

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

In the Matter of

KEARNY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-2006-027

ANN TAYLOR, et al.

Charging Parties.

Appearances:

For the Respondent, Genova, Burns & Vernoia
(Joseph M. Hannon, Esq. of counsel)

For the Charging Parties, Bucceri & Pincus
(Gregory Syrek, Esq. of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On January 4, 2006, Ann Taylor and other individuals^{1/}
(Charging Parties) filed an unfair practice charge against the
Kearny Board of Education (Respondent or Board). The charge
alleges that the Board violated 5.4a(1), (3) and (4)^{2/} of the New

^{1/} Charging Parties are Ann Taylor, Mary Bartiromo, Patricia
Edwards, Dianne Foray, Dolores Leadbeater, Veronica Green,
Linda Renshaw and Nancy Rowe (C-1).

^{2/} These provisions prohibit public employers, their
representatives or agents from: "(1) Interfering with,
restraining or coercing employees in the exercise of the
rights guaranteed to them by this act; (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

(continued...)

Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), when it changed Charging Parties' status from full-time to part-time and eliminated health care coverage and entitlement to sick leave, in retaliation for Charging Parties' filing a representation petition and, subsequent, unsuccessful attempt to organize full-time aides.

On May 31, 2006, a Complaint and Notice of Hearing issued (C-1).^{2/}

On June 30, 2006, Respondent Board filed its Answer (C-2) generally denying that it retaliated against Charging Parties for filing a representation petition and their organizing attempt. Additionally, the Board raised various affirmative defenses, including but not limited to, that it has a managerial prerogative to reduce hours of work and that its actions were taken for budgetary reasons.

After I granted several mutual adjournment requests to give the parties time to develop stipulated facts and prepare joint exhibits, a hearing was held on April 30, 2007 at which the parties examined witnesses and presented exhibits. I granted

2/ (...continued)
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."

3/ Exhibits are marked respectively "C", "CP" and "R" for Commission, Charging Parties and Respondent. Transcript references to the hearing are "T-".

Charging Parties' and Respondent's requests to extend the briefing schedule due to late receipt of the transcript and due to the parties settlement efforts. Briefs and replies were filed by October 19, 2007. Based on the record, I make the following:

FINDINGS OF FACT

The parties stipulated to the following facts (1 through 14) (J-8):

1. At the time the charge was filed, Charging Parties, Ann Taylor, Mary Bartiromo, Patricia Edwards, Dianne Foray, Veronica Green, Dolores Leadbeater, Linda Renshaw and Nancy Rowe were employed as aides by the Respondent, Kearny Board of Education.

2. Charging Parties are public employees within the meaning of N.J.S.A. 34:13A-1 et seq. Respondent is a public employer within the meaning of N.J.S.A. 34:13A-1 et seq.

3. At the time the charge was filed, Charging Parties were employed in positions requiring them to provide services to special education students on a daily basis.

4. The initial date of hire for each Charging Party is as follows:

Taylor	-	October 1991
Bartiromo	-	1989
Edwards	-	September 1992
Foray	-	September 1990
Green	-	January 1990
Leadbeater	-	September 1992
Renshaw	-	September 1989
Rowe	-	March 1990

5. Prior to the 2005-2006 school year, Charging Parties were employed on a full-time basis.

6. On or about January 12, 2004, a representation petition was filed with the Public Employment Relations Commission seeking an election to establish the Kearny Teachers' Aides Association as the negotiations representative of a unit consisting of all full-time aides employed by the Respondent (J-1).

7. On or about August 6, 2004, a letter was issued by Arnold Zudick, Director of Representation, indicating that an election would be ordered to determine whether the full-time aides wished to be represented by the Kearny Teachers' Aides Association for negotiations purposes (J-2).

8. By letter dated October 18, 2004, Charging Parties applied for health insurance coverage through the Respondent (J-3).

9. The Commission issued a decision on December 16, 2004, dismissing the Representation Petition (J-4).

10. Charging Parties were provided with health insurance effective January 1, 2005.

11. On June 17, 2005, Charging Parties received letters thanking them for their service and stating that they would be retained on the active list for the 2005-2006 school year (J-5).

12. On July 7, 2005, the Respondent reduced the employment status of each Charging Party. Their hours would be reduced [effective September 2005] to less than 19.50 hours per week.

13. Charging Parties were notified of the Respondent's action by letter dated July 28, 2005 (J-6).

14. As the result of the Respondent's action of July 7, 2005 to reduce the employment status of the Charging Parties, their health insurance coverage was terminated effective September 1, 2005 (J-7).

Ann Taylor

15. Ann Taylor has been employed as a special education aide by the Board for 16 years. Special education aides either work with students in the classroom or on buses. She is currently assigned to the Franklin School as a part-time aide working mornings with 7th and 8th grade special education students. Her duties include reinforcing teacher lesson plans, escorting mainstreamed students to classes, helping students during lunch and doing some computer work (T14-T15, T47, T86).

16. On January 24, 2000, the Kearny Teachers' Aides Association led by Taylor filed a representation petition seeking to organize full-time special education aides (T15, T51). Before filing the petition, the aides attempted to join both the teachers' and the secretaries' NJEA bargaining units, but were rejected in both instances (T51, T54).

17. While the petition was pending, in September and October 2000, Taylor wrote Board Administrator Leslie Gaulton and requested health benefits for full-time aides, benefits that she insisted the aides were entitled to but not receiving (CP-4, CP-5; T29).

18. In October 2000, Taylor collected and forwarded the benefits applications to Gaulton. Immediately thereafter, he called her into his office. Gaulton informed Taylor that the Board was extremely unhappy with her demands and that if the full-time aides pushed the health benefits demand, their hours would be cut to part-time (T27-T29).

19. In November 2000, the aides responded in writing to Gaulton:

We, the undersigned, who are full-time aides with the Kearny Board of Education, have discussed the issue of health insurance benefits relative to our employment. Having realized that this issue is cost prohibitive to the Board, we have decided to waive our right to health coverage and maintain our full-time status. This decision is done without prejudice.

We are also requesting a meeting with the Labor Relations Committee to discuss other aspects of our employment. We ask that the Board delay any action involving this issue until both sides have had an opportunity to meet (CP-6).

The Labor Relations Committee never met with the aides (T30).^{4/}

^{4/} According to Taylor, this was not the first time the aides
(continued...)

20. On December 29, 2000, the Director of Representation dismissed the January 2000 petition filed by the Association, finding the proposed unit of all full-time classroom aides too narrow. Kearny Bd. of Ed., D.R. 2001-4, 27 NJPER 68 (¶32030 2000).

21. Even before the 2000 organizational effort, beginning in 1996 and continuing to the present, Taylor wrote a series of letters on behalf of all full-time aides to the former and current Heads of Special Services James Canaley and Art Monaco, former and current Superintendents Louis Acocella and Robert Mooney, Gaulton and various Board members, including Board President Mary Torres, requesting pay increases and other benefits (CP-1 through CP-3, CP-7 through CP-10, T15-T16). With one exception (CP-1)^{5/}, Taylor received no response to her

4/ (...continued)
were asked to waive health benefits in exchange for maintaining their full-time job status. In 1992 former Superintendent McGeehen told the full-time aides at a meeting that they would have to waive health benefits to retain their jobs. At that time the aides did not realize that, as full-time employees, they were entitled to these benefits (T58). Both Charging Parties Edwards and Bartiromo testified. They have been employed by the Board since at least 1992. Neither confirmed nor denied this meeting with McGeehan. Taylor's testimony is hearsay and not supported by residual evidence on the record. Therefore, I cannot find as a fact that the 1992 meeting took place. In any event, whether the meeting took place is immaterial to my decision as too remote in time from the 2005 adverse action alleged in the charge.

5/ In October 1996 Superintendent Acocella responded to a
(continued...)

letters nor were any pay increases or other benefits granted (T19, T22-T24).

(a) Specifically, in 1996 Taylor wrote Canaley seeking pay increases for the full-time aides (CP-1). Then Superintendent Acocella denied the request but suggested that she reiterate her request to Canaley prior to the preparation of the 1997/1998 budget (CP-2). Following Acocella's suggestion, Taylor repeated her request for a pay increase on behalf of the aides in May 1997, but received no response from Canaley (CP-2; T22).

(b) In June 1999, Taylor once again renewed her request for a pay increase for aides to current Superintendent Mooney. Taylor suggested that the aides receive a pay differential similar to the ones received by custodians and school secretaries (CP-3). She received no response to this letter (T24).

(c) Similarly, in January 2001, on behalf of the aides, Taylor sought a meeting with Board President Torres, to discuss "certain aspects of our employment" (CP-7; T31). Having received no response by February, Taylor again wrote Torres requesting the meeting and copied all Board members so that they would be aware of her meeting requests (CP-8). Taylor received no response from Torres or any Board member to the follow-up letter (T33-T34).

5/ (...continued)
September 1996 letter from Taylor (CP-1, CP-2). He refused to recommend the pay increase the aides sought.

(d) In the following September of 2001, having gotten no response from Torres, Taylor wrote Gaulton seeking parity for aides with other non-certified full-time employees as to salary, benefits and "rights delineated by local contracts and/or entitlements for said school employees" (CP-9; T35). Taylor signed the letter individually and on behalf of the Kearny Teachers' Aides Association. The aides had decided to work as a group even though their 2000 organizational effort was unsuccessful, and they were not recognized by the Commission as a majority representative (T36, T60). Gaulton did not respond to this letter or schedule a meeting (T36).

(e) On June 6, 2003, Taylor wrote current Head of Special Services Art Monaco requesting a pay increase and holiday pay for full-time aides (CP-10). Taylor signed the letter as President of the Kearny Teachers' Aides Association and copied Superintendent Mooney, Assistant Superintendent Kiss, Board President Martello and all Board members. She received no response (T38).

22. On January 12, 2004, a second representation petition was filed by NJEA Field Representative John Dillon on behalf of the Kearny Teachers' Aides Association (J-1; T38-T39). As before, the Association was seeking to represent all full-time special education classroom aides. Nine aides fell within these

parameters, although there were approximately 170 part-time aides also employed by the Board (R-1; T50, T87).^{6/}

23. On June 22, 2004, Taylor on behalf of the Association wrote Gaulton requesting that he place a letter, that she enclosed, on the Board agenda and that it be read to all Board members at the June 28, 2004 Board meeting (CP-11; T40). Taylor also requested that the Board discuss the issues raised in the letter - a pay increase, health benefits and paid holidays for full-time aides - and provide a written response to the aides' requests (CP-11). No response, written or otherwise, was received to CP-11 (T40).

24. On October 15, 2004, the Director of Representation ordered an election among all full-time aides. Kearny Bd. of Ed., D.R. 2005-5, 30 NJPER 425 (¶139 2004) (Kearny I). The Board appealed. In December 2004, the Commission reversed the Director's decision and determined that a unit of all full-time aides, excluding part-time employees, was not an appropriate unit (J-4). Kearny Bd. of Ed., P.E.R.C. 2005-42, 30 NJPER 504 (¶171 2004) (Kearny II).

25. On October 6, 2004, however, before the Director's decision was issued, but after the Director indicated by letter

^{6/} The Board stopped hiring full-time aides in 2003 or 2004 (T49). As of the 2004/2005 school year, there were only 8 full-time aides who are the Charging Parties in this matter (T87).

(J-2) that he would order an election, Taylor wrote Association members advising them to apply for the New Jersey State Health Benefits Program and enclosing forms for them to fill out and return to her before the final day (October 22) of the open enrollment period (CP-12; T41).

26. After receipt of the open enrollment forms, Taylor forwarded them to Gaulton on October 18, 2004 (J-3; T-42). As a result of the aides' request for health benefits, for the first time, the Board granted the full-time aides health care coverage effective January 1, 2005 (T91). The additional cost to the Board was \$120,000 annually (T92).

27. According to Taylor, in June 2005, Gaulton called Taylor into his office to discuss the issue of health benefits. Also present was Board employee Mrs. McDonald who was in charge of payroll. Taylor described the ensuing discussion:

Mr. Gaulton told me that there were certain Board members who were irate, that we were pursuing a bid to become a union and take our medical benefits and they would prefer not to have to deal with this at all, if that was possible (T62-T63).

Neither Gaulton nor McDonald testified. I cannot, therefore, find as fact that this conversation took place or that these statements were made. This testimony is uncorroborated double hearsay.

28. On July 28, 2005, Superintendent Mooney sent letters to the aides informing them that the Board met at a special meeting

on July 7, 2005 to address budget cuts in response to a budget reduction imposed by the Mayor and Council after the defeat of the school budget in April 2005 (J-6). He informed them that the Board decided for cost savings, as well as the impact on the students, to reassign all full-time aides to part-time status. The hourly rate of pay for the part-time position - eleven dollars - was the same as the aides had been receiving as full-time employees (CP-13). The only difference was the numbers of hours worked. As a full-time aide, Taylor worked 29.75 hours per week, while as a part-time aide her hours are capped at 19.50 per week (T44-T45).

29. Taylor was not notified in advance of the special meeting, although she learned the day of the meeting that the Board was considering cutting the aides' hours of work. Taylor and some of the full-time aides attended the meeting. NJEA Uniserv representative Ed Stevens attended the meeting and spoke on behalf of the full-time aides. At this time there was no active organizing effort, since the Commission decision had been issued the previous December.

30. Health care coverage for full-time aides ceased as of September 1, 2005 when the aides' positions were reduced to part-time status (hours not to exceed 19.50 per week) (J-6).

Patricia Edwards

31. Until December 2006, Patricia Edwards worked as an aide employed by the Board. As a full-time aide, she worked 28.75 hours per week. When her status was changed to part-time, she worked 15 hours per week at \$11.00 per hour (T66-T67).

32. In 2004, Edwards addressed the Board at its meeting about a pay increase and creating a pay scale for the aides. She was told that the Board would look into the possibility of a pay scale, but nothing happened as a result of her requests (T68-T69).

33. According to Edwards, sometime after this Board meeting, but before the second representation petition was filed, she called the Town of Kearny about a personal matter and Board President Mary Torres answered the phone (T70-T73). After they discussed the personal matter, Edwards inquired whether anything was being considered about the pay scale (T71). According to Edwards, Torres replied that she felt that she (Torres) was stabbed in the back (T71). Edwards explained the conversation as follows:

Q. Did she say anything beyond that?

A. No.

What was your understanding as to the reason why she said that?

A. My understanding was - possibly my belief was that we were asking for a pay increase and also that we were trying to form a union.

* * *

Q. Did Ms. Torres say anything else in connection - did Ms. Mary Torres say anything else during the course of this conversation?

A. No, no. (T71-T72)

I cannot find as a fact that Torres made this statement because Torres did not testify and this testimony is uncorroborated hearsay. However, even if I credit that the statement was made, other than Edwards' belief that Torres was referring to the aides' request for pay increases and attempt to form a union, the statement itself does not support Edwards' understanding nor did Edwards provide any context or explanation to support that belief. Taken alone, I cannot discern what Torres meant by her comment and, therefore, cannot find as a fact that the statement, even if made, referred to the aides' organizing effort or request for a pay increase.

Mary Bartiromo

34. Bartiromo has worked for the Board for 18 years. As a full-time special education bus aide, she worked between 28 and 29 hours per week. Although she is not currently working, as a part-time aide, she worked 19.50 hours per week (T74-T76).

35. In July 2005, after the special July 7 Board meeting to discuss the aides' hours of work, Bartiromo received a telephone call from Art Monaco's secretary, Linda Stevenson, telling her that if she wanted to remain a full-time employee she would have to sign a waiver giving up her benefits. Stevenson told her not

to discuss the call with the other aides, but to call back with her answer (T80, T83).

A couple of days later, when Bartiromo called back after discussing the offer with her husband, she spoke to Monaco. Monaco claimed that he did not know what she was talking about (T81, T83). In any event, Bartiromo told him that she would not sign a waiver (T81).

Robert Mooney

36. Mooney has been employed by the Board as Superintendent since July 1998 (T86). The Kearny school district has been in the State Health Benefits Program (SHBP) since before Mooney was hired as superintendent (T161-T162).

37. Budgets for the Board are first submitted to the county for preliminary approval and then annually in April to the voters for approval (T92).

The budget sheet for the 2005-2006 school year was prepared by Gaulton in consultation with Mooney, the assistant superintendent and other administrators (R-2; T93-T95). Mooney prepared a power point presentation to clarify the budget for the public and Board (R-3; T96).

The 2005-2006 school year was a difficult budget year because State aid to the Board was flat as it had been for the previous few years. With increases in various budget areas,

Mooney was asking for a \$270 increase per household on a \$100,000 of assessed value which is the average home in Kearny (T98-T100).

38. When the 2005-2006 budget was presented to the voters on April 19, 2005, it was defeated (R-4; T102). The budget was then presented to the Town Council to determine whether to keep the budget as is or to cut it. The Town Council elected to cut the budget by \$810,000 (R-4; T102-T103).

After several meetings with the Board in May 2005, the Council adopted a resolution reducing the school budget by \$810,000 in four categories: \$450,000 from the general fund or anticipated surplus; \$120,000 from salaries for grades 1 to 5; \$100,000 from salaries for grades 6 to 8; and \$140,000 from salaries for grades 9 to 12 (R-4, R-5; T103).

39. After the decision of the Town Council to reduce the school budget, the budget process required that the Board be given an opportunity to accept or reject the new budget (T104). Under this process, if the Board accepted the reductions, then it was free to allocate the new monetary amounts any way it chose as long as the bottom line budgetary allocation was met (T103-T104). Here, the Board accepted the proposed \$810,00.00 budget reduction and proceeded to analyze several areas for possible cost savings (T105-T107).

The priority for the Board was not to lose classroom teachers and to retain the student/staff ratio (T10, T123). All

of these considerations were discussed at Board meetings (T110-T111).

Among areas which Mooney considered for cost savings was the elimination of the director of public relations position, the non-funding/elimination of a videography program, not adding classes in the World Language program, eliminating a desktop publishing lab, reducing the athletic budget by \$20,000 as well as the status of the classroom aides (T107-T109). Prior to the budget defeat, there were no discussions regarding the status of the full-time aides and their employment for the 2005-2006 school year (T106).

40. At special Board meetings on July 7 and July 18, 2005, the Board acted on the various proposed budget cuts (R-6, R-7). First, the assistant superintendent reviewed staffing district-wide and came up with several strategy options, including moving staff around to attain efficiencies (T112-T113). As a result, no reduction in faculty for the elementary and high school was necessary as part of the budget cutting process (T113). Also, although the Board considered eliminating the high school Latin program, enrollment increased and the program was retained (T116, T154).

Among the cost saving measures which were implemented, the Board approved reducing the full-time coordinator of public relations position to two hourly positions - web site and

newsletter - filled by full-time teachers as an extra duty (T114). The full-time person who held this position retired saving the Board about \$140,000 in salary and benefits. The difference between the full-time position and the part-time hourly positions saved the Board at least \$60,000.00 (T113-T115, T151-T152, T164-T165).

The Board also decided to keep the network support engineer as a part-time position even though the defeated budget set aside funds for a full-time position (T115-T116, T152-T153). Additionally, the Board eliminated the high school videography program which was funded by the county, but the Board was responsible for supplies, equipment and various facility maintenance costs (T116-T117, T150-T151). The Board also realized a small savings by eliminating transportation funding for student groups and by cutting \$20,000 from the athletic budget (T121, T155).

In addition, a decision was made not to hire extra teachers to expand a State-mandated World Language program (T117-T119). The State required the program be provided to grades 3 through 8 but the Board only provided World Language in grades 3 and 5 (T118-T119). Because of the budget defeat, the Board explained to the County Superintendent that it could not comply with State mandates in this regard, thus saving approximately \$110,000.00 (T119-T120, T150).

Finally, the Board decided to reduce the full-time classroom aides hours of work from full-time to part-time, thus realizing a savings of \$120,000 in health benefits. Under the SHBP, the Board was not required to provided such benefits to part-time employees (T117, T137-T138). The Board viewed this decision as a fiscal issue because it did not effect the staff/student classroom ratio (T123). In actuality, by reducing the full-time aides to part-time positions, there was no savings in salary, because the number of aides was slightly increased due to the need to provide the same classroom and bus coverage for special education students as before the budget cuts (T163). As a result, since the July 2005 decision to retain only part-time aides, the number of aides has risen slightly each year (R-1; T89, T131).

41. By July 2005, most of the budget cuts were achieved as reflected by the District Budget Statement for school year 2005-2006 (R-2, R-8; T127-T129). However, there was a \$120,000.00 shortfall in three staffing lines, and Gaulton asked the Board to give him more time to find that money (T122). During the 2005-2006 school year, Gaulton met that shortfall of \$120,000.00 by making additional, unspecified cuts in the budget (R-7; T122-T123).

ANALYSIS

Charging Parties assert that their hours of work were reduced resulting in the loss of health benefits in retaliation for their organizing efforts. The Respondent denies retaliation for protected activity and contend that a voter budget defeat in April 2005 forced cut backs for the 2005-2006 school year which included, among others, reducing full-time aides to part-time status to capture savings from health benefits. The timing of its decision to reduce Charging Parties' hours of work, Respondent asserts, is not related to Charging Parties' unsuccessful efforts to form a union and does not suggest hostility to the exercise of that protected activity. I agree.

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates subsection 5.4a(3) and, derivatively, a(1) of the Act. Under Bridgewater, a violation is found if Charging Parties prove by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This is done by direct or circumstantial evidence establishing that the employee(s) engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive is proven and if the employer has not presented 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 motives unlawful under our Act and other motives contributed to a personnel action. In 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 is not considered unless the Charging Party has proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action.

Here, the first two Bridgewater standards are met, namely, Charging Parties filed a representation petition seeking to organize, an activity protected by our Act, and the Board knew of their organizing efforts. The question is whether the Board was hostile to this activity. Charging Parties argue that hostility is established by the Board's vigorous opposition to the conduct of the representation election, by two statements made by then Board President Torres and Board Administrator Gaulton, and by the timing of events.

First, as to the Board's opposition to the conduct of a representation election seeking a unit of all full-time aides,

our Rules and case law contemplate that the public employer can present documentary and other evidence as well as position statements challenging the appropriateness of the unit.

N.J.A.C. 19:11-1.2 states in pertinent part:

- (a) A petition for certification of public employee representative filed by a public employee, a group of public employees, any individual, or an employee organization shall contain:
 - 2. A description of the collective negotiations unit claimed to be appropriate. . . .

N.J.A.C. 19:11-2.2(b) states in pertinent part:

The Director of Representation shall determine whether or not a valid question concerning the representation of employees exists in a prima facie appropriate unit.

The employer has an interest in an appropriate unit structure and in non-proliferation of its bargaining units. That interest is balanced against employee rights to form a union.

State of N.J. and Professional Ass'n of N.J. Dept. of Education, P.E.R.C. No. 68, NJPER Supp. 273 (¶68 1972), rev'd NJPER Supp. 2d 14 (¶7 App. Div. 1973), rev'd 64 N.J. 231 (1974). Here, Charging Parties made two attempts to organize a unit of all full-time aides - in 2000 and 2004. In both instances, the Board opposed the formation of a bargaining unit limited solely to full-time employees. It argued that the proposed unit structure was too narrow and, therefore, not appropriate. It had a right to do so. The Director of Representation in 2000 and the Commission in 2004

agreed that the petitioned-for unit was not appropriate for the reasons articulated by the Board and dismissed the petitions.

Therefore, the Board's conduct in opposing the 2004 representation petition does not support that it was hostile to Charging Parties' protected activity.

Next Charging Parties contend that two statements - one by Board President Torres and one by Business Administrator Gaulton - evidence the Board's hostility. I found, however, that Board President Torres may or may not have stated that she felt that she was "stabbed in the back", but Charging Party Edwards' "understanding" of that statement, that it referred to the organizational effort or the aides' request for pay increases, was self-serving and not supported by the record. I also found no residual evidence to support the double hearsay testimony of Charging Party Taylor that Business Administrator Gaulton told Taylor that the Board was irate that the aides were attempting to organize and to get health benefits. Therefore, these statements do not support that the Board was hostile to the exercise of protected activity.

Charging Parties also argue that the timing of the Board's decision to reduce their hours of work is suspicious and supports hostility. They contend that the reduction in hours took place at the first possible time it could after the December 2004 dismissal of the representation petition, namely at the beginning

of the 2005-2006 school year. Specifically, Charging Parties assert that they were already providing full-time services for the 2004-2005 school year, so the first time the Board could retaliate was shortly after the 2004-2005 school year was over and before the beginning of the 2005-2006 school year. The Board announced in July 2005 that effective September 2005 Charging Parties would be reduced to part-time status.

The Board responds that the timing of events was too remote to support hostility. It asserts that no adverse employment action was taken against Charging Parties until after the April defeat of the 2005-2006 school budget which was 18 months after the filing of the representation petition. Moreover, the Board explains that its decision to reduce Charging Parties' hours to part-time was one of several cost-saving measures taken in response to the budget defeat. The Board claimed the Charging Parties were not singled out for adverse action.

Finally, the Board contends that from 1996 to present, Taylor, on behalf of herself and other full-time aides, requested that the Administration and Board negotiate over pay increases, health benefits and other terms and conditions of employment.^{7/}

^{7/} The Board and Administration rarely responded to Taylor's demands and, when they did, the demands were rejected. Since the duty to negotiate runs exclusively to the majority representative, not to individuals, this pattern also does not evidence hostility. N.J. Turnpike Auth. (Beall), P.E.R.C. No. 80-106, 6 NJPER 106 (¶11055 1980); Rutherford (continued...)

During that time period, the Board took no adverse personnel action to reduce Charging Parties' hours of work which supports that it was only the budget defeat in April that triggered its decision to reduce the aides to part-time status.

Timing is an important factor in assessing motivation and may give rise to an inference that a personnel action was taken in retaliation for protected activity. City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987); Bor. of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985).

Charging Parties cite several cases in support of its timing argument. No. Bergen Tp. Bd. of Ed., P.E.R.C. No. 2002-12, 27 NJPER 370 (¶32135 2001), aff'd 28 NJPER 406 (¶33146 App. Div. 2002) (where contested transfer occurring 1 month after grievance filing found to be disciplinary); Newark Housing Authority, P.E.R.C. No. 97-109, 23 NJPER 205 (¶28099 1997) (where Commission remanded to Hearing Examiner to consider if transfer decision within one month after heated exchange and grievance filings evidenced hostility); Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App.

7/ (...continued)
Free Public Library, D.U.P. 2000-17, 26 NJPER 295 (¶31119 2000). Here, there was no majority representative, and, therefore, no duty to negotiate was triggered by Taylor's demands, even if those demands were concerted on behalf of other full-time aides.

Div. 1996), certif. den. 149 N.J. 35 (1997) (issuance of reprimand 8 months after union representative called superintendent "lying scuzzball" supports hostility). These cases demonstrate that each situation requires a factual analysis to determine whether hostility can be inferred from timing. Timing alone, however, cannot support such an inference. See Camden Bd. of Ed., P.E.R.C. No. 2003-77, 29 NJPER 223 (¶68 2003) (where timing of transfer within 6 months of grievance filing together with conflicting reasons for transfer support inference of hostility).

Here, the protected activity - the organizing effort - began with the filing of a representation petition in January 2004. A week before the Director's October 15, 2004 decision ordering an election (Kearny I), Charging Parties submitted enrollment forms seeking health benefits in the SHBP. While the Board's appeal of the Director's decision (Kearny I) was pending, the Board notified Charging Parties that they would receive health benefits effective January 1, 2005. The Commission dismissed the representation petition in December of 2004 (Kearny II). Charging Parties, nevertheless, received health benefits effective January 1, 2005.

The decision to reduce their hours of work resulting in the loss of health benefits was made in July 2005 effective September at the beginning of the 2005-2006 school year. Reduction in

hours for the aides was one of several budget decisions made in July effective for September 2005. These decisions were precipitated by the April 2005 school budget defeat and subsequent cost cutting measures for the 2005-2006 school budget. There is no evidence in the record that the Board discussed, or even considered, reducing the aides' work hours before the April 2005 vote. The intervening budget difficulties, therefore, caused by voter rejection of the proposed budget for the 2005-2006 school year, a budget that included health benefits for full-time aides, weakens the timing argument. Under these circumstances, I do not find that timing was evidence of hostility.

Even if I accept that the timing was suspicious and supported Charging Parties' hostility argument, the Board demonstrated that it would have reduced aides to part-time status in order to realize savings from health benefits regardless of their 2004 organizing activities. Faced with having to meet the Town Council's mandate of shaving \$810,000 from the original 2005-2006 budget, the \$120,000 in savings from the Charging Parties' health benefits together with several other measures, including not expanding the State-mandated World Language program, met this goal. The savings in health benefits alone was significant and in keeping with the Board's priority of not

eliminating any classroom-teacher positions and maintaining the staff/student ratio.

Indeed, since at least 1996, the Board had indicated to Charging Parties, individually and as a group, that the cost of health benefits for full-time aides was significant and not a budgetary expense that it was willing to undertake. As a result, in years past, Charging Parties were asked or required to waive these benefits to maintain their full-time hours of work. In 2004, upon request, the Board granted the benefits without demanding waivers, but when its budget was defeated as a result of voter, not Board, action, once again the Board looked to the added expense of providing health benefits as a significant budgetary item, among other items, it could eliminate in order to maintain its teaching staff to student ratio and meet its budget goals. Thus, its decision regarding Charging Parties was not a violation of our Act.

Charging Parties counter, however, that the Board did not have to accept the Town Council's mandate to cut the budget by \$810,000.00 and could have challenged that decision. Its choice to accept the reduction, Charging Parties assert, supports that the Board retaliated against Charging Parties for their organizing efforts. I disagree. There is no evidence in the record as to the Board's rationale for choosing to accept the Town Council's decision or what consideration was given, if any,

to alternative budget proposals, but there is also no evidence that the Board's decision not to challenge the Town Council in this regard was tied to Charging Parties' failed organizing effort. I cannot draw that inference from this record.

Lastly, Charging Parties contend that the Board did not have to reduce all full-time aides to part-time status to meet its budget target. In analyzing the budget figures, Charging Parties conclude that the Board had enough budget cuts -- \$760,000.00 -- without the \$120,000.00 in savings from the full-time aides' health benefits, that it only needed to cut another \$50,000.00 to meet the \$810,000.00 goal. The fact that the Board reduced all of the full-time aides to part-time status, Charging Parties postulate, thus saving more than it needed, is evidence that the Board was retaliating against Charging Parties. I reject this argument.

The evidence supports that the Board did not have excess funds to meet its 2005-2006 budget. Gaulton asked the Board during the July 2005 special meetings to give him more time to make additional cuts and, as a result, shaved another \$120,000.00 during the course of the 2005-2006 school year to meet projected budget shortfalls. However, even if Charging Parties have accurately analyzed the evidence regarding the 2005-2006 budget cuts, the fact that the Board may have made more cuts than necessary does not support Charging Parties' retaliation theory.

It is highly speculative to conclude that given excess funds, the Board would not have decided to restore some or all of the World Language program, increased staff in other areas or kept those funds in reserve for unanticipated expenses. I cannot conclude that the Board's decision regarding Charging Parties was motivated by hostility to the organizing effort and not fiscal prudence.

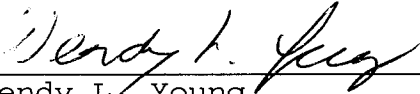
Finally, Charging Parties contend that the Board violated 5.4a(4), specifically that the Board reduced Charging Parties' hours of work in retaliation for their filing a representation petition. Public employers violate this subsection when they discharge or otherwise discriminate against any employee because he/she has signed or filed an affidavit, petition or complaint or given any information or testimony under the Act. The burden of proof under 5.4a(4) is identical to that under 5.4a(3) as set forth in Bridgewater. NJ/State (Human Ser.), P.E.R.C. No. 91-41, 16 NJPER 587, 590 (¶21258 1990). Having found no hostility to Charging Parties' protected activities, I find that the Board also did not violate this subsection.

CONCLUSIONS OF LAW

The Kearny Board of Education did not violate 5.4a(1), (3) and (4) of the Act.

RECOMMENDATION

I recommend the Complaint be dismissed.



Wendy L. Young
Hearing Examiner

DATED: November 2, 2007
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by November 13, 2007.