H.E. NO. 2013-1

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

In the Matter of

RIDGEFIELD BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2011-494

RIDGEFIELD TEACHING ASSISTANTS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging 5.4a(1), (2), (3), (4) and (5) violations based on the Board's actions in RIFing Association Membership Chair Calautti, President Ganci and Building Representative Bickford and not recalling them when 78 out of 86 full-time teaching assistant positions were reestablished. The Association alleged that by its actions, the Board stripped the Association of all of its officers, chilling the atmosphere of support for and participation in the Association. The Hearing Examiner found that the Board was not hostile to any protected activities and that its decisions regarding the three individuals were not pretextual. She credited the testimony of the decision-maker supervisors that no consideration was given to union status and that decisions were based on their day-to-day experiences with the teaching assistants and the ability of the individuals to perform the job.

The Hearing Examiner also found that the Board's refusal to recall teaching assistants by seniority, as recommended by its attorney, was consistent with its past stance in negotiations. She rejected the contention that the Attorney's recommendation to the Board that it use seniority criteria in the recall process committed the Board to do so in light of the parties' negotiations history of reducing any such agreements to writing and requiring ratification. The written modification agreement, agreed to by the parties in this instance, did not reference seniority in the recall. Finally, she did not credit Bickford's version of a conversation in which Director Drimones allegedly told her the Board would not offer her a position because of the litigation in this matter.

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Appearances:

For the Respondent,
Ferrara, Turitz, Harraka and Goldberg, P.C., attorneys
(William Rupp, of counsel)

For the Charging Party,
Oxfeld Cohen, attorneys
(Sanford R. Oxfeld, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On June 28, October 3 and December 9, 2011, the Ridgefield Teaching Assistants Association (Charging Party or Association) filed an unfair practice charge and amended charges against the Ridgefield Board of Education (Respondent or Board) alleging that the Board violated 5.4a(1), (2), (3), (4) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).[1/] Charging Party alleges that all 86 full-time teaching

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, (continued...)

assistants were informed by the Board in March 2011 that they would not be rehired for the 2011-2012 school year but that some might be offered part-time positions. As a result, the parties negotiated and reached an agreement modifying the collective negotiations agreement to provide single medical insurance coverage in exchange for restoration of 78 full-time teaching assistant positions.

Subsequently, Board Counsel Stanley Turitz advised New Jersey Education Association (NJEA) UniServ Representative Norman Danzig that the restored positions would be offered in order of seniority provided that no disciplinary action had been taken against the teaching assistant. Association President Francis Ganci (15 years seniority), Building Representative Dolores Rickford (17 years seniority), and Negotiations Committee Member

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1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

Roberta Genaro (10 years seniority) as well as Association Membership Chairperson, Theresa Calautti, who had been laid off in January 2011, were not offered re-employment, while less senior teaching assistants were re-employed. Also, the Association contends that the Board has hired full-time teaching assistants not previously employed by the Board without first offering those positions to the laid off assistants. Further, on or about July 1, 2011, Director of Special Education Pat Drimones informed Dolores Bickford that certain teaching assistants were not rehired because of the unfair practice charge filed by the Association.

The Association maintains that these actions were taken against Ganci, Calautti and Bickford because of their union activities.[2/] Additionally, the Board's actions, it is asserted, have stripped the Association of all of its officers, thus, chilling the atmosphere for support and participation in the Association.[3/]

2/ On the third day of hearing, Charging Party withdrew all allegations regarding Roberta Genaro (3T74-3T75).

3/ I take administrative notice that on September 29, 2011, Ms. Iliana Beitez filed a representation petition, seeking to decertify the Association as the majority representative of the teaching assistants (3T122-3T123). On November 22, 2011, the Director of Representation issued D.R. No. 2012-6 and ordered that the unfair practice charge in the matter before me block the processing of the decertification petition.

The charge seeks by way of remedy an order requiring the Board to abide by the parties' agreement to rehire teaching assistants by seniority and, specifically, to rehire Ganci, Bickford, and Calautti and to cease retaliation against these named individuals as well as such other equitable relief as may be required.

On November 22 and 29, 2011, a Complaint and Notice of Hearing was issued on the charge and amended charge (C-1, C-2).[4/] On December 9, 2011, Charging Party filed a second amended charge (C-3). On December 12, 2011, I amended the Complaint to conform to the amended charge.

On December 2, and 19, 2011, the Board filed its Answer (C-4, C-5). It generally denies the allegations in the charge but admits that the parties reached an agreement to modify the collective negotiations agreement. The modification included a change to medical coverage. It also admits that Ganci, Bickford and Genaro were not re-employed after the May 2011 reduction in force, but denies that it retaliated against any individuals for union activity. The Board admits that sometime after July 30, 2011, it hired full-time teaching assistants not previously employed by the Board without first offering the positions to certain laid off teaching assistants, but denies that its actions

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4/ "C" refers to Commission exhibits. "J", "CP" and "R" refer to joint, charging party and respondent exhibits respectively.

violated the parties' modification agreement. The Board also specifically denies the statements allegedly made by the Director of Special Education Pat Drimones to Bickford.

At the pre-hearing conference, I granted the parties' mutual request to sequester witnesses. Each side was permitted one resource person who could be a witness at the hearing. Danzig acted as the resource person for Charging Party, while Drimones was Respondent's resource person (1T12-1T13).

A hearing was conducted on February 6, 7 and 8, 2012. The parties examined witnesses and presented documentary evidence. Briefs and replies were filed by May 7, 2012. Based on the record, I make the following:

FINDINGS OF FACT

1. The Ridgefield Board of Education and the Ridgefield Teaching Assistants Association are, respectively, public employer and public employee representative within the meaning of the Act (1T11-1T12).

2. The Association represents all full-time and part-time teaching assistants employed by the Board. The parties' current collective negotiations agreement is effective from July 1, 2009 through June 30, 2012 (J-1).

3. Norman Danzig has been employed by the NJEA for approximately 13 years and is responsible for about a dozen local units. His duties include negotiating collective agreements,

enforcing those agreements through the parties' grievance procedure as well as organizing activities (1T27). In particular, he is responsible for providing services to the Ridgefield Teaching Assistants Association (1T27).

In 2004, Danzig was involved in organizing the Association's bargaining unit.[5/] He also negotiated the initial collective agreements, a lengthy process because the parties negotiated two agreements simultaneously, one covering two years back and one covering a period of three years forward (R-2, R-3; 1T28).

4. During negotiations for the first two collective agreements (R-2 and R-3), the Association had proposed a seniority provision (R-1). Specifically, the Association proposed that in any reduction in force (RIF), employees would be laid off in order of seniority and recalled by seniority (R-1). The Board objected to such a provision, and, although the seniority issue was important to the Association, the parties reached agreement without inclusion of a reduction in force provision and, specifically, with no seniority provision in either initial agreement (R-2, R-3; 1T53-1T54, 1T147-1T148).

5. In the current collective agreement, Article 16, entitled "Reduction in Force", was inserted and provides:

5/ I take administrative notice that a certification of representative under docket no. RO-2004-093 was issued by the Director of Representation on June 23, 2004, certifying the Association as majority representative of all teaching assistants employed by the Board.

> A. If, after the start of the school year, the Board determines that a reduction in force of the teacher assistants is necessary, and the total headcount is reduced as a result, affected employees shall be given priority in filling vacancies that exist the following September. **This priority shall be granted at the discretion of the Board, and shall not be granted to those employees with disciplinary issues or to those employees who were separated from employment due [to] a non-renewal.**
>
> B. In the event of a reduction in force such that there is a reduction in the total headcount of full-time assistants for a period of twelve months from the reduction, affected employees shall be given priority in filling vacancies that exist. **This priority shall be granted at the discretion of the Board, and shall not be granted to those employees with disciplinary issues or to those employees who were separated from employment due [to] a non-renewal.** Full-time [sic] assistants will be recalled and placed on the step they occupied at the time of the reduction in force. (Emphasis added) [J-1]

Article 12, entitled "Miscellaneous Provisions", provides in pertinent part for the posting of vacancies, including promotional opportunities, and that notice be given by registered letter (J-1).

6. The agreement was modified in June 2011 (J-2). The changes represented by the modification will be discussed more thoroughly below.

Ridgefield's Special Education Program

7. Ridgefield has a large special education program servicing its own in-district students as well as out-of-district students as part of a magnet program. These students are placed in one of three schools - Shaler Academy, Slocum Skewes School and Ridgefield Memorial High School. Currently, there are approximately 230 out-of-district tuition students and 200 in-district students (2T53).

8. Special needs students range in age from 3-years to 21-years old (2T65). Many of the students are multi-disabled and/or autistic (2T58). Some are aggressive and/or non-verbal, relying substantially on teachers and teaching assistants for their physical needs, including hygiene-related services such as assistance in the bathroom. Additionally, some students need to be carefully watched because they "bolt" and must be chased down (2T66).

9. Recently, as all municipal budgets have tightened, other districts are keeping special needs students, that they are able to service, in-district and sending only the most difficult students out-of-district (2T66-2T67). As a result, the special needs student population in Ridgefield has grown more difficult to handle (2T67).

10. The Ridgefield special education program is headed by a Supervisor or Director of Special Services, Patricia Drimones who

oversees all special education operations (2T53). Three consociates report to her. The term consociate was created by the Board to connote a supervisory position within the special education program. Consociates are members of the Ridgefield Education Association, the teachers union (2T59).

Currently, Peter Noonan is the acting principal and consociate at the Shaler Academy which houses a pre-K and kindergarten program (2T57-2T58, 3T129-3T130). Steven Kahn is the special needs consociate at the high school (2T58, 3T96). The high school houses students in the special education program from ages 14 through 21 with behavioral disabilities, multi-disabled, autistic and specific learning-disabled students who have been mainstreamed (2T58). Dr. Laurie Densen is the consociate at Slocum Skewes School which services autistic and multi-disabled as well as specific learning-disabled students (2T58, 3T51-3T52). Although there is no testimony as to the grade level or ages of the students assigned to Slocum Skewes, I infer that the school services students older than kindergarten but under the age of 14 or below high school grade level.

The January 2011 Reduction in Force (RIF)

11. The special education magnet school budget is based on revenue from the number of out-of-district tuition students the Board anticipates attending the program in any given year (2T55). The budget for the 2010-2011 school year projected 252 tuition

students, but when the year began, only 229 students were registered (2T55). This was also the first year of Governor Christie's budget cuts which impacted school districts and municipalities state-wide (2T55). Although some students were added to the program once the school year commenced, two months into the school year, it was clear that there was going to be a deficit because the actual student population for 2010-2011 fell far short of the anticipated budgeted number (2T55). Therefore, in November 2010, Superintendent Dr. Robert Jack ordered an audit of the entire program (2T55).

The audit revealed that the district's surplus funds had shrunk to $60,000, significantly below the $600,000 surplus needed for a school district the size of Ridgefield's (2T55-2T56). The auditor recommended immediate cuts in the special needs magnet school program (2T56). Accordingly, just before the Christmas break in December 2010, Drimones was instructed to RIF five full-time teaching assistants. Specifically, Dr. Jack asked Drimones to meet with her three consociates (Noonan, Kahn and Densen) and come back to him with a recommendation as to which teaching assistants should be RIF'd (2T56-2T57). The only guidelines the team was given by Jack was to keep the best employees for the program (3T98). No particular teaching assistant(s) was mentioned by either the superintendent

or the Board as a target of the January 2011 RIF (3T77-3T78, 3T102, 3T129).

12. Thereafter, Drimones met with the consociates. The team wanted the most versatile teaching assistants, namely, ones who could work with students with different types of disabilities and who could restrain students either physically or verbally through de-escalation techniques (2T61-2T62). Also, the team looked for flexibility in terms of being able to move the teaching assistant from one program to another to fill in during emergent situations as well as the ability to get along with different teachers who are the decision-makers within the classroom (2T67-2T68). Finally, they considered disciplinary as well as absentee records (2T62, 3T66).

13. Drimones was aware that Frances Ganci was Association President and that Theresa Calautti and Dolores Bickford were perhaps building representatives because they sat in on a couple of meetings between association members and the administration, although she was not sure that sitting in on meetings connoted any particular union position (3T46-3T47). I credit her testimony.

Kahn was aware the Ganci was the Association President but has unaware what, if any, position either Bickford or Calautti held with the Association (3T108). I credit his testimony. Densen was also aware that Ganci was Association President

(3T84). There is no evidence in the record that she was aware of any union position or activity of Calautti or Bickford. I, therefore, infer that she was only aware of Ganci's position with the Association. There is also no evidence in the record that Noonan was aware of the union status or activities of Ganci, Calautti or Bickford. I infer, therefore, that he had no knowledge of union activity as to these individuals. Drimones, Densen, Kahn and Noonan deny taking into consideration union membership, leadership or activities during the decision-making process or even discussing same (2T47, 3T65, 3T87, 3T102, 3T129). I credit their testimony.

14. Four teaching assistants were recommended by Drimones and the consociates to be RIF'd in January 2011 - Donna Perez, Kelly Hugin, Rosina Narcisi, and Theresa Calautti. The fifth teaching assistant who was included in the RIF was Vivian Kaczorowski who had already notified the Board that she was leaving in February 2011 due to a medical condition (2T60-2T61). The team's recommendations were accepted and approved by Superintendent Jack and the Board at the Board's January 6, 2011 meeting (R-13; 2T70).

15. Donna Perez was RIF'd because, at a parent's request, she was restrained from having contact with a student. Specifically, the police were contacted. Perez was instructed by them to have no further contact with the student, but continued

to do so in texts to the student and the parent. Perez was given a written warning (2T62-2T63, 3T45). Also considered in the decision to RIF Perez, was an incident where Densen had to separate Perez and Calautti who were screaming at each other in the middle of the school hallway (3T58).

16. Kelly Hugin was RIF'd because she caused the district to lose one of its community-based instructional sites - Modells (2T63). Community-based education is an integral part of the special education program. Students are taken into the local community to practice the skills they are taught in the classroom such as language, money and social interaction skills (3T59-3T60). Most classes go out on a weekly basis to practice these skills (3T60). Hugin had taken a student into Modells and then accused the student of touching her (Hugin's) hair which resulted in a screaming match between the two (2T63, 3T45). Hugin was reprimanded for the incident (2T63).

17. Rosina Narcisi had informed Drimones that she was unable to handle high-functioning academic situations, and, therefore, could not be assigned to the high school (2T64, 3T45-3T46). Also, because of recent surgery, Narcisi could not work at Shaler which required her to change diapers (2T64, 3T45). Another position which Narcisi had previously been assigned - bathroom security - was eliminated (2T64). Basically, she was

not versatile or flexible enough to justify keeping her in the program, and so the team recommended she be RIF'd.

18. Theresa Calautti was RIF'd for many reasons: (1) she had difficulty getting along with co-workers; (2) a parent had asked that she be removed as a one-on-one classroom aide for her mainstreamed child, asserting Calautti was too harsh with her son; (3) some teachers asked that Calautti not be assigned to their classrooms; and (4) Calautti had physical limitations causing her to request accommodations that limited her ability to participate in various activities including community-based instruction, field trips and fire drills (CP-14; 2T64-2T65, 3T36, 3T40, 3T43, 3T47-3T48, 3T68). Calautti worked at various times under the supervision of both Kahn at the high school and Densen at Slocum Skewes. Noonan never supervised Calautti. Both Kahn and Densen recommended she be RIF'd.

19. At the high school, Calautti was supervised by Kahn who recalled complaints from teaching staff that Calautti had difficulty following directions and that she inappropriately voiced complaints in the classroom in front of students (3T100). Also, in one instance, Calautti was assigned to assist a student in a one-to-one situation and contacted the parent with information that the teacher was counter to her own communications with the parent (3T100). The teacher felt the student did not need a one-to-one assistant. Kahn agreed and

felt that there were better teaching assistants suited for the high school environment (3T59, 3T61-3T62, 3T90, 3T100). Kahn transferred Calautti at that point to Slocum Skewes under Densen's supervision (3T101).

20. Densen has known Calautti since Densen was a child, and later taught Calautti's daughter in Densen's own Slocum Skewes classroom (3T55). Despite their personal history, Densen felt that the 2008-2009 and 2009-2010 school years with Calautti were very difficult (3T55). For instance, in September 2009, Calautti was placed in a classroom with Teacher Lorraine Ferrante and nine autistic students. Ferrante planned an apple picking trip, but Calautti asked not to go because the trip would be too stressful and strenuous for her. As a result, Calautti had to be switched with a teaching assistant from another class in order to maintain the required adult-to-student ratio (3T55-3T56).

Also, Calautti frequently complained to Densen about other teaching assistants, requiring Densen herself to mediate the situations and/or call meetings between herself, Calautti, Ferrante and Drimones (3T56-3T37). Densen had numerous conversations with Calautti and the teachers about Calautti's conflicts with staff (3T92). Specifically, Calautti had a history of not getting along with Hugin and Perez. There was a screaming incident between Perez and Calautti in the school

hallway (3T57-3T58). This concern was indirectly expressed in Calautti's 2008-2009 evaluation (CP-15).

Densen admits she did not express the concern about Calautti's conflicts with staff directly in this evaluation (CP-15), giving Calautti ratings of commendable in all categories. Densen couched her concerns in a nice way in order not to hurt Calautti's feelings. For instance, in the evaluation Densen described Calautti as well-intentioned but suggested that Calautti's directions and comments to co-workers would be better received coming from the classroom teacher. This comment recognized Calautti's difficulties getting along with staff (CP-15; 3T90-3T91).

Calautti admits that she had difficulties with other teaching assistants over the years including Hugin and Perez as well as Brian Guidi (2T27-2T28, 2T30). She also acknowledges the problems with the teaching assistants in Ferrante's class due to too much bickering (2T32). In that instance, all of the teaching assistants were called into the principal's office to discuss the situation (2T32).

In addition to the staff conflicts, in the 2010-2011 school year, Calautti complained to Densen that for medical reasons, she had to eat lunch at noon (3T60). If Calautti was on a community-based trip with the students, it would happen, occasionally, that they would not get back to school until 1:00

p.m. for lunch (3T60). Densen tried to accommodate Calautti by suggesting she eat on the bus, but Calautti declined to do so (3T60). Calautti also objected when the students would eat lunch during the community-based trip at a McDonalds, even though Densen arranged for her to be able to bring her own food to the restaurant to eat (3T60-3T61). Calautti wanted to eat lunch at school (3T61).

Also that year, Calautti got dizzy during an evacuation drill; emergency medical technicians (EMT's) had to be called to assist her. This created a particular problem because Calautti was responsible for moving her cognitively impaired/autistic students aged 14 through 16 to a near-by church. These students needed supervision and were not sure what to do when Calautti collapsed, although Calautti's direct supervisor, Mr. Generalli, was able to move the students safely to their destination (3T64-3T65). Afterwards, Densen wrote an incident report (3T89).

There was one other incident where EMT's were called to assist Calautti during the school day (3T89). Basically, Calautti's medical issues made it difficult to place her in Densen's program and was one of the reasons together with her difficulties getting along with staff that led Densen to support the team's recommendation to RIF her (3T54, 3T56).

Calautti denies that she had any problems as described by Densen such as participating in community-based instruction -

e.g. having to eat lunch at a certain time, being hesitant or unable to attend field trips, or evacuating students during fire drills (2T15, 2T17). I do not credit her testimony in this regard. It was self-serving and not supported by other evidence in the record including Calautti's own testimony. For instance, Calautti admits that she required medical assistance during the evacuation drill as described by Densen because she felt faint (2T17). Calautti also admits to having significant health issues in recent years suggesting that she might have had difficulty with the physical aspects of her job as described by Densen. In particular, in the beginning of November 2008, Calautti had a heart attack and was on medical leave until her return to work on November 24, 2008. Then, in 2009, two stents had to be replaced, and she was on medical leave returning to work on December 7, 2009 (2T18, 2T25-2T26). Densen's testimony was compelling and specific regarding Calautti's limitations and complaints. I credit that testimony.

Finally, although evaluations in the first years of Calautti's employment reflect generally excellent or acceptable performance (CP-16 through CP-22), the last couple of years demonstrated concerns about her performance. In 2008-2009, as stated earlier, Densen reflected her concerns about Calautti's ability to get along with her co-workers by suggesting that Calautti's comments to co-workers would be better received coming

from the classroom teacher (CP-15). Then in Calautti's 2009-2010 evaluation, her principal, Janet Seabold, rated her, not "commendable", but "satisfactory" in all areas but one -"exhibits patience and understanding of student needs" - where she received a "needs improvement" rating (CP-14). Seabold wrote that some students did not respond as well to Calautti's direct recommendations for their behavior and might need a more cajoling approach (CP-14).

21. At the time of her RIF in January 2011, Calautti had been employed by the Board for many years. From 1974 to 1983, she was employed as a secretary. Her testimony was somewhat vague as to years of service, but apparently she became a teaching assistant in 1983 (1T219). CP-8, an exhibit prepared by the Board at the request of the Association, is a list of teaching assistants by dates of hire. That document demonstrates that Calautti was hired as a full-time teaching assistant in September 1996. The record is unclear as to what, if any, position Calautti held between 1983 and 1996. I infer that before September 1996 Calautti may have held a part-time teaching assistant position.

Calautti was association membership chair from the time the association was formed in 2004 until her RIF in 2011 (1T224). Calautti describes her tenure as membership chair as very successful, because approximately 95 percent of the teaching

assistants were members of the Association (1T225). Calautti was also a building representative and would sit in on meetings between teaching assistants and their supervisors, reporting back to Ganci afterwards (1T225-1T226). She attended quite a few Board meetings (1T226).

22. Calautti was notified on January 5, 2011 by Superintendent Jack that the Board might be taking personnel action at its executive meeting on January 6, 2011 that could affect her and that she should notify him in writing if she wished the discussion to take place in public session (CP-23). Calautti went to Densen to inquire what was happening. According to Calautti, Densen told her she should retire because she was getting on in years and too sick to work (1T228-1T229, 2T18).

The next day, Calautti received a letter from Jack informing her that at that night's Board meeting he would be recommending the elimination of several teaching assistant positions in the Magnet School Program, including Calautti's, based on the recent audit indicating a severe short fall in the Magnet School revenue (CP-24). The letter also informed Calautti that in lieu of the contractually required 21-day notice provision, she would receive compensation for the next 21 days (CP-24).

Calautti states that this was the first she learned about a RIF (1T230). She met with Ganci, Drimones and Jack at the Board office (1T232). According to Calautti, when she asked why she

was being let go, Drimones pulled her 2009-2010 evaluation out of her personnel file and indicated it was because of that evaluation (CP-14; 1T233).

Calautti attended the Board meeting on January 6 and was told by the Board when she inquired that there was no specific reason that she was losing her job other than the RIF for budgetary reasons (2T7-2T8). On January 7, 2011, Calautti and the others were officially informed about their RIF (CP-25; R-13). Calautti was the only union officer RIF'd at that time (1T234, 2T10). She never filed a grievance regarding the job action (2T11).

Budget Concerns and Discussions for 2011-2012

23. Despite the January 2011 RIF, budget concerns persisted. Discussions took place during closed session Board meetings beginning in January 2011 about the budget for 2011-2012 (1T150-1T151). Budgets have to be approved in March or April for the coming fiscal year beginning in July (1T151). For 2011-2012, an audit report again demonstrated a significant deficit and very little free appropriated balance or surplus to cover the deficit (1T151). As a result of the audit report, Board Attorney Stanley Turitz advised the Board that the only action it could take unilaterally to address the deficit would be to RIF positions as it did earlier in the month; everything else would have to be negotiated with the various unions (1T152).

24. Turitz has represented the Board for most years since 1985 (1T147). He negotiated on behalf of the Board for the parties' first two collective negotiations agreements (R-2, R-3) but was not involved in the negotiations for the current agreement (J-1). Turitz maintains that he and NJEA Representative Danzig with whom he negotiated the first two collective agreement have known each other a long time and have a very cordial, even excellent, relationship (1T156, 1T159, 1T175). Up until the July 1, 2011 RIF, Danzig concurs that he relied on Turitz's word as being sufficient to commit the parties to an agreement (1T41). I infer, therefore, that Danzig and Turitz had a good relationship until the disagreement that led to the filing of this charge.

25. In accordance with Turitz's advice to the Board about the deficit, a meeting was scheduled for February 3, 2011 with the various unions - Teacher's, Custodian's, Administrator's and Teaching Assistant's Associations. All the unions were present, including Association President Ganci, although Danzig was not in attendance at this meeting. Turitz conducted the meeting and handed out the audit report. He explained the budget situation, namely that four or five million dollars had to be recaptured in order to have an approved budget going forward into the next fiscal year. Turitz also communicated that the only way for the Board to address the deficit unilaterally was to cut positions,

or, in the case of the Association, to reduce teaching assistants from full-time to part-time to save on medical benefits. He sought cost-saving suggestions from the unions (1T152-1T153).

26. Sometime after this meeting, in either late February or early March, Ganci contacted Danzig about the Board's demanding concessions from the teaching assistants in order to keep their full-time positions (1T28). Danzig reached out to Turitz who explained that the Board had serious financial difficulties which meant cutting personnel to meet the deficit (1T56). He encouraged Danzig to share with him, as the Board spokesperson, any cost-saving ideas to avoid another RIF (1T157).

Danzig told Ganci what Turitz communicated, and discussions began among the Association leadership to formulate a proposal to avoid another RIF. Among the suggestions considered, was foregoing a 4% wage increase due on July 1, 2011 under J-1 and accelerating the payment of health care premium contributions (1.5% of salary) to July 1, 2011, contributions that would not be due until the expiration of the parties' current collective agreement on June 30, 2012 (J-1; 1T31-1T32). Danzig verbally communicated these proposals to Turitz in April and was told to make a formal offer which Danzig gave to Turitz on May 10, 2011 (CP-9; 1T33). At the Board's May 12 meeting, Turitz presented the Association's offer reflecting the same terms communicated verbally to him, but the Board rejected it. Danzig was told to

make another offer (1T33). However, at the May 12 meeting, the Board approved a resolution abolishing all 86 full-time teaching assistant positions and creating 172 part-time positions as of June 30, 2011 (R-14).

27. Sometime between May 12 and the next Board meeting on May 26, Danzig called Turitz and presented a hypothetical, namely if the Association was willing to give up dependent medical coverage, how many positions could be restored (1T34, 1T36, 1T158-1T159). Turitz was not sure of the exact number of positions that could be restored given the number of students in the program but told Danzig he would discuss it with the Board in executive session on May 26 and have an answer for him that night (1T35, 1T159).

28. On May 26, as promised, Turitz presented the Association's proposal vis-a-vis the single-only medical benefit (1T160). Turitz was told, after consultation with Drimones who was at the Board meeting, that 78 full-time positions could be restored if the Association conceded dependent-care medical coverage (1T160). The Board also wanted some other concessions or modifications of J-1, including: (a) a change in the number of hours to qualify as a part-time employee, as well as a change in the number of hours to qualify for medical coverage (25 hours per week), (b) reducing certain notification requirements, and (c)

the elimination of Article 16, entitled Reduction in Force, effective July 1, 2011 (1T36-1T37, 1T161-1T163).

29. When the Board went back into public session, Turitz and Danzig left the building to discuss what the Board could accept to restore some of the 86 full-time teaching assistant positions (1T36, 1T165). Turitz reviewed the concessions the Board demanded in order to restore 78 full-time positions (1T165). Danzig wanted to know how the current 86 teaching assistants would be slotted into the 78 full-time positions pursuant to Article 16 of the parties' current agreement (1T38).

According to Danzig, Turitz responded that the rehires would be done by seniority, "how else would it be done" (1T38). According to Turitz, he responded that the teaching assistants would be rehired in accordance with Article 16, but that he would recommend to the Board that they use seniority in the rehire process, because it was "the most objective and easiest way of doing it, barring anybody who may have discipline problems, et cetera" (1T165). The two also discussed that any agreement between the parties had to be ratified by the Board and Association (1T82-1T83). This was the last discussion the two had that night (1T38-1T39).

I credit Turitz regarding the substance of their discussion on the evening of May 26, namely that he felt selection by seniority was advisable and would recommend it to the Board.

Both Danzig and Turitz were experienced negotiators. Turitz credibly testified, that historically, any agreements between the Association and Board are reduced to writing and require ratification by the parties (1T165-1T166). Accordingly, I infer that Danzig knew from his discussion with Turitz that his authority was limited only to recommending seniority and that Turitz did not have the authority based on their discussion to bind the Board to selection by seniority. Moreover, each was aware of the parties' negotiations history, namely that the issue of seniority in filling positions after a RIF was regularly raised by the Association and rejected by the Board (R-1, R-2, R-3; 1T148). Essentially, on May 26, Danzig heard what he wanted to hear that night from Turitz - that 78 full-time positions would be restored and that seniority would be used as the method to fill those positions.

Apparently, this is what Danzig believed the Board would agree to and took away from his discussion with Turitz, because he then spoke to the approximately 30 to 40 teaching assistants who attended the meeting that night and were waiting to hear what had transpired between the two men (1T38-1T39). Danzig reviewed what he termed the "tentative deal" and explained that he would call an emergency membership meeting to vote on it (1T39). Teaching Assistant Dolores Bickford was present and states that

Danzig told those at the meeting that the rehires would be done by seniority (1T200).

However, when Turitz made the recommendation to the Board, the Board, as it had done in the past, rejected the concept of using seniority to fill the positions (1T165-1T166). Turitz never communicated to Danzig that the Board rejected his recommendation, but the recommendation as to seniority was not included in the Modification Agreement (J-2) prepared by Turitz and ratified by the parties (1T167, 1T180).

30. On May 31, Turitz e-mailed Danzig a proposed modification agreement to J-1 codifying the parties' discussion on May 26 and reaffirming that any agreement would not be binding unless the Board ratified it at a public meeting (R-7). Turitz further explained that if the Association were to ratify the agreement before the Board, he would hold it in escrow until the Board formally established the 78 full-time positions effective July 1, 2011. He then wrote that if Danzig approved what he had prepared, Danzig should execute the modification agreement and return it to him as soon as possible but no later than 5:00 p.m. on June 1, 2011 (R-7).

Danzig responded to R-7 shortly thereafter stating that the agreement accurately reflected their May 26 discussion and raised a few questions (R-7; 1T41). Danzig wanted to know: (1) if the 78 teaching assistants would be issued individual contracts the

day after the Board approved the resolution restoring the positions; and (2) he wanted to confirm that the rehired teaching assistants would not have to pay the 1.5% of salary toward the health care premium until the expiration of the current collective agreement, and that the assistants would move to the next step on the salary guide and would retain all benefits they had in 2010-2011 (R-7). No mention was made that the modification contained no reference to seniority as the basis for filling the 78 positions. Danzig then requested Turitz to confirm these understandings. Handwritten notes in the margin of the Danzig e-mail (R-7) indicate that as to the items Danzig wanted to confirm Turitz responded in the affirmative except as to the timing of the individual contracts for which Turitz had no information (R-7).

31. An Association ratification meeting took place on or about May 31, 2011 (1T39). Ganci was ill and could not attend, but Turitz had her sign the agreement before the meeting in the event of ratification (J-2; 1T78). Ganci reviewed the agreement before signing and understood that the teaching assistants were giving up dependent coverage and that part-time hours were being changed for purposes of entitlement to medical benefits (J-2; 1T109-1T110). Ganci had no expectations based on the modification agreement that any particular number of assistants would be rehired although she hoped they all would be (1T110).

Although the modification agreement prepared by Turitz had no provision requiring that the 78 restored full-time positions be filled by seniority, Danzig told those in attendance at the meeting that rehiring would be done by seniority as he discussed with Turitz (1T40, 1T68).

32. The Board approved the modification agreement (J-2) at its June 9 meeting (R-15). A copy of the agreement was forwarded to Danzig on June 10 (R-4). Although Danzig admits that he reviewed the modification agreement before the meeting, the fact that the agreement made no reference to hiring by seniority "got a little away from [him]" (1T68). In any event, Danzig was not concerned about the lack of reference to "seniority" in J-2 because:

> . . .the issue was reestablishing those positions. In any hiring,. . . it was normal - the Board of Education never gets involved with the specifics of how the mechanics of how a hiring goes on. That's up to the Superintendent and the Administration.
>
> I had Mr. Turitz's word, which up to that point had always been good . . . [1T41]

33. The agreement modifying J-1 and entered into in June 2011 by the Association and the Board provides in pertinent part:

> **Article 16 is omitted effective July 1, 2011.** In the event the Board creates any additional full-time teaching assistant positions during the period of June 9, 2011 through June 30, 2011, those employees who received non-renewal notices and whose positions were affected by the Board action taken on May 12, 2011 abolishing full-time

> teaching assistant positions, shall be given priority in filling such new vacancies as set forth in and subject to the limitations specified in Article 16 without the requirement for posting by the Board notwithstanding the provisions of Article 12, paragraphs 4 and 8 and provided further that such eligible employees execute and return their individual contracts not later than eight (8) calendar days for the Board taking action in making appointments. [J-2] [emphasis added]

The modification agreement also amended Article 8, "Hours of Work", by changing the part-time hours from 3 ½ hours per day to 4 ½ hours and increasing the number of weekly hours for part-time assistants from 19 ½ hours to 24 ½ hours (J-2).

Finally, the modification agreement eliminated paragraph 1 of Article 11 entitled "Insurance Protection". Specifically, the Board omitted family health care insurance protection for full-time teaching assistants, providing single-person only coverage and changed entitlement to health insurance coverage from at least 20 hours per week to 25 hours (J-2).

Mid-June Turitz/Danzig Email Exchange

33. Sometime in mid-June, Danzig first learned that seniority was not being used in the recall after receiving a couple of telephone calls - one from Bickford and another from Ganci, neither of whom had received individual contracts for 2011-2012 (1T43). Turitz never indicated to Danzig that the

Board had rejected his (Turitz's) recommendation that seniority be used in filling the 78 full-time positions (1T42).

34. Danzig and Turitz spoke by phone and then exchanged e-mails beginning on June 15, 2011 (R-4). Danzig requested a list of all teaching assistants who were rehired and those who were not, as well as, the seniority list used for the rehire, the reasons for rehiring or decision not to rehire (R-4).

Turitz responded that he had no list and confirmed that Article 16 does not provide for seniority in rehire but provides only that the Board has discretion whether to use seniority as a basis for rehire. Turitz further wrote that the reasons for the RIF were financial, that reasons for an offer of employment were, therefore, not required, and, finally, that the administration selected the best candidates for the school district (R-4).

Upon receipt of Turitz's e-mail, Danzig responded on June 16 reiterating that Turitz told him the 78 positions would be filled by seniority as long as there had been no discipline (R-4). To this, Turitz wrote that the modification agreement (J-2) speaks for itself and that if it did not reflect the parties' agreement Danzig should have raised the issue before executing the agreement. Turitz reiterated that seniority is an option to be used at the Board's discretion and confirmed that in this instance the Board picked the strongest candidates to fill the positions (R-4).

The June Selection Process for Filling the 78 Positions

35. Once the Board and Association reached agreement (J-2) to modify the collective agreement (J-1) and rehire 78 full-time teaching assistants, the process of selecting among the 86 who had been RIF'd in May 2011 began. Just as in the December 2010 selection process, Drimones and the three consociates - Kahn, Noonan and Densen - were tasked by the Superintendent with finding the most versatile and flexible individuals to fill the positions. Neither Superintendent Jack nor the Board advised the team who to select for the 78 positions or who not to rehire nor was union leadership or membership activities discussed. They were instructed only to find the strongest candidates (2T75-2T76, 3T21-3T22, 3T34-3T35, 3T66, 3T77-3T78, 3T98, 3T102, 3T129).

Basically, the four reviewed personnel files, including evaluations. Although evaluations were reviewed and were somewhat useful, Drimones finds that supervisors tend to stay positive and try to give discipline verbally. Kahn confirmed that, in general, he believes that evaluations should emphasize the positive so that it reflects what staff needs to work on. He views evaluations as a growing process and learning experience (3T111). Densen also operated in the same manner in her evaluations. Her last evaluation of Bickford, for example, was prepared after the decision not to rehire her and, therefore, was drafted to be as positive as possible so that Bickford could use

the evaluation to get another job (R-8; 3T72, 3T85). The group also considered the programs proposed for the following year and any disciplinary actions (verbal and written), generally taking into account the day-to-day experience of the consociate/supervisors with the individuals, both past and present (2T77).

36. As in December 2010, their recommendations were accepted by the Board and approved at the Board's June 16, 2011 meeting by resolution of the Board (R-16). In the end, eight teaching assistants were not offered a contract for 2011-2012 - Dolores Bickford, James Briety, Jesse Essbach, Fran Ganci, Roberta Genaro, Maria Manalis, Dorothy Shaffer and Jeanne Zappel (2T79, 3T10).

On the recommendation of Drimones and the three consociates, the following teaching assistants were not rehired for the reasons articulated below.

37. James Brierty was not rehired because he was determined to have no versatility within the special education program. He was assigned solely to security duties at the door of the school and did not want to work in a classroom (3T11, 3T26, 3T76). Brierty, however, was rehired in October 2011 when the door security position was reestablished (CP-8; 3T27-3T28).

38. Jesse Essbach had numerous absences and disciplinary actions. He was suspended earlier in the year and was on a

last-chance agreement (3T12, 3T26). Densen had written him up several times, including one incident where Essbach left inappropriate magazines in a student's desk as well as numerous instances of chronic lateness. Densen considered Essbach's actions to be extreme enough to require a written reprimand, unlike the normal situation where she tries to speak to the teaching assistant about performance concerns (3T80-3T81, 3T87). Due to the difficulties that Densen experienced with Essbach, he was transferred to the high school on the last-chance agreement. Thereafter, Kahn caught him smoking in front of the school and reprimanded him (3T107). Essbach was not rehired on the recommendation of Densen and Kahn with the concurrence of Drimones and presumably Noonan who had never supervised him (3T128).

39. Roberta Genaro did not want to return for the 2011-2012 school year because her husband retired, and they were moving to Manalapan (3T12, 3T23-3T24).

40. Maria Manalis worked under Noonan who recommended that she not be rehired because of a very poor attendance record, although he is aware that she was rehired eventually as of September 1, 2011 (CP-8; 3T130). There is no evidence in the record to explain why Manalis was rehired or whose decision it was to bring her back.

41. Dorothy Shaffer also worked under Noonan. She was hired as a one-to-one teaching assistant for an out-of-district student who was transferred back to his home district. Her services were no longer required and, therefore, she was not rehired (3T13, 3T24, 3T129).

42. Jeanne Zappel notified Drimones and Densen that her husband was retiring and volunteered to relinquish her position (3T13, 3T23).

43. Fran Ganci was hired by the Board on April 1, 1996 as a teaching assistant in the special education program (1T85).[6/] At the time of the July 1 RIF, Ganci worked under Densen's supervision at Slocum Skewes (3T67). She had numerous absences throughout 2010-2011 and had been out on sick leave since April 26, 2011 (1T101, 1T129-1T130). That year, she had used up all of her banked sick leave time - approximately 55 days - as well as her two personal days and one and a half unpaid sick days (1T101-1T102, 1T126-1T128). In previous years, Ganci had used more than her annual allotted sick days (10 per year). For instance, in the 2009-1010 school year, Ganci used 24 sick days.

6/ Two evaluations (May 2004 and May 2008) presented in evidence at this hearing demonstrate positive reviews from the evaluators (CP-2, CP-3). There were two incidents written up and placed in Ganci's personnel file, one in 2004 and one in 2006 (R-5, R-6; CP-4). Although there was a lot of testimony about these evaluations and incidents, since the reason for Ganci's RIF and decision to not rehire were based on her sick leave record and absences particularly in 2010-2011, I have not reviewed this testimony in any detail.

That year she was assigned as a one-to-one teaching assistant, necessitating reassignment of her duties to another teaching assistant on days she was out sick (1T127-1T128).

In 2010-2011, Drimones received several notes from Ganci's physician about her inability to return to work for specified periods of time. Finally, on May 26, 2011, Ganci's doctor wrote that she would not be able to go back to work until further notice (CP-5). On July 1, 2011, Ganci qualified for disability payments which continued until December 31, 2011 (1T102). Ganci admits that during that time from April 26, 2011 until December 31,2011, she could not perform the duties of a teaching assistant (1T133).

According to Drimones, once the team received notification on May 26 that Ganci would be out indefinitely, the team decided that she would not be rehired (3T29). Drimones had heard rumors that Ganci intended to retire and wasn't interested in coming back, although Drimones never called Ganci to confirm the rumors (3T28-3T29). Densen also never contacted Ganci to inquire as to when, or if, she would be coming back, because she knew Drimones had received notes from Ganci's doctor which was the standard procedure (3T83). Like Drimones, Densen had heard rumors about

Ganci not wanting to return, and Densen felt it made no sense to bring her back (3T67, 3T83-3T84).[7/]

44. Dolores Bickford was hired by the Board as a teaching assistant in 1994 (CP-8; 1T188). She worked both at the high school under Kahn and, most recently, at Slocum Skewes under Densen (3T67, 3T103, 3T117).

Kahn shared concerns about Bickford's performance when she was assigned to the high school in 2007-2008. Her evaluation that year reflected that Bickford ignored teacher directions and complained in front of students, that Bickford had difficulty working with the replacement teachers when the classroom teacher went out on medical leave, that although she tried to be helpful to the students, her actions led to animosity and had a negative impact on her, the staff and program (CP-11; 3T103-3T104, 3T117). Kahn also had concerns about Bickford's leaving in the middle of the day for medical reasons (3T114). Finally, when Bickford complained about her inability to physically perform certain tasks for the community-based Strive program, a program

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7/ Ganci retired effective June 30, 2011 in order to qualify for her pension (CP-8; 1T118-1T119). She has been collecting $1,200 per month in disability and pension payments and an additional $704 every two weeks in unemployment benefits. She was earning approximately $28,000 per year at retirement (1T124-1T125). As of January 1, 2012, Ganci ceased receiving disability payments and has been collecting her ordinary retirement pension (1T120). Ganci has applied for other teaching assistant positions since January 1, 2012 but has received no offers of employment (1T134).

emphasizing community-based instruction and work experience, Kahn recommended that she might work better with younger children. Bickford was, therefore, transferred to Slocum Skewes the next year under Densen's supervision (3T103, 3T115-3T117).

Densen recalls two main reasons she recommended to the team that Bickford not be rehired for 2011-2012. First, Bickford had a lot of conflicts with teachers and other teaching assistants. Specifically, Densen had to move her three or four times during 2010-2011, because Bickford had many complaints about her co-workers (3T67-3T68, 3T84). Secondly, Bickford frequently left school mid-day (four to six times) for medical reasons which left Densen scrambling for coverage for the remainder of the day (3T68, 3T86). By leaving mid-day, under the parties' collective agreement, Bickford could not be charged for the sick day, because attendance for four hours during the school day counts as a full-days attendance (3T68).

Bickford's 2010-2011 evaluation (R-8) was prepared after the decision not to rehire her (3T72, 3T85). Densen, therefore, tried to be as positive as possible so that Bickford could use the evaluation to get another job (3T72). However, several comments in the evaluation reflected Densen's concerns, namely the fact that Bickford was moved three different times that year (R-8; 3T70-3T71). Although Densen wrote that these moves met specific needs, Densen explained that the moves were actually

because of the difficulties Bickford experienced with staff (3T71, 3T85).

Also, in the evaluation Densen commented that Bickford should keep conversations to a minimum which reflected that Bickford's assigned teacher had come to Densen several times during the year to complain about Bickford's talking to another assistant while the teacher was conducting the class, thus disrupting the flow of the lesson (3T71). The evaluation also reflected Densen's concern that Bickford left early for medical reasons which Bickford was admonished to minimize in the future (R-8). Bickford, however, has never been reprimanded for leaving early nor has she received any other reprimands during her employment in Ridgefield (1T194, 1T217).

In July 2011, Densen wrote Bickford a job recommendation at her request so that she could apply for another position. Densen's recommendation was basically complimentary, although she added at the end of the letter that if further information was needed she could be contacted (CP-13; 1T205-1T206, 3T73).

The July 1, 2011 RIF

45. At the June 16 Board meeting, the Board authorized the change in the number of hours required of teaching assistants to receive healthcare coverage (minimum of 25 hours per week), the elimination of dependent medical coverage for all teaching assistants and the appointment of the 78 full-time named

individuals (CP-8; R-16). Association President Ganci and Building Representative Bickford were not rehired (CP-8; 1T74-1T75). Association Membership Chair Calautti who had been RIF'd in January 2011, was also not rehired (CP-8; 1T74-1T75).[8/] In addition to Ganci and Bickford and six other teaching assistants, also, RIF'd from the special education program beginning July 1, 2011 were an occupational therapist, a physical therapist and two speech therapists (2T72-2T73).

46. Among the Association's leadership who were rehired was Association Treasurer Denise Carelli and Vice-President George Wagner (CP-8; 1T73-1T74). Ganci characterized Wagner as not very active in Association affairs and believes that he resigned before he was offered a position for 2011-2012 (1T73-1T74). I do not find this as a fact since Wagner did not testify, and Ganci's testimony was tentative in this regard. Ganci also offered no reason as to why Wagner resigned.

As to Carelli, Ganci states that she too resigned her position before being rehired, but, according to Ganci, Carelli resigned because the job as Association treasurer became too demanding when Ganci was out on sick leave for a prolonged period (1T111, 1T137). Building Representative Sue Rutz was also

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8/ Roberta Genaro, an Association building representative, was also not rehired, but allegations that Genaro was retaliated against for her Association activities were withdrawn by the Association on the third day of hearing (1T112, 3T74).

rehired as was Pat Gross who was briefly membership chair (1T111, 1T113, 1T137).

47. When Bickford learned she would not receive a contract for 2011-2012, she spoke to her classroom teacher, then to Densen, Drimones and Superintendent Jacks' secretary, but was passed from one to the other without explanation until she was referred back to Drimones who told Bickford she would get back to her but never did.

On or about July 1, 2011, Bickford alleges she called Drimones in her office, because Bickford heard there would be positions for teaching assistants in the coming year (C-3; 1T210). According to Bickford, Drimones told her she could not apply because there was a civil action against the Board (1T203). Drimones denies the conversation, explaining that she was on vacation from the close of school on June 28 until July 6, 2011 and was, therefore, not in her office. More importantly, Drimones did not learn about the unfair practice charge until she met with Turitz on an unrelated matter in October or November 2011 (3T20-3T21, 3T23, 3T34). I credit Drimones. Her testimony was specific, whereas Bickford's testimony about a "civil action" and the timing of the conversation was vague. Drimones' recall was sharper in this regard. Also, the unfair practice charge was not filed until June 28, 2011 when Drimones was on vacation.

Even if she spoke to Bickford around July 1, it is unlikely that she would have known about the charge.

48. Currently, there are no officers of the Association (1T115). Ganci admits that the lack of participation could be the result of the pending petition for decertification and the decision of members that they no longer wish to be represented by the Association (1T137-1T138).

ANALYSIS

The Association essentially alleges that the Board's RIF of Membership Chair Terry Calautti in January 2011 and of Association President Fran Ganci and Building Representative Dolores Bickford in May 2011 as well as the failure to recall them to fill one of the 78 full-time positions was in retaliation for their union activities and to chill any support for the Association. The Association urges that an inference of hostility be drawn from the Board's rejection of seniority as a basis for its decisions as to which teaching assistant to rehire, namely that the Board was determined to get rid of the Association leadership and that its rationale for not rehiring these individuals was pretextual. Based on the record, I do not conclude that the Board's actions regarding Calautti, Ganci and Bickford violated the Act.

The standard for determining whether an employer's conduct is discriminatory and, therefore, violates subsection 5.4a(3) and

derivatively a(1) of the Act was established by the New Jersey Supreme Court in Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984). There, the Court determined 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 rights. Id. at 246.

If an illegal motive has been proved and if the employer has not presented any evidence of a motive not illegal under our Act, or its explanation has been rejected as pre-textual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under out 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 union animus was a motivating or substantial reason for the personnel

action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

The decision as to whether a Charging Party has proved hostility is based upon consideration of all the evidence, including that offered by the Respondent, as well as the credibility determinations and inferences drawn by the hearing Examiner. See, Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987).

Here, there is no direct evidence that protected activity was a substantial or motivating factor in the Board's decision to RIF Calautti in January 2011 or Ganci and Bickford in May 2011 and its decision not to rehire them for the 2011-2012 school year. Financial constraints triggered the need to eliminate teaching assistant positions in both January and May 2011 and resulted in the parties' decision to modify the collective agreement by, among other changes, eliminating dependent medical coverage in order to restore 78 out of 86 full-time positions for the 2011-2012 school year.

Also, no direct evidence supports that the Board or its agents - Superintendent Jack, Board Attorney Turitz, Director of Special Services Drimones or Consociates Kahn, Densen and Noonan - were hostile to any protected activities or harbored any animus towards the Association or its leadership. For instance, no evidence was introduced of difficult labor relations.

Although negotiations for the parties' first two collective agreements were lengthy, Association Representative Danzig indicated this was due to the fact that two agreements covering five years were negotiated simultaneously. Danzig described his relationship with Board Attorney Turitz during this initial negotiations period as friendly and cordial. Although Turitz did not represent the Board in negotiations for the current collective agreement, no evidence suggests that those negotiations were any less amicable or, in the alternative, acrimonious.

There is, also, no evidence of numerous and contentious grievance filings from which to conclude that the decision to RIF the three individuals and not to rehire them grew out of hostility to protected activity. Likewise in both the January and May RIFs, the decision-maker team, led by Supervisor Drimones, consisted of three consociates who themselves were members of the Teacher's Association. As the day-to-day supervisors of Calautti, Ganci and Bickford, their observations and recommendations were followed and accepted by Director Drimones and the Board. No evidence supports that they were predisposed to discriminate against the Association's leadership or that they, or Drimones, were given directives by Superintendent Jack or the Board to do so.

Thus, without direct evidence of hostility to union activity, it is necessary to examine the circumstantial evidence in this case. Clearly, Calautti, Ganci and Bickford were engaged in protected activity. Calautti was membership chair since the inception of the Association in 2004 and was, purportedly, successful in this role. She attended meetings with the Board as well as the Superintendent. Association President Ganci was involved in many activities on behalf of the Association including negotiations and attendance at Board meetings. Likewise, Bickford as a building representative, appeared on behalf of individual members and attended Board meetings. There is no doubt, therefore, that the Board and Superintendent Jack knew of these activities.

However, the Board and Jack delegated authority to Drimones and the three consociates to decide who were the best candidates to rehire. The teams recommendations were accepted. There is no evidence, circumstantial or otherwise, that Drimones and her team were instructed by the Board or Jack as to any union activities of the teaching assistants.

Thus, although Drimones was aware that Ganci was Association president and thought "perhaps" that both Calautti and Bickford were building representatives, the three consociates were only aware of Ganci's activities. All credibly testified that no discussion related to union activity took place between them in

their deliberations during the selection process for the January 2011 or the recall decisions from the May 2011 RIFs.

Basically, there is no evidence that the team led by Drimones acknowledged or cared in anyway about Ganci's, Calautti's or Bickford's protected activities. See generally, Tp. of Teaneck, P.E.R.C. No. 2000-45, 26 NJPER 48(¶31018 1999)(layoff of union negotiator not violation where supervisor/decision-maker neither acknowledged nor cared about union activity and friction with employee arose from failure to perform job functions and professional distrust). Moreover, the rationales for the decisions not to rehire are supported by the evidence adduced herein and are not pretextual.

As to Calautti, who together with four other teaching assistants was RIF'd in January 2011, both Kahn and Densen who had supervised her recommended for multiple credible reasons that she be RIF'd. Specifically, Calautti had difficulty getting along with co-workers, including Donna Perez and Kelly Hugin, both of whom were also RIF'd with her in January 2011. Densen who was Calautti's most recent supervisor detailed numerous difficulties with Calautti's job performance, including Calautti's inability to take part in various activities, namely field trips and community-based instruction, both of which are important to the special education program.

Charging Party suggests that the deficiencies in job performance described by Densen were not reflected in Calautti's evaluations, but this contention is inaccurate. Densen's evaluation reflect the difficulties with co-workers. Also, Calautti's last evaluation before she was RIF'd was completed by her Principal who reduced Calautti's ratings from "commendable" to "satisfactory" with one "needs improvement" in the area of patience and understanding of students needs, clearly reflecting performance concerns.

Calautti's medical issues also made it difficult to place in the program - e.g. she needed to eat lunch at a certain time precluding easy attendance in the community-based activities, and she required EMT assistance during student evacuation drills. There is no doubt that teaching assistants are required to address not only the emotional needs of their students, but their physical needs as well. It is a difficult and demanding job. Calautti's physical limitations and medical requirements, together with her inability to get along with staff, led to Densen's and Kahn's recommendation to RIF her, not Calautti's position as a successful Association membership chair.

Additionally, the fact that Donna Perez and Kelly Hugin, two of the co-workers Calautti had difficulties with that year, were also laid off in the January RIF supports that Densen's recommendation to RIF her was based on Calautti's job

performance, not pretextual. Finally, Densen's longstanding personal relationship with Calautti which was, for all intents and purposes, a good one supports that the decision to RIF her was for the stated reasons, namely difficulties with staff and her physical limitations.[9/]

Respondent correctly contends that because Calautti was RIF'd in January 2011, she was ineligible for selection to one of the 78 newly created full-time teaching assistant positions as long as there were eligible assistants from the 86 positions abolished in the May RIF. Accordingly, Calautti was not considered as a candidate to fill one of the 78 spots for 2011-2012. There was no obligation under the parties' modification agreement to consider her as a possible candidate for rehire in that group.

As to Ganci, the rationale for the decision not to offer her a position in 2011-2012 was based on her medical condition and the notification to Drimones by Ganci's physician that, as of May 26, 2011, Ganci would be out on sick leave indefinitely. Ganci had been out since April 2011. So, when the team met to make

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9/ Charging Party argues in its brief that Drimones' failure to recall any specific instances of performance related problems regarding either Calautti or Bickford supports that the rationale to RIF them was pretextual. I reject this argument. Drimones was not the day-to-day supervisor of either Bickford or Calautti. Both Densen and Kahn testified credibly as to the specifics of their job-related concerns regarding both women. It is logical that Drimones relied on their opinions in this regard.

their decisions as to who to offer a full-time position for the coming school year, there was no indication when Ganci would return. Both Drimones and Densen had heard rumors that Ganci was going to retire. Accordingly, the team's decision not to recommend Ganci be rehired was based on her inability to work. Ganci admits that from April 26, 2011 when she went out on medical leave until December 31, 2011, she could not physically perform the duties of a teaching assistant. Therefore, even if Ganci had been offered a position for 2011-2012, she could not have accepted a position for September 2011.

Charging Party asserts that I should infer that this rationale was pretextual because neither Drimones nor Densen called Ganci to confirm the "rumors" of retirement. I do not draw this inference. Ganci's doctor had notified them that her medical leave was indefinite. Whether Ganci intended to retire or not, it was apparent to Drimones, Densen and the rest of the team that her ability to perform the job was compromised. To save a spot for Ganci who might never be able to return and, conversely, not to fill a position with an able-bodied teaching assistant is illogical. Accordingly, their recommendation not to rehire Ganci was reasonable and not pretextual.

Finally, Bickford was supervised by both Densen and Kahn. Both concluded that she was not the best candidate to rehire. Kahn recommended that Bickford be transferred from the high

school, because Bickford ignored teacher directions, complained in front of students and had difficulty working with replacement teachers. Also, Bickford left in the middle of the day for medical reasons and complained about her inability to physically perform certain tasks for the community-based program.

Densen experienced similar difficulties with Bickford who had a lot of conflicts with teachers and other teaching assistants. Densen moved her several times during the 2010-2011 school year. Also, like Kahn, Denson noted that Bickford left four to six times mid-day for medical reasons, forcing Densen to scramble for coverage.

Charging Party asserts that Densen's and Kahn's job performance criticisms were pretextual, because her evaluations did not specifically or directly mention them. However, I did not find that either Densen or Kahn failed to note these difficulties. Kahn expressed his concerns in Bickford's 2007-2008 evaluation noting that she complained in front of students, had difficulty getting along with teachers and that her actions led to animosity among staff. Bickford's last evaluation for 2010-2011, which Densen prepared after making the decision not to rehire her, was couched in more positively, because Densen did not want to hurt Bickford's job prospects. That is understandable. For instance, Densen observed that Bickford was moved several times during the year to fill specific needs which,

according to Densen, reflected Bickford's frequent conflicts with co-workers. Densen also admonished Bickford in the evaluation to minimize having to leave school early for medical reasons which was a veiled reference to several instances when Bickford left mid-day and had to be replaced by another assistant.

The fact that Bickford was never reprimanded for leaving mid-day does not indicate that Densen and Kahn were not concerned. Densen credibly testified that she communicated these concerns verbally. Written reprimands were reserved for extreme misconduct, such as Densen's discipline of Jesse Essbach for, among other things, leaving inappropriate magazines in a student's desk.

Finally, I also reject Charging Party's contention that Densen's job recommendation for Bickford supports that the rationale for not rehiring her was pretextual. Many employers write positive recommendations to assist former employees.

Next, I cannot infer from the Board's rejection of Turitz' recommendation to exercise its discretion by using seniority in the selection process to fill the 78 restored positions that it was hostile to the Association leadership. The evidence supports that since the Association became the majority representative, the Board's consistent position in negotiations was that seniority would not form the basis for such decisions. Even though the Board agreed to add Article 16 in the parties'

current agreement inserting for the first time language giving it discretion to give priority to employees affected by a RIF, no where in the agreement is there reference to seniority as a basis for filling positions in the event of a RIF. The fact that the Board declined to do so in the May RIF was consistent with its past opposition to seniority-based rehire decisions. Indeed, the Board's insistence on removing Article 16 prospectively in the parties' modification agreement (J-2) reaffirmed this stance. Accordingly, when the Association agreed to the terms of the modification agreement, it was well aware of the Board's stance in this regard and should not have been surprised that Turitz' recommendation was rejected.

Finally, I draw no inference of hostility from the Board's rehiring of Manalis and Briety in the fall of 2011. Briety was rehired in October 2011 when the door security position he previously filled was re-established. There is no evidence as to why Manalis was rehired in September 2011 and what, if any, consideration was given to her previous attendance record. However, there is also no evidence in the record that Ganci sought reinstatement. Her own testimony establishes that she was not physically able to perform as a teaching assistant until January 2012.

Similarly, there is no evidence that Calautti applied for a position after her RIF in January 2011. In any event, neither

the parties' collective agreement (Article 16) nor the modification agreement require the Board to give those who were affected by the January RIF priority for any additional full-time teaching assistant positions created from June 9, 2011 through June 30, 2011. Calautti was not, therefore, contemplated in that agreement.

As to Bickford, she testified that she inquired of Drimones in the summer of 2011 about a position for the next year. I did not credit Bickford's testimony as the substance of that conversation with Drimones or that any such conversation about a position took place. Even if Bickford inquired about an opening, there is no evidence that she actually applied for a position at that time or that there was a position available. The teaching assistant positions occupied by Manalis and Briety were apparently created in the late summer or fall of 2011.

Based on the foregoing, I do not find that Respondent violated 5.4a(1) and (3) of the Act.

First, I do not find that the Board violated 5.4a(2). That provision prohibits public employers from dominating or interfering with the formation, existence or administration of any union. It is designed to protect bonafide employees organizations from improper employer activity which threatens its formation, existence or administration. Borough of Shrewsbury, D.U.P. No. 79-12, 5 NJPER 13 (¶10007 1978, aff'd P.E.R.C. No.

79-42, 5 NJPER 45 (¶10030 1979), aff'd 174 N.J.Super. 25 (App. Div. 1980), certif. den. 85 N.J. 129(1980).

While motive is not an element of an a(2) offense, there must be a showing that the acts complained of actually interfered with or dominated the formation, existence or administration of the employee organization. In Atlantic Community College, P.E.R.C. No. 87-33, 12 NJPER 764-765 (¶17291 1986), the Commission discussed the standards for a 5.4a(2) violation. Basically, the Commission differentiated domination which occurs when the employer, not the employees, directs the organization from interference which involves less severe conduct. Domination goes beyond mere interference where the organization is deemed capable of functioning independently once the interference is removed. Domination is aimed, the Commission explained, at the employee organization as an entity.

Here, the Association asserts that by RIFing Calautti in January 2011 and then Ganci and Bickford in May 2011 and not rehiring them for the 2011-2012 school year, the Association is left without any officers, particularly since Vice-President Wagner and Treasurer Carelli who were both rehired for 2011-2012 resigned. Thus, the Association contends the Board has ensured that the Association cannot function in representing its members. However, the assertion that either Wagner or Carelli resigned due to the Board's actions regarding Calautti, Ganci or Bickford is

not supported by the record in this matter. Carelli resigned because Ganci's medical leave created too much Association work for her to handle, and she no longer wished to be an officer as a result. Wagner's rationale is a mystery. No explanation was provided by any witness and Wagner did not testify. Therefore, no negative inference can be attributed to his decision to resign his Association office. In any event, he was apparently never too actively involved with the Association and may have concluded for the same reasons as Carelli that without Ganci, there was too much work.

Nor can an inference be drawn that because of the Board's actions in RIFing Calautti, Ganci or Bickford and not rehiring them that others have refused to step into vacated Association leadership positions for fear of retaliation. Calautti's RIF was months earlier than Ganci's or Bickford's and too remote in time to conclude that its effect carried over to Wagner's or Carelli's resignations in May/June 2011 or the inability thereafter to find other candidates for Association office. Ganci herself admits that the lack of membership participation could be the result of the members' no longer wishing to be represented by the Association. In any event, it is unclear whether no one volunteered to fill Association leadership positions or whether anyone was asked and refused and what, if any, were the reasons for their decisions not to become involved in the Association as

an officer. The burden is on the Charging Party to prove the allegations in its charge by a preponderance of evidence on the record. It has not met its burden in this instance. Based on the foregoing, I do not find that the Board violated 5.4a(2) of the Act.

Next, I do not find that Respondent violated 5.4a(4) of the Act. That section prohibits public employers from 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. Charging Party relies on its allegation that when Bickford went to Drimones on or about July 1, 2011 to discuss the possibility of applying for a position in 2011-2012, Drimones allegedly told Bickford that she could not apply for a position if one opened up, because of a civil litigation - presumably the charge in this matter. However, I did not credit Bickford's testimony in this regard. Drimones plausibly refuted her testimony explaining that she (Drimones) was on vacation from the end of June to the second week in July 2011 and, more importantly, did not learn of the Association's charge until she met with Turitz in the fall of 2011. I credited her testimony.

Additionally, the burden of proof under 5.4a(4) is identical as under 5.4a(3) as set forth in Bridgewater. Since no fact established that the actions regarding Bickford were motivated in

whole or part by animus to the exercise of protected activity, I do not find that the filing of the charge here prevented her from being rehired after July 2011 for the 2011-2012 school year.

Finally, the Association alleges that the Board violated 5.4a(5) of the Act. That section requires, among other things, that the employer negotiate in good faith with the majority representative concerning terms and conditions of employment. Here, I found that the parties negotiated and agreed to modify their current collective agreement in exchange for restoring 78 full-time teaching assistant positions for 2011-2012. That agreement was reduced to writing and that writing reaffirmed the Board's discretion to decide how to fill the 78 positions. It determined to fill the positions with the best candidates, not by seniority.

The May 26 conversation between Danzig and Turitz did not bind the Board to relinquish its discretion to pick the best candidates, even if Turitz felt that it was the easiest and fairest way to make rehire decisions and committed to recommend seniority as a basis for recall decisions in this instance. The Board had never done so in the past and retained the discretion to do so in the future.[10/] Danzig was well aware that the parties

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10/ The Board asserts that parole evidence bars the testimony of Danzig regarding Turitz' statements that seniority would be preferable as the fairest and easiest method to determine who to rehire. It contends that the Danzig/Turitz

(continued...)

practice was to reduce their agreements to writing and to have any such agreements subject to ratification by each side. Turitz' statement about seniority, therefore, cannot be construed as a commitment by the Board and could not reasonably be relied on by Danzig or the Association. See generally, Borough of Palmyra, P.E.R.C. No. 2008-16, 33 NJPER 232 (¶89 2007).

The modification agreement (J-2) contained no language guaranteeing that the 78 teaching assistant positions would be filled by seniority. Danzig provided two different explanations for why he nevertheless recommended that the membership ratify the agreement without this guarantee. First, Danzig explained that he was unconcerned because the Board never involved itself in the mechanics of hiring. This explanation is improbable in light of the parties' negotiations history and the Board's consistent stance in rejecting seniority as a criteria in rehire decisions after a RIF. Certainly, the missing reference to seniority in the modification agreement should have raised a concern and signaled to Danzig that the seniority issue was not

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10/ (...continued)
discussion cannot vary the terms of clear language of the modification agreement. To the extent the Association is asserting that the discussion altered any term of the modification agreement, specifically by requiring the Board to exercise its discretion in a particular manner, I agree. However, since I have rejected the Association's contention that Turitz' recommendation had any binding effect on the Board or committed the Board to exercise its discretion under Article 16 by using seniority to rehire, the parole evidence argument is not dispositive.

yet resolved. Minimally, it warranted a call or e-mail to Turitz to verify Danzig's understanding based on their May 26 conversation.

Danzig's second explanation for why he neither questioned Turitz about the seniority issue or raised it as a concern when reviewing the modification agreement is, however, plausible - the lack of a seniority provision "got away" from him. He was concerned about other, presumably more pressing, issues, such as when the teaching assistants would receive their individual contracts after the agreement was ratified, whether step movement would be honored and that no health care premium contribution would be required until the expiration of the collective agreement. None of these concerns touched on seniority in the recall selection process.

Danzig's failure to follow-up on this issue in the written agreement contributed to the parties' misunderstanding in this regard. Although it might have promoted better labor relations for Turitz to have communicated the Board's rejection of his recommendation on the seniority issue to Danzig (it certainly strained the previously good relationship between the two), there was nothing nefarious in his failure to do so.

Based on the foregoing, I do not find that the Board violated 5.4a(5) of the Act.

CONCLUSIONS OF LAW

Respondent did not violate N.J.S.A. 34:13A-5.4a (1), (2), (3), (4) and (5) by laying off Frances Ganci, Dolores Bickford and Terry Calautti as the result of two reductions in force during the 2010-2011 school years, by not rehiring them for the 2011-2012 school year, by any statements allegedly made by Supervisor of Special Services Pat Drimones to Dolores Bickford in regard to applying for a teaching assistant position in 2011-2012, or by refusing to negotiate in good faith with the Association.

RECOMMENDATION

I recommend that the Commission dismiss the Complaint.

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 July 23, 2012.

Wendy L. Young
Hearing Examiner

DATED: July 11, 2012
Trenton, New Jersey