P.E.R.C. NO. 78-91

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

MANALAPAN-ENGLISHTOWN REGIONAL
BOARD OF EDUCATION AND EDWARD A.
BARRETT, SUPERINTENDENT,

Respondent,

Docket No. CO-77-181-96

-and-

MANALAPAN-ENGLISHTOWN EDUCATION
ASSOCIATION,

Charging Party.

SYNOPSIS

The Commission determines in an unfair practice proceeding that the Association was not engaged in protected activity when it directed school students to take home to their parents a letter outlining the Association's position in a labor dispute with the Board, where the Board had directed the Association's leaders not to distribute the letter through students and where the Board had not similarly utilized school students to make its positions on labor relations matters known to the Community. Thus, the Commission reversed the Recommended Decision of the Hearing Examiner who found that the Board, by preferring tenure charges to the Commissioner of Education against Association President Melvin Reid, based upon Reid's alleged violation of the directive not to distribute the letters, had engaged in conduct violative of N.J.S.A. 34:13A-5.4(a)(1) and (3).

However, the Commission determines that two subsequent letters written by Reid which related to the dispute concerning the distribution of the letter, were entitled to the protection of the Act and concludes that the Board committed unfair practices in violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) by preferring tenure charges against Reid based upon his authorship of two subsequent letters. The Commission, in disagreement with the conclusion of the Hearing Examiner, finds the two letters at issue in this case to be distinguishable from the contents and setting of a speech with the Appellate Division, in Pietrunti v. Bd. of Ed. of Brick Tp., 128 N.J. Super. 149 (App. Div.) certif. den. 65 N.J. 573, cert. den. 419 U.S. 1057 (1974) held constituted sufficient grounds for the dismissal of a tenured teacher. The Board is ordered to cease and desist from preferring tenure charges or otherwise disciplining Association members for their activities in connection

with the two letters the Commission found were protected by the Act. The Commission also holds that the anticipated dismissal of the tenure charges by the Commissioner of Education does not render the case moot.

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-and- Docket No. CO-77-181-96

MANALAPAN-ENGLISHTOWN EDUCATION
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Metzler Associates
(By Stanley C. Gerrard, Esq.)
For the Charging Party, Chamlin, Schottland, Rosen & Cavanagh, Esqs. (By Michael Schottland, Esq.)
For Amicus Curiae, New Jersey School Boards Association, (By David Carroll, Esq., General Counsel and John Collins, Esq., On the Brief)

DECISION AND ORDER

An unfair practice charge was filed with the Public Employment Relations Commission by the Manalapan-Englishtown Education Association (the "Association") on December 30, 1976 alleging that the Manalapan-Englishtown Regional Board of Education (the "Board") and Edward A. Barrett, Superintendent, violated the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. by certifying tenure charges against Melvin Reid, a teacher employed by the Board and the President of the Association. Additionally, it is alleged that the Board violated the Act by attempting to prevent the distribution through the school children of a letter prepared by the Association.1/

1/ Specifically, the Association alleged violation of N.J.S.A. 34:13A-3.4(a)(1), (2) and (3), the text of which is quoted in footnote 2 of the Hearing Examiner's Report.

Three pieces of correspondence, all penned by Melvin Reid provide the focus of the instant controversy in which we are called upon to judge not only whether the contents of the letters enjoy the protection of the Act, but also whether Mr. Reid and the Association, by directing school children to deliver one of the letters to their parents, were using a means of distribution entitled to the protection of the Act. The dispute between the parties was crystallized by the certification of tenure charges against Mr. Reid to the Commissioner of Education by the Board in response to Mr. Reid's activities in connection with the aforementioned correspondence.

The three letters in question are annexed to the Recommended Report and Decision of the Hearing Examiner 2/ as Appendices A, B and C. The impetus for the initial letters, dated November 19, 1976, was a change in the system of parent-teacher conferences in the district made by the Board; a change which was opposed by the Association.

The first letter, Appendix A, is addressed to parents and guardians of children enrolled in the Manalapan-Englishtown District. The letter attempts to explain the difficulties and inconveniences for both teachers and parents perceived by the Association in connection with the changes in the parent-teacher conference system. The Association chose to deliver this letter to parents by sending it home with the students in the district.

2/ H.E. No. 78-27, 4 NJPER 123 (¶4060, 1978). A copy of that report is attached hereto and made a part hereof.

The administration, through a directive from Superintendent Barrett, attempted to preclude distribution of the letter in this manner. The events transpiring on November 18 and 19, 1976 in connection with this letter are set forth in the Hearing Examiner's Report which we shall discuss in more detail infra.

The letters labeled Appendices B and C are both dated November 22, 1976 and discuss the events of November 18 and 19, particularly the dispute between the Association and the administration regarding the Association's efforts to distribute the first letter through the school children. Letter B is addressed to the members of the Association and letter C was sent to Superintendent Barrett.

The tenure charges certified by the Board to the Commissioner of Education are set forth at page 13 of the Hearing Examiner's Report.[3/] The acts deemed by the Board to be sufficient, if true, to warrant imposition of the penalties imposed under the tenure hearing law, N.J.S.A. 18A:6-9 et seq. are Mr. Reid's authorship of the November 22, 1976 letters (Appendices B and C); his alleged disobedience of Barrett's directive not to distribute the November 19, 1976 letter (Appendix A) by using school children; his alleged attempts to persuade other members of the Association to distribute the letters and to disobey the

3/ We have been advised in Exceptions filed by the Respondent and at oral argument that the Board has asked the Commissioner of Education to withdraw all tenure charges against Reid. The Commissioner, who has complete control of proceedings under the tenure hearing law after charges have been certified, apparently is expected to dismiss the charges. We have not yet been advised by any of the parties that this has occurred.

directions of their superiors; and his alleged absence from his assigned teaching station without permission to engage in personal and/or Association activities.

The Hearing Examiner has recommended that we find that Mr. Reid, in authoring the November 19, 1976 letter and in directing its distribution to parents through school children, was engaged, on behalf of the Association, in activities protected by Section 5.3 of the Act.[4/] He concluded that the directive to cease distribution of that letter through the school children constituted conduct which was violative of N.J.S.A. 34:13A-5.4 (a)(1) and also that the certification of tenure charges concerning Mr. Reid's activity on November 18 and 19, 1976 amounted to violations of N.J.S.A. 34:13A-5.4(a)(3) and derivatively, N.J.S.A. 34:13A-5.4(a)(1).

Declaring that he could not distinguish the contents of the November 22 letters from a speech which was found by the Appellate Division to warrant dismissal of a tenured teacher,[5/] the Hearing Examiner found the contents of those letters to fall outside the protection of the Act and concluded that the Board had not engaged in unfair practices by certifying tenure charges based upon Reid's authorship of the November 22 letters. He also found the Board not to have committed unfair practices by certifying

4/ N.J.S.A. 34:13A-5.3 provides in relevant part that public employees, "...shall have and shall be protected in the exercise of the right, freely, and without fear of any penalty or reprisal, to...assist any employee organization...."

5/ Pietrunti v. Board of Education of Brick Township, 128 N.J. Super. 149 (App. Div.), certif. den. 65 N.J. 573, cert. den. 419 U.S. 1057 (1974).

tenure charges based upon Reid's alleged disruption of another classroom.

The exceptions filed by the Board challenged the Hearing Examiner's findings with respect to his conclusion that the Association and Reid were engaging in protected activity when they directed that the November 19, 1976 letter be sent home with the school children.[6/] The brief of amicus curiae School Boards Association also attacks the Hearing Examiner's conclusions on the November 18 and 19 incidents. The School Boards Association, in its brief and at oral argument, held before the Commission May 25, 1978, and the Respondent at oral argument, urged that we find the Hearing Examiner's findings respecting the November 22 letters to be moot in view of the pending dismissal of the tenure charges. The Association contended at oral argument that the Hearing Examiner's conclusions on the November 22 letters were erroneous and ought to be reversed.

Upon consideration of the entire record in this matter, we find the contents of all three letters written by Mr. Reid to enjoy the protection of the Act. However, contrary to the findings of the Hearing Examiner, we do not find that the Board committed unfair practices within the meaning of the Act in attempting (through Superintendent Barrett's directive) to bar the Association from distributing the November 19, 1976 letter through school children, or in certifying tenure charges to the Commissioner of

6/ The Respondent also excepted to the finding that the November 19 1976 letter was protected alleging it contains false and misleading statements. The Respondent at oral argument appeared to concede, however, that the contents of the letter were protected. No tenure charge was filed which put the contents of the November 19 letter in issue.

Education based upon Mr. Reid's alleged disobedience of that directive.7/

We believe the Hearing Examiner erred in his treatment of the Board's policies relevant tothe sending home of literature, solicitations and other similar material with school children. While the Hearing Examiner may be technically correct that there was no evidence adduced to show that the Association had received prior notice of the Board's claimed existing policy against sending home non-school material with the students, we find such conclusion not to be determinative of the issue in this case. Initially, we note that the record in the instant case certainly shows that there was notice to Association leaders that the administration disapproved of the November 19, 1976 letter being sent home with the shcool children, and that they attempted to prevent it.

More importantly the issue in this particular proceeding is not whether Mr. Reid is to be held responsible for violating an existing Board policy, but rather whether or not the activities for which he was brought up on tenure charges are protected by this Act. If the Board's policy was clearly one of which the Association had notice, it might still be an unfair practice if the enforcement or even the existence, of that policy prevented employees from, or punished them for, exercising rights guaranteed by this Act. The purpose of the Act is to prevent employers from

7/ We wish to make it clear that in cases of this nature we do not pass upon whether disciplinary actions which are taken in response to unprotected activity are appropriate under the circumstances. If we find that the object of the disciplinary action is not conduct protected by the Act, than our inquiry normally can go no further.

engaging in conduct which violates the Act and such conduct might still be improper even if the employees have prior notice of the employer's action.

The brief of the amicus curiae contends that the cases relied on by the Hearing Examiner to hold the Board's policies were being applied in a discriminatory manner, having been forged in controversies where private sector employee organizations sought to solicit other employees to engage in protected activity, should not control the instant case. We agree that the cases cited by the Hearing Examiner (at pages 21-22 of his report) are not analogous. While the attempts of an employee organization to solicit public support for its positions are certainly within the realm of protected activity,[8/] we cannot agree that an employee organization has an absolute right protected by the Act to distribute its literature through school children. We note in this regard that it is not alleged that the Board has attempted to distribute labor relations statements to the public through the school children and at the same time precluded the Association from so doing. Regardless of whether the motives of the Association were to involve students in the labor relations dispute or simply to save postage funds, our decision would be no different. Nor do we believe that their decision will inhibit in a significant manner the ability of the Association to enlist public support for its positions at the negotiations table.

8/ In re Laurel Springs Board of Education, P.E.R.C. No. 78-4, 3 NJPER 323 (1977).

Any additional inconvenience caused by alternative methods of communication is more than justified by the reasoning behind the Board's policy. While Justice (then Judge) Pashman has held it perfectly proper to allow student questions in classrooms on labor relations matters involving their teachers, River Dell Ed. Ass'n v. River Dell Bd. of Ed., 122 N.J. Super. 350 (Law Div., 1973) he stressed that the case before him involved "questions" initiated by the students and opined that teachers should not use their classrooms as a soapbox. Id. at 357. We believe that the utilization of students as a conduit for labor relations materials exceeds the parameters of the River Dell decision and impermissively involves students in a dispute that does not relate to the learning process. This is particularly true where the instruction by a classroom teacher to take home a message to parents really amounts to the involuntary involvement of students.

While we have thus concluded that the Association was not protected by the Act in its decision to distribute the November 19 letter through students, we find that the November 22nd letters, which are vigorous statements of the Association's position in the controversy and vigorous attacks on the Superintendent's position, are entitled to the protection of the Act. Actions taken or statements made in furtherance of an unsuccessful cause do not lose the constitutional or statutory authorization under which the statements were made. We disagree with the Hearing Examiner in his application of the Pietrunti decision. The Hearing Examiner noted the Pietrunti court's awareness that the speech therein did

not occur with respect to any specific grievance or dispute and recognized that it was the existence of a specific dispute herein which prompted the November 22nd letters. That, in our view, is sufficient to distinguish the Pietrunti case from the controversy before us. We also believe that the content of the letters are distinguishable from the speech given in Pietrunti which was appended to the court's opinion at 128 N.J. Super. 170-173. The speech in Pietrunti attacked the general character and integrity of the superintendent of schools rather than the stance he had taken in a single controversial dispute which we believe is the case herein. We thus hold the Hearing Examiner erred when he held that the November 22, 1976 letters did not enjoy the protection of the Act.

We do not believe the instant case should become moot, assuming that the tenure charges against Reid are dismissed as anticipated. The leveling of tenure charges against Mr. Reid is the single most severe punishment that can be exacted since it involves the possibility of a loss of his job. Having found that charges were certified, in part based upon activity which falls within the protection of Section 5.3 of the Act, we would deem it an abdication of our statutory responsibility to prevent and remedy unfair practices not to address actions which, when taken, resulted in violations of N.J.S.A. 34:13A-5.4(a)(3) and, derivatively, N.J.S.A. 34:13A-5.4(a)(1). The anticipated dismissal of the tenure charges, as they involve the writing of the November 22 letters as well as the November 19 distribution, will affect the appropriate remedy in this case, but we believe that the purpose of the Act

requires that the Board be ordered to cease and desist from taking any other adverse action against Reid or other employees as a result of the issuance of the November 22nd letters.[9/]

We do adopt the Hearing Examiner's conclusion that the record does not support a violation of N.J.S.A. 34:13A-5.4(a)(2).

ORDER

Accordingly, for the reasons set forth above IT IS HEREBY ORDERED that the Manalapan-Englishtown Regional Board of Education:

1. Cease and desist from interfering with, restraining or coercing Melvin Reid and/or other employees represented by the Manalapan-Englishtown Education Association or discriminating in regard to hire or tenure of employment of such employees by certifying tenure charges to the Commissioner of Education or taking any other disciplinary action against them in connection with the November 22, 1976 letters.

2. Take the following affirmative action:

a. Post in a conspicuous place at School District Administration Offices located in the Clark Mills School, and at all schools in the district, copies of the attached "Notice to All Employees". Copies of such notice, on forms to be provided by the Commission, shall be posted by the Board immediately upon receipt thereof, after being duty signed by the Board's representative, and shall be maintained by it for a period of at least

9/ We are aware of the fact that the Association filed a suit in Federal district court regarding this matter and that, as part of the settlement of that suit the Board agreed to the dismissal of the tenure charges against Reid. However, that settlement did not include a withdrawal of the instant unfair practice charge.

sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Board to ensure that such notices are not altered, defaced or covered by any other material.

b. Notify the Chairman of the Commission within twenty (20) days of receipt of this order what steps the Board has taken to comply herewith, including a statement as to the current status of the tenure charges certified against Melvin Reid to the Commissioner of Education.

Additionally, IT IS HEREBY ORDERED that the portion of the complaint relating to the attempted distribution through school children of the November 19, 1976 letter of the Association as well as the alleged violation of N.J.S.A. 34:13A-5.4(a)(2), be dismissed in their entirety.

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Hartnett, Parcells and Graves voted for this decision. None opposed. Commissioner Schwartz abstained. Commissioner Hipp was not present.

DATED: Trenton, New Jersey
June 30, 1978
ISSUED: July 5, 1978

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing Melvin Reid and/or other employees represented by the Manalapan-Englishtown Education Association or discriminating in regard to hire or tenure of employment of such employees by certifying tenure charges to the Commissioner of Education or taking any other disciplinary action against them in connection with the November 22, 1978 letters.

MANALAPAN-ENGLISHTOWN REGIONAL BOARD OF EDUCATION

(Public Employer)

Dated _____ By _____

(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780

H.E. No. 78-27

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

In the Matter of

MANALAPAN-ENGLISHTOWN REGIONAL BOARD OF EDUCATION
and EDWARD A. BARRETT, Superintendent,

Respondents,

- and -

CO-77-181-96

MANALAPAN-ENGLISHTOWN EDUCATION ASSOCIATION

Charging Party.

SYNOPSIS

A Commission Hearing Examiner issues his Recommended Report and Decision in an unfair practice proceeding. The Complaint alleges that the Respondents barred the distribution to elementary school students by the Charging Party of its letter addressed to their parents and guardians concerning a labor relations dispute, in violation of N.J.S.A. 34:13A-5.4(a)(1). The Complaint also alleges that by instituting tenure charges against the Charging Party President because he prepared, signed and distributed the letter and two other letters addressed to the Charging Party's membership and Superintendent of Schools, respectively, and because he engaged in other related conduct the Respondents violated N.J.S.A. 34:13A-5.4(a)(1) and (3) prohibiting interference with protected conduct and discrimination to discourage the exercise of rights protected by the Act.

The Hearing Examiner concludes that the Charging Party's initial letter and the method of its distribution were protected by the Act. Accordingly, he also concludes that the Respondents' attempt to restrain its distribution violates sect. 5.4(a)(1) and that the Board of Education's institution of tenure charges alleging that the role of the Charging Party's President in encouraging its distribution in the face of a claimed Board of Education rule prohibiting distribution without prior approval of the Board or the Superintendent violated the Education Law, constitute discrimination in regard to tenure of employment in violation of sect. 5.4(a)(1) and (3). The Hearing Examiner concludes that the two subsequent letters signed and distributed by the Charging Party's President, as well as his entry and disruption of a class while seeking to investigate the Superintendent's order restraining distribution of the initial letter to parents were unprotected conduct under the Act. Accordingly, he recommends dismissal of allegations claiming their inclusion in the tenure charges violates the Act. He also recommends dismissal of an allegation claiming Respondents' conduct violates N.J.S.A. 34:13A-5.4(a)(2) prohibiting interference with the existence or administration of the Charging Party as an employee organization.

The Hearing Examiner recommends that the Respondent Board of Education cease and desist from interfering with or coercing its employees by seeking to restrain them from distributing to parents via school children the letter addressed to parents and cease and desist from discriminating in regard to hire or tenure of employment by bringing tenure charges before the Commissioner of Education seeking to discipline employees

because they have engaged in conduct protected by the Act; also that the Respondent Board of Education notify the Commissioner of Education that it has withdrawn those charges, post notices supplied by the Commission advising its employees of these corrective actions; and notify the Commission in writing of the steps taken to comply with its order.

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

H.E. No. 78-27

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

In the Matter of

MANALAPAN-ENGLISHTOWN REGIONAL BOARD OF EDUCATION [1]
and EDWARD A. BARRETT, Superintendent,

Respondents,

- and -

Docket No. CO-77-181-96

MANALAPAN-ENGLISHTOWN EDUCATION ASSOCIATION

Charging Party.

Appearances:

For the Respondent, Metzler Associates,
Consultants (By Stanley C. Gerrard, Esq.)

For the Charging Party, Chamlin, Schottland, Rosen and Cavanagh, Esqs.
(Michael Schottland, Esq., Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

Statement of the Case

An Unfair Practice Charge filed with the Public Employment Relations Commission ("Commission") on December 30, 1976 by the Manalapan-Englishtown Education Association ("Association") alleges that the Manalapan-Englishtown Regional Board of Education ("Board") and Edward A. Barrett, ("Barrett"), its Superintendent, have engaged and continue to engage in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). Specifically, the Association charges that the Board and Barrett have violated 13A-5.4(a)(1),(2) and (3) of the Act [2] by an

1/ The name of this Respondent is hereby corrected to reflect its proper title as established by documentory evidence.

2/ These sub-sections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed 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."

alleged course of intimidation and coercion of the Association's membership, teachers employed by the Board, so as to bar the Association's release of November 19, 1976 ("Nov. 19") letter addressed to parents or guardians of students in the School District relating to parent-teacher conferences and by instituting proceedings against Mel Reid ("Reid"), the Association's President, under the New Jersey Tenure Employees' Hearing Act ("Tenure Law") to discipline Reid because he attempted to circulate the letter to parents or guardians and to resist the alleged coercive efforts of Barrett to bar circulation of the letter.

It appearing that the allegations of this charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on March 10, 1977. The Board in its Answer [3/] filed March 21, 1977 denied any violations of the Act as alleged, admitted that its Superintendent Barrett directed teachers not to distribute the said Nov. 19 letter and that it preferred charges against Reid for willful violation of the Superintendent's directive, with the State Commissioner of Education ("Commissioner"). By way of affirmative defense, Respondents claim the Nov. 19 letter; (1) is intentionally false and misleading; (2) violates the final and binding provisions of certain arbitrations awards issued under the parties' then current collective agreement; (3) its distribution by teachers through school children violates long-standing lawful Board policy, which formed the basis for Barrett's directive against its distribution; and (4) the Board's charges against Reid under the Tenure Law are properly pending before the Commissioner under his exclusive statutory jurisdiction.

A subsequently filed supplemental Complaint alleges that;(1) the original set of charges against Reid under the Tenure Law had been ruled defective by the Commissioner for failure to provide Reid an opportunity to answer prior to certification to the Commissioner for hearing; (2) thereupon at the Board's direction, Barrett prepared an affidavit of charges which were served upon Reid and then supplemented by letter of Board Counsel and to which Reid replied by Counsel; and (3) the Board then resolved to certify the charges to the Commissioner. [4/] Respondents answered the amended complaint orally, admitting the facts alleged in the amended complaint, but denying the alleged violations

3/ While Counsel filed responsive pleadings, entered its appearance and filed post-hearing brief on behalf of Respondent Board only, I find Counsel's failure to appear on behalf of Respondent Barrett to be a mere technical oversight, particularly as Barrett is named a Respondent in his representative capacity only. Accordingly, Counsel's appearance, defense and representation of Respondent Board, in all respects, shall be deemed an appearance, defense and representation of Respondent Barrett, and pleadings filed, argument made, and brief filed on behalf of Respondent Board shall be deemed filed and made on Respondent Barrett's behalf as well.

4/ The Association was subsequently granted leave to further amend the Complaint orally, to allege that the Board instituted the tenure charges on December 16, 1976 and reinstituted them later because of an anti-Association bias based, at least in part, upon a dispute with regard to conference week which resulted in the filing of an unfair practice charge by the Association, in Docket No. 77-162, on December 17, 1976, copy of which was received by the Board on December 16, 1976. Transcript ("Tr.") pp. 277-78; 280.

of the Act and renewing their affirmative defenses. 5/

Hearing was held before the undersigned on May 26 and June 6, 1977. All parties were given full opportunity to introduce relevant evidence, 6/ to examine and cross-examine witnesses and to file briefs. Post-hearing briefs were filed by Respondents on July 23, 1977 and by the Charging Party on July 29, 1977.

Upon the entire record in the case and from my observation of the witnesses and their demeanor I make the following:

FINDINGS OF FACT

1. The Manalapan-Englishtown Regional Board of Education is a public employer within the meaning of the Act, and is subject to its provisions.

2. Edward A. Barrett is Superintendent of Schools of the Manalapan-Englishtown Regional Board of Education and is subject to its provisions. He became Superintendent effective September, 1975. Prior thereto he had been Assistant Superintendent and had been employed in the District since 1969.

3. The Manalapan-Englishtown Education Association is a public employee representative within the meaning of the Act, and is subject to its provisions.

4. The Manalapan-Englishtown Regional Board of Education administers a School District comprising elementary grades Kindergarten through eighth ("K-8"). The student population exceeds 4200 and professional staff approximates 275. There are six schools, two contain grades K-3 (Taylor Mills and Clark Mills), one contain 3rd grade only (Pine Street), two contain grades 4-6 (Milford Brook and Lafayette Mills), and one houses grades 7-8 (Pinebrook). The administration offices for the School

5/ Respondents' oral motion to strike from the complaint the allegations and exhibits relating to the Board's invocation of the Tenure Law and its filing of charges thereunder was denied, and is hereby reaffirmed. The Commission has exclusive authority to determine unfair practices, N.J.S.A. 34:13A-5.4(c), whether or not they relate to proceedings before another State agency.

6/ The record includes a transcript of the taking of a deposition of Board President John Engel and Superintendent Barrett in a related proceeding entitled Mel Reid vs. Edward Barrett, Allan Gewirtz, Anthony Morelli, Gail Nelson, et. al., Docket No. 77-247, U.S. District Court (New Jersey) in which Reid seeks relief against the same entities, Superintendent Barrett, the Board members and the Board, similar to that sought in the instant proceeding, viz., an order enjoining them from prosecuting the same tenure disciplinary charges, in addition to compensatory and punitive damages and costs for alleged violations of Reid's civil and constitutional free speech rights. Respondents' Counsel objected to its receipt into evidence and its evidentiary use on the ground that the deposition related solely to the Tenure charges. See F.N. 5 above, supra. The undersigned's ruling and bases therefor, including Rule 4:16-1B of the New Jersey Rules of Civil Practice, appear at Tr., pp. 195-199. The deposition is marked in evidence as Charging Party's Exhibit No. 9 ("C.P. No. 9")

District are housed in an extension to and are physically attached to the Clark Mills School. The Milford Brook School is located several hundred yards from Clark Mills across an open field. The School District is located in a suburban and semi-rural community, 6 and 20 miles northwest of Freehold and Asbury Park, respectively, 7/ in the N.W. corner of Monmouth County.

5. The Association has been the sole and exclusive collective negotiations representative for all certified personnel, including teachers and certain other staff professional employees employed by the Board for at least the last ten years.

6. A collective negotiations agreement in effect between the Board and Association immediately prior to July 1, 1975 contained a grievance procedure culminating in advisory arbitration as well as a provision requiring any changes or modifications in terms and conditions of employment to be made only through negotiations by the Board and Association (Article XXVIII(E)) and providing in an article entitled "Teaching Hours and Load" that teachers may also be required to attend no more than four (4) evening assignments or meetings each year (Article VII (J)). A collective negotiations agreement between the parties effective from July 1, 1975 to June 30, 1977 continued Article XXVIII (E), now as Article XXIX, paragraph 29.5, continued Article VII (J), now as Article VII, paragraph 7.13 and now provided a four step grievance procedure culminating in binding arbitration on a submission by the Association (Article III). It also contained a provision relating to teacher preparation periods, guaranteeing classroom teachers five preparation periods per week of at least 30 minutes duration and providing compensation by way of either released time or money if in temporary situations a teacher is denied a preparation period. (Article VII, paragraphs 7.8, 7.9 and 7.10).

7. Sometime in the Spring of 1975, the Association filed a grievance, and in the fall of 1975 filed a second grievance, both of which, upon agreement with the Board, were submitted on their merits to the same arbitrator. The grievances raised identical issues as to whether the Board had violated the collective agreement by unnegotiated increases in instructional hours during parent-teacher conference weeks of April 28, 1975 and in the fall of 1975, respectively. The arbitrator had first determined the arbitrability of the issue relating to the week of April 28, 1975 in a limited award dated September 24, 1975. Only the second grievance would result in a binding award. The Board and Association stipulated and the arbitrator found the following facts: 1. For the six years prior to 1974-1975 spring semester, conference week consisted of at least four (4) half ($\frac{1}{2}$) days of instruction, with four (4) half ($\frac{1}{2}$) days of release time for conferencing parents. During the same period only one night was

7/ The Freehold Transcript is a weekly newspaper, published on Thursdays. The Asbury Park Press, a newspaper which covers School District matters, publishes daily.

scheduled for teachers to be available for evening conferences if requested by parents. These evenings were always scheduled on half (½) days of instruction. 2. The Spring 1975 conference week consisted of Monday and Tuesday evening conferences after full days of instruction. The following Wednesday, Thursday and Friday were half (½) days of instruction with respective afternoons for conferences. 3. The Fall 1975 conference week consisted of Monday and Tuesday evening conferences after full days of instruction. The following Wednesday and Thursday were half (½) days of instruction with respective afternoons for conferences. 4. Teachers are not required to attend at night during conference week if no conferences are requested by parents. Reid, then Professional Rights and Responsibilities (P.R.R.) Chairman, in effect, grievance Chairman, and Joseph D. Murphy, then President, appeared for the Association at the hearing held on January 7, 1976. [8/] The arbitrator in an award dated March 27, relying primarily upon Article VII (J) and noting that the Association did not challenge the Board's claim that the parent-teacher conference was a matter of educational policy to be determined by the Board but did challenge the effect of the Board's determination upon workload, the terms and conditions of the teachers' employment, concluded that the Board did not violate the collective agreements by the unnegotiated increase in instructional hours in the spring and fall of 1975. The record contains no evidence as to whether the Board sought Court confirmation of the award.

8. On April 29, Reid and seven other teachers employed at Milford Brook School grieved the Board's refusal to compensate them for preparation periods denied them during conference week of April 5, in violation of Article VII, paragraphs 7.8, 7.9 and 7.10 of the collective agreement. The grievance was ultimately submitted to arbitration. [9/]

9. On May 18, Superintendent Barrett wrote Reid, as Association grievance chairman, objecting to any questioning by Reid of a District administrator or principal, Mr. Garreau, on his administrative procedures in dealing with a teacher during an early stage of the grievance process. Barrett stated he considered improper Reid's comportment in intervening and expressing his viewpoint and desired procedures. Barrett also characterized as indefensible the hypocrisy of Reid's intruding himself and his viewpoints upon Mr. Garreau, at the same time Reid was processing a grievance

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8/ All dates hereinafter set forth shall be in 1976 unless otherwise noted.

9/ The arbitrator found that the conference schedule for the week of April 5 consisted of three half (½) days of instruction on Monday, Tuesday and Wednesday with respective afternoons for conferences and, additionally, one evening also designated for conferences, which, commensurate with need, may extend to more than one evening (up to four) in accordance with the prior arbitration award.

against Garreau for discussing the matter with his superior. Barrett concluded the letter: "You were intimately involved in negotiating the Agreement with the Board of Education and MEEA and should be well aware of the bounds of your comportment therein. I advise you to adhere to them."

10. In October, at a meeting of the Association's representative council, reaffirmed at the November meeting of the Association's executive council, Reid, now President of the Association since June 1, was authorized to prepare a letter to be sent home to parents and guardians of School District students advising them there might be some inconvenience to them not present in previous years, in scheduling conferences, due to the change in schedule.

11. At all times relevant to consideration of the instant Complaint, labor relations between the parties, Respondent Board and Association, had deteriorated to a serious degree. In December in response to a newspaper reporter's inquiry, Respondent Barrett characterized the recent relationship between the Board and Association as marked by "bad feelings", and both Association witnesses Reid and Murphy, over the same period, described it as hostile.

12. Reid prepared a letter addressed to parent or guardian dated November 19, which was printed and ready for use by November 18. It is reproduced in full as Appendix "A" to this Report. On or before November 18, Reid distributed the Nov. 19 letter to Association senior building representatives who were to distribute the copies to Association senior faculty representatives who, in turn, were to distribute them to individual teachers in each building to be given to their students to take home at the end of the school day on November 18. Because of the 19th date on the letter, some faculty members interpreted the Association decision to call for the letter's distribution to students at the end of the school day on November 19. No prior request for permission to so distribute the letter was made of the Superintendent.

13. On November 18, Superintendent Barrett was out of his office at the Clark Mills School attending a meeting elsewhere. At approximately 10 or 11:00 a.m. he received a telephone call from his Assistant, Robert Hagler. He learned that at a principals meeting held that morning, one principal had informed Hagler that the Association building representative in his building had advised that the Association membership was going to send home the Nov. 19 letter that day. The letter was read to Barrett. Barrett was also informed that Hagler and the principal had some concern and felt the letter should not go home. Barrett told Hagler to tell the principals that the letter should not go home and that he would be back in his office before the end of the day and he would take care of the matter. Upon returning to his office in the early afternoon, Barrett drafted a memorandum to the teaching staff. After trying, unsuccessfully,

to reach a Mr. Cassetta, a labor relations consultant associated with Metzler Associates, Respondent's representative in this proceeding, and after consulting Board President John Engel and Mr. Youssouf of the Board's law firm, Dawes, Gross & Youssouf, Esqs., by telephone (Tr. 247; C.P. No. 9, p. 45), Barrett then personally informed three principals by telephone, his secretary informing the three others by telephone, that a memorandum signed by them for the Superintendent was to be delivered to each teacher saying that the Nov. 19 letter should not go home by way of the children in the District. The memorandum which Barrett drafted and, after consultation, he directed be hand-delivered to each teacher reads as follows:

> "TO ALL TEACHERS OF SCHOOL
>
> The Superintendent of Schools has directed that the MEEA letter dated November 19, 1976 regarding Parent Teacher Conferences is not to be distributed via the children of the Manalapan-Englishtown Regional Schools.
>
> For the Superintendent
>
> _____
> Principal "

Also on November 18 Barrett prepared and issued a memorandum as follows:

> "TO: W. Mark Horvath, Bus. Adm.
> Gerry Moorcraft, Bd. Secty.
> FROM: Edward A. Barrett, Supt.
> TOPIC: Letter to All Staff Members
> DATE: November 18, 1976
>
> The principals have been directed to give the teachers the following letter. If, in my absence, in the early afternoon Mr. Cassetta, Mr. Dawes and/or Mr. Yousoff (sic) contact me regarding this matter, please inform them of this letter, vertatim, on my behalf.
>
> [The Memorandum TO ALL TEACHERS OF SCHOOL followed.]
>
> The above note to all teachers was hand-delivered personally by each school principal."

14. After receiving word of Superintendent Barrett's directive, each principal that morning telephoned the Association building representative in his respective school to inform him of the directive. During the afternoon of November 18, each principal prepared and duplicated the message described in Finding No. 13 which had been dictated to them and delivered it to all teachers each could contact. [10/] During distribution of the Superintendent's memorandum in Milford Brook School, Principal Carmen Daccurso sought to hand a copy to Reid who declined to accept it but indicated that he was aware of its contents. (Tr. 99; 101-102).

10/ In one school, Lafayette Mills, the message set forth in Finding No. 13 was preced-
(cont'd. page 8).

15. In the morning of November 18, Reid started receiving telephone messages from Association senior building representatives that principals and administrators were directing the Nov. 19 letter not be sent home, that they could possibly be charged with insubordination if they disobeyed the directive. One such message to Reid came from Clark Mills School building representative Frank DeSanto. Principal Robert F. Castellano had informed DeSanto by telephone that he had been directed to direct him not to give the Nov. 19 letter out. DeSanto replied he had been advised that it was perfectly legal to do so and said he was confused by this. DeSanto asked Castellano what he thought the disparity between what he had learned and what he was then being informed meant. Castellano told DeSanto that it could represent insubrodination had he gone ahead and given it out. DeSanto informed Reid of this conversation. 11/

16. Reid responded to these messages by reiterating to several teachers the position of the Association's representative council when it adopted the decision to send the Nov. 19 letter home that the Board can probably hold teachers who distribute the letter insubordinate under their procedure, perhaps even fire them, but that, particularly in the absence of any reason being given, he could not change the council's position. Under those circumstances,it was up to the individual teacher to decide what to do. (Tr. 107). Reid also responded by leaving his own building, Milford Brook, during a preparation period in the late morning of November 18, to see Superintendent Barrett at his office in Clark Mills. In doing so, Reid failed to request permission on this occasion from Principal Daccurso to leave his building in accordance with the principal's requirement. (Tr. 181). However, Reid had a long standing arrangement of being able to leave his building during the school day during preparation period to use, with the Superintendent's approval, School District Xerox equipment in the administration office

10/ (cont'd. from page 7).
ed by the partial distribution by the building principal of a notice to teachers from "Office of the Principal" which read as follows: "It has come to my attention that a letter prepared by your Association has been drafted for distribution by you to the families of the children in your class. I have been directed by the Superintendent of Schools to inform you that all communiques must have his prior approval, or that of his office." Between noon and 1:00 p.m., upon a telephone call from Assistant Supt. Hagler, distribution ceased, the notice was retrieved and teachers were advised that the letter may go home with the children (Tr. 311-312). Shortly after 1:00 p.m. the memorandum directing the Nov. 19 letter not to be distributed was issued and distributed.

11/ While Reid testified DeSanto and other building representatives told him that his principal told him he "could" or "could possibly" lost his job if he sent the letter out, particularly in view of the failure of the Association to call DeSanto to testify, I credit Castellano's version of the actual conversation and not Reid's hearsay report of DeSanto's and other unnamed representatives of DeSanto's versions. This is not to dispute that Reid may have received from DeSanto and others an exaggerated account of the principal's directive.

at Clark Mill's School to duplicate Association material at Association expense (Tr. 104; 118). In Barrett's absence outside the District, Reid informed his secretary that "his people were being intimidated in terms of sending this letter out" (Tr. 33) and that if the Superintendent had any reasons why the letter shouldn't go home, he, Reid, needed them in writing before the end of the day because the letter would be distributed that day as previously arranged. He stated that he would hold accountable Mr. Barrett or whoever else was responsible for stopping the letter. Upon leaving Barrett's office, Reid used an Administration Xerox machine under the arrangement whereby the Association pays for duplicating its materials, and then, having recalled DeSanto's earlier message, proceeded towards the Clark Mill's principal's office with the intent of seeking clarification of DeSanto's report. On the way he passed DeSanto's open classroom, and instead of continuing to the principal's office, stopped to talk with him in the rear of the classroom [12/] while a reading group was in session. Castellano, standing in the doorway, saw Reid and DeSanto talking. When Reid saw Castellano he left DeSanto, came out into the hall and explained he was here to determine whether or not his building representatives were being intimidated. Castellano expressed concern about his interruption of the class. Reid repeated his explanation and Castellano repeated his expression of concern, whereupon Reid left the building. The normal practice for all visitors to a school in the District, including District personnel, is to sign in the office and receive permission before visiting a classroom. Reid had not sought such permission. Reid had apparently entered the Clark Mills School proper through an interior doorway connecting the School and District Administrative offices (Tr. 35). This entrance contains no notice of the directive that all visitors seek permission in the office before visiting the School. (Tr. 164). Castellano reported this incident to Barrett later in the day.

17. Superintendent Barrett, who returned to his School District office between 12:00 and 12:15 p.m. in the early afternoon of November 18 received the message from his secretary which Reid had left with her not more than an hour earlier (C.P. No. 9, p. 40). Barrett informed his secretary he would take care of it. At no time that day or thereafter did Barrett contact Reid to discuss Reid's request or information left with his secretary. Barrett testified that he did not contact Reid on November 18 because of the "time constraint" (Tr. 265). During the same period of time Barrett did contact at least three principals and spoke to others involving the Nov. 18 letter. See Finding No. 13. Barrett did issue the directive described in Finding No. 13.

12/ Reid testified he motioned for DeSanto to come out in the hall, but then clarified that he had spent 5 to 10 minutes in the classroom after DeSanto had motioned to him to enter.

18. By letter dated November 18, Reid, on Association letterhead signed by himself as President, brought to the Board's attention allegations of professional misconduct against a Mrs. Estelle Harris, a management level employee, made by the Association based upon many teacher complaints. The Association petitioned for the appointment of a committee composed of single Board, administrator and Association representatives, to conduct an impartial investigation and subsequently report its findings to the Board in closed session. The charges included failure to follow evaluation procedures, levying wholesale, unjustified charges of unprofessional conduct against the entire teaching staff of one building, damaging a teacher's case for renewal by a substantial alteration of her professional opinion, exhibiting hostility and threatening a subordinate's job security without justification, and advising teaching staff members that political considerations take precedence in her educational decision making.

19. On November 19, a second memorandum from Barrett relating to the Association's attempt to deliver to parents through students the Nov. 19 letter was hand-delivered to teaching staff by principals. Barrett noted that the Nov. 19 letter had gone home through some teachers via children, and continued "I can only view the actions of those teachers as insubordinate and I am pursuing it in that perspective." He then noted "...that some of you have been again urged to distribute the letter today. Please stop to think! I do not want the children of this District used as messengers in a labor relations dispute and I will not permit them to be so used. There are many ways to distribute a message, including the mails, but not through our children. That's the principle of this, not the letter and its contents. If the message of the letter does not get out in time, there is redress (including financial) through the courts and arbitration. But, this should not be through the inappropriate use of our children."

20. Approximately a third of the Nov. 19 letters were sent home via the students but the remaining two thirds were not, either on November 18 or 19. Barrett subsequently received 10 to 15 telephone calls from parents concerning the Nov. 19 letter. The record contains no evidence of their contents.

21. On November 22, hearing was held before the arbitrator on the submission of the grievance claiming compensation for Reid and seven other teachers for denial of preparation periods during the April parent-teacher conference week. Only Reid testified or appeared of the eight grievants. Reid, as President, as well as an NJEA representative and two other Association officers and a teacher appeared for the Association. According to the arbitrator, Reid lacked information as to the claims of the other seven grievants. Reid claimed three lost preparation periods for each of the eight grievants on Monday, Tuesday and Wednesday afternoons of the week of April 5,

by reason of being pre-occupied with conferences with parents. The arbitrator found Reid had failed to establish that he was deprived of the preparation period as alleged, having failed to overcome the Board's contention that he is free to schedule the conferences with the available school time as well as the accountable after-hour time commensurate with the March 27 arbitration award (see Finding No. 7, supra). In the absence of Reid's conference schedule, which was not produced, Reid's claims, as well as the seven other, failed for lack of proof. In the award, dated December 30, the arbitrator ruled that the April 5 conference week schedule did not violate the contract.

22. By letters dated November 22, signed by Reid on Association letterhead, Reid addressed the Association membership and Superintendent Barrett, respectively. They are reproduced in full as Appendices "B" and "C" to this Report. Copies of both letters were distributed to the Association's membership on November 22. Barrett received only the letter addressed to him (Appendix "C").

23. By letter dated November 23, Board President Engel informed Reid that the Board had determined the procedures Reid had outlined regarding the allegations against Mrs. Harris were not in accordance with New Jersey Statutes Title 18A and the Association should comply therewith in filing such a complaint.

24. By letter dated November 23, Michael D. Schottland, attorney for the Association, wrote Barrett with reference to the Association's efforts to distribute the Nov. 19 letter. He referred to one principal's suggestion that Reid obtain the Superintendent's approval prior to distribution. He noted that the Association was not aware of any published policy by the Board which pertained to the matter and suggested the exploration of the establishment of a mutually agreeable policy with regard to distribution of educational material and leaflets by teaching staff personnel and Association representatives. By letter reply dated December 7, Barrett reiterated his view that he did not wish to have the children of the District used in a labor dispute and added that he did not consider the letter to be educational material. Barrett concluded that as he saw the matter solely as a function of his responsibilities as Superintendent of schools, he saw no need to further pursue it (with Mr. Schottland). Later, during the taking of his deposition, on May 24, 1977, Barrett testified that he directed the Nov. 19 letter not be distributed to students because first, it did not serve the interests of the students nor of the community, such as a charitable interest, etc. Second, it smacked of labor relations and the children should not be used as a vehicle to carry it home, and, third, it contained some distortions, if not outright inaccuracies. Finally, Barrett was also confused by the 19th date on the letter, although it was distributed on the 18th.

25. In a letter dated December 14, addressed to Reid as Association President, Board President Engel answered a December 9 letter from Reid. In it, after responding to Reid's complaints regarding delay in processing grievances, he concluded, inter alia, "Finally, please do not talk to me about attitudes of the Board, for I can only reflect on the attitudes you and some of your members express when handling administrative and board topics."

26. On December 16, the Association served on Board Secretary Moorcroft by certified mail a copy of a charge and on December 17 the Association filed the charge [13/] under the Act against the Board alleging unilateral imposition by Board adoption of a policy at a meeting on November 18, of a significant change in staff obligations. The change alleged was a decrease in release time from instructional duties in order to permit afternoon and evening conferences with parents during two conference weeks per year, from 400 minutes per week to 300. The Association claimed a refusal to negotiate terms of, and impact of, this alteration, and alleged violations of 34:13A-5.4(a)(1) and (5). [14/] As remedy the Association sought an order directing negotiations and an award of compensation for extra work done in the interim.

27. The Association claimed (Tr. 277) but failed to offer any evidence to establish that on the evening of December 16, the Board met and voted to certify the charges against Reid to the Commissioner.

28. On December 21, Board Secretary Moorcroft served upon Reid a Statement of Charges preferred against him by the Board under the Tenure Law for determination by the Commissioner. Because of the Board's failure to provide Reid an opportunity to answer the charges under the Tenure Law as described at page 2, supra, the Commissioner refused to entertain them, but rather than dismiss he provided the Board the opportunity to amend. By affidavit sworn to February 11, 1977, Barrett reiterated the earlier charges. The affidavit was served upon Reid on February 14, 1977. By letter dated March 17, 1977, Board attorney Dawes provided Reid's attorney, Schottland, with a specification of the charges.

29. By letter dated April 21, 1977, Commission Director Unfair Practice Proceedings Kurtzman, pursuant to Commission Rule 19:24-2.3 (N.J.A.C. 19:14-23) refused to issue complaint and deferred further processing of the charge filed December 17 by the Association, described in Finding No. 26, to the parties' contractual grievance/binding

13/ Another charge, not relevant, Docket No. CO-77-169 was also filed by the Association against the Board on the same date.

14/ This subsection prohibits, inter alia, an employer refusal to negotiate in good faith with the majority representative of its employees in an appropriate unit concerning terms and conditions of employment.

arbitration procedures, without prejudice to any party. He stated he found such action appropriate upon receipt of letters from the Respondent confirming a willingness to waive any contractual time limits on the filing and processing of grievances to arbitration with respect to the allegations of the instant charge and, stating, in response to the Charging Party's contrary claim, that "the subject matter of the charges in the instant cases is clearly within the four corners of the collective bargaining agreement between the parties."

30. By letter dated May 6 Reid, by attorney Schottland, advised the Board that "under the circumstances, [Reid] chooses not to file a written statement with the Board at this time." Schottland suggested that in view of the proceeding, sub judice, and the pendency of the U.S. District Court law suit against the Board, Barrett, and all of its members with the exception of one, the Board defer taking any action to certify charges to the Commissioner.

31. By resolution adopted by the Board on May 23, 1977, served upon Reid and filed by letter dated May 24, 1977 with the Commissioner, the Board certified the identical set of charges initially brought by the Board, with one exception. 15/

The pending charges against Reid, certified to the Commissioner, which the Board determined, if true, warrant dismissal or a reduction in salary, allege the following conduct:

1. Reid directed the distribution of the Nov. 19 letter in violation of a direct order of the Superintendent contained in a Nov. 18 memorandum.

2. On Nov. 18, Reid attempted to circulate the Nov. 19 letter, and to persuade members of the Association to distribute it to their classrooms through intimidation of said employees.

3. On Nov. 22, Reid sent a letter to Barrett which was circulated to all members of the Association.

4. On Nov. 22, Reid prepared and signed a letter and distributed it to the Association membership.

5. Reid left post of duty without permission, to engage in personal and/or Association activities.

6. Reid coerced and counseled other members of the Association to disobey the lawful directions and orders of their supervisors.

Each of the charges specified that Reid's conduct violated N.J.S.A. 18A:28-5. 16/ With

15/ Original charge No. 5 as well as Barrett's February 11, 1977 affidavit contained the added phrase that Reid left his post of duty "on numerous occasions."

16/ N.J.S.A. 18 A:28-5 entitled "Tenure of Teaching staff members" provides, inter alia, (cont'd. page 14)

respect to Charge No. 1, in his March 17, 1977 letter to Schottland, Board attorney Dawes specified that Barrett's Nov. 18 and 19 memos (Findings Nos. 13 and 19) comprise the Superintendent's instructions to staff. With respect to Charge No. 5, Dawes specified that a memo dated November 19 from Castellano to Barrett documents Reid's 'unpermissioned' entrance into a classroom of another teacher and, further, that a memo dated December 14 from Daccurso to Barrett also relates to another instance when Reid left his classroom. Neither memorandum was offered or received in evidence in the instant proceeding. With respect to Charge No. 6, Dawes referred to Reid's November 22 letter to the Association membership, in which he "chides his colleagues for not sending a certain letter home and in which he accepts full responsibility for directing the distribution of the letter in question." (Commission Ex. No. 3, Appendix C attached). With respect to Charges No. 2 and 6, Superintendent Barrett testified under cross-examination that he initially made the "assumption" that Reid had persuaded members of the Association to circulate the Nov. 19 letter through intimidation because of the fact that a substantial number - 10 to 15 - went home from Reid's school building. Barrett further testified that he concluded that Reid had used intimidation and coercion and included those charges in his affidavit in sole reliance upon the language contained in Reid's Nov. 22 letters to himself and the Association membership. (Tr. 254-55). At his deposition two weeks earlier, Barrett had also relied, at least in part, upon reports from two principals that Reid or Association Vice President Murphy had "urged" members at meetings in their schools to distribute the Nov. 19 letter. (C.P. No. 9, pp.51-52).

32. Also by letter dated May 25, 1977, Board member and negotiations chairperson Marge Rucker addressed the District's instructional staff members with respect to negotiations then underway for a successor to the 1975-77 agreement. She noted that the Board had received many letters from individual teachers expressing dismay over what had been reported to them as a salary proposal from the Board. She next noted the Board Team's concern about the figures and then informed the staff of the parties' negotiating positions. She expressed surprise as to why the staff and others had been misled and given figures below those offered at the bargaining table, particularly since both negotiating teams agreed to keep all negotiation matters confidential until

16/ (cont'd. from page 13)
that the services of all teaching staff members shall be under tenure during good behavior and efficiency and they shall not be dismissed or reduced in compensation except for inefficiency, incapacity, or conduct unbecoming such a teaching staff member or other just cause and then only in a manner prescribed by subarticle B of Article 2 of Chapter 6 of this title [Section 18A:6-9 et seq.]. Reid was a tenured teacher, having been employed by the District for seven consecutive years at the time of hearing.

a settlement was achieved, and concluded by hoping such inflamatory practices be discontinued.

33. During the hearing, for the first time on the record (other than reference made generally by one principal (see F.N. 9, supra and in Respondents' affirmative defense contained in answer sworn March 18, 1977) Respondent, by Superintendent Barrett cited two Board policies as providing grounds for the order to staff not to distribute the Nov. 19 letter to parents and guardians of school children. The first, adopted or readopted by the Board in 1969, and retained by the Board Secretary in a Board policy book, an official file, with copies retained by the Superintendent and each principal and school library, reads as follows:

> "PERSONNEL
> SOLICITING AND SELLING
>
> Solitations, Sale of Articles, Tickets, etc.
>
> A. No pupil, teacher, or other school employee may be solicited by agents or representatives of business, commercial or financial institutions while on school premises, except as such business relates to the school program and then only by authorization of the Superintendent.
>
> B. No article may be sold by or to pupils under direction of the school except those approved by the Superintendent and offered for sale in connection with the instructional program.
>
> C. No tickets shall be sold through the school staff or students for events other than those sponsored by the school or school connected groups.
>
> D. Material originating outside the school system - such as circulars, handbills, posters, cards, booklets, or other types of advertising are not sent into homes by the school unless approved in advance by the Superintendent.
>
> E. Lists of pupils names and addresses shall not be released to an agency which is not school connected.
>
> F. All charitable collections which are asked to be done by pupils will de denied unless they are of educational benefit and all collections are to be approved by the Board before being allowed.
>
> Board of Education
> Manalapan-Englishtown Regional Schools
> Englishtown, N. J."

A second Board policy, - described by Barrett at his deposition as a revision of the 1969 policy (C.P. No. 9, p. 39) and at the hearing as a second material policy (Tr. 218) - is embodied in a resolution adopted by the Board on May 20, providing as follows:

"SPECIAL INTERESTS

It is the policy of the Board of Education that neither pupils, staff members nor the school facilities may be used in any manner for advertising or promoting the interests of any non-school agency or private organization without the approval of the Board of Education.

School pupils on, in, or about the premises of the Board of Education may not be requested to participate in any organized campaign to raise funds for any purpose, nor may teachers permit such drives within the classroom unless officially approved by the Board of Education.

Motion made by Kathleen Stockel, seconded by Margaret Rucker, and adopted May 20, 1976."

Superintendent Barrett testified that he had been provided authority orally by the Board to act for it in determining approval under the first paragraph of the 1976 policy. (Tr. 218; 269-70). At the hearing Barrett claimed that paragraph D. of the 1969 policy and the first paragraph of the 1976 policy apply equally to the Nov. 19 letter. (Tr. 218; 262). The record contains no evidence that the teaching staff, including Reid, were ever provided actual notice of the Board policies. Barrett also claimed that the Association was not within the "school system" and was under a "non-school agency", thus requiring his advance approval before material could be distributed home. During the taking of his deposition on May 24, 1977 Barrett considered the Parent Teachers Association ("P.T.A.") a school agency (C.P. No. 9,p. 58), yet, during the hearing on June 6, 1977, Barrett declared the P.T.A. to be a non-school agency. (Tr. 267). Material related to the P.T.A. Talent Show was admittedly sent home through principals without initial clearance by the Superintendent (C.P. No. 9, p. 58). In terms of a past practice, during the 1975-76 school year, Barrett approved 20 to 30 requests by organizations outside the school system to have material sent home via school children. (Tr. 291). During the same period of time, Barrett recalled disapproving only one request made at the end of the school year, date not specified, by a charitable organization that desired to get children, not their parents or guardians, involved in a bazzar. (Tr. 290-91). Barrett testified he had disapproved other requests in the past on more than one occasion but failed to specify any, other than the one to which he testified, no files having been maintained on refused requests. Reid's uncontroverted testimony established that quite a bit of material is routed home to parents through students, particularly in the fall and spring, including material from outside the school system such as literature from the Junior Chamber of Commerce ("JCs") and the Board of Recreation Commissioners ("recreation committee"), etc. (Tr. 29-30).

34. The 1975-77 collective agreement provides in Article V, paragraph 5.4 that "The Association shall have the privilege of reasonable use of inter-school mail and school mail boxes, providing that open materials, except meeting announcements shall receive prior approval of the Superintendent." The practice between the parties under this provision has been that Association materials which are open are not generally distributed through the inter-office mail from one building to another without such prior approval. Materials which are closed are so distributed without such approval. Open Association material, not distributed through inter-office mail but rather hand-delivered to each building, are frequently distributed in particular buildings in teacher mail boxes without prior approval under a District-wide practice applicable at the building level (Tr. 114). The Nov. 19 and November 22 letters were open material, placed in unsealed envelopes. They were not distributed through inter-office mail from one building to another, but were distributed through building representatives who placed them in teacher mail boxes (Tr. 69; 114).

THE ISSUES

1. Is the subject matter of the November 19th letter protected under the Act?

2. Did the Association members, Reid included, engage in the exercise of rights protected by the Act when they sought to distribute to parents and guardians through school children the November 19th letter?

3. Did Respondents Board and Barrett engage in a course of intimidation and coercion of the Association's membership designed to bar distribution of the November 19th letter in violation of the Act?

4. Even if they did not, nonetheless, did Respondents' interdiction of the distribution of the Nov. 19 letter by means of school children constitute interference with the exercise of rights protected by the Act?

5. Were Reid's November 22 letters to the Association's membership and Respondent Barrett's conduct protected by the Act?

6. Does the Respondent's invocation of the Tenure Law to discipline Reid constitute interference with Reid's rights protected by the Act with respect to each of the charges contained in the Respondent Board's certification to the Commissioner of Education?

DISCUSSION AND ANALYSIS

During the hearing, Respondents' representative stated on the record that he did not contend that the contents of the Nov. 19 letter were unprotected by the Act (Tr.78).

Yet, Respondents in their answer raise two affirmative defenses, claiming the contents are intentionally false and misleading and violate certain binding arbitration awards issued under the parties' current agreement. At the hearing and in their brief, Respondents amplify and press these defenses. Thus, a threshold issue is presented as to whether the Nov. 19 letter itself, apart from its manner of intended distribution,enjoys the Act's protection. If it does not, whether or not the manner of distribution is protected under the Act, surely the Respondents would be fully warranted in seeking to stop its distribution, even to the extend of warning employees so engaged of adverse personnel actions if the distribution continued. Nothing in 34:13A-5.4 protects employees from the consequences of engaging in conduct not protected as a "right" under the Act, See In re Board of Education, Borough of Haddonfield, P.E.R.C. No. 77-36, 3 NJPER 71 (1977).

With respect to the Nov. 19th letter's false and misleading nature, Respondents note first that Reid's reference in the first paragraph to reduction in time for conferencing parents "over the past two years" is contrary to the facts which even Reid admitted, that time available for conferencing was the same in 1976 as in 1975. Respondents are reading too much into the phrase. Although phrased artlessly, Reid appears to have intended only to refer to reduction in available time commencing two years ago, when the Association filed its initial grievance in April, 1975 claiming unilateral increase in instructional hours. (See Tr. 110).

Next, Respondents claim the second sentence is untrue. Reid here states that teachers have attempted to make the best of the situation. The implication which Respondents read into this sentence, that because teachers had adequate time as confirmed by two arbitrators the letter misstates the facts,is not a fair one and surely does not misstate "facts."

Respondents next claim the letter's comment in the second paragraph that the arbitration action proved "inconclusive" is a serious distortion of fact, the statement in the third paragraph that teacher flexibility in scheduling conferences has been reduced is untrue, the statements in the fourth paragraph that parents may have found growing inconvenience in conferencing distorts the facts, and the statement in the last paragraph reporting the Association's intention to resolve the situation to the advantage of all members of the educational community is true only if limited to teachers.[17/] Certainly from the Association's view, the arbitration awards did not put to rest an on-going dispute, evidenced both by the Nov. 19th letter itself and the later filed unfair practice charge of December 17. Respondents' argument here thus overlaps their claim that the letter raises a subject with the public which had been put to rest by

17/ Respondents' brief reference to the nature of parent complaints is dehors the record.

virtue of two binding arbitration awards issued under the existing contract. While it is true that both awards dealt with the same subject matter dealt with in the letter, only the first interpreted the contract provision requiring up to four evenings assignments (Article VII (J)) as authorizing the Board's unilateral change in conference week schedule. The second award found insufficient evidence to sustain a claim of reduction in preparation periods during a succeeding conference week and relied on the result reached in the first award. The first award thus established the breadth and meaning of contract language relating to parent-teacher conferencing and was binding on the parties during the term of the agreement. See In the Matter of Hudson County Board of Chosen Freeholders, P.E.R.C. No. 78-48 (1978). The award, however, did not foreclose the Association from seeking to inform parents, guardians and voters in the School District of the continuing nature of a controversey involving the scheduling of conferences with their child's or ward's teachers. As stated by the Commission in The Matter of Laurel Springs Board of Education, P.E.R.C. No. 78-4 at pages 5-6 of its Decision:

> "As discussed by the Hearing Examiner, it is the intent of the Act to protect public employees in their proper activities in support of their majority representatives. This includes activities designed to inform the public of their view of a particular dispute or issue as well as their activities at the negotiating table. Similarly, a public employer is not prohibited from proper activities designed to inform the public of its reasons for a particular position taken..."

It is clear that the subject matter about which the Association continued to raise serious question was the impact of the Board's unilateral change in the conference week schedule upon its members' workload, without doubt a term or condition of their employment, In re Byram Township Board of Education, P.E.R.C. No. 76-27, 2 NJPER 143 (1976), aff'd and modified, 15 N.J. Super. 12, 26 (App. Div. 1977). In this context the language used in the Nov. 19th letter did not mistate the matter. The items, which from Respondents' position appear to conflict with the first award, are really items which manifest the continuing nature of the dispute from the Association's vantage point. The Respondent has at least recognized the continuing viability of the dispute under the agreement by taking the position before the Commission on the unfair practice charge which deals directly with the Board's conduct in adopting a revised conference week schedule - that the underlying dispute is still cognizable under the grievance - arbitration clause after two arbitration awards. 18/

18/ The Respondents could have conceivably claimed either that the Commission should defer to an outstanding arbitration award on the same dispute under the Spielberg doctrine, Spielberg Manufacturing Co., 112 NLRB No. 1080 and thus dismiss the charge, or that the award is binding on the parties and constitutes a form of res judicata. It did neither.

Even if one or more of the phrases constitutes a mistatement of fact the Association has a fairly wide latitude in expressing its view point under the First and Fourteenth Amendments to the Constitution of the United States and Article I, paragraph 6 of the Constitution of New Jersey.

Particularly in the absence of any intentionally or wilfully false statement in the letter as urged by Respondent, I conclude that the contents of the Nov. 19 letter are protected by the language of the Act which provides that public employees "shall have, and shall be protected in the exercise of, the right, freely and without fear of penalty or reprisal, to...assist any employee organization...", N.J.S.A. 34:13A-5.3.

The next question is whether the Association's attempts to distribute the letter via school children is likewise protected. Respondents' raise a number of defenses seeking to show that the Association's conduct in this regard was not protected. In their answer and brief Respondents rely on the adoption of the two policies proscribing the distribution of certain materials in the classrooms without the approval of the Superintendent (Finding No. 33). As the Board has broad statutory authority to make rules governing the day to day operations of the school District, N.J.S.A. 18A:11-1, these reasonable Rules, adopted pursuant thereto, are binding on the Association members. Accordingly, Respondents conclude the Association's attempts to distribute the material without prior approval cannot be protected by the Act and the Board and Superintendent may take every reasonable means to forestall its distribution, including the direction to cease such distribution.

Whether or not the statements of policy cover, or were intended to cover, employee organization distribution of leaflets, letters or the like, is open to serious doubt. The Nov. 19 letter was prepared by teachers employed within the school system. The Association, the employee organization with which the teachers are affiliated, is a membership organization of employees within the school system and has an on-going negotiating relationship with the Board concerning the terms and conditions of their employment within the school system. Even the Superintendent was unable to finally determine whether the P.T.A. was a school agency for purposes of administering the second policy concerning Special Interests, finding it was on one occasion and concluding otherwise two weeks later during the hearing. Surely the Association, whose members are all employed by the Board, should have at least the same standing under the policies as an organization such as the P.T.A. which includes persons - parents and guardians - not so employed. Finally, nothing on the face of either policy statement establishes that they were intended to reach the employee organization's distribution of materials concerning a labor relations matter. 19/

19/ While the Respondents suggest that the Association's distribution of the Nov. 19 (cont'd. page 21)

Apart from the foregoing, there is no evidence in the record to show that the Association and its membership were made aware of either of the policies as they are claimed to affect Association distribution of literature, and, clearly, Respondents' belated attempts to the contrary notwithstanding, there is no evidence that the Respondent Board had a rule in effect prohibiting distribution of literature on school premises before the end of the school day. [20] While an employer in the private sector can lawfully forbid distribution of literature on his premises during work hours, in each case the employer had a valid no-solicitation or no-distribution rule which placed employees on notice and which, if violated, could result in disciplinary action. See E.D.S. Service Corp., 187 NLRB 698, 76 LRRM 1491 (1970); Ferenbach Inc., 213 NLRB, No. 63, 87 LRRM 1381 (1974). See also, e.g. NLRB v. Steelworkers, 357 U.S. 357 (1958); Essex International, Inc., 211 NLRB No. 112, 86 LRRM 1411 (1974).

Accordingly, I conclude that the two Board policies did not apply to the Association or, were ambiguous, at best, and, in any event, the Association membership had no knowledge of these policies or of any others restricting their distributions of literature to students on school premises. Thus, whether, in fact, the employees had any other reasonable means of communication with parents and guardians is immaterial. [21] And, in any event, the cases draw a distinction between rights of non-employees and those of employees with respect to availability of other means of distribution, viewing such alternate means as a significant factor only in cases involving attempted distribution by non-employee union organizers. See Babcock v. Wilcox, 351 U.S. 105, 38 LRRM 2001 (1956).

Assuming, arguendo, that either or both of the Board policies could be found to be applicable here, [22] I conclude that the Respondents engaged in disparate treat-

19/ (cont'd. from page 20)
letter violates Article V, paragraph 5.4 of the agreement, the uncontroverted testimony regarding the Association's practices in the District under that provision appears to lead to the opposite conclusion. In any event, neither the Board nor the Superintendent sought to rely upon a breach of the agreement as a ground for ordering a cessation of distribution of the letter and the provision was only brought into the proceeding by their representative, belatedly, at the hearing, after the filing of an answer containing affirmative defenses which did not assert breach of contract.

20/ Respondents during the hearing claimed that the Nov. 19 letter had to be given to students before the end of the teachers' work day. Yet the record contains no evidence as to when any distribution by teachers to students was made.

21/ The Association had access to two local newspapers to inform parents and voters of the problem and their position.

22/ The only N.J. statutory reference to distribution of material to school children is inapposite. See N.J.S.A. 18A:42-4.

ment with respect to application of the rule in such a way as to restrict distribution through school children where labor relations matters were involved and not otherwise, and, furthermore, discriminatorily applied the rules. See Montgomery Ward & Co., Inc., 224 NLRB No. 12, 92 LRRM 1346 (1976); Frederickson Motor Express Corp., 199 NLRB 557, 82 LRRM 1091 (1972); Textron Inc., 199 NLRB 131, 81 LRRM 1645 (1972). As to disparate treatment, there is no doubt that the Superintendent permitted extensive solicitation through children for social and charitable purposes. Yet when the Association sought to acquaint parents and guardians with the nature of a continuing labor relations dispute affecting them the Superintendent determined that because the matter involved labor relations he would not permit the children to be so "used". The Superintendent's real concern was not the failure to provide advance notice as required by either policy, but the fact that the material involved related to a continuing conflict with the Superintendent and Board over the scheduling of parent-teacher conference week in spite of two binding arbitrations relating to the same underlying matter. In any event, the Superintendent had actual notice of the Association's letter before the distribution commenced and did not raise the failure to request permission at the time.

With respect to discriminatory application, the Superintendent knew Reid was trying to reach him, but failed and refused to respond, citing time factors which did not otherwise constrain him from consulting and instructing extensively by telephone. Barrett made a quick initial decision while under considerable pressure from his administrative colleagues. Barrett also immediately sought legal and labor relations advise with respect to his response, before distributing his order. Thus, his direction to teachers was a calculated labor relations strategy itself and was buttressed the following day by his reference to the use of children "...as messengers in a labor relations dispute." The application of the statements of Board policy, publicly acknowledged by the Superintendent and Board later as an affirmative defense in the answer to Complaint, was not a ground to prohibit distribution on which the Superintendent early relied. Finally, the Respondents do not claim and did not introduce any evidence to support a claim, that the Nov. 19 letter's manner of distribution interfered with the Board's exercise of its authority to properly administer the District or "...materially and substantially interfere[d] with the requirements of appropriate discipline in the operations of the school[s]", Tinker v. Des Moines Independent Community School District et al; 393 U.S. 503, 507 (1969).

With respect to the third issue, I conclude that the Respondents did not engage in intimidation or coercion of the Association's membership in an effort to bar the Nov. 19 letter. The only evidence which approaches coercion involves a principal

informing a senior building representative that his conduct in continuing to distribute the letter in violation of the Superintendent's order could represent insubordination. In the context of the Superintendent's edict, the principal's statement can be reasonably interpreted as a prediction of possible future action rather than a threat or warning of immediate adverse consequences. My conclusion in this regard does not relieve the Board from its responsibility for Superintendent's conduct in having interfered with, restrained or coerced employees under N.J.S.A. 34:13A-5.4(a)(1) by ordering the Association membership to cease distribution of the Nov. 19 letter protected by the Act. See In the Matter of International Association of Firefighters Local 2081, AFL-CIO and the City of Hackensack, P.E.R.C. No. 78-30 (1977). The Respondent's obligation is based upon the foregoing analysis and discussion and constitutes my disposition of the fourth issue.

Turning now to the fifth issue, there is a serious question whether statements contained in the two November 22 letters may receive the protections of the Act. In Pietrunti v. Board of Education of Brick Township, 128 N.J. Super 149 (App. Div.),cert. den. 65 N.J. 573, cert. den. 419 U.S. 1057 (1974), the Court upheld a determination of the Commissioner of Education that a speech delivered by a tenured teacher, President of the teachers' negotiating agency, which attacked the school administration and school superintendent,warranted her dismissal as a teacher under the Tenure Law. While other conduct by the teacher in question had been made part of the record by the Commissioner, the Court concluded that the speech alone, considering its content, was sufficient in itself to warrant the dismissal. The Court viewed the speech as containing abusive rhetoric, of a reckless and intemperate nature. The Court concluded that the teacher's position as head of the negotiating organization and the fact that the speech dealt with employee organization concerns did not relieve her of the duty of conducting herself in a professional manner. In so doing the Court distinguished Pickering v. Board of Education, 391 U.S. 563, 885 S. Ct. 1731, 20 L. Ed. 2d 811 (1968) where the Supreme Court held that a letter to the editor of a local newspaper critizing the manner in which his board of education and superintendent of schools had handled past proposals to raise new revenue for the public for the defendant school system did not justify the teacher's dismissal and that its contents and publication were protected by the First Amendment to the U.S. Constitution. The Court in Pietrunti found that the teacher's letter in Pickering did not contain insulting language or an attack on superiors and that while the teacher Pietrunti had the right to speak out publicly on matters of teacher relations with the Board and Superintendent she had ignored those issues and had distorted them into a vehicle to place scorn and abuse on the school administration in general and the superintendent of schools in particular, citing Duke v.

North Texas State University, 469 F.2d 829 (5 Cir. 1972), cert. den. 412 U.S. 932, 93 S. Ct. 2760,37 L.Ed.2d 160 (1973), where the Court had sustained a dismissal of a teacher who had made speeches using profane language and criticizing university administration and policies. The Court in Pietrunti applied the Pickering test striking a balance "between the interests of the teacher as criticizer, commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering, supra at 568.

While I am not entirely convinced by the Court's reasoning in Pietrunti that the balance there was properly struck, I am bound by the result achieved. It represents the view of the Courts of New Jersey on the limits of the protection accorded a speech by a teacher in a labor relations context. In particular, the Nov. 22 letter to the Superintendent circulated to the Association membership contains personal invective directed toward Barrett's personal motive and behavior. Likewise, the November 22nd letter to the membership manifests a personal gratuitous attack, beyond a presentation of the dispute and the problems posed by the Superintendent's refusal to allow distribution of the Nov. 19 letter in the manner adopted by the Association. By their contents, both letters distort the issues and convert them into a personal vendetta beyond the protection of the Act. In so concluding, I reject any contention that the timing and context of the November 22 letters should distinguish them from the Pietrunti speech. While Reid on November 22 had attended an arbitration hearing on the second grievance relating to parent-teaching conferencing, the fact that the dispute was then active and alive did not relieve him from the duty of conducting himself in a professional manner. Neither should the fact that the November 22 letters are a response to the unfair practice committed by the Board and its Superintendent in acting to stop distribution home of the Nov. 19 protected letter provide Reid or the Charging Party any basis of validity for his conduct under the Act. I conclude that, on balance, the Superintendent's and principals' conduct were not sufficient provocation for Reid's November 22 letters so as to provide them protection as impulsive behavior directly related to improper conduct by the other party. See Thor Power Tool Co., 351 F.2d 514, 68 LRRM 2239 (7th Cir. 1965).

However, the element of provocation, while insufficient in my judgment to warrant a finding that the wording of the November 22 letters are protected under the Act, should become a part of the record to be made on the Board's tenure charges before the Commissioner and may serve to mitigate whatever penalty may be invoked by the Commissioner. As well, the timing of Reid's letters and the audience to which they were directed, while not sufficient to warrant distinguishing the facts herein

from those in Pietrunti, [23] may serve also as mitigating circumstances under the Tenure Law.

As to the sixth issue dealing with the Tenure Law charges, as I find the Association's Nov. 19 letter and its intended distribution protected under the Act, the 1st charge relating to Reid's distribution is improper and may not be referred to the Commissioner for ultimate determination. I also find that Reid did not engage in intimidation to persuade members to distribute the letter and conclude the Board's pressing of this matter in the 2nd charge is also improper and a violation of the Act. With respect to Charges Nos. 3 and 4, as I have concluded that Reid's conduct in sending the two November 22nd letters is not protected by the Act, the Board may properly pursue those charges under the Tenure Law. With respect to Charge No. 5, I also conclude that the Act does not provide protection for Reid's entry into, and interruption of, a 5th grade reading class, even though invited into the class by the teacher, and even though Reid probably received exaggerated accounts of principal prohibition of the Nov. 19 letter distribution which he felt compelled to verify. Nothing claimed by the Charging Party with respect to interference with distribution of the Nov. 19 letter justified the immediate interference with the conduct of a class in session, even a reading group in which teacher and student interaction may be minimal. Therefore, I find Reid's conduct in this regard, the only conduct specified by the Board's counsel as relating to the charge, [24] unprotected by the Act.

With respect to Charge No. 6, just as Respondents failed to present any probative evidence of Reid's alleged coercive conduct in counseling other members to disobey lawful directions in Charge No. 2, and because the alleged coercion, even though claimed to appear in Reid's November 22 letter to the membership, relates to the Association's protected conduct in distributing the Nov. 19 letter, I also find Reid's conduct protected by the Act and the Board's processing of the charge before the Commissioner improper and violative of the Act because it interfers with Reid's protected rights thereunder.

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[23] In Pietrunti, the Court considered the setting and timing of the speech, that it occured at the beginning of a school year and not in the heat of a dispute and that Pietrunti was invited to speak by the administration, as well as the fact that it was addressed to new teachers unfamiliar with the school district and employee and employer organization concerns and relations with the administration, in reaching its result.

[24] Insofar as the charge may relate to Reid's leaving his school building during a preparation period and walking the corridors of Clark Mills School to see the principal, I find such conduct protected because of the practice, and circumstances, described in Finding No. 16.

I also conclude that the Charging Party has failed to prove its last amended allegation of the Complaint that the Association's pressing of its side of the conferencing dispute, in particular its filing of the charge on December 17, caused Respondent Board to institute charges under the Tenure Law. No proof was adduced as to the date of the Board's meeting to vote on certifying charges to the Commissioner. If the Association intended to allege a violation of N.J.S.A. 34:13A-5.4(a)(4) - insofar as relevant, discrimination because of signing or filing an affidavit, petition or complaint under the Act - it failed to do so, by failing to charge a violation of the cited subsection. Finally, I am not convinced that the charge of December 17 motivated the Board to press charges. The basis for that decision was the series of actions in which Reid had engaged some weeks prior thereto and they must stand or fall on their own merit as I have analyzed them.

It is accordingly finally concluded that the Board and Barrett have violated N.J.S.A. 34:13A-5.4(a)(1) by ordering the cessation of distribution home of the Nov. 19 Association letter signed by Reid addressed to parents or guardians; they have also violated N.J.S.A. 34:13A-5.4(a)(3) and (1) by instituting charges under the Tenure Law against Reid because of his failure and refusal to cease such distribution and by falsely alleging thereunder Reid's intimidation, and coercion and counseling of other teachers to distribute the letter and disregard the Superintendent's order.

The Respondents have not violated subsection (a)(2) by such conduct, nor have they otherwise engaged in coercive conduct intended to restrain the Association's distribution of the Nov. 19 letter, nor have they violated the Act by instituting tenure charges against Reid because he prepared, signed and distributed two letters dated November 22, one addressed to the Association's membership and the other addressed to Superintendent Barrett or entered another teacher's class and interfered with instructional duties, which allegation forms the basis for a charge citing Reid for leaving his post of duty without permission, to engage in personal and/or Association activities.

Reid remains employed without suspension by the Board pending determination of the charges. As to the Association's requested remedy that the Board be directed to circulate the Nov. 19 letter to parents and taxpayers at its expense, I do not find such a remedy warranted or necessary to dissipate the effects of Respondents' unfair practices. I will recommend the normal posting remedy as part of the affirmative relief required herein and I will provide, inter alia, that the Respondent Board cease and desist from restraining the Association membership from distributing to school children for their parents or guardians the November 19th letter.

Upon the basis of the foregoing findings of fact, analysis and discussion and the entire record in this case, I make the following recommended:

CONCLUSIONS OF LAW

1. By ordering the Association membership to cease their distribution through school children of the November 19 letter addressed to parent or guardian concerning the dispute between the Board and Association over an alleged unilateral change in scheduling parent-teacher conferences, the Respondents Edward A. Barrett, Superintendent of Schools, and Manalapan-Englishtown Regional Board of Education have engaged in and are engaging in unfair practices within the meaning of N.J.S.A. 34:13-5.4(a)(1).

2. By instituting charges against Association President Mel Reid under the New Jersey Employer's Hearing Act based upon Superintendent Barrett's affidavit, seeking to discipline Reid because he directed the distribution of and counseled Association members to distribute the November 19 letter as aforesaid in spite of the Superintendent's order and falsely alleging Reid intimidated and coerced Association members to disobey their supervisor's directions not to distribute the letter, the said Respondents have engaged in and are engaging in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(3) and (1).

3. The Respondents, by the conduct described in paragraphs 1 and 2, above, have not engaged in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(2).

4. The Respondents, by instituting and certifying charges under the said Tenure Act seeking to discipline Reid because he prepared, signed and distributed to the Association's membership the November 22nd letters addressed to the Association's membership and to Superintendent Barrett, and because he entered into another teacher's classroom and disrupted a class while in session did not thereby engage in unfair practices within the meaning of N.J.S.A. 34:13A-5.4(a)(1),(2) or (3).

RECOMMENDED ORDER

Upon the basis of the foregoing recommended Findings of Fact and Conclusions of Law, it is recommended that the Manalapan-Englishtown Regional Board of Education

1. Cease and desits from:

   (a) Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed them by the Act by seeking to restrain them from distributing to parents and voters in the School District via school children information concerning a labor relations dispute between the Board of Education and their employee organization.

   (b) Discriminating in regard to hire or tenure of employment to discourage its employees in the exercise of the rights guaranteed to them by the Act by bringing tenure charges before

the Commissioner of Education seeking to discipline employees because they have engaged in conduct protected by the Act.

2. Take the following affirmative action:

(a) Notify the Commissioner of Education that it has withdrawn Charges Nos. 1, 2 and 6 certified to the Commissioner of Education for determination under the New Jersey Tenure Employees' Hearing Act which charge employee Mel Reid with violation of N.J.S.A. 18A:28-5 because they have engaged in conduct protected by the Act.

(b) Post at School District Administration Offices located in Clark Mills School in a conspicuous place the copies of the attached notice marked as Appendix "D". Copies of such notice, on forms to be provided by the Commission, shall be posted by the Board immediately upon receipt thereof, after being duly signed by the Board's representative, and shall be maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by the Board to ensure that such notices are not altered, defaced or covered by any other material.

(c) Notify the Chairman of the Commission within twenty (20) days of receipt of this Order what steps the Board has taken to comply herewith.

IT IS FURTHER ORDERED that all other sections of the supplemented and amended Complaint which allege that the Manalapan-Englishtown Regional Board of Education engaged in other violations of sect. 5.4(a)(1) and (3) and violations of sect. 5.4(a)(2) be dismissed.

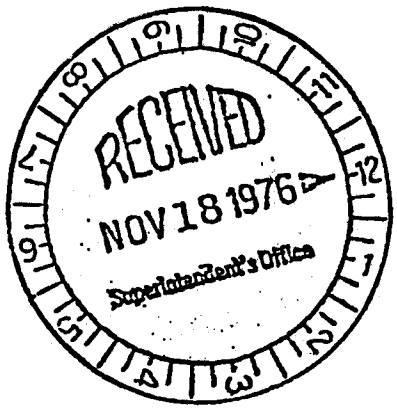
Robert T. Snyder
Hearing Examiner

DATED: Newark, New Jersey
February 28, 1978

APPENDIX "A"

Manalapan-Englishtown Education Association

Englishtown, New Jersey 07728



November 19, 1976

Dear Parent or Guardian:

Over the past two years the Board of Education has reduced the amount of time available to teachers for conferencing parents. Believing that parent-teacher conferences are a positive force in maintaining a productive educational atmosphere for the individual child, teachers have attempted to make the best of the situation.

At the same time, the Manalapan-Englishtown Education Association has sought arbitration action and negotiations to resolve the matter. Unfortunately, the arbitration action proved inconclusive and the Board of Education has refused to negotiate the matter. Further action before the Public Employees Relations Commission is being planned. But while hearings and attorneys' conferences come and go, the problem remains.

Consequently, teachers are finding it increasingly necessary to limit conferences and reduce the flexibility of conference scheduling. Such restriction of what was once an open channel of parent-teacher communication is regretable.

It is hoped that this letter will help to explain any growing inconvenience you find in conferencing with your child's teacher.

The Manalapan-Englishtown Education Association has been, is, and will be attempting to resolve the situation to the advantage of all members of the educational community.

Very truly yours,

Mel Reid
President, M.E.E.A.

APPENDIX "B"

MANALAPAN-ENGLISHTOWN EDUCATION ASSOCIATION
Englishtown, N.J.

November 22, 1976

MEEA Membership
Manalapan-Englishtown Regional Schools

Dear Colleagues:

I know that the recent wave of administrative interference in our Association has been unsettling. I am proud that so many of you have refused to submit to the administrative intimidation that Ed Barrett has been directing. Yet I also understand the doubt that led many of you to grudgingly submit to the threats.

Ed Barrett has gained nothing by his attempt to deny the Association its rights. One third of the district's classroom teachers have exercised those rights. And for each teacher who exercised those rights there was one teacher who came to the brink of doing so. The actions of the one third are a heartening display of teacher determination in the face of a thorough campaign to intimidate.

Unfortunately, it is not enough to believe in the professional and individual rights of the teacher. We must also practice our beliefs. Ben Franklin put it more strongly, but his words still have the ring of wisdom --

> They that give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.

Ed Barrett has chosen to make an issue of the letter. The letter itself is a small matter. But the Association's right to represent the teacher without management interference and to communicate with the community in the same fashion used by other organizations within the district are major issues of basic rights and freedoms.

Ed Barrett seems infected by his own propaganda. He seems to believe that he may exceed the legal authority of his office and still demand obedience. Obedience for the sake of obedience, that, my friend, is subservience.

Isn't his attitude more frightening than his threats? That the Superintendent of Schools views the sending home of a letter as a power struggle worthy of an all-out administrative effort in an incredibly sad realization.

Our anger must renew our courage but then we must let our anger subside. We will do what must be done to prevent Ed Barrett from repeating his recent excesses, but we must have sympathy too. All Ed has is his authority. He seems to have missed the founding precepts of this nation. The insecurity and frustrations of his existence must be great.

Know that our cause is just. Ours is the power of conviction and commitment to principle, and there is no economic or physical power that can match the power of personal conviction. Keep the faith.

Mel Reid

APPENDIX "C"

MANALAPAN-ENGLISHTOWN EDUCATION ASSOCIATION
Englishtown, N.J.

November 22, 1976

Mr. Edward Barrett, Superintendent
Manalapan-Englishtown Regional Schools
Clark Mills School

Dear Mr. Barrett:

Your interference in the Association is unprecedented. Last month, we met and spoke of a "new beginning". At that time I extended my hand to you in the interest of mutual respect and a renewed effort at professional accord in the district. You shock my hand and I believed our intents were compatible.

I indicated to your office on Thursday, Nov. 18, at approximately noon, that if you did not want the letters to go home through the schools, you would have to supply me with written reasons for my consideration. You chose to ignor this request and proceeded directly to coerce individual teachers to stop distribution of the letters. Every organization in the district can send home material to the parents through the schools, except the Manalapan-Englishtown Education Association!? If it weren't for your all-out effort to intimidate each and every teacher in the district with your threats, the whole issue would be laughable.

I obtained a copy of the memo you issued to some teachers on Friday, Nov. 19. Your drive to control others seems to have distorted your ability to separate educational matters from labor issues. Your use of the children to justify your position seems analogous to the use of God to justify the Spanish Inquisition, the use of states' rights to justify the maintenance of slavery and discrimination and the recent use of national security to justify the violation of the rights of individual citizens.

If you want to charge anybody with anything, charge me. If I could have stood in the doorway of each school building during dismissal on Thursday, Nov. 18, 4,500 letters would have gone home with the children. Each teacher and Association Representative was charged by my directive to distribute the letters. I am responsible for the letter and its distribution. Your intimidation procedures have now served their purposes, some teachers submitted, some teachers did not. Vindictive pursuit of teachers other than myself will yield nothing.

Since your goal is the weilding of enough power to limit the Association in the legitimate exercise of its rights, the matter can be resolved between you and me. If you charge me, make it stick, and lay on punitive action, you will create the illusion of your legal right to intimidate and you will destroy my effectiveness as a teacher advocate. But leave other teachers and other administrators out of this contest.

Yours truly,

Mel Reid

cc: MEEA Members
Building Principals

APPENDIX "D"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE SHALL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act by seeking to restrain them from distributing to parents and voters in the School District via school children information concerning a labor relations dispute between ourselves and their employee organization.

WE SHALL NOT discriminate in regard to hire or tenure of employment to discourage our employees in the exercise of the rights guaranteed to them by the Act by bringing tenure charges before the Commission of Education seeking to discipline employees because they have engaged in conduct protected by the Act.

WE SHALL notify the Commissioner of Education that we have withdrawn such charges.

(Public Employer)

MANALAPAN-ENGLISHTOWN REGIONAL BOARD OF EDUCATION

Dated _____ By _____
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with Jeffrey B. Tener, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780