's son had good experiences with Porter.

128. During school year 1992-1993, the Board never engaged in a discussion concerning the hiring of a replacement music teacher for Porter until the February 22 meeting. On February 22, Marold did not reiterate the argument he raised in April, 1992, that Porter's mid-year termination would have serious negative consequences on the music program. The Board did not discuss the consequences of a mid-year termination on the music program because it focused only on Porter's receipt of tenure. Frank told the Board that he would do his best to hire a replacement music teacher. Based on the number of mid-year applications which the Board received at the time it hired Porter, and the number of teacher

applications it received for full-year positions, the Board believed that it would not be difficult to find a replacement for Porter's position.

129. At the conclusion of the closed session, the Board reconvened in public session to conduct its vote on whether or not Porter would be terminated. The Board voted 8-1 in favor of terminating Porter (R-11). Cucurello was the sole Board member voting against Porter's termination.

130. While Nykun knew that Porter was Association co-president, she did not know what Porter did as co-president. Nykun was not aware that the Association had filed a grievance concerning the level of health benefits. Nykun did not consider Porter's Association activities when she decided upon her vote (7T113).

131. The Board engaged in no discussion concerning Porter's role as co-president, the health benefits grievance, or the upcoming negotiations for a successor agreement. There was no discussion concerning the possibility of Association members "working to rule" if negotiations were not concluded by September, 1993. Both Moore and Cucurello testified that the Board did not discuss Porter's union activity, the prior negotiations, the upcoming negotiations or possible job actions when it discussed Porter during the executive session (10T24; 10T39; 10T133; 11T22). I find Cucurello's testimony particularly credible and give it great weight, since he was the only Board member who voted against Porter's termination.

132. On February 23, 1993, Frank sent Porter a letter confirming that the Board terminated her employment effective at the close of business, February 22, 1993 (CP-36). On the same day, Spear sent Frank a letter requesting that the Board submit reasons for Porter's non-renewal (CP-44). On February 26, 1993, Frank sent Spear a letter indicating that Porter was terminated because the Board felt that it could secure a better teacher (CP-37).

ANALYSIS

The New Jersey Supreme Court has set forth the standard for determining whether an employer's action violates section 5.4(a)(3) of the Act in Bridgewater Tp. v. Bridgewater Public Works Association, 95 N.J. 235 (1984).

Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation

without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

There is no direct evidence that Porter's protected activity was a substantial or motivating factor in her termination. Consequently, the charging party must rely on circumstantial evidence. The Commission has held that timing is an important factor when assessing circumstantial evidence of discriminatory conduct. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). See also City of Margate, H.E. No. 87-46, 13 NJPER 149 (¶18067 1987), adopted P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987). In this case, a careful examination of the timing of events is crucial.

Porter was Association co-president and, as such, met with the superintendent and certain Board members to discuss various issues affecting terms and conditions of employment. Consequently, Porter was engaged in protected activity and the employer knew of

this activity. As is frequently the case, the focus issue is whether the Board was hostile toward Porter's exercise of protected rights.

The Board and the Association engaged in lengthy, arduous negotiations in order to reach the 1991-1993 collective agreement. These negotiations resulted in the Association conducting a series of job actions. Porter supported the Association in its negotiations effort and participated in the job actions, however, maintained a low profile. While the series of job actions were not welcomed by the Board or the community, they did not have a seriously disruptive effect on the school program. Although the blue/gold games were initially cancelled, they were ultimately conducted at a later date. The teachers' participation in the "work to rule" job action did not have a significant effect on students, because the collective agreement included time before or after classes when teachers were available to students. The teachers adhered to the contractual schedule so that students always had access to teachers outside of the regular class period. The Board maintained the view that job actions were always a possibility in circumstances where the parties did not timely conclude negotiations. Thus, under the circumstances surrounding the negotiations for the 1991-1993 collective agreement, the Board members understood and recognized the Association's need to engage in such job actions. Moreover, the Board felt that the job actions conducted by the Association were not out of line with actions taken in other districts.

In April, 1992, the Board met in routine fashion to consider renewal contracts for non-tenured teachers for the next school year. At that time, the Board had a great deal of difficulty in deciding whether Porter should be offered a renewal contract. The complaints which the Board had received regarding Porter's teaching style resulted in a great deal of discussion among the Board members as to whether Porter should be granted a renewal contract, notwithstanding the positive recommendations of the schools' administrators. The Board had little faith in the recommendations of its administration, particularly Marold, who was primarily responsible for conducting Porter's formal observations and evaluations. By the slightest margin (5-3) a majority vote was garnered in favor of Porter's renewal for the next school year. However, this vote was achieved with the understanding that the Board would have an additional opportunity to review Porter's teaching performance prior to her tenure acquisition date in March, 1993.

The Board concluded the April, 1992 meetings by issuing directives to its administrators to help Porter achieve success. The Board suggested that Ottaviano reassign Porter from the Mountain View School to the Hilltop School so that she would no longer be required to teach stringed instrument lessons. It also directed Marold to work with Porter to help her with the deficiencies the Board was concerned with, and discussed in his presence, during the April meetings. The Board's concerns with Porter's teaching ability arose well before she became co-president of the Association.

Porter was aware of the Board's concerns with her teaching performance. Shortly after the April Board meetings, Ottaviano and Marold separately told her that the Board had some concerns with her teaching performance. This resulted in Porter seeking to meet with the Board to discuss some of the issues which the Board raised. Porter met with the Curriculum Committee.

The Association argues that Porter engaged in a series of significant, aggressive Association activities during the time in which she served as Association co-president. The Association asserts that as the embodiment of this new, aggressive Association activity, the Board decided to terminate Porter. I find that the record does not support the Association's argument.

Between September, 1992 and Porter's termination in February, 1993, there were only four instances when Porter interacted with the Board or its representatives on behalf of the Association.^{22/}

The first issue which Porter dealt with as co-president relates to Frank's proposed new observation form. After reviewing the form, Porter and Garrison told Frank that the Association had

^{22/} I note that in each of the four incidents Garrison, as co-president, was also involved and equally supported the Association's position on each issue. Consequently, there is nothing in the record that would lead me to conclude that by terminating only Porter, the Board could have known that it would bring about a change in its relationship and dealings with the Association. There is no evidence to show that the Board knew that positions taken by the Association were developed by Porter alone, developed jointly by Porter and Garrison, or, for that matter, developed by Garrison alone.

some problems with the form. Frank modified the form to satisfy the Association's concerns. Frank was happy because he was able to use the observation form he suggested, and because the adoption of the new form represented a successful interaction with the Association by the newly appointed superintendent. The Board did not ask Frank to change the current observation form. However, the Board did not oppose the new form if that was what Frank wanted. The Board knew nothing about the objections to the form raised by the Association or what modifications were made to the form. The Board knew only that the district would begin using a new form which was acceptable to both its administration and the Association. The Board was happy that Frank was able to successfully interact with the Association and achieve a mutually agreeable result.

The second incident involved the Staff Advisory Council. Frank told the Board that he wanted to establish a Staff Advisory committee in order to maintain open communications between the Association and the administration. The Board approved of Frank's idea, believing that anything that maintained a free flow of communications was positive. Frank met with Porter, Garrison and an Association representative from each school. During the only Staff Advisory Council meeting which took place before Porter was terminated, Frank was told that the Association had problems with parents not adhering to the chain of command, no time off for teachers observing the Jewish holidays, Board members' children harassing teachers and a few other minor issues. In apparent

response to the Association's concern with the chain of command, Frank had a statement included in the minutes of each Board meeting advising that parents should follow the chain of command when wishing to raise a school related issue and not go directly to Board members. Frank never told the Board the reason for the inclusion of such statement. Also, Frank never told the Board about any issue raised by the Association during the Staff Advisory Council, including the issues concerning time off for the Jewish holidays and problems certain teachers had with Board members' children.

The third incident concerned the January 7, 1993 meeting. The meeting was characterized as "very cordial." Moore and Brown thought it was a good idea. Everyone left the meeting with the understanding that money was the only significant issue to be addressed in the negotiations, and the hope that negotiations would be "short and sweet." The parties agreed not to bring in professional negotiators. While Porter indicated that the Association would "work to rule" if there was no contract in effect by September, 1993, neither Brown nor Moore considered Porter's comment to be a threat or a problem. Brown and Moore expected the negotiations would be concluded long before September. Further, "working to rule" did not significantly undermine the educational program in the district. Other than Brown and Moore, the Board was never informed that the January 7 meeting occurred.

The fourth incident concerns the February, 1993, filing of the grievance regarding the level of health benefits. The grievance

was signed by both Porter and Garrison. Neither Garrison nor Porter discussed the grievance directly with any Board member. The Board, as a whole, never engaged in any discussions concerning the grievance. Except for Brown and Moore, the other Board members' knowledge of the grievance was superficial at best. The evidence shows that Moore and Brown were confused by the filing of the grievance, but not hostile toward the fact that the grievance was filed. Further, neither Moore nor Brown knew whether Porter was the moving force behind the filing of the grievance, since both co-presidents' names were listed.

Thus, of the four incidents in which Porter participated, the Board, as a whole, had almost no knowledge of any of them. Only Frank knew of the level of Porter's involvement with the new observation form and the Staff Advisory Council. The observation form incident was amicably resolved. The Staff Advisory Council provided the Association an opportunity to air problems before they escalated to a formal dispute. Only Moore and Brown knew about the January 7, 1993 meeting, and the issue raised and the names shown on the grievance. The January 7 meeting can not be characterized as a confrontational meeting. Thus, I find that the record does not support the Association's argument that Porter engaged in a series of significant, aggressive Association activities, and, to the extent that Porter did engage in Association activities, it was mostly non-adversarial or amicably resolved. In any event, the Board, as a whole, had very little knowledge about the Association, in general, and Porter's leadership role, in particular.

The first time Porter interacted directly with any Board member in her official capacity as Association co-president was on January 7, 1993. However, in November, 1992, Moore told Frank to make sure that Porter was evaluated early because the Board had to make a decision pertaining to Porter's retention prior to her March 6, 1993 tenure acquisition date. Moore directed Frank to investigate the procedure to be followed for reviewing a teacher whose tenure eligibility date is in the middle of the school year. Frank had a similar conversation with Brown who also confirmed that Porter did not yet have tenure and asked Frank to investigate the Board's options regarding Porter's tenure acquisition. Both of these conversations occurred before Porter had any direct interaction with a Board member in her capacity as Association co-president and prior to the time that Porter said anything about possible job actions by the Association membership. On or about December 22, 1992, Frank told Brown and Moore that the Board could not arrange a meeting to discuss and vote upon Porter's tenure acquisition within what Frank believed to be a 60-day advance notice period required under Porter's employment contract. Clearly, had it not been for the filing of the health benefits grievance in February, 1993, resulting in Brown's telephone call to the Board attorney, Porter's tenure acquisition would have been a fait accompli as far as Moore and Brown were concerned.

Thus, in April, 1992, before Porter ascended to a leadership role with the Association, Board members were expressing

serious reservations concerning her teaching. In November, 1992, before any Board member had any interaction with Porter which could even arguably be considered adversarial, the Board proceeded with its intention to review Porter before her tenure acquisition date. The Board's intention to review Porter was reasonable since the Board continued to receive complaints relating to Porter's teaching.

The Association argues that many of the complaints which the Board received from parents and students regarding Porter were inaccurate. I find that the facts support the Association's contention. However, the Act protects employees against adverse personnel actions taken by their employers in retaliation for exercising protected rights. This Act does not protect employees against employers making what might arguably be considered the wrong decision based on misinformation. I find that the information relied upon by the Board in its decision to terminate Porter, while perhaps inaccurate, was obtained in good faith. The Board believed that there were problems with the strings program and student participation in the chorus was declining. Neither Ottaviano, Frank nor Marold did anything to dispel the Board's impressions. Marold confirmed problems with the strings program and the number of students participating in the chorus had declined. Nykun, rightly or wrongly, voted to terminate Porter based on her conversations with parents and not based upon Porter's union activity. Likewise, Moore and Brown relied upon parent comments, and Moore also relied upon student discussions which she overheard while driving children

to the Morristown soup kitchen and other places. Cucurello, the only Board member voting in favor of Porter's retention, confirmed that the Board neither discussed nor considered Porter's Association activity when it addressed her acquisition of tenure. The Board, as a whole, never knew about the January 7, 1993 meeting. While the Board knew that a grievance had been filed in February, 1993, it did not know that Porter was involved. While there was a great deal of discussion among the teachers concerning job actions which the membership might conduct if a successor agreement was not concluded by September, 1993, the Board was not aware of that intra-Association debate.

The Association cites numerous cases in support of its argument that the Board violated the Act by terminating Porter. I find those cases to be factually distinguishable from this case or inapposite. Consequently, I find that the Board did not violate section 5.4(a)(3) of the Act when it voted to terminate Porter. The Board was not hostile toward Porter's exercise of rights protected by the Act. Porter's Association activity was not a substantial or motivating factor in her termination.

The Association argues that the Board violated section 5.4(a)(1) of the Act. The Commission's standards to determine whether a subsection (a)(1) violation has occurred is set forth in New Jersey Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550, 551, n.1 (¶10285 1979), which reads:

It shall be an unfair practice for an employer to engage in activities which, regardless of the

absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification.

The Association argues that the Board

...ignored the entire statutorily mandated and administratively regulated observations/evaluation process and the recommendations of its supervisors and administrators when the Board terminated, mid-year, the one teacher in the district who espoused a proactive, aggressive Association presence within the Mendham Borough School District.

The record contains no evidence supporting the Association's allegation that the Board ignored the statutorily mandated and administratively regulated observation/evaluation process. Moreover, although the Board may solicit the recommendations of school administrators such as superintendents or building principals regarding teacher contract renewals, the Board retains the ultimate decision making authority. Rotondo v. Carlstadt-East Rutherford Reg. H.S. District, 276 N.J.Super. 36 (App. Div. 1994). Thus, I find no evidence to indicate that the Board's action has interfered with, restrained or coerced employees in the exercise of the rights guaranteed to them by the Act.

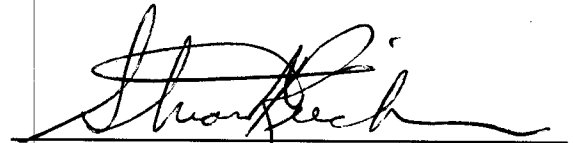
Accordingly, based upon the above findings and analysis, I make the following:

CONCLUSIONS OF LAW

The Mendham Borough Board of Education did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) by terminating Robin Porter.

RECOMMENDATIONS

I recommend that the Commission **ORDER** that the Complaint be dismissed.

A handwritten signature in cursive script, appearing to read "Stuart Reichman", written over a horizontal line.

Stuart Reichman
Hearing Examiner

Dated: July 19, 1996
Trenton, New Jersey