

P.E.R.C. NO. 89-17

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ESSEX COUNTY VOCATIONAL SCHOOLS  
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-87-16-57

MARIE IADIPAOLI,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission dismisses a Complaint based on an unfair practice charge filed by Marie Iadipaoli against the Essex County Vocational Schools Board of Education. The charge alleged that the Board violated the New Jersey Employer-Employee Relations Act when it excluded her from meetings, eliminated her position and issued her a negative evaluation allegedly because she filed charges and a petition with the Commission.

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MARIE IADIPAOLI,

Charging Party.

Appearances:

For the Respondent, H. Curtis Meanor, Acting County Counsel  
(Anthony P. Sciarrillo, Assistant County Counsel, of  
counsel)

For the Charging Party, Klausner, Hunter & Oxfeld, Esqs.  
(Nancy I. Oxfeld, of counsel)

DECISION AND ORDER

On September 3, 1986, Marie Iadipaoli ("charging party")  
filed an unfair practice charge against the Essex County Vocational  
Schools Board of Education ("Board"). She alleged the Board  
violated the New Jersey Employer-Employee Relations Act, N.J.S.A.  
34:13A-1 et seq., specifically subsections 5.4(a)(1), (3) and  
(4),<sup>1/</sup> when it excluded her from meetings, eliminated her position

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<sup>1/</sup> These subsections prohibit public employers, their  
representatives or agents from: "(1) Interfering with,  
restraining or coercing employees in the exercise of the

and issued her a negative evaluation allegedly because she had filed charges and a petition with the Commission.

On November 14, 1986, a Complaint and Notice of Hearing issued. On November 25, the Board filed its Answer asserting it was motivated by business and educational considerations, not by the charging party's protected activity.

On May 20 and 21, and July 15 and 16, 1987, Hearing Examiner Arnold H. Zudick conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs by February 1, 1988.

On February 26, 1988, the Hearing Examiner recommended the Complaint be dismissed. H.E. No. 88-40, 14 NJPER \_\_\_\_ (¶ \_\_\_\_ 1988). He found that the charging party had failed to prove any Board hostility to protected activity. He also found that the Board would have taken the same actions absent the protected activity. He concluded that the Board acted because of the charging party's unacceptable performance in preparing the district's curriculum for monitoring and her failure to attend the monitoring.

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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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

On May 26, 1988, after an extension of time, the charging party filed exceptions. She claims: she was excluded from directors' meetings immediately after filing a grievance and an unfair practice charge against the Board; the Hearing Examiner erred by finding she testified that Harvey told her she would be fired if she did not attend the retreat; she was not complimented at a June 4, 1986 staff meeting and not included on a list of transferees because of her protected activity; poor performance could not have motivated her demotion because the duties of her new title are somewhat greater than those of her old; economic need could not have motivated the demotion because her salary increased; her relocation and inadequate facilities were motivated by her protected activity; the Hearing Examiner erred in concluding the charging party never submitted proof of illness or warned Harvey of her upcoming illness; the district did not fail monitoring because of inadequate curriculum, and her negative evaluation was unfounded and motivated by her protected activity.

On August 2, 1988, after an extension of time, the Board filed cross-exceptions urging adoption of the recommended report.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 2-15) are accurate. We adopt and incorporate them with these minor clarifications. We find it plausible that the charging party did not testify that Harvey threatened to fire her for not attending the retreat. It was the adult school job that the charging party had to attend and that would explain why Harvey excused her from the retreat. That explanation would also reconcile

Harvey and Iadipoali's testimony.<sup>2/</sup> We clarify that while the charging party offered no proof of a serious illness before the Hearing Examiner, the record is silent as to whether she presented such proof to the Board.

This allegation of retaliation for the exercise of protected rights is governed by In re Tp. of Bridgewater, 95 N.J. 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the protected activity. Id. at 246.<sup>3/</sup>

The Board knew that the charging party had engaged in protected activity. But the Hearing Examiner found no hostility to

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<sup>2/</sup> Modifying this factual finding does not, however, alter our legal conclusion.

<sup>3/</sup> If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

that activity. He found that the demotion, evaluation and office relocation were not motivated by protected conduct, but by the Board's evaluation of the charging party's job performance and other business and educational reasons. We agree.

The charging party worked for the Board since 1957. In 1984, she was appointed to be the first director of curriculum and instruction. That director title and two others were included in the administrative negotiations unit. In January 1986, effective July 1, 1985, the Board and the administrators' association agreed to exclude all five director titles from the association's unit. On February 25, 1986, the Board unilaterally set the charging party's salary. On February 27, the charging party grieved the salary and requested an appearance before the Board. On March 10, she appeared before the Board. On March 12, the Board denied her grievance. On April 23, the charging party filed an unfair practice charge and a unit clarification petition.

On May 1, 1986, Harvey met with the four other directors. The charging party was told she was not expected to attend. On May 3, the Board held a retreat. The charging party could not attend in the morning when the other directors participated. The afternoon session was generally closed to directors.

In 1984, the charging party had been placed in charge of preparing the district for State monitoring. On May 5, 1986, she called in sick and did not attend the monitoring scheduled to begin that day. The district failed monitoring in large part because much

of the curriculum material the charging party had prepared was deemed inadequate. When the charging party returned from sick leave on May 19, she was relieved of her curriculum and monitoring duties. She was also excluded from directors' meetings. At a June 4 staff meeting, Harvey praised the work of the other directors.

On June 18, 1986, the charging party was informed her position would be abolished. On June 27, she was notified her office would be moved to a different location and she was given a negative formal evaluation. At her new office, she no longer had full-time secretarial assistance. Due to wiring problems, a telephone was not installed until October.

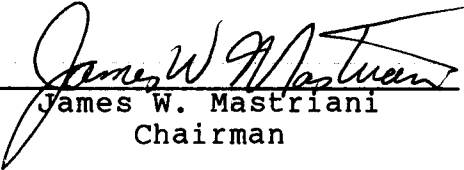
There is no direct evidence of hostility to the charging party's filing a grievance, an unfair practice charge or a unit clarification petition. Nor is there sufficient circumstantial evidence to infer hostility. The grievance was filed in March. No adverse action was taken. The charge and petition were filed on April 23. On May 5, the monitoring problems began. The only evidence offered to show hostility before May 5 was the exclusion from the May 1 meeting. That is not enough. The charging party could offer nothing more than the fact that she was excluded. Accordingly, we dismiss the allegations that the title elimination, office transfer or negative evaluation were motivated by reasons illegal under our Act. The title elimination was consistent with

the Board's intention to eliminate some director positions and its evaluation of the charging party's performance.<sup>4/</sup>

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

  
James W. Mastriani  
Chairman

DATED: Trenton, New Jersey  
August 12, 1988  
ISSUED: August 15, 1988

Chairman Mastriani, Commissioners Wenzler, Smith and Johnson voted in favor of this decision. Commissioners Reid and Bertolino abstained. None opposed.

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<sup>4/</sup> We specifically reject the contention that, overall, the reasons for the negative evaluation were pretextual. We do not consider whether each point of the evaluation was valid. We simply find that the Board was not illegally motivated when it evaluated, demoted and relocated the charging party.



H.E. NO. 88-40

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

In the Matter of

ESSEX COUNTY VOCATIONAL SCHOOLS  
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-87-16-57

MARIE IADIPAOLI,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that Essex County Vocational School Board of Education did not violate the New Jersey Employer-Employee Relations Act when it abolished the administrative position of employee Maria Iadipaoli and assigned her to another position, or when it issued her a negative evaluation. The Hearing Examiner concluded that the Charging Party did not prove that the Board's actions were based upon the Charging Party's exercise of protected activity. The Hearing Examiner further concluded that the Board would have taken the same action even in the absence of such protected activity.

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

H.E. NO. 88-40

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

In the Matter of

ESSEX COUNTY VOCATIONAL SCHOOLS  
BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-87-16-57

MARIE IADIPAOLI,

Charging Party.

Appearances:

For the Respondent, Schwartz, Pisano, Simon & Edelstein,  
Esqs. (Nathanya G. Simon, of counsel)

For the Charging Party, Klausner, Hunter & Oxfeld, Esqs.  
(Nancy I. Oxfeld, of counsel)

HEARING EXAMINER'S RECOMMENDED  
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public  
Employment Relations Commission (Commission) on September 3, 1986  
by Marie Iadipaoli (Charging Party) alleging that the Essex County  
Vocational Schools Board of Education (Board) violated subsections  
5.4(a)(1), (3) and (4) of the New Jersey Employer-Employee  
Relations Act, N.J.S.A. 34:13A-1 et seq. <sup>1/</sup> The Charging

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<sup>1/</sup> These subsections prohibit public employers, their  
representatives or agents from: "(1) Interfering with,

Party alleged that the Board acted against her because of her exercise of protected activity. The Charging Party alleged, for example, that the Board eliminated her position, excluded her from meetings, and issued her a negative evaluation because she filed a grievance, and filed charges and a petition before the Commission.

A Complaint and Notice of Hearing issued on November 14, 1986. The Board filed an Answer (C-2) on November 25, 1986 denying that it violated the Act. The Board asserted that its actions were based upon business and educational considerations, and not upon the Charging Party's protected activity.

Hearings were held in this matter on May 20 and 21, and on July 15 and 16, 1987.<sup>2/</sup> Both parties submitted post-hearing briefs, the last of which was received on February 1, 1988.

Based upon the entire record I make the following:

Findings of Fact

1. The parties stipulated to the following facts:
  - A. The employment history of the Charging Party to June 1986 is as follows:

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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; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

2/ The transcripts from the hearing will be referred to as: May 20--TA, May 21--TB, July 15--TC, and July 16--TD.

Initial employment as business trade teacher, 1957. Guidance counselor position effective 1961. Vice principal position effective 1973. Supervisor of instruction position, 1976, with seniority credit back to 1972. Acting principal 1977. Back to Supervisor of instruction, August 1977. Director of curriculum and instruction, July 1984. Curriculum coordinator, coordinator of curriculum and instruction July 1986.

B. The Board created five director positions effective as follows: Director of Planning and Computer Services, effective March 19, 1984. Director of Support Services, effective March 19, 1984. Director of Adult and Continuing Education/evening school, effective March 19, 1984. Director of Vocational and Technical Education, effective March 19, 1984. Director of Curriculum and Instruction, effective March 19, 1984. All of the above positions, with the exception of Director of Curriculum and Instruction, were posted and advertised for applications. The charging party was appointed the position of Director of Curriculum and Instruction effective July 1, 1984.

C. For the 1984-85 school year, three of the Director positions including Director of Curriculum and Instruction were included in the administrative bargaining unit.

D. Effective July 1, 1985, the contract between the administrative unit Essex County Vocational Administrative and Supervisors Association (Association) and the Board had expired. The Charging Party continued to be paid pursuant to the 1983-85 contract between those parties.

E. As a result of negotiations for the successor agreement, the Association and the Board modified the recognition clause in the 1985-87 contract to exclude all directors from the bargaining unit. In January of 1986, the Association and the Board arrived at a new contract retroactive to July 1, 1985, and effective through June 30, 1987.

F. At the Board Meeting of February 25, 1986, the Board set the Charging Party's salary for the 1985-86 school year at \$48,500.00.

G. On February 27, 1986, the Charging Party filed a grievance letter with H. Ronald Smith, the secretary to the Board concerning her salary for

1985-86 school year and requesting an appearance before the Board.<sup>3/</sup> On March 10, 1986, the Charging Party appeared before the Board with Barbara Kratt, the Association representative. On March 12, 1986, the Charging Party and Association representative were notified in writing that the Board had denied a grievance.

H. On April 23, 1986, the Charging Party filed with PERC a charge against the Board, Docket No. CI-86-76, and clarification of unit petition, Docket No. CU-86-58.

I. On June 10, 1986, the Charging Party participated in the exploratory conference at PERC concerning cases cited above. Also present at that conference was Dr. William Harvey, the Board's superintendent of schools.

J. The clarification of unit petition was dismissed by the Commission's Director of Representation on August 7, 1986. The charge matter continued to a hearing and is pending final action by the Commission.<sup>4/</sup>

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<sup>3/</sup> Exhibit J-17 is the February 27, 1986 "grievance letter" filed by the Charging Party regarding her 1985-86 salary. In J-17 the Charging Party alleged that other Directors were receiving a raise of 11.2%, while she was only receiving a raise of 3.5%.

<sup>4/</sup> The CU Petition was filed by Iadipaoli on April 23, 1986 seeking to have her Director position placed back into the Association's unit. That Petition was dismissed because individuals are not entitled to file CU petitions. N.J.A.C. 19:11-5. The Charge against the Board (CI-86-76) was also filed on April 23, and that same day Iadipaoli filed a charge (CI-86-77) against the Association. In those charges Iadipaoli alleged that the Board and Association violated the Act by agreeing to remove her title from the unit. Those cases were consolidated, and at hearing on March 30, 1987, Hearing Examiner, Susan Weinberg dismissed the charge against the Board. On January 22, 1988, the Hearing Examiner issued a decision, Essex County Vocational Tech. Bd.Ed., H.E. No. 88-36, 14 NJPER (¶ \_\_\_\_\_ 1988) renewing her decision regarding the charge against the Board, and recommending dismissal of the charge against the Association. Those charges are now pending before the Commission for final action.

K. The Charging Party's salary for 1986-87 school year was set pursuant to the contract between the Association and the Board in the amount of \$51,700.00.

2. William Harvey became the Board's Superintendent in January 1984. Just prior to assuming that position, he learned that the Board was going to be monitored by the State Department of Education (TD63). By the fall of 1984, Harvey had appointed Iadipaoli to coordinate the District's efforts to pass the monitoring (TD65). Harvey's staff knew that passing the monitoring was important to the Board (TD81), and on more than one occasion he specifically told Iadipaoli that the most important function of her job was to see that the Board passed monitoring (TD75).<sup>5/</sup>

In March 1984, just after Harvey became Superintendent, he recommended that the Board create five director positions (TD62-TD63). The Board approved the request and Iadipaoli became the Director of Curriculum and Instruction by July 1984 (TD63). By November 1985, however, Harvey recognized that the administration was topheavy and some director positions had to be eliminated (TD76-TD77; TC102-TC104). In November and December 1985, and January 1986, Harvey told the directors of the need to reorganize

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<sup>5/</sup> Iadipaoli testified that Harvey never said he hoped or expected the District to pass monitoring of curriculum (TB122-TB123), but she also testified that she knew she was expected to perform her curriculum responsibilities so that the District would pass (TB123). Since the Charging Party did not deny that she was expected to perform her work so that the District would pass monitoring, I credit Harvey's testimony that he did tell Iadipaoli that passing the monitoring was her most important function.

the administration and reduce the number of director positions (TD76-TD77; TC102-TC104; TD46-TD47). Iadipaoli was present at meetings when reorganization was discussed (TD45).

In accordance with those discussions, Harvey, on June 18, 1986, notified Iadipaoli that her position would be abolished (TD86). On June 23, 1986 Harvey made a formal recommendation to the Board to reorganize the administration by abolishing two director positions (TD85). The Board accepted that recommendation and abolished the Director of Curriculum and Instruction position held by Iadipaoli, and the Director of Adult and Vocational/Technical Education position held by James Southers (TD85). Southers, in a lateral move, became principal of the Irvington Center School,<sup>6/</sup> and Iadipaoli became Coordinator of Curriculum and Instruction effective July 1, 1986 (TD85). As a result of going from a director position, which was not included in a negotiations unit, to the coordinator position, which was included in the Association's unit, Iadipaoli received a higher salary (TD112). The duties of Iadipaoli's Coordinator position included many of the same duties as her former director position.

3. The District was being monitored by the State at "Level I" of the monitoring program. There were ten elements to the monitoring, including curriculum, and Iadipaoli was responsible for

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<sup>6/</sup> Southers had been appointed acting principal of the Irvington School in April 1986, and formally became principal of the school when his director position was abolished (TB166; TC105-TC106).

the curriculum area in particular, and for coordinating the District's readiness for monitoring in general (TA76). In preparing for the monitoring, the Charging Party collected information and prepared various documents showing course outlines, curriculum guides, course proficiencies, book lists, long-range plans and other materials in a variety of subjects (TA77). Iadipaoli prepared the material in accordance with what she perceived were the monitoring guidelines (TA77). Much of the information Iadipaoli prepared for the monitoring was first approved by the Board, such as curriculum guides (TB113, J-27), action plans, five-year plans, and textbook selections (TA71-TA72; J-23, J-18, J-45).

In late April 1986, Iadipaoli and Harvey met with the monitors in a preliminary planning session to prepare for the actual monitoring (TC17). The monitoring was scheduled to begin on Monday, May 5, 1986, and continue for approximately two weeks. The meeting of May 5 was referred to as the "entrance conference" (TC17). Iadipaoli was expected to attend that conference and subsequent days of monitoring to provide information for the monitors (TD93-TD94).

On Thursday, May 1, 1986, Iadipaoli learned by chance that Harvey was conducting a meeting with the four other directors. She interrupted the meeting to ask Harvey if she was expected to be at that meeting and was told she was not (TA23). Iadipaoli had no knowledge of what was discussed at the meeting (TA25).

A meeting was scheduled for Saturday, May 3, 1986, referred to as the "Board Retreat." The agenda for the Retreat (J-14) showed



the morning session was to include a discussion of the Superintendent's salary, and then a discussion of long-range plans and EEO. The afternoon session was to include a discussion about reorganization and leadership training, and then a discussion about alternate funding. The directors were invited to the Board Retreat but were not allowed to participate in all the discussions (TC97-TC99; TD100-TD101). On the morning of May 3, Harvey changed the agenda for the day and J-14 was not followed (TC98, TC100, TD99-TD100). The morning session with the directors present only included discussion of the long-range plans and EEO (TC100, TD100). The Superintendent's salary was not discussed that day (TC99).

The afternoon session was a closed session excluding the directors (TC100, TD100-TD101). Only Board members, the superintendent, the business administrator, board secretary and assistant board secretary, and Board attorneys were present in the afternoon session (TD101).<sup>7/</sup> In the afternoon session the Board discussed the reorganization, acquisition of land, and personnel matters (TD102).

On Friday, May 2, 1986, Iadipaoli was aware of the Board Retreat scheduled for the following day. She asked Harvey if she could be excused from the morning session because she taught in an adult school on Saturdays from 8:30 a.m. until noon (TA26). Harvey

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<sup>7/</sup> Eloise Forster, the Director of Planning and Computer Services at that time, was asked to come into the afternoon session for a brief time (TC100).

approved her request and told her it was not necessary for her to come to the meeting at all (TD98).<sup>8/</sup>

On May 3 Iadipaoli did not come to the morning session (TA26, TB129). She did not know that the agenda had been changed, nor did she know what was discussed or who attended the morning session (TB129-TB131). Iadipaoli arrived at the Retreat at 12:45 p.m. (TA26), and noticed that there was no meeting in progress and that people were eating lunch (TA26-TA27). When Harvey saw her he told her that the afternoon meeting was a closed session and she could not go into the meeting (TD101). Iadipaoli did not know what the Board discussed in the afternoon session (TB129, TB131). She did not know who was present at the afternoon meeting, and who, besides herself, was excluded from the afternoon meeting (TB129-TB131).<sup>9/</sup>

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<sup>8/</sup> Iadipaoli testified that on Friday, May 2, Harvey told her that if she did not show up on May 3 she would be fired, but then she testified that Harvey told her she did not have to come to the Retreat (TD26). Harvey similarly testified that he told Iadipaoli that she was not required to come to the Retreat (TD98). I credit Harvey's testimony, and do not credit Iadipaoli's testimony that Harvey told her that she would be fired. Throughout the hearing Harvey appeared to be a more trustworthy witness, with a better command of the facts, and more self-assured than Iadipaoli. It makes little sense that Harvey would threaten Iadipaoli with termination and then abruptly change his mind.

<sup>9/</sup> Iadipaoli testified that when Harvey saw her he asked her to leave without any mention of there being a closed session. She also testified that she saw the directors go back into the meeting room after lunch (TA27). I do not credit Iadipaoli's

Iadipaoli gave no hint to Harvey on May 3 that she was feeling ill or would not appear at the monitoring entrance conference scheduled for Monday, May 5.

4. On the morning of May 5, 1986, Harvey, Forster, and the other directors were at work awaiting the beginning of the monitoring scheduled for 9:00 a.m. (TC17-TC18, TC170). Iadipaoli did not appear, and had not previously telephoned Harvey to notify him that she would be absent (TC18; TD93). The official procedure for notifying the District of one's absence was to telephone the Code-A-Phone service and leave a taped message (TC169-TC170). Iadipaoli telephoned the service sometime on the morning of May 3, and Harvey was notified by 11:00 a.m. that she was out sick (TC93).

Iadipaoli remained on sick leave from May 5, 1986 until May 19, 1986 (TB148). During that entire absence Iadipaoli never telephoned Harvey to discuss the monitoring (TD94-TD95). When other directors had been out ill they usually telephoned Harvey to discuss important matters in which they were involved (TD94). Given the significance attached to the monitoring, and Iadipaoli's responsibility to prepare the curriculum for monitoring, Harvey had expected to hear from her before and during the monitoring process

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9/ Footnote Continued From Previous Page

testimony. Both Harvey and Forster testified that directors did not attend the afternoon session except on a limited, as needed, basis (TD102). Their testimony is more reliable and is credited here. Iadipaoli could not be certain who attended the afternoon session (TB129-TB131); thus, her testimony is unreliable.

(TD94-TD95). Harvey was upset that Iadipaoli did not call him, and he thought she was retaliating because she was unhappy with her salary (TD95-TD96).

When Iadipaoli did not appear on May 5, Harvey asked Forster to assume the responsibility for assisting the monitors in reviewing the curriculum information Iadipaoli had prepared (TC18). The monitors spent three days reviewing most of the curriculum material and concluded that it was in such a state of disarray they could not determine whether curriculum was being properly implemented in the schools (TC25, TC175). The monitors discontinued the monitoring at that point and gave the District two weeks to get the curriculum information into proper order (TC25-TC26, TC175-TC176). Much of the curriculum material Iadipaoli prepared was unacceptable to the monitors (TC25). As a result, the District failed the curriculum monitoring at Level I (TB123, TB126, TD19).

The monitors found the curriculum material prepared by Iadipaoli to be unacceptable in English, math, commercial art, keyboarding, business math, computer programming, and data and word processing (TC26-TC41). They also found that certain documents prepared by Iadipaoli, J-3, J-18, J-19, J-23 and J-24, and J-45 were unacceptable because they were inadequate or unorganized, and because information contained therein was no longer current (TC23-TC24, TC58-TC95). Forster had to redo those documents within the two-week period granted by the monitors, and the new documents, R-1, J-39, J-40, J-37, and J-35, respectively, were eventually found to be acceptable (TC23-TC26; TC58-TC95).

There were several other problems with the material Iadipaoli prepared. Goals and objectives were not in cross guides for each subject area (TB105); course proficiencies were all in one binder (TB108); and, several items were merely duplicated materials (TB138). Iadipaoli was not aware that the monitors would not accept her grade level and course level designations (TB188-TB189), and she did not specify course numbers to objectives so that they could be compared (TB190).

Upon Iadipaoli's return to work on May 19, she first learned that the monitoring material she prepared had been unacceptable to the monitors and that Forster redid much of that material (TB98, TB203, TB206). At that time, Harvey told her that he did not want her involved in curriculum again (TD98). Harvey had lost confidence in Iadipaoli. He felt that after having several years to prepare for the monitoring and then submitting unacceptable material, Iadipaoli did not have the ability to organize the curriculum (TD97-TD98).

5. Harvey conducted meetings with the directors on May 27 and 28, 1986, but Iadipaoli was not included. Iadipaoli did not attempt to attend those meetings and had no knowledge what took place (TA31). Harvey had a general staff meeting on June 4, 1986 which Iadipaoli attended (TA31). At that meeting Harvey praised the work of the four other directors, but made no mention of Iadipaoli (TA12, TA15, TA32). Harvey also had meetings with the four other directors on June 12 and 13, 1986, but Iadipaoli was not invited to

those meetings nor did she attempt to attend (TA32-TA33). On June 18, 1986 the four other directors were involved in interviewing candidates for a career coordinator position and Iadipaoli was not asked to participate (TA33-TA34).

6. On June 18, 1986 Iadipaoli was notified that her position would be abolished, and on June 23 Harvey formally made that recommendation to the Board (TD85-TD86). On June 27 Iadipaoli was notified that her office would be moved to a different location, and she was given her formal evaluation (J-12)(TA40, TA55-TA56). Exhibit J-12 was the only evaluation Iadipaoli ever received during the two years she held the Director of Curriculum position (TA55).

Exhibit J-12 was prepared by Harvey and Forster and was a negative evaluation. It began by explaining that Iadipaoli did not accept and assert responsibility well; remained unfamiliar with District procedures; did not keep current with State requirements; and had difficulty identifying the District's needs. Exhibit J-12 included language criticizing specific curriculum documents and information Iadipaoli prepared for the monitors, and language concluding that her work did not comply with Element 3 of the State Monitoring Guidelines, which resulted in the District failing the monitoring at Level I. Much of the information contained in J-12 was provided by Forster from criticisms the monitors made about Iadipaoli's curriculum material (TD3).

Iadipaoli's failure to adequately prepare the District's curriculum for monitoring was the main reason for Harvey's

dissatisfaction with her performance and her negative evaluation in J-12 (TD80-TD81, TD112). Harvey criticized Iadipaoli's curriculum performance as "lacking effort." He believed that Iadipaoli did not understand the problems with the monitoring, and that she would not assume any responsibility for those problems (TD83).<sup>10/</sup>

Iadipaoli signed J-12 on June 30, 1986, but did not concur with the "alleged weaknesses." She submitted a lengthy rebuttal to the evaluation (attached to J-12) contesting the weaknesses listed in J-12. In the rebuttal, she often blamed the Superintendent, and certain directors for many of the problems.

7. When Iadipaoli assumed her new coordinator duties she was instructed to move her office from the central office location to a different Board facility (TA40). Office space at central office was crowded, and as part of the reorganization of the directors' positions, the office space at central office was reallocated (TC111-TC112). Since Iadipaoli was no longer a

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<sup>10/</sup> Harvey testified that Iadipaoli's litigation with the Board--her charges and exercise of protected activity--was not a factor in making his decisions regarding her employment status (TD80). I credit that testimony. Harvey testified in a forthright manner. His answers were not strained or calculated. He responded to questions quickly as one would who had a command of the facts. When questioned regarding the monitoring and Iadipaoli's work, Harvey displayed emotion showing that he was genuinely upset over Iadipaoli's failure to adequately prepare the curriculum for monitoring, to appear at the entrance conference, and to telephone him regarding her absence. As a result, I found Harvey to be a believable witness. Thus, I also credit his testimony that he criticized Iadipaoli on J-12 because he believed that she did not understand the problems, and would not assume responsibility for those problems.

director, and since three of the other four coordinators had offices outside the central office location, Iadipaoli was moved to another facility (TC113-TC114).

After her office was moved in early July 1986, Iadipaoli's access to photocopying equipment and secretarial assistance was reduced, but still adequate (TA43-TA45, TA49, TC134-TC135). Like other coordinators, she was required to share secretarial services (TC135-TC137). In addition, although a telephone was not installed in her office until October 1986 (TA45-TA46, TA49), that was due to wiring problems which prevented installation when the Board first requested it in early July 1986 (TC127).

#### Analysis

The Board did not violate the Act by any of its actions towards Iadipaoli. The Board's actions were based upon legitimate educational and management considerations, and not upon Iadipaoli's exercise of protected activity.

The burden here is on the Charging Party to prove that the Board's actions were motivated by--and in reaction to--Iadipaoli's exercise of protected activity. The New Jersey Supreme Court in Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984)(Bridgewater), created a test to be applied in analyzing whether a charging party has met its burden of proof. Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the



adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected activity. Id. at 246.

If a charging party satisfies those tests, then the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. The burden will not shift to the employer, however, unless the charging party proves that anti-union animus was a motivating or substantial reason for the employer's actions.

The Charging Party did not meet her burden of proof which would have required the Board to justify its actions, but if she had, the record shows that the Board's elimination of Iadipaoli's director position, and its reasons for the content of J-12, were based upon legitimate business and educational considerations. Since the facts relied on by the parties to prove their respective cases occurred during the same time period, it is not realistic to consider the Charging Party's facts in a vacuum in deciding whether it proved a prima facie case of hostility. All the facts occurring during the relevant time period must be considered in determining the basis for employer motivation. By filing her grievance, and her petition and charges before the Commission, Iadipaoli was obviously engaged in protected activity and the Board was aware of such activity. But, the mere fact that Iadipaoli exercised those

protected rights with the Board's knowledge is not proof that the Board was hostile toward her for exercising those rights. Lyndhurst Bd.Ed., P.E.R.C. No. 87-139, 13 NJPER 482 (¶18177 1987).

The Charging Party failed to prove that her protected activity was a substantial or motivating factor in the Board's actions. There was no proof, for example, that Harvey, Forster, or any other Board official made any remarks, or authored any documents suggesting anti-union animus. Similarly, Iadipaoli offered no testimony that Harvey or Forster made any remarks linking their actions with Iadipaoli's exercise of protected activity.

In analyzing (a)(3) (and (a)(4)) cases, the timing of the protected activity and the alleged unlawful act(s) is always an important factor in deciding employer motivation, and the Charging Party's case is apparently based upon that factor. The Charging Party filed her grievance in February 1986 and filed the petition and charges in late April 1986. Except for the minor incident between Harvey and the Charging Party on May 3, 1986 regarding the Board Retreat, all of the alleged unlawful acts occurred after the Charging Party failed to appear at the monitors' entrance conference on May 5, and after the monitors found Iadipaoli's curriculum material unacceptable.<sup>11/</sup> I find that the primary motivating

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<sup>11/</sup> The Charging Party alleged that the unlawful acts began on May 1, 1986 when Harvey allegedly excluded Iadipaoli from a directors' meeting. But since the Charging Party did not know what occurred at that meeting, and did not produce any independent evidence linking her exclusion from the meeting with her protected activity, I ascribe little weight to this incident.

factor behind the elimination of Iadipaoli's director position and the issuance of J-12 was her unacceptable performance in preparing the District's curriculum for monitoring, and her failure to attend the entrance conference. Harvey explained as far back as 1984 that passing the monitoring was one of the District's primary goals. Iadipaoli had been entrusted with the responsibility to prepare the District's curriculum to pass the monitoring, and once it became clear to Harvey that Iadipaoli had failed to accomplish that goal, he did not want her to have any further involvement in the process. Although Iadipaoli's protected activity had occurred during the same time period, it was not a factor in the Board's actions. I credited Harvey's testimony that failing the monitoring was a key factor in evaluating Iadipaoli, and that he was dissatisfied with her performance.

In her post-hearing brief Iadipaoli argued that the Board had approved her curriculum and other plans for monitoring and that she prepared the material in a manner the monitors had expected. In making that argument, the Charging Party apparently concluded that, therefore, the Board's asserted reasons for its actions were pretextual. I do not make the same conclusion. The Charging Party failed to place any weight on the fact that it was the State monitors, not Board officials, who found Iadipaoli's work unacceptable. Harvey and the Board merely reacted to that determination, and had a right to conclude therefrom that Iadipaoli had not satisfactorily performed her job.

I also credited Harvey's testimony that he believed Iadipaoli's absence from the entrance conference was in retaliation for the salary she received from the Board. Iadipaoli was absent for two weeks yet offered no proof of a serious illness. Having given Iadipaoli the significant responsibility to prepare the District's curriculum for monitoring, Harvey was entitled to expect that she would be at the entrance conference, or that she would contact him regarding her unavailability. Iadipaoli's failure to contact Harvey caused some disruption of the monitoring process, and Harvey was entitled to conclude therefrom that her absence was deliberate.<sup>12/</sup>

Thus, considering the events surrounding the monitoring process, and absent any independent evidence of anti-union animus, the Charging Party did not prove by a preponderance of the evidence that the Board was hostile to her exercise of protected activity.

If the Charging Party had proved that the Board's actions were to some extent a reaction to her exercise of protected activity, the evidence, nevertheless, shows that the Board would have taken the same action based upon legitimate business and educational considerations. See Bridgewater; State of New Jersey, P.E.R.C. No. 86-89, 12 NJPER 194 (¶17072 1986). In November and December 1985 and January 1986, prior to Iadipaoli's engaging in

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<sup>12/</sup> I am not finding that Iadipaoli's absence was or was not due to illness. I am merely finding that Harvey had the right to conclude that it was a form of retaliation by Iadipaoli.

protected activity, Harvey informed the directors of the need to reorganize the administration and reduce the number of director positions. Public employers have the managerial prerogative to abolish and create positions, and transfer, assign and reassign employees to meet operational needs. Ridgefield Park Bd.Ed. v. Ridgefield Park Ed. Assn., 78 N.J. 144 (1978); Ramapo-Indiana Hills Ed. Assn. v. Ramapo-Indian Hills Reg. H.S. Dist. Bd.Ed., 176 N.J. Super. 35 (App. Div. 1980). The decision to eliminate some director positions had been made prior to Iadipaoli's exercise of protected activity, and Iadipaoli's position was selected for elimination primarily because of her failure to adequately prepare the District's curriculum for monitoring. The same situation would have occurred even if Iadipaoli had not engaged in protected conduct.

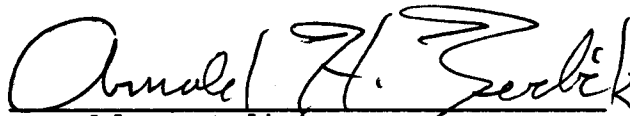
Similarly, the content of J-12 was based upon the results of the monitoring and would have occurred even in the absence of protected conduct.

The incidents that occurred after the monitoring process had been completed, moving Iadipaoli's office, changing her access to secretarial and photocopying assistance, and the late installation of her telephone, were all lawfully based. The office, secretarial and photocopying changes were consistent with how most of the other coordinators were handled, and the telephone situation proved to be a technical problem, none of which were based upon Iadipaoli's exercise of protected conduct.

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

Recommendation

I recommend the Commission ORDER the Complaint dismissed.

  
Arnold H. Zudick  
Hearing Examiner

Dated: February 26, 1988  
Trenton, New Jersey