P.E.R.C. No. 79-99

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SALEM COUNTY BOARD FOR
VOCATIONAL EDUCATION,

Respondent,

Docket No. CI-78-35-81

- and -

DANIEL McGONIGLE,

Charging Party.

ERRATA

The Commission's Decision in the above-entitled matter, dated May 22, 1979 and issued May 23, 1979, is hereby corrected as follows:

Page	Paragraph	Delete	Substitute
7	§B.1. of Order Line 3	"77-78 school year"	"78-79 school year"
"APPENDIX A"	Third paragraph Line 3	"77-78 school year"	"78-79 school year"

BY ORDER OF THE COMMISSION

By Jeffrey B. Tener
Jeffrey B. Tener
Chairman

DATED: June 5, 1979
Trenton, New Jersey

P.E.R.C. NO. 79-99

STATE OF NEW JERSEY
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-and- Docket No. CI-78-35-81

DANIEL McGONIGLE,

Charging Party.

SYNOPSIS

The Commission affirms a finding by its Hearing Examiner that the Board violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when it terminated Daniel McGonigle in the middle of the school year. The record supports his conclusion that McGonigle's engaging in protected activity was the catalyst for his dismissal which therefore was in violation of the statutes notwithstanding that there may have been deficiencies in his performance.

The Commission also adopted the Hearing Examiner's recommended remedy that McGonigle be reinstated with back pay, but it declined to award interest as part of its make whole remedy.

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SALEM COUNTY BOARD FOR VOCATIONAL EDUCATION,

Respondent,

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Docket No. CI-78-35-81

DANIEL McGONIGLE,

Charging Party.

Appearances:
For the Respondent, Acton & Point, Esqs.
(Mr. Lawrence W. Point, of Counsel)

For the Charging Party, Joel L. Selikoff, Esq
(Mr. Steven R. Cohen, of Counsel)

DECISION AND ORDER

On May 8, 1978, an Unfair Practice Charge was filed with the Public Employment Relations Commission by Daniel McGonigle alleging that the Salem County Board for Vocational Education (the "Board") violated the New Jersey Employer-Employee Relations Act (the "Act"), specifically N.J.S.A. 34:13A-5.4(a)(1) and (3), by terminating his employment as a result of his exercise of rights protected by the Act. A hearing was held before Commission Hearing Examiner Alan R. Howe, and he issued his Recommended Report and Decision on January 20, 1979. H.E. No. 79-29, 5 NJPER ___ (¶____ 1979). A copy is attached. Exceptions were filed by the Board and responded to by McGonigle, and at the Board's request, oral argument was heard by the Commission on April 26, 1979.

The Hearing Examiner concluded that the Board violated

both of the above-cited subsections of the Act, with §(a)(1) having been violated both derivatively from the (a)(3) transgression and independently. Exception is taken by the Board to both findings, asserting that the record does not support the Hearing Examiner, and that there existed sufficient legitimate causes for the action taken in terminating Mr. McGonigle's employment. Having reviewed the record thoroughly we affirm the Hearing Examiner insofar as he concluded that the Board violated N.J.S.A. 34:13A-5.4 (a)(1) and (3).

The primary thrust of the exceptions goes to the contention that evaluations dating back prior to any protected activity by McGonigle evidence a lack of preparation on his part warranting dismissal upon his "refusal" to improve. Although we recognize that there is some merit to this argument, we are not convinced that this alone caused the termination uninfluenced by Board ire at McGonigle's protected activity. Real concern with McGonigle commenced with his inquiries into his transfer during the summer. Although we do not adopt the Hearing Examiner's rationale for finding this to be protected activity,[1/] the recent Supreme Court decision in Bd. of Ed. Twp. of Bernards, Somerset County v. Bernards Township Ed. Assn, et al, 79 N.J. 311 (March 15, 1979) renders employee complaints about even non-negotiable matters grievable and therefore protected although not subject to binding arbitration. As the report prepared by Superintendent of Schools, Dr. Adams, for the September 27 Board meeting indicates, McGonigle's "attitude" toward his transfer, i.e.,

1/ H.E. No. 79-29, fn. 29 at pp. 13-14.

he questioned it, was part of the reasoning used to support his firing.

Furthermore, McGonigle raised objections as to the lunch facilities for teachers and duty-free lunch periods and spoke of filing a grievance.[2/] The above-mentioned report was prepared within a week of McGonigle's raising of the duty-free lunch issue at a meeting with Dr. Adams and others and we deem that timing to be significant. Shortly thereafter, McGonigle complained about the food service and within days Dr. Adams prepared a Supplemental Report noting that a replacement was being sought, and then proceeded to place his dismissal on the Board's agenda. We believe the inference is clear that these actions were largely responsible for the Board's action,[3/] and therefore the Act was violated regardless of the fact that there may also have been legitimate concerns with his performance.

In terminating McGonigle, we conclude that the Board did intend to discourage the exercise of protected activities - which does not have to mean it was desirous of total combat with the union - but rather reflected a desire to avoid assertive types such as McGonigle, or just McGonigle himself. Even absent that conclusion, the firing of an employee who has been complaining about working conditions is a clear independent violation of §(a)(1) as per the

2/ We accept the Hearing Examiner's first hand evaluation of the testimony and his finding that McGonigle did make such a statement. See H.E. 79-29 at p. 5.

3/ See the testimony of Dr. Adams cited by the Hearing Examiner at fn. 22, H.E. No. 79-29, p. 8. The fact that these reports, including frequent observations and evaluations of McGonigle all occurred during the first several weeks of the school year further indicate they were out of the ordinary and prompted by Dr. Adams' consternation over McGonigle's complaint about the transfer and other protected activities.

Hearing Examiner's analysis.

The Board takes exception to the Hearing Examiner's finding that McGonigle's prior evaluations were satisfactory. Rather it maintains that these evaluations, made prior to the time when McGonigle was active in the Association indicated that he was performing poorly, mainly in the area of failure to prepare adequate lesson plans, and that he had been warned to improve in this area. Even if there is some validity to the Board's exception it does not obviate the finding that the Charging Party was terminated because of his protected activities.

McGonigle was first employed by the Board for the 1976-77 school year. Therefore, his termination in November 1977 came after only two months of his second year of teaching at Salem. Regardless of how the Board characterizes the prior evaluations they encompassed only his first year of teaching and on the basis of them McGonigle was offered reemployment and given his salary increment.[4/] As indicated the record further establishes that within the first two weeks of the 1977-78 school year, McGonigle's second, Dr. Adams was having him evaluated frequently. Since McGonigle had not taught summer school the only intervening events had been his election to Association office, complaints to Dr. Adams over his transfer and

4/ We do not place heavy emphasis on the receipt of a salary increment as we recognize that such increments are rarely withheld. However, the Board clearly has the authority to withhold such increment for "inefficiency or other good cause", N.J.S.A. 18A: 29-14 and the withholding of increments are intended to be utilized by boards of education as a way to evaluate and encourage teachers to improve their performance. See Bernards, supra. The payment of the increment to McGonigle must therefore be taken as an indication that his performance met whatever standard the Board utilized, regardless of how minimal, for the receipt of such an increase.

the meeting at which he threatened to file the first grievance ever against the Board, all activities protected by this Act. Yet by September the Board maintains that Dr. Adams had formed the educational judgment that McGonigle might have to be terminated and by November he was fired. No teaching incidents were established which would have justified a change in the educational judgment of June 1977 that McGonigle was at least satisfactory enough to retain as an employee to one that he must be summarily terminated two months into the year. The conclusion is inescapable that the preemptory termination in November 1977 was motivated by Dr. Adams'disapproval of how McGonigle exercised his rights under the Act. Even if this Commission were of the opinion that McGonigle's vigorous exercise of his rights as an employee was ill advised and not the type of behavior that would benefit himself or the Association, nothing in the record establishes that it went beyond that which was protected. And even if Dr. Adams' consternation could have been expected, it does not change the fact that he could not permit that consternation to be the motivation for initiating McGonigle's termination.

Additionally, it cannot be disputed, again assuming arguendo, that McGonigle's performance as a teacher was not completely satisfactory, the Board's illegally motivated conduct in terminating him in November foreclosed the opportunity normally afforded an inexperienced teacher to "improve". But for the Board's discrimination, McGonigle would have had nearly eight months of the school year to correct those areas in which the Board found him truly lacking. The Board cannot now benefit from its preemptory

termination by claiming that McGonigle's performance in September and October would have resulted in his non-renewal in June. The record is devoid of any indication that it was the Board's normal practice to terminate a non-tenured teacher as soon as it became aware of poor performance, rather than follow the normal practice of simply not rehiring a teacher for the ensuing year. 5/

It should also be emphasized that reinstatement will not entitle Mr. McGonigle to tenure. He has at this point completed only one year and two months of teaching at Salem, the Board has nearly two full years to evaluate his performance on valid criteria before it must decide if he is deserving of tenure.

The charging party has requested that any back pay award be made with interest. Without deciding whether we have the authority to award interest, we decline to do so in this case.

ORDER

For the above-cited reasons and upon the entire record herein, it is hereby ORDERED that the Salem County Board for

5/ N.J.S.A. 18A:27-3.1, which provides for the evaluation of non-tenured teachers, also appears to contemplate a full year's employment, even for unsatisfactory teachers, as it provides for three observations, with at least one in each semester. These observations are to be followed by a conference with supervisors who will discuss the evaluation report with the teacher with the goal of improving any deficiencies. See also N.J.A.C. 6:3-1.19. The concept of non-reemployment, rather than immediate termination of an unsatisfactory non-tenured teacher, is carried forward by the succeeding sections to the observation requirement as it speaks in terms of a statement of reasons and an opportunity for an informal hearing before the Board when a non-tenured teacher is not offered employment for the succeeding year. See N.J.S.A. 18A:27-3.2 and N.J.A.C. 6:3-1.20. Thus the statutory scheme for non-tenured teachers also anticipates that the normal situation is an attempt at improvement and no offer of reemployment if deficiencies are not remedied.

Vocational Education:

A. Cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refraining from terminating employees, such as Daniel McGonigle, for the exercise of such rights.

2. Discriminating in regard to tenure of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act.

B. Take the following affirmative action:

1. Pay Daniel McGonigle the amount he would have received as Building Trades Instructor at the H.D. Young Center from December 4, 1977 through the end of the 1977-78 school year less any amount received in mitigation thereof.

2. Offer to reinstate Daniel McGonigle to his former position as Building Trades Instructor at the H.D. Young Center, or to a substantially equivalent position. Said offer may be made for a position for the 1979-80 school year, rather than commencing immediately.[6/]

3. Post at all places where notices to employees are customarily posted, copies of the attached notice marked as

6/ Since the present school year is virtually completed and Mr. McGonigle's prior position was a ten month position, reinstatement for the last several weeks of the school year does not seem practical. However, if the Board chooses, it could offer Mr. McGonigle immediate reinstatement or make its offer effective with the 1979-80 school year.

"Appendix A". Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon receipt thereof, after being signed by the Respondent's authorized representative, and shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other material.

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

BY ORDER OF THE COMMISSION

Jeffrey B. Tener
Chairman

Chairman Tener, Commissioners Graves, Hartnett and Parcells voted for this decision. None opposed. Commissioners Hipp and Newbaker abstained.

DATED: Trenton, New Jersey
May 22, 1979
ISSUED: May 23, 1979

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly by refraining from terminating employees, such as Daniel McGonigle, for the exercise of such rights.

WE WILL NOT discriminate in regard to tenure of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act.

WE WILL pay Daniel McGonigle the amount he would have received as Building Trades Instructor at the H.D. Young Center from December 4, 1977 through the end of the 1977-78 school year less any amount received in mitigation thereof.

WE WILL offer to reinstate Daniel McGonigle to his former position as Building Trades Instructor at the H.D. Young Center, or to a substantially equivalent position.

SALEM COUNTY BOARD FOR VOCATIONAL 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, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H.E. No. 79-29

99

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

In the Matter of

SALEM COUNTY BOARD FOR VOCATIONAL EDUCATION,

Respondent,

- and - Docket No. CI-78-35-81

DANIEL McGONIGLE,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Board violated Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it terminated Daniel McGonigle effective December 4, 1977 with his last day of work November 4, 1977. The Hearing Examiner found that the Board had terminated McGonigle for his exercise of rights protected by the Act, in particular, his vigorous protest over transfer of work location in the summer of 1977, his raising a complaint under the contract regarding duty-free lunches for teachers and his threat to file a grievance in the absence of a satisfactory resolution of the problem, the latter occurring in September and October, 1977.

In so concluding, the Hearing Examiner found that the Board's superintendent and others in administration were motivated by anti-union animus toward McGonigle in retaliation for the exercise by McGonigle of rights protected by the Act, citing the Commission's decision in Haddonfield Borough Board of Education, P.E.R.C. No 77-31, 3 NJPER 71 (1977), which sets forth the standard for a Subsection 5.4(a)(3) violation of the Act.

The Hearing Examiner also found, in the alternative, that without regard to proof of anti-union animus, the Board independently violated Subsection 5.4(a)(1) when it terminated McGonigle, citing the Commission's standard for such a violation in New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (1978).

Finally, the Hearing Examiner recommended that McGonigle be reinstated with back pay from December 4, 1977 with interest at the rate of eight (8%) per cent, noting that although the Commission has never awarded interest the Charging Party had here requested it and that there was ample precedent by the National Labor Relations Board for an award of interest.

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 exeeptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modity the Hearing Examiner's findings of facts and/or conclusions of law.

H.E. No. 79-29

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

In the Matter of

SALEM COUNTY BOARD FOR VOCATIONAL EDUCATION, 1/

Respondent,

- and -

Docket No. CI-78-35-81

DANIEL McGONIGLE, 1/

Charging Party.

Appearances:

For the Salem County Board for Vocational Education
Acton and Point, Esqs.
(Lawrence Point, Esq.)

For Daniel McGonigle
Joel S. Selikoff, Esq.
(Steven R. Cohen, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on May 8, 1978 by Dan McGonigle (hereinafter the "Charging Party" or "McGonigle") alleging that the Salem County Technical School Board of Education (hereinafter the "Board" or the "Respondent") had engaged 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. (hereinafter the "Act"), in that the Board had on or about November 3, 1977 terminated the Charging Party on account of the exercise by him of activities protected by the Act, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3) of the Act. 2/

1/ As amended at the hearing.

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

The charge was amended on August 18, 1977 to allege, additionally in a Count Two, the basic facts alleged in the original charge with some amplification.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on June 12, 1978. Pursuant to the Complaint and Notice of Hearing, hearings were held on August 22, August 24, September 13 and September 14, 1978 in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. The Respondent filed a post-hearing brief on November 15, 1978 and the Charging Party filed its brief on December 18, 1978. 3/

Unfair practice charges, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and after hearing and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Salem County Board for Vocational Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Daniel McGonigle is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

3. McGonigle was employed by the Board on August 30, 1976 for the 1976-77 school year, commencing in September 1976, as a Carpentry Instructor at the Career Center (R-2).

4. Shortly after commencing employment, McGonigle became a member of the Salem County Vocational Teachers Association (hereinafter the "Association"). McGonigle was not active in the Association other than holding membership and attending meetings until April 5, 1977 4/ when he was elected as one of the Vice Presidents (R-6), a position which he formally assumed on or about May 1. 5/

3/ The delay in the filing of Respondent's brief was attributable to the delay in the receipt of transcript. The additional delay in the filing of the Charging Party's brief was due to its counsel's protracted involvement in the Camden teachers' strike for six weeks during October and November 1978.

4/ All dates hereinafter are in 1977 unless otherwise indicated.

5/ Dr. William H. Adams, the Superintendent of Schools, personally learned of McGonigle's election as a Vice President of the Association on April 6. Victor C. Morella, the principal of the Career Center, testified that in June and July it was common knowledge that McGonigle was a member and a Vice President of the Association.

5. After McGonigle's assumption of the office of Vice President he undertook to reconstruct the organization of the Association, which was "weak", and, among other things,he sought the assistance of the New Jersey Education Association, utilizing its help to provide workshops in various areas of union concern. There was, however, insufficient proof that the Respondent had actual knowledge, or should have known, of the activities of McGonigle with respect to the internal functioning of the Association.

6. McGonigle's end-of-the-first year staff evaluation was favorable and he was recommended for appointment for the 1977-78 school year with full salary increment. 6/ The employment contract for the 1977-78 school year was dated June 29 (R-1) and, as of that date, McGonigle's performance must be rated as satisfactory.

7. In mid-July, Morella, in consultation with Calvin Roberts, the Building Trades Coordinator, decided to transfer McGonigle from his position as Carpentry Instructor at the Career Center to the H. D. Young Center as a Building Trades Instructor. A recommendation to this effect was made to Dr. Adams by Morella shortly thereafter, and, on July 25, Morella met with McGonigle to discuss the recommended transfer. According to Morella, McGonigle "was not enthusiastic about the transfer." On July 26 the Board of the Respondent, on recommendation of Dr. Adams, formally approved the transfer of McGonigle from the Career Center to the Young Center (CP-10, R-17). Under date of July 28, Morella sent a letter to McGonigle, which made no reference to the action of the Board on July 26, in which Morella said that, in consultation with Roberts and Dr. Adams, he had recommended that McGonigle be transferred as of September 1 and he invited McGonigle to discuss the matter with him (R-21). On August 1 McGonigle met with Morella. McGonigle requested copies of all documents contained in his personnel file, a copy of the Board's policy manual and "specific information" relating to McGonigle's transfer to the Young Center. 7/ On August 2 McGonigle had an unscheduled meeting with Dr. Adams, during the course of which McGonigle stated, inter alia, that his proposed transfer would be detrimental to his "union activities", to which Dr. Adams responded that no one was out to "get" him. 8/ On August 8 McGonigle ver-

6/ This evaluation is dated May 13 and was made by Dr. Adams (R-4), who also testified that reappointment could be with or without full salary increment.

7/ Dr. Adams testified that no teacher had ever made such a request previously. Morella responded to McGonigle's request on August 2 (R-8).

8/ In Dr. Adams' summary of the meeting of August 2, he confirmed that McGonigle was told "that no one was out to get him or was there any attempt to have him

(continued next page)

bally accepted the transfer to the Young Center with "certain areas of reservation" (R-11). (See also R-12).

8. When McGonigle commenced teaching at the Young Center, on or about September 1, he embarked on a campaign of recruitment of new members in his several capacities as a Vice President of the Association, Building Representative at the Young Center, and a member of the Faculty/Administration Liasion Committee. According to McGonigle, there were no members of the Association at the Young Center and he recruited five new members during the first week of September. 9/ The dues checkoff cards, signed by the employees whom McGonigle recruited, 10/ were turned over to the Treasurer of the Association, who in turn forwarded them to a clerk in the office of the Secretary of the Board. The clerk routinely files the cards and does not apprise the Board administration, such as Dr. Adams, of the names of employees who have been recruited into the Association or the center where they are located. Although the recruiting activity of McGonigle was essentially corrobrated by David Vest, a Charging Party witness, and by Respondent witnesses, Gladys Harper and Mavis Atkinson, 11/ there is no evidence that their knowledge of McGonigle's recruitment activities was ever communicated or made known to Dr. Adams or to other members of the administration. The Hearing Examiner credits the testimony of Dr. Adams that he and the administration had no knowledge, prior to the hearing, of the recruiting activities of McGonigle, or the names of the employees recruited by McGonigle, or the center from which they were recruited. 12/

8/ (continued from page 3)
resign from his teaching position" (R-9). However, Dr. Adams also stated in this summary that the conference took place "because of negative feedback that had been received concerning Mr. McGonigle's attitude toward the transfer." (Emphasis supplied). In this latter connection see Finding of Fact No.17 and footnote 22, infra.

9/ There were eight or nine teachers employed at the Young Center at this time.

10/ McGonigle testified that the cards did not indicate in any way that he was the person who did the recruiting.

11/ Vest was a member of the Association during his employment from September 1975 through June 1978, and he was on the Negotiating Committee during the 1977-78 school year. Harper and Atkinson are members and present officers of the Association.

12/ In so crediting Dr. Adams, the Hearing Examiner is cognizant of his testimony that, during August (at the beginning of contract negotiations), the Association negotiators presented to him and the Board representatives (as the Association had in the past) a list of the names of the members of the Association
(continued next page)

9. On September 14 McGonigle's supervisor, Raymond J. Bielicki, "observed" McGonigle in his teaching situation in the Shop Building of the Young Center. The observation (R-15), to the extent that observations were made by Bielicki, indicates that McGonigle's performance was clearly "satisfactory". A conference on the "observation", involving Bielicki and McGonigle, was held on September 19 (R-15). 13/

10. In his capacity as a Vice President of the Association and Building Representative at the Young Center, McGonigle soon ascertained that the biggest problem was the teachers' duty-free lunch period. A duty-free lunch is provided for in the collective negotiations agreement (J-1: Article V, paragraph A., 5 and Article XVI, paragraph E., 1). McGonigle first discussed this problem with Bielicki, and when Bielicki stated to McGonigle that he felt the problem was solved, McGonigle said that he was going to take the problem to the Liasion Committee in an effort to avoid "following through with a grievance." 14/

11. The Liasion Committee was convened in the afternoon of September 15 by Dr. Adams and, among those present, were McGonigle, Vest, Morella and Bielicki (R-13). During the course of the meeting McGonigle raised, among other things, the matter of the duty-free lunch at the Young Center, which is provided for in the collective negotiations agreement (Finding of Fact No. 10, supra).15/ McGonigle testified credibly that Dr. Adams claimed that he, McGonigle, was raising a purely personal matter and not a matter on behalf of other teachers. McGonigle denied this, stating that the faculty at the Young Center wanted him to take the matter of the duty-free lunch to the Liasion Committee; the Hearing Examiner credits

12/ (continued from page 4)
so that Dr. Adams could determine whether the Association had majority status. McGonigle's recruiting at the Young Center did not commence until after September 1. The Hearing Examiner is also aware of the testimony of Atkinson that Dr. Adams asked her in October whether she had gotten any new members at the Young Center. Atkinson made no reference to McGonigle.

13/ The Hearing Examiner finds that Dr. Adams was apprised of R-15 shortly after September 19.

14/ This conversation with Bielicki took place immediately prior to the commencement of the Liasion Committee on September 15.

15/ Dr. Adams acknowledged on cross-examination that McGonigle did so. Morella and Bielicki denied that McGonigle had raised the duty-free lunch even though they both agreed that the minutes of the meeting were accurate. These minutes, prepared under the direction of Dr. Adams, indicate clearly to the Hearing Examiner that the matter of the duty-free lunch at the Young Center, in relationship to the contract, was raised and discussed (R-13, pp. 4, 5).

McGonigle in this regard. [16] McGonigle testified without contradiction that, during the foregoing discussion with Dr. Adams over the duty-free lunch, Dr. Adams was "very hostile". [17]

12. On September 16 McGonigle told Bielicki that the problem of the duty-free lunch was still present and that he would file a grievance. [18] However, McGonigle never filed a grievance, giving as the reason the fact that no grievance had ever been filed against the Board, and that he did not know how to file a grievance under the grievance procedure. [19]

13. On or about September 22 Dr. Adams prepared a "confidential" Special Personnel Report for the Board's regular meeting on September 27 (R-17). In the first paragraph of this Report Dr. Adams stated:

> "As was indicated in a conference report dated August 2, 1977 (R-9) concerning a meeting between me and Mr. McGonigle there appeared to be a serious attitude problem with respect to his teaching at the Young Center and there has not been an improvement to date. The situation has worsened and I have advised both Mr. Waller, Director of Special Needs and Mr. Bielicki... to carefully monitor the situation since Mr. McGonigle's performance as a teacher could not only have a negative impact on the program for which he is responsible but on other employment orientation programs at the Center." (Emphasis supplied).

Dr. Adams also continued in the same Report, as follows:

> "...it is necessary for the Board of Education to be aware that if present indicators in performance (by McGonigle) hold that it may be necessary for an early termination prior to the conclusion of the school year..." (Emphasis supplied).

16/ Dr. Adams acknowledged on cross-examination that he "may" have told McGonigle that he was raising a personal matter and that McGonigle "may" have said that he, McGonigle, was raising the matter on behalf of other teachers.

17/ Vest essentially corroborated McGonigle when he, Vest, testified that Dr. Adams told McGonigle that he was raising a "contract negotiating item", and that this should not take place at a Liasion Committee meeting.

18/ Notwithstanding Bielicki's denial that McGonigle told him that he, McGonigle, would file a grievance, the Hearing Examiner credits McGonigle's threat to do so based on the corroborating testimony of Vest and Respondent's witness, Atkinson.

19/ Although Dr. Adams testified that he did not personally know that McGonigle had threatened to file a grievance, he acknowledged that no formal grievance had ever been filed against the Board by anyone but that there had been several instances of threats to file grievances.

Dr. Adams then listed six "examples" of problems with McGonigle, three of which were ultimately included in a post-termination letter from Dr. Adams to McGonigle dated November 23 (R-14). 20/ Further, after noting that McGonigle may still become a successful teacher, Dr. Adams said:

> "The prospectus, however, is becoming increasingly dim. This alert is provided to the Board of Education due to the possible necessity should corrective supervision and assistance not immediately turn around the situation to terminate Mr. McGonigle prior to the conclusion of the school year." (Emphasis supplied).

Dr. Adams noted finally that the foregoing information was provided to the Board for its consumption, and would not be included in McGonigle's personnel file. Accordingly, McGonigle was never apprised by Dr. Adams or anyone of the contents of the said Report, learning of it only after the filing of the instant unfair practice charge.

14. On October 20 McGonigle casually encountered the Culinary Arts instructor, Mr. Borkowski, at the Young Center and McGonigle discussed with him improving the food service to the teachers by providing crackers with the soup and providing hotter trays. Borkowski complained to Bielicki about McGonigle's having allegedly harassed him over the food service, and on October 21 Dr. Adams sent a "confidential" memo to Bielicki, in which he said at one point: "I do not know what the nature of Mr. McGonigle's complaint was and have been informed that the intent of the harassment may have materialized for other purposes." (Emphasis supplied)(CP-2a). The Board's witnesses were unanimous in their testimony that McGonigle should have gone to Bielicki with the food service problem, not to Borkowski, and this failure to follow "procedure" was cited by Board witnesses as a formal criticism of McGonigle. McGonigle was reprimanded by Bielicki prior to November 4 (CP-2b).

15. On October 19 Bielicki again "observed" McGonigle in his teaching situation at the Young Center, this time at a Lecture. This observation (R-16) disclosed four "needs improvement" notations, but these were clearly outweighed by 10 "satisfactory" notations. 21/

20/ See Finding of Fact No. 19, infra. Compare paragraphs B, C and E of R-17 with paragraphs 3, 4 and 5 of R-14.

21/ The 10 "satisfactory" notations were supplemented in several instances by an attached explanatory narrative, which was devoted principally to deficiencies in "pre-planning". The conference on this "observation" did not take place until October 31, a date after which Dr. Adams had concluded that McGonigle must be terminated, but before the Board formally acted on Dr. Adams' recommendation on November 1 (see Finding of Fact No. 17 and footnote 22, infra).

16. Several days prior to October 25 Dr. Adams prepared a "Supplemental Report", which was presented to the Board at its regular meeting on October 25; Item 4 was a report concerning McGonigle (R-18). In this Report Dr. Adams said: "Basically the situation has not changed since the last report (R-17)...and Mr. Bielicki has been in the process of seeking a suitable replacement. As soon as a suitable replacement is found, a recommendation to the Board of Education will be made to terminate Mr. McGonigle's employment." (Emphasis supplied).

17. Several days prior to November 1, the date of the Board's annual reorganization meeting, Dr. Adams sent a memo to the Board members, adding three additional items to the agenda, Item 2 of which was a request to terminate McGonigle: "Based on irresolvable problems concerning Mr. McGonigle's attitude and its resultant impact on his performance..." (Emphasis supplied) (R-20). 22/

18. The Board on November 1, in accordance with the recommendation of Dr. Adams, voted unanimously to terminate McGonigle, effective December 4 with his last day on the job to be November 4 (R-19). McGonigle was so notified by letter dated November 3, which contained no reasons for termination (CP-3).

19. On November 8 McGonigle sent a letter to Dr. Adams requesting specific reasons for his termination (CP-5) and, under date of November 23, Dr. Adams sent McGonigle a letter outlining the reasons for his termination (R-14), as follows:

> "1. Inconsistency with Board of Education philosophy and policies in carrying out teaching assignments as indicated by your immediate supervisor.
>
> "2. Consistent failure to meet deadlines for submission of required school related materials.
>
> "3. Failure to significantly improve lesson planning despite specific recommendations and assistance.
>
> "4. Failure to respond properly concerning the possible removal of property from the Career Center as requested by Mr. Morella on August 30, 1977.

22/ Dr. Adams testified on direct examination that the "final decision" to terminate McGonigle was made between October 25 and November 1, noting that "probably by mid-October" it was clear that there was "little chance that reform was going to take place." (2 Tr. 113). Further, when asked on direct examination if there was any "straw that broke the camel's back", Dr. Adams testified:

> "I don't think there was a single item. The instances that occurred, beginning in September and, I guess going back to August, the transfer, there was just a negative reaction to the transfer..." (2 Tr. 112)(Emphasis supplied).

See also, 2 Tr. 104, 105 and 127 with reference to the Borkowski incident (Finding of Fact No. 14, supra).

"5. Distruction (sic) of school purchase order and failure to follow properly procedures for acquisition of parts for the equipment in the carpentry shop." 23/

20. Atkinson, Treasurer of the Association for four years and currently President, testified without contradiction that the Association had gotten stronger each year and that the administration has been tolerant of the Association and has never interfered with its activities. She stated that while Treasurer she was membership chairman and was never interfered with in recruiting new members for the Association. Notwithstanding her membership and officership in the Association, she became a tenured teacher.

21. Roberts, who joined administration in 1976 as Building Trades Coordinator, and thus left the negotiations unit, testified without contradiction: (1) that he helped organize the Association at the Young Center in 1972; (2) that he negotiated for the Association from 1972 to 1976; (3) that he was Vice President and then President during the years 1972-1974; and (4) that he became tenured in June 1976. Roberts felt that the administration encouraged union involvement and that it gave ample opportunity for recruitment of members for the Association without any interference.

23/ With respect to Items 1 and 2, the testimony of Dr. Adams indicated clearly that these matters antedated McGonigle's end-of-the-first year staff evaluation, in which Dr. Adams recommended McGonigle for reappointment for the 1977-78 school year with full salary increment (Finding of Fact No. 6, supra). Item 3 is essentially refuted by the "observations" of McGonigle by Bielicki on September 14 and October 19 (see Findings of Fact Nos. 9 and 15, supra; compare with R-5). With respect to Item 4, the Hearing Examiner credits the testimony of McGonigle, confirmed by Respondent's witness Roberts, that he, McGonigle, knew nothing of the whereabouts of certain manuals from the Career Center and that he had not removed them. Finally, with respect to Item 5, the Hearing Examiner credits McGonigle in his testimony that he did not destroy any purchase order or fail to follow proper procedures -- note is also made of the testimony of Dr. Adams, on cross-examination, that he had simply "assumed" that McGonigle had destroyed the purchase order (3 Tr. 40). See also, with respect to Items 4 and 5, Exhibit R-24.

THE ISSUE

Did the Respondent violate Subsections (a)(1) and (3) of the Act when it terminated McGonigle with his last day on the job being November 4, 1977?

DISCUSSION AND ANALYSIS

The Positions of the Parties

First, Respondent urges that even if it had knowledge of the engaging by McGonigle in protected activities, such as his recruitment of new members and his threat to file a grievance, the Respondent, in its decision to terminate McGonigle, did not consider these activities. For reasons not altogether clear, the Respondent cites in support Pietrunti v. Board of Education of Brick Township, 128 N.J. Super 149, certif. den., 65 N.J. 573, cert. den., 419 U.S. 1057 (1974). The Respondent next cites Haddonfield Borough Board of Education, P.E.R.C. No. 77-31, 3 NJPER 71 (1977) for the proposition that the Respondent in fact had no knowledge of any engaging by McGonigle in protected activities. Further, the Respondent Board should not have imputed to it knowledge or responsibility for the actions of its Superintendent or any lower echelons of supervision, citing State of New Jersey and Council of New Jersey State College Locals, etc., P.E.R.C. No. 78-55, 4 NJPER 153 (1978). Finally, Respondent, again relying on Haddonfield, supra, urges that the Charging Party has failed to show the existence of any anti-union animus at any level of management or administration.

The Charging Party first contends that in terminating McGonigle the Respondent committed an independent Subsection (a)(1) violation, citing Interboro Contractors, Inc., 157 NLRB 1295, 61 LRRM 1537 (1966), enf'd. 388 F.2d 495, 67 LRRM 2083 (2nd Cir. 1967); C & I Air Conditioning, Inc., 193 NLRB 911, 78 LRRM 1417 (1971), enf. den. 486 F.2d 477, 84 LRRM 2625 (9th Cir. 1973); and Monark Boat Co., 179 NLRB No. 150, 72 LRRM 1543 (1969). [24] Next, Charging Party urges an additional finding that the Respondent also violated Subsection (a)(3), and derivatively Subsection (a)(1), citing Haddonfield, supra, and City of Hackensack [25], i.e., the Respondent manifested anti-union animus toward McGonigle and was motivated in whole or in part by retaliation for McGonigle's

24/ The Charging Party, anticipating the defense of good faith by Respondent, cites a Commissioner of Education decision and two cases from other jurisdictions (See Charging Party's brief, p. 30).

25/ P.E.R.C. No. 77-49, 3 NJPER 143 (1977), rev'd. on other grounds, 162 N.J. Super 1 (App. Div. 1978), pet. certif. granted, ___ N.J. ___ (1978).

exercise of protected activities or, in the alternative, under the "inherently destructive" doctrine, McGonigle was terminated for the exercise of protected activities without regard to a specific showing of anti-union animus.

The Respondent Violated Subsection (a)(3) and Derivatively (a)(1) of The Act When It Terminated McGonigle As Of November 4, 1977

In Haddonfield, supra, the Commission had before it a case of first impression involving the standard to be applied in order to find a Subsection (3) violation. The Hearing Examiner in that case had presented the Commission with options involving four possible tests. The Commission adopted a combination of two of the four tests set forth by the Hearing Examiner, namely, (1) the "one of the motivating factors" test - the"Respondent's actions were motivated in part by statutorily protected union activities engaged by the alleged discriminatee, even if other motivating factors exist;" and (2) the "inherently destructive of employees rights" test - the "employer's conduct is so inherently destructive of employee rights that the existence of an anti-union motivation as one of the factors in the decision may be presumed and need not be proved." Thereafter the Commission said in Haddonfield:

> "...A violation of N.J.S.A. 34:13A-5.4(a)(3) should be found if it is determined that a public employer's discriminatory acts were motivated in whole or in part by a desire to encourage or discourage an employee in the exercise of rights guaranteed by the Act or had the effect (inherently destructive) of so encouraging or discouraging employees in the exercise of those rights.
>
> "Application of this two-fold standard will normally involve a preliminary showing by the Charging Party of two essential elements. There must be proof that the employee was exercising the rights guaranteed to him by the Act, or that the employer believed said employee was exercising such rights, and proof that the public employer had knowledge, either actual or implied, of such activity.
>
> "It is believed by the Commission that adoption of the above standard will best effectuate the Declaration of Policy section of the Act, incorporated in N.J.S.A. 34:13A-2 and the protected rights guaranteed by N.J.S.A. 34:13A-5.3. Discriminatory acts by em-

> ployers, even if only partly motivated by an employee's union activities, or acts that would discourage exercise of such rights, would clearly tend to frustrate the express intent of the Act." (3 NJPER at 72)

Following its decision in Haddonfield, the Commission decided City of Hackensack, supra, where it articulated further on the combined two tests adopted in Haddonfield. In City of Hackensack the Commission said:

> "Under the Haddonfield decision, a Section 5.4(a)(3) violation may be found if the Charging Party can prove either that anti-union animus was one of the motivating factors for the discriminatory conduct or that effect of the employer's action was 'inherently destructive' of rights guaranteed to employees by the Act..." (Emphasis supplied)(3 NJPER at 144)

The Hearing Examiner finds and concludes, based on the foregoing Findings of Facts, that the Charging Party has adequately met its burden of proving anti-union animus toward McGonigle on the part of the Respondent by a preponderance of the evidence under the "one of the motivating factors" test adopted by the Commission in Haddonfield and City of Hackensack, supra. [26/] The Hearing Examiner therefore finds and concludes that the Respondent violated Subsection (a)(3) of the Act, and derivatively Subsection (a)(1), [27/] when the Board of Education on November 1, upon recommendation of Dr. Adams, terminated McGonigle effective December 4 with his last day of work to be November 4.

In so finding adequate proof of anti-union animus toward McGonigle, the Hearing Examiner has fully considered Respondent's proofs, through its witnesses, Atkinson and Roberts, that they have for years engaged in activities on behalf of the Association, including the holding of various offices and positions, and yet became tenured, notwithstanding the exercise of these concedely protected activities (Findings of Fact Nos. 20 and 21, supra). As will be apparent hereinafter, the record amply demonstrates that the exercise by McGonigle of activities protected by the Act was clearly a thorn in the side of the administration of the

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26/ Accordingly, the Hearing Examiner finds it unnecessary to decide whether or not the Respondent's overall conduct was "inherently destructive" of McGonigle's rights without regard to anti-union animus. In this connection, the Hearing Examiner notes that the Commission has been most sparing in applying the "inherently destructive" test: Compare City of Hackensack, supra, (f.n. 12) 3 NJPER at 144, and Brookdale Community College, P.E.R.C. No. 78-80 (f.n. 3), 4 NJPER 243 (1978) with City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190, 192 (1978), appeal pending, App. Div. Docket No. A-3776-77.

27/ See Galloway Township Board of Education, P.E.R.C. No. 77-3, 2 NJPER 254, 255 (1976).

Respondent, particularly Dr. Adams, and that, as a result, McGonigle was terminated before gaining tenure as a teacher.

McGonigle, who had not been active in the Association since his hire on August 30, 1976, was elected a Vice President on April 5 and formally assumed the position on May 1; Dr. Adams learned of McGonigle's election on April 6 and Morella testified that it was "common knowledge" that McGonigle was a Vice President in June and July (Finding of Fact No. 4, supra). Further, as of June 29, the date of McGonigle's second employment contract, he was clearly a satisfactory teacher, having been reappointed for the 1977-78 school year with full salary increment (Finding of Fact No. 6, supra).

Although the Hearing Examiner has found that no knowledge could be imputed to the Respondent of McGonigle's activities with respect to the internal functioning of the Association, after assuming the office of Vice President (Finding of Fact No. 5, supra), it was nevertheless decided by Morella in mid-July to transfer McGonigle from the Career Center to the Young Center. (For the details of the transfer see Finding of Fact No. 7, supra). McGonigle strenuously resisted the proposed transfer, making an extensive request for documentation relating to it, and asserting to Dr. Adams that the transfer would be detrimental to his "union activities". 28/ On August 8 McGonigle accepted the transfer with "certain areas of reservation."

The Hearing Examiner finds and concludes that McGonigle was engaged in the exercise of a protected activity under the Act, of which the Respondent had actual knowledge, when he vigorously protested the proposed transfer from the Career Center to the Young Center, notwithstanding the fact that he finally accepted the transfer and the fact that the exercise was a futile one, in view of the Board's early approval of the transfer on July 26. 29/

28/ Although Dr. Adams denied that anyone was out to "get" McGonigle, he did state that "negative feedback" had been received concerning McGonigle's attitude" toward the transfer (see footnote 8, supra). The Hearing Examiner also notes, adversely to the Respondent, that the Board approved McGonigle's transfer on July 26, notwithstanding that McGonigle was led to believe by Morella and Dr. Adams that the transfer was still an open question as of August 2.

29/ See North Brunswick Township Board of Education, P.E.R.C. No. 79-14 (f.n. 16), 4 NJPER 451, 453 (1978) where the Commission found that "...individual employee conduct, whether in the nature of complaints, arguments, objections, letters or other similar activity relating to enforcing a collective negotiations agreement or existing working conditions of employment in a recognized or certified unit, constitute protected activities under our Act..." In so concluding,
(continued next page)

As found in Finding of Fact No. 8, supra, the Charging Party failed to prove that the Respondent had knowledge, prior to the hearing, of McGonigle's recruitment activities at the Young Center during the first week of September. Thus, notwithstanding McGonigle's extensive recruiting activity, which would clearly be protected under the Act, the Charging Party has not satisfied the second part of the preliminary two-fold requirement of Haddonfield, supra. 30/

When, however, McGonigle took up the "duty-free lunch" issue at the Young Center, on behalf of himself and other teachers, first discussing it with Bielicki and then raising it with Dr. Adams at the Liasion Committee meeting on September 15, McGonigle was clearly exercising a right protected by the Act, as to which Respondent necessarily had actual knowledge. 31/ In Finding of Fact No. 11, supra, the Hearing Examiner credited McGonigle and Vest: (1) that McGonigle was not raising a purely personal matter; (2) that Dr. Adams was "very hostile"; and (3) that, according to Dr. Adams, McGonigle was raising a "contract negotiating item", which had no place at a Liasion Committee meeting. 32/

29/ (continued from page 13)
the Hearing Examiner is aware that transfers and reassignments are not mandatorily negotiable and are, in fact, illegal subjects under Subsection (a)(5): Ridgefield Park Education Association v. Ridgefield Park Board of Education, 78 N.J. 144, 156, 162 (1978). However, the Hearing Examiner is of the view that McGonigle's resistance to the transfer, particularly in the context of possible deterrence to his "union activities" and Dr. Adams' comments in R-9 regarding "attitude", brings McGonigle under the umbrella of protected activity delineated in North Brunswick Township Board of Education, supra. Further, the Hearing Examiner is also cognizant of the fact that the charge of unfair practices, as amended, does not allege that McGonigle's resistance to the transfer was a protected activity (see C-1 and C-3) but, however, the issue of the transfer was fully litigated.

30/ In agreement with the Respondent (brief, p. 3), the Hearing Examiner declines to find implied knowledge by Respondent of McGonigle's recruiting activities under the NLRB's "small plant doctrine."

31/ As noted in Finding of Fact No. 10, supra, the issue of the duty-free lunch is provided for in the collective negotiations agreement and, therefore, when McGonigle raised the matter at the Liasion Committee meeting he was engaging in a protected activity as recognized by the Commission in North Brunswick Township Board of Education; footnote 29, supra.

32/ In Monark Boat Co., supra, at p. 10, the NLRB found that although a management-employee meeting was not intended as a "grievance meeting", it became such when an employee complained on behalf of all employees about unsatisfactory working conditions, an activity protected by Section 7 of the NLRA. Thus, while Dr. Adams may have taken exception to McGonigle's raising a matter outside of the normal educational concerns with which the Liasion Committee usually deals, McGonigle's conduct at the meeting was clearly protected at all times.

On September 16, the day after the Liasion Committee meeting, McGonigle told Bielicki that the duty-free lunch problem was not solved, and he threatened to file a grievance which, for the reasons stated in Finding of Fact No. 12, supra, never occured. Inasmuch as the filing of a grievance is a protected activity under the Act, 33/ the Hearing Examiner concludes a priori that the threat to file a grievance is likewise a protected activity, a conclusion with which the Respondent apparently agrees (Respondent's brief, p. 1).

Notwithstanding a clearly "satisfactory" observation of McGonigle by Bielicki on September 14, which Dr. Adams was apprised of shortly after September 19 (Finding of Fact No. 9, supra), Dr. Adams on or about September 22 prepared a "confidential" Special Personnel Report for the Board's regular meeting on September 27, the timing, contents and tone of which indicate clearly to the Hearing Examiner that Dr. Adams was "setting up" McGonigle for eventual termination, based on McGonigle's exercise of protected activities at the Liasion Committee on September 15 and his threat to file a grievance on September 16.

In the said Report, Dr. Adams made reference to the August 2 meeting with McGonigle with respect to the transfer situation, and a "serious attitude problem" with respect to McGonigle's teaching at the Young Center. Dr. Adams also employed such phrases as the "situation has worsened", "negative impact" and noted that the "prospectus...is becoming increasingly dim." (Finding of Fact No. 13, supra).

In spite of the obvious gravity and detriment to McGonigle's future employment, Dr. Adams made special care to label the Report "confidential" and to keep it out of McGonigle's personnel file. Thus, McGonigle was never apprised by Dr. Adams or anyone of the said Report, learning of it only after the filing of the instant unfair practice charge.

On October 19 McGonigle was again favorably "observed" by Bielicki (Finding of Fact No. 15, supra) and on October 20 McGonigle met Borkowski and discussed with him the improving of food service to the teachers at the Young Center. 34/ After a complaint by Borkowski to Bielicki, Dr. Adams on October 21 sent a "confidential" memo to Bielicki, in which he confessed ignorance of McGonigle's complaint

33/ North Brunswick Township Board of Education, supra, (4 NJPER at 453) and Lakewood Board of Education, P.E.R.C. No. 79-17, 4 NJPER 459, 461 (1978).

34/ Clearly McGonigle was engaged in the exercise of a protected activity when he discussed this matter with Borkowski and no further citation of authority is required.

and yet stated that he was informed that "...the intent of the harrassment may have materialized for other purposes." As a result, McGonigle was reprimanded by Bielicki sometime prior to November 4. (Finding of Fact No. 14, supra).

Once again, and note carefully the timing, Dr. Adams, several days prior to October 25, a regular Board meeting date, prepared a "Supplemental Report" wherein he advised the Board that nothing had changed since his last Report to the Board on September 27. Dr. Adams continued, stating that Bielicki has been in the process of seeking a suitable replacement and that as soon as one is found a recommendation will be made to the Board "to terminate Mr. McGonigle's employment." (Finding of Fact No. 16, supra). There was no evidence that McGonigle was ever apprised of this Report prior to his termination or at any time until after the filing of the instant unfair practice charge.

Thus, the die was clearly cast for McGonigle's demise in Dr. Adams' "Supplemental Report" to the Board on October 25 even though Dr. Adams testified on direct examination that the "final decision" to terminate McGonigle was made between October 25 and November 1, the latter date being the Board's annual reorganization meeting (Finding of Fact No. 17, supra). In a memo to the members of the Board several days prior to the November 1 meeting, Dr. Adams set forth a request to terminate McGonigle based on "irresolvable problems" concerning McGonigle's "attitude" and its resultant impact on his "performance".

What followed thereafter is somewhat anti-climactic. The Board routinely voted without dissent to terminate McGonigle's contract effective December 4 with his last day on the job to be November 4. McGonigle was so notified by letter dated November 3, which contained no reasons for termination. (Finding of Fact No. 18, supra). Thereafter McGonigle requested specific reasons for his termination and, under date of November 23, Dr. Adams sent him a letter enumerating five reasons, which the Hearing Examiner finds to be after-the-fact, pretextual, self-serving, gratuitous and specious. 35/

The Respondent contends that its Board should not have imputed to it knowledge or responsibility for the actions of Dr. Adams or any lower echelons of supervision, citing State of New Jersey and Council of New Jersey State College Locals, etc. 36/ In answer to this contention the Hearing Examiner cites North Brunswick Township Board of Education, supra, where the Commission in a termination

35/ See Finding of Fact No. 19, supra, and particularly footnote 23 and Lakewood Board of Education, supra, (f.n.8, 4 NJPER at 461, 462).

36/ Page 10, supra.

case held the Board of Education responsible for the actions of its supervisory subordinates. 37/ The Hearing Examiner also notes that the State of New Jersey case is clearly distinguishable since the Board of Trustees of Ramapo College there conducted a tenure hearing, at which the alleged discriminatee was present, and the Commission found on substantial evidence that the Trustees' actions were not tainted by any anti-union animus which may have been attributable to administrative subordinates of the College.

In The Alternative, The Respondent Independently Violated Subsection (a)(1) of the Act When It Terminated McGonigle as of November 4, 1977

The Hearing Examiner has previously found and concluded that the Respondent violated Subsection (a)(3) of the Act, based upon sufficient proof by the Charging Party of anti-union animus, the Hearing Examiner declining at the same time to apply the "inherently destructive" test of the Commission in Haddonfield and City of Hackensack, supra. 38/ The Hearing Examiner has also found a derivative Subsection (a)(1) violation. 39/ The foregoing was based on a rejection by the Hearing Examiner of the Respondent's proofs that it had not manifested anti-union animus because of the uncontradicted testimony of Atkinson and Roberts. 40/

The Hearing Examiner now considers arguendo the implied contention by the Respondent that its proofs with respect to Atkinson and Roberts negated anti-union animus. In this connection, the Hearing Examiner will now consider the contention and citations of authority by the Charging Party that the Respondent independently violated Subsection (a)(1) of the Act when it terminated McGonigle with his last day on the job November 4.

Preliminarily, the Hearing Examiner notes that the Commission has never decided, in a termination case, that an employer has independently violated Subsection (a)(1) -- termination cases having always been decided by the Commission based upon a finding of anti-union animus and a Subsection (a)(3) violation under Haddonfield and City of Hackensack, supra.

37/ See also, Columbia County Board of Public Instruction, Lake City, Florida v. P.E.R.C., 1 PBC para. 36,086 (Fla. Dist. Ct. of App. 1977).

38/ See footnote 26, supra.

39/ See footnote 27, supra.

40/ See Findings of Fact Nos. 20 and 21, supra.

The Commission set forth the standard for an independent Subsection (a)(1) violation in New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (1978), as follows:

> "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce a reasonable [41/] employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial 'business' justification..." (4 NJPER at 422) (Emphasis supplied).

In Interboro Contractors, C & I Air Conditioning and Monark Boat [42/] the NLRB found independent violations of Section (a)(1) of the NLRA in each case where employees had made complaints about working conditions not unlike McGonigle herein. [43/] In these cases there had either not been proof of anti-union animus or the NLRB found it unnecessary to reach the question of anti-union animus.

Under the foregoing NLRB authority, and consistent with the Commission's Subsection (a)(1) standard in New Jersey College of Medicine and Dentistry, supra, [44/] the Hearing Examiner finds and concludes, in the alternative, that the Respondent independently violated Subsection (a)(1) of the Act when it terminated McGonigle because of his exercise of rights protected by the Act. [45/]

41/ The Hearing Examiner respectfully suggests that the Commission delete the word "reasonable" from its Subsection (a)(1) standard inasmuch as there is no NLRB or federal court precedent for such a qualification: see Textile Workers Union of America v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657, 2659 (1965). The Commission is constrained to follow NLRB precedent where "appropriate": Lullo v. International Association of Fire Fighters, 55 N.J. 409 (1970) and Galloway Township Board of Education v. Galloway Township Association of Educational Secretaries, 78 N.J. 1, 9 (1978).

42/ Page 10, supra.

43/ See also, New York Trap Rock Corp., 148 NLRB No. 41, 56 LRRM 1526 (1964); Erie Strayer Co., 213 NLRB No. 45, 87 LRRM 1162 (1974); John Sexton & Co., 217 NLRB No. 12, 88 LRRM 1502 (1975); Roadway Express, Inc., 217 NLRB No. 49, 88 LRRM 1503 (1975); Trumbull Asphalt Co., 220 NLRB No. 120, 90 LRRM 1293 (1975); and Aro, Inc., 227 NLRB No. 43, 94 LRRM 1010 (1976).

44/ Subject to the aforesaid suggestion in footnote 41, supra.

45/ All of the prior references to the Hearing Examiner's Findings of Fact under the Subsection (a)(3) discussion, supra, apply with equal force with respect to the finding of an independent Subsection (a)(1) violation.

* * * *

Upon the foregoing, and upon the record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(3), and derivatively 5.4(a)(1), when it terminated McGonigle effective December 4, 1977 with his last day of work November 4, 1977.

2. The Respondent Board independently violated N.J.S.A. 34:13A-5.4(a)(1) when it terminated McGonigle effective December 4, 1977 with his last day of work November 4, 1977.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refraining from terminating employees, such as Daniel McGonigle, for the exercise of such rights.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act.

B. That the Respondent take the following affirmative action:

1. Forthwith offer reinstatement to Daniel McGonigle, without prejudice to any rights or privileges that he may have enjoyed prior to termination, to his former position as Building Trades Instructor at the H. D. Young Center, or to a substantially equivalent position, with back pay from December 4, 1977 with interest at the rate of eight (8%) per cent, 46/ less interim earnings since that date.

46/ Although the Commission has never awarded interest in a back pay order, the Charging Party has requested that interest be awarded (C-1, C-3) and the Hearing Examiner here concludes that interest is clearly appropriate on the instant record. There is ample NLRB precedent for an award of interest: see Isis Plumbing & Heating Co., 138 NLRB 716, 51 LRRM 1122 (1962) and Florida Steel Corp., 231 NLRB No. 117, 96 LRRM 1070 (1977). The authority for awarding interest at eight (8%) per cent is found in the New Jersey Civil Practice Rules: see Rule 4:42-11(a) pertaining to interest rates on judgments, awards and orders for the payment of money.

2. Post at all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A". Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon the receipt thereof, after being signed by the Respondent's authorized representative, and shall be maintained by it for a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced or covered by other material.

3. Notify the Director of Unfair Practices within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

Alan R. Howe
Hearing Examiner

DATED: January 29, 1979
Trenton, New Jersey

"APPENDIX A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act and will refrain from terminating employees for the exercise of such rights.

WE WILL NOT discriminate in regard to hire or tenure of employment, or any term or condition of employment, to encourage or discourage our employees in the exercise of the rights guaranteed to them by the Act.

WE WILL offer reinstatement to Daniel McGonigle, without prejudice to any rights or privileges that he may have enjoyed prior to termination, to his former position as Building Trades Instructor at the H. D. Young Center, or to a substantial equivalent position, with back pay from December 4, 1977 with interest at the rate of eight (8%) per cent, less interim earnings since that date.

SALEM COUNTY BOARD FOR VOCATIONAL 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, 429 East State Street, Trenton, New Jersey 08608 (609) 292-9830