

P.E.R.C. NO. 98-94

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-94-77

IRVINGTON ADMINISTRATORS ASSOCIATION,

Charging Party.

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. TI-H-94-1

ANTHONY PILONE,

Petitioner.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint and Contested Transfer Petition against the Irvington Board of Education. The Complaint was based on an unfair practice charge filed by the Irvington Administrators Association. The Complaint alleges that the Board violated the New Jersey Employer-Employee Relations Act when it transferred and reprimanded a principal, Arthur Pilone, because he engaged in activities protected by the Act. The Petition alleges that the Board transferred Pilone for disciplinary reasons in violation of N.J.S.A. 34:13A-25. The Commission concludes that the petitioner did not prove its allegations by a preponderance of the evidence and that the Association did not prove that protected activity was a substantial or motivating factor in the personnel action.

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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Petitioner.

Appearances:

For the Respondent, Schwartz Simon Edelstein Celso & Kessler, P.A. attorneys (Nicholas Celso, of counsel; Joseph Morano, on the brief)

For the Charging Party, Wayne J. Oppito, Esq.

DECISION

On September 1, 1993, Anthony Pilone, a school principal, filed a petition for contested transfer determination. The petition alleges that the Irvington Board of Education transferred him from a high school to a middle school position for disciplinary reasons. N.J.S.A. 34:13A-25 prohibits a school board from transferring employees between work sites for disciplinary reasons.

On September 13, 1993, the Irvington Administrators Association filed an unfair practice charge against the Board. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (2), (3), (4), (5) and (7),^{1/} by transferring and reprimanding Pilone because he engaged in activities protected by the Act.

On February 23, 1996, after unsuccessful settlement efforts, a Complaint issued on the charge and the cases were consolidated for hearing. Original hearing dates were postponed upon agreement of the parties. The Board's Answers deny that Pilone was reprimanded or that he was transferred for disciplinary reasons or because he engaged in protected activity.

On February 19 and 20, 1997, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

introduced exhibits. They waived oral argument but filed post-hearing briefs.

On July 23, 1997, the Hearing Examiner recommended dismissing the petition and the Complaint. H.E. No. 98-3, 23 NJPER 461 (¶28216 1997). He credited the testimony of Board witnesses that Pilone was transferred because he was the principal best qualified to handle an expansion at the middle school. He concluded that Pilone was not singled out for transfer as an act of discipline or anti-union animus.

On August 5, 1997, the charging party and petitioner filed exceptions supported by their post-hearing brief. The exceptions assert that the Hearing Examiner erred when he determined that the transfer was not for disciplinary and anti-union reasons.

On August 18, 1997, the Board filed an answering brief urging adoption of the Hearing Examiner's recommendation.

We have reviewed the record. We incorporate the Hearing Examiner's findings of fact (H.E. at 3-13).

We begin with the contested transfer petition. N.J.S.A. 34:13A-25 prohibits the transfer of school employees between work sites for disciplinary reasons. The petitioner has the burden of proving its allegations by a preponderance of the evidence. N.J.A.C. 19:18-3.10(c); N.J.A.C. 19:14-6.8. The Hearing Examiner concluded that the petitioner did not meet that burden. He credited testimony establishing that the petitioner was

transferred based on qualifications, not as an act of discipline. We have no basis to disturb those findings and we therefore dismiss the petition.

Based on the Hearing Examiner's findings about the basis for the transfer, we dismiss the Complaint as well. Once we determine Absent proof that protected activity was not a substantial or motivating factor in an adverse personnel action, our inquiry must end. In re Bridgewater Tp., 95 N.J. 235 (1984).

Finally, absent any evidence to support the 5.4a(1), (2), (4), (5) and (7) allegations, we dismiss those allegations.

ORDER

The petition and Complaint are dismissed.

BY ORDER OF THE COMMISSION



Millicent A. Wasell
Chair

Chair Wasell, Commissioners Ricci and Wenzler voted in favor of this decision. Commissioner Buchanan voted against this decision. Commissioner Boose abstained from consideration. Commissioners Finn and Klagholz were not present.

DATED: January 29, 1998
Trenton, New Jersey
ISSUED: January 30, 1998

H.E. NO. 98-3

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

In the Matter of

IRVINGTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-94-77

IRVINGTON ADMINISTRATORS ASSOCIATION,

Charging Party.

IRVINGTON BOARD OF EDUCATION,

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Docket No. TI-H-94-1

ANTHONY PILONE,

Petitioner.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Irvington Board of Education did not violate the New Jersey Employer-Employee Relations Act by transferring Association President, Anthony Pilone, from the high school principal position to a middle school principal position. The Hearing Examiner found that the transfer was not intended as discipline, nor was it made in response to Pilone's exercise of protected activity.

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. 98-3

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Appearances:

For the Respondent, Schwartz Simon Edelstein Celso &
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(Nicholas Celso of counsel, Joseph Morano, on the brief)

For the Charging Party,
Wayne J. Oppito, Esq.

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 1, 1993, Anthony Pilone (Petitioner) filed a petition for contested transfer determination (C-1A) with the New Jersey Public Employment Relations Commission alleging that the Irvington Board of Education (Board) transferred him from the position of high school principal to a middle school principal

position for predominantly disciplinary reasons in violation of subsection 25 of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.^{1/} On September 13, 1993, the Irvington Administrators Association (Association or Charging Party) filed an unfair practice charge (C-1E) with the Commission alleging that the Irvington Board of Education violated subsections 5.4(a)(1) through (a)(5), and (a)(7) of the Act.^{2/} The Association specifically alleged that Pilone was transferred and verbally reprimanded because he engaged in activities protected by the Act. The Charging Party-Petitioner seeks an order requiring the Board to transfer Pilone back to the high school as principal.

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- ^{1/} This subsection provides that: Transfers of employees by employers between work sites shall not be mandatorily negotiable except that no employer shall transfer an employee for disciplinary reasons.
- ^{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. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative. (7) Violating any of the rules and regulations established by the commission."

An order consolidating cases, and a Complaint and Notice of Hearing were issued on February 23, 1996 (C-1). The Respondent filed answers to both the petition and the charge on October 13, 1993, and March 18, 1996, respectively. It denied the transfer was based on discipline, that Pilone was verbally reprimanded, or that he was transferred because he engaged in protected activity.

Hearings were held on February 19 and 20, 1997.^{3/} Both parties filed post-hearing briefs by July 7, 1997.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Anthony Pilone has been employed by the Board for 38 years. In 1972, he became Assistant Principal (Administrative Assistant) at the Myrtle Avenue Middle School which he held until 1978 when he became Vice Principal of Irvington High School. He became High School Principal, a twelve month position, in 1985 which he held until 1993, and became the Myrtle Avenue Principal, also a twelve month position, on July 1, 1993 (1T14-1T15, 1T87). Pilone had applied for the Myrtle Ave. Middle School principals position approximately mid-way through his High School principalship because, as a ten month position at that time, the Middle School position paid more per month than his twelve month High School position. He was rejected for the Middle School

^{3/} The transcripts will be referred to as 1T (February 19) and 2T (February 20).

principalship at that time, but it became a twelve month position when he was transferred into it on July 1, 1993 (1T84, 1T87-1T88).

Pilone served as Association President for 1990-91, and again from 1992 to the present (1T47-1T48). He was on the Association's negotiations committee from 1978 through 1993. He participated in negotiations leading to R-1 (the 1988-90 agreement), R-2 (the 1992-95 agreement), and the most recent agreement, R-3 (the 1995-98 agreement) (1T50-1T52).

Pilone also participated in negotiations attempting to reach an agreement for 1990-1992, but no agreement was reached for those years. After approximately thirty negotiation sessions, mediation and fact finding, the Board imposed a salary guide in 1991 for the 1990-92 period. Pilone was still President when the new terms were imposed by the Board (1T53). Those negotiations were characterized as hard bargaining, but the negotiators conducted themselves as gentlemen at all times (1T54-1T55). There was no evidence of bitterness.

Negotiations leading to R-3 began in October 1994 and concluded in December 1996. Negotiations leading to R-2 began in October 1991 and concluded in January 1994 (1T50-1T52).

2. The Board has employed a series of superintendents and assistant or deputy superintendents between 1985 and 1993, the time Pilone was High School Principal. From 1985 through 1988 Anthony Scardaville was Superintendent, and Albert Cohen was

Deputy Superintendent. Between 1988 and August 1992 there were several changes. Cohen was Acting Superintendent then Superintendent in 1988 and 1989, and Bernice Venable was Assistant Superintendent. Venable became Superintendent in 1990-1991, and Dr. Francis became interim superintendent in 1991-92, until Rodgers Lewis was appointed Superintendent in August 1992 (1T17-1T22, R-7, R-11, R-13, R-19).

3. Prior to Lewis' employment with the District, the Board had begun a building program, as required by the State, to regain its full certification. As a "special needs district" the Board had to improve its facilities and improve the results of student standardized scores. The program designed to improve its facilities included a new elementary school, and additions to the Myrtle, and Union Middle Schools. Myrtle was expected to grow from approximately 500 to approximately 900 students (2T31).^{4/}

Lewis' plan for improving the District also included reviewing academic achievement and the way the schools were operated, reorganizing the central office, transferring some administrative staff, and changing some titles (2T8). Lewis first discussed these matters with his Administrative Council which included the principals in December 1992, and January 1993. Then

^{4/} Former Deputy Superintendent Guy Ferri, said Myrtle Middle School was going from 700 to 1400 students (1T96). Lewis said the growth was from 500 to 900 students. The record does not establish which numbers were accurate but does show a substantial increase was expected.

he and his cabinet, his assistant/deputy superintendents, decided to recommend transfers that would strengthen the educational program (2T9-2T10, 2T33).

Because it was nearly doubling in size, Lewis was particularly concerned with improving education at the Myrtle Middle School. He wanted a principal there who could best take charge with a smooth transition and improve student testing results (2T33). Guy Ferri, then Deputy Superintendent for Personnel, and a former Association officer, told Lewis that Pilone had done a fantastic job at the High School getting students to pass the High School Proficiency Test. Ferri thought Pilone was the best qualified principal to handle the Middle School expansion and he recommended him to Lewis for that position (1T96, 1T99-1T100). In order to transfer Pilone to the Middle School, Ferri and Lewis decided to transfer principals Priscilla Butts from Mt. Vernon Elementary to the High School, and Alan Gamba from Myrtle Middle School to Mt. Vernon (1T98-1T100). Lewis finalized his decision to transfer Pilone, Butts and Gamba in May 1993, but they were not informed of the transfers until the Board approved the appointments (2T34, 2T47). Additionally, neither Ferri nor Lewis informed Pilone or the other principals of the specific reasons for the transfer (1T44, 1T116, 2T34, 2T44-2T45). But neither Ferri, Lewis or the Board transferred Pilone as a disciplinary measure. Ferri testified that he had no intention to discipline Pilone, and that neither Lewis nor any Board member

ever expressed to him an intent to discipline Pilone (1T108). I credit his testimony. He was direct, his testimony made sense, and he was not contradicted.

In addition to transferring Pilone, Butts and Gamba, Lewis made other changes and transfers that he thought would improve the District. Two assistant superintendent jobs, and two directors jobs were restructured, and two guidance counselors and several teachers were transferred for educational reasons (1T101-1T104, R-38). As part of the educational improvement plan, Lewis also decided to change several principals, including the one at Myrtle Middle School, from ten to twelve month positions (1T104).

Lewis took his recommendations to the Board's personnel committee which eventually approved the plan and presented it to the Board for final action. The Board approved the plan, including Pilone's transfer, in June 1993 (2T11).

4. Pilone was evaluated several times while serving as High School Principal. He was evaluated in 1986, 1987 and 1988 by Scardaville and/or Cohen (CP-5A, B, C). Those evaluations were positive and complimented Pilone on improving academic achievement at the High School. He was similarly evaluated by Venable in 1989 (R-19), but received at least a partially negative evaluation by Superintendent Lewis on June 1, 1993 (R-32).

5. During his role as Association President, Pilone has filed and processed several grievances (1T56-1T62), and has

testified on behalf of the Association in prior unfair practice hearings. Irvington Bd. of Ed., P.E.R.C. No. 96-74, 22 NJPER 194 (¶27102 1996); Irvington Bd. of Ed., P.E.R.C. No. 95-64, 21 NJPER 125 (¶26077 1995).

The grievances Pilone processed between 1991 and 1993 included a grievance for guidance counselor Wilma Crespo in 1991 (1T57); a guidance department grievance in 1991 (1T59); and a grievance concerning the breakfast program processed in 1992, just after Lewis became Superintendent. The superintendent is the second or third step in the parties grievance procedure (R-2). Lewis recalled hearing and denying the breakfast program grievance, but did not recall participating in other grievances (2T26). Pilone processed a grievance concerning salary guide placement in January 1993 (1T56), and a grievance concerning summer school assignments to vice-principals in June 1993 (1T57), but there was no evidence Lewis was directly involved in those grievances (1T56-1T60).

6. Priscilla Butts was the High School Vice-Principal working with Pilone from approximately 1985 through 1991. Pilone evaluated her throughout those years with consistently superior evaluations (R-7, R-8, R-9, R-10, R-11, R-12, R-13, R-14, R-15). Butts became principal of the Mt. Vernon Ave. Elementary School in 1991 or 1992. She was evaluated by Lewis twice, receiving satisfactory evaluations (R-16, R-17). Butts became High School Principal on July 1, 1993.

7. While attending a school basketball game in March 1993, Pilone had a conversation with County Superintendent Peter Carter, telling him he (Pilone) had to RIF nearly 20 teachers at the High School because the State had cut school funds. Carter told Pilone to do nothing, presumably because he (Carter) would check into it, by coming to the District (1T27-1T32).

On the Monday following the basketball game Carter telephoned Superintendent Lewis, told him of his conversation with Pilone, and told Lewis he (Carter) should have been informed of the changes being made in the District. When that conversation ended, Lewis telephoned Pilone, expressed "his displeasure" with Pilone having discussed with Carter a plan that had been raised in Lewis' Administrative Council meeting, and told Pilone that only he (Lewis) should speak to Carter on issues concerning the District. Lewis directed Pilone not to discuss District matters with the County Superintendent in the future. Pilone apologized, and the conversation ended (1T33-1T34; 2T28-2T29, 2T43).

While Lewis did not talk to Pilone with an angry tone, he told Pilone he was not pleased that Pilone had, in his (Lewis') opinion, overstepped his Principal position and assumed the role of superintendent (2T29-2T30).

8. At a Parent Teachers Students Association (PTSA) meeting in January 1993, Dr. Lewis, and PTSA President, Harry Padden, told Pilone that they would like to have the Mayor of Irvington, and a guest speaker, speak at the High School

graduation in June. The Mayor appointed the Board members, but he was not insistent on speaking at graduation, he wanted to convey his greetings. Lewis felt it was appropriate to invite the Mayor to offer greetings (2T38-2T39). Pilone noted that the Graduation Committee was opposed to the Mayor being allowed to speak and he supported that position, but he was not opposed to a guest speaker. Lewis did not at that time, however, direct Pilone to invite the Mayor to speak (1T23-1T25, 2T24-2T25, 2T37).

In March 1993, Lewis again asked Pilone if the Mayor would be allowed to speak at graduation, but he did not direct Pilone to do so at that time (1T25-1T26).

In May 1993 Lewis telephoned Pilone and told him Board President Walton wanted the Mayor, and a guest speaker, at graduation. Lewis new Pilone was opposed to the Mayor speaking, but he encouraged the idea of bringing greetings and they came to an understanding resulting in Pilone arranging for the Mayor to offer greetings (1T26, 2T24, 2T37-2T38).

The tenor of their conversation was pleasant, Lewis did not shout at, threaten, or reprimand Pilone regarding the Mayor's graduation participation, nor did it have any effect on his transfer (2T25-2T26).^{5/}

^{5/} I credit Lewis' testimony that he did not reprimand, threaten or shout at Pilone during their May conversation regarding the Mayor, and that it had no effect on his decision to transfer Pilone. I found Lewis to be a believable witness. He testified calmly, was not evasive, and his testimony was not contradicted by Pilone or anyone else.

9. Lewis evaluated Pilone on June 1, 1993 (C-1C; R-32). Prior to that evaluation Lewis had never met with Pilone to review his performance. Lewis had not told Pilone his staff direction needed improvement, that he needed to evaluate his staff on a regular basis, or give him any indication of his performance at the High School (1T36-1T37). In the standardized form component of C-1C, Pilone received a "Needs Improvement" in two of the five sections. In the written evaluation component of C-1C Lewis gave Pilone a very good evaluation of his leadership, management, staff supervision, teacher involvement, and planning skills. He noted Pilone needed improvement, however, as an educational leader for pupil progress and student achievement and attendance. During the evaluation Lewis did not say anything about Pilone's performance, and did not tell him he was being transferred (1T38-1T39).

On June 2, 1993, Pilone sent Lewis a rebuttal to C-1C (R-33 or C-1D), disagreeing with many of the "needs improvement" notations on C-1C, and raising ways he thought he demonstrated educational leadership. Lewis responded by letter of June 9, 1993 (R-34), noting the evaluation was based upon his own judgment.

10. By letter of June 10, 1993 (R-36) Lewis notified Pilone that on June 16 the Board would discuss an administrative reorganization, including transfers, that might impact upon his assignment. Pilone was told to notify Lewis if he wanted the Board discussions regarding his (Pilone's) appointment to be held in public. That was the first time Lewis had hinted to Pilone he

may be subject to transfer. Pilone responded to R-36 on June 14, 1993 (CP-3), notifying Lewis he wanted to meet with the Board on June 16 to discuss what he said was Lewis' recommendation for his (Pilone's) "demotion". The Board apparently, however, did not meet on June 16 (1T40-1T41).

On June 22, 1993, Lewis presented the Board with the rationale for the administrative transfers he recommended, particularly those for Pilone, Butts, and Gamba (R-37). The rationale given for Pilone's transfer was:

The district anticipates a major expansion of our middle school program during the 1993-94 school year, to include a fifty percent enrollment increase and expanded curricular offerings. Mr. Pilone has nearly twenty years experience in secondary school administration at both Myrtle Avenue School and the high school. His strong secondary background and his experience at implementing new or changed programs will facilitate a smooth successful transition for Myrtle's expansion, and will provide a background for continuity between the middle school and the high school.^{6/}

6/ The rationale given for transferring Butts and Gamba were:

Mrs. Butts:

Mrs. Butts' transfer to Principal of the high school will capitalize on her experience and skills which address that school's perceived needs. She is an experienced high school administrator who is familiar with the organization, curriculum and personnel, thus ensuring a smooth and quick transition. She is a child advocate who addresses students' needs individually, and who already has the respect of the student body. She works well with people of diverse talents and cultures, mainstreaming students' and staff's unique contributions into the organizational fabric for a team

Footnote Continued on Next Page

Pilone had not previously seen Lewis' rationale (1T43).

Exhibit R-38 was the Board's proposed administrative organizational chart for 1993-94 which was prepared for the Board's Personnel Committee Meeting of June 23, 1993. It contained information on employee terminations, retirements, appointments, transfers, assignments, employment and re-employment. In addition to noting the Pilone, Butts, and Gamba transfers, R-38 included a memorandum from Lewis to the Board dated June 23 providing the same rationales for the three transfers as contained in R-37.

On June 24, 1993, Lewis sent Pilone a letter (R-39) similar to R-36, notifying him that on June 30, 1993 the Board was going to discuss an administrative reorganization, including transfers, that might impact upon his assignment. Pilone responded by letter of

6/ Footnote Continued From Previous Page

approach. Mrs. Butts has developed community links and agency liaisons which can bolster an effective school/parent/community partnership for learning, which is a significant assessed need at our high school.

Mr. Gamba:

Student achievement at Myrtle Avenue School has not improved significantly during Mr. Gamba's tenure as principal. Additionally, Mr. Gamba has been unsuccessful in initiating meaningful parent involvement. Mt. Vernon's student achievement levels are satisfactory so that the focus can be on maintaining gains and making reasonable improvement. Similarly, there already is active parent involvement at Mt. Vernon, providing Mr. Gamba with a firm basis for him to build upon. Mt. Vernon Avenue School can also benefit from Mr. Gamba's strong abilities in the areas of student discipline, organizational skills and consistency of actions.

June 28, 1993 (R-40), similar to CP-3, requesting that his appointment be discussed in a public session unless he could be present with his union representative in a private session.

On June 30, 1993, the Board met and approved Pilone's transfer to Myrtle Ave. School (R-42). By letter of July 1, 1993 (CP-4), the Board officially notified Pilone of the transfer and that his salary was subject to the parties agreement which provided a lower salary for middle school principals than for the high school principal. On or about July 12, 1993, Pilone filed a grievance over the transfer which Lewis denied by letter of July 27, 1993 (R-44).

11. Despite the language in R-42 and R-44 about Pilone's new position being paid pursuant to the parties' agreement, since the time Pilone was transferred from the High School to the Middle School in 1993, there has been no reduction in his salary from what it would have been had he remained High School principal (1T67-1T71, R-2, R-3). The parties negotiated that Pilone will continue to receive the same salary he would have received as High School principal through June 1998 (R-3).

12. Pilone believed his transfer was based upon union animus by the Board and by Superintendent Lewis, but he had no personal knowledge of Board members making anti-union comments, or conspiring to transfer him (1T64-1T66). Lewis believed unions were necessary and thought he had a good relationship with the Association (2T27). He denied having discussions with any Board members to take negative action against Pilone because of his union

activity or because of the incident regarding the Mayor (2T28). I credit that testimony. There was no contrary evidence.

13. No independent facts were presented that the Board interfered with the existence or administration of the Association, discriminated against Pilone because he was involved in other cases before the Commission, or that the Board failed to negotiate in good faith, or violated any Commission rule or regulation.

ANALYSIS

There are two issues in this case. First, was Pilone transferred as discipline for the incidents involving the Mayor, County Superintendent Carter, his rebuttal to Lewis' evaluation, and more? Second, was Pilone transferred for engaging in activities protected by the Act? Answers to those questions rest, of course, on resolving why Pilone was transferred.

Standards of Proof

Despite alleging in its charge that the Board violated subsections 5.4(a)(1) through (a)(5) and (a)(7) of the Act, the charge was prosecuted as a 5.4(a)(3) allegation, that Pilone was transferred in retaliation for engaging in protected activities. The standard of proof and of review in 5.4(a)(3) cases was established by the Supreme Court in In re Bridgewater Tp., 95 N.J. 235 (1984). There the Court held that: "no violation will be found unless the charging party has proved, by a preponderance of the

evidence on the entire record, that conduct protected by the Act was a substantial or motivating factor in the adverse action. This may be done by direct or circumstantial evidence showing 1) that the employee engaged in activity protected by the Act, 2) that the employer knew of this activity, and 3) that the employer was hostile toward the exercise of the protected activity." Id. at 246.

If the employer did not present 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 the hearing examiner, and then the Commission to resolve.

Since this is the first transfer petition arising under the Act (N.J.S.A. 34:13A-25 and 34:13A-27)^{7/} and Commission Rules (N.J.A.C. 19:14-6.1 through 19:14-6.13, and N.J.A.C. 19:18-1 et seq.) to be resolved after a hearing, the Commission has not had the opportunity to establish formal standards of review in transfer cases. The burden of proof, however, is the same as in unfair practice cases. The petitioner has the burden of proving its allegations by a preponderance of the evidence. N.J.A.C. 19:18-3.10(c), N.J.A.C. 19:14-6.8.

In deciding this transfer case, I need not resolve whether the Bridgewater standards and shifting burdens should apply in all transfer cases. Initially, that is for the Commission to decide. Here I am guided, instead, by the Commission's decision in UMDNJ (Rutgers Medical School), P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987), where the Commission explained that in determining whether a charging party has met its burden of proving an illegal motive, the trier-of-fact must review the whole record, and "make credibility determinations, resolve conflicts and draw appropriate

^{7/} 34:13A-27 provides in pertinent part:

- a. If there is a dispute as to whether a transfer of an employee between work sites or withholding of an increment of a teaching staff member is disciplinary, the commission shall determine whether the basis for the transfer or withholding is predominately disciplinary.
- b. If the commission determines that the basis for a transfer is predominately disciplinary, the commission shall have the authority to take reasonable action to effectuate the purposes of this act.

inferences." Since a petitioner in a transfer case has the same burden as a charging party and must, therefore, prove the illegal motive, i.e., that the transfer was for discipline, I will consider all the evidence - and factual determinations and inferences I have made - in deciding the viability of the petition.

The Petition

Pilone alleged in the petition that his transfer was discipline for engaging in lengthy and bitter negotiations between the Association and the Board: because he filed several grievances on behalf of the Association; for initially opposing the Mayor's participation in graduation; because of his conversations with County Superintendent Carter about possible RIF's at the High School; and, issuing a rebuttal to his evaluation. The Petitioner's theory of the case is that Superintendent Lewis was angry with Pilone over those matters, for which he was, allegedly, disciplined by being transferred to Myrtle Middle School.

The record, however, did not support the Petitioner's allegations. While there was evidence of lengthy negotiations there was no proof of bitterness. Pilone testified there was a gentlemanly attitude during negotiations, and Lewis could not have been involved in any of those negotiations before August 1992, his hiring date. If he was involved in negotiations thereafter, there is no evidence of heated exchanges between he and Pilone, or Pilone and anyone else that might be the basis for retaliation in the form of discipline.

The evidence regarding the grievances that Pilone filed that might have involved Lewis is devoid of any substantial basis from which to infer Lewis (or the Board) would impose discipline. It is not enough for the Petitioner to merely allege that Lewis disciplined Pilone because he filed grievances. There was no evidence of Lewis making threats or even negative comments regarding the grievances.

The incidents involving the Mayor and County Superintendent Carter, when viewed in context with Ferri's explanation for the transfer, were insufficient evidence to warrant my drawing an inference of an unlawful motive for the transfer. Although Lewis was displeased with Pilone for telling Carter about the RIF's, Lewis denied the transfer was for discipline, and I credited both he and Ferri that Pilone was transferred because he was the best qualified principal to handle the Middle School expansion.

Finally, Pilone's mere submission of a rebuttal to his evaluation is insufficient basis to infer that it was the reason for imposing discipline. Neither Pilone's rebuttal, nor Lewis' response were phrased in a hostile or combative way. Having considered all the evidence I find the transfer was not an act of discipline. Therefore, the petition should be dismissed.

The Charge

The Charging Party proved the first two Bridgewater elements, but failed to prove the third element, hostility. The

Charging Party's mere allegation of union animus, standing alone, is insufficient to prove an illegal motive. Compare, Newark Teachers Union, H.E. No. 97-14, 23 NJPER 135 (¶28067 1996). Pilone was clearly engaged in protected conduct and the Board was, obviously, aware of it, but there was no direct evidence of hostility. Pilone admitted he had no evidence that Lewis, or any other Board official or member, made anti-union remarks or conspired to transfer him. I credited Ferri's testimony that Pilone was transferred because he was the best principal to handle the Middle School expansion. Pilone did not contradict that testimony nor offer any other evidence to rebutt it.^{8/}

I further find that the circumstantial evidence merely reinforces the Board's case. From the effective date of the transfer through at least 1998, the Board, acting in good faith, negotiated with the Association to maintain Pilone's salary at the same level it would have been if he remained at the High School. While there is no guarantee that practice will continue past 1998, I infer from that practice that the Board intended to recognize Pilone's leadership ability and did not want him to suffer any short term loss resulting from the transfer. That practice corroborates Ferri's testimony that Pilone was not transferred for discipline or because of his union activities, but as recognition of his leadership abilities.

^{8/} In its post-hearing brief the Charging Party/Petitioner argued there was no educational justification for Pilone's transfer, but that remark is contradicted by Ferri's testimony.

The Charging Party/Petitioner's reliance on the fact that Lewis never warned Pilone of the possible transfer in March or May 1993, nor told him of the reason for the transfer, to support his case, lacks merit. Lewis was under no legal obligation to warn Pilone in March or May. Once Lewis made his final decision, the Board acted properly by sending Pilone R-36 and R-39 notifying him of his right to appear before the Board. Given the facts I have already found and credibility judgments I have made, I do not infer that Lewis' handling of Pilone's transfer demonstrated unlawful motive.

Lewis made several other transfers and changes besides Pilone's. In the context of those actions, Pilone's transfer was treated like the others. Consequently, I do not infer Pilone was singled out as an act of discipline or union-animus. Therefore, the 5.4(a)(3) allegation should be dismissed.

Finally, since there was no evidence to support the 5.4(a)(1), (2), (4), (5) and (7) allegations, they too, should be dismissed.

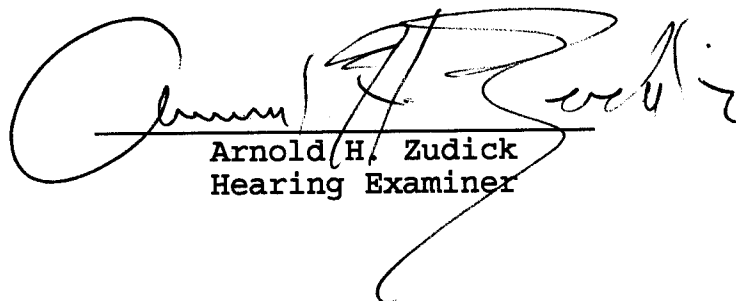
Accordingly, based upon the above findings and analysis, I make the following:

CONCLUSION OF LAW

The Board did not violate the Act by transferring Anthony Pilone to the middle school principal position.

RECOMMENDATION

I recommend the Petition and the Complaint be dismissed.



Arnold H. Zudick
Hearing Examiner

DATED: July 23, 1997
Trenton, New Jersey