

H.E. NO. 2013-4

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

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2009-334

TRENTON EDUCATIONAL SECRETARIES
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint based upon an unfair practice charge alleging that a public employer violated 5.4a(1), (3) and (5) of the Act by abolishing a secretarial position held by Association Vice President Ann Sciarrotta, who was transferred to another secretarial position. The Charging Party alleged that the Board took that action in retaliation for Sciarrotta's exercise of protected conduct. The Hearing Examiner found that the Charging Party had not demonstrated hostility toward protected conduct, as required under In re Bridgewater Tp., 95 N.J. 235 (1984). The Hearing Examiner held that there was no causal connection between union activity and the Board's decision.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair 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.

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Appearances:

For the Respondent,
Parker McKay, P.A. , attorneys
(Elizabeth M. Garcia, of counsel)

For the Charging Party,
Zazzali, Fagella, Nowak, Kleinbaum & Friedman,
attorneys
(Jason Sokolowski, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 23, 2009, the Trenton Educational Secretaries Association (TESA or Charging Party) filed an unfair practice charge with the New Jersey Public Employment Relations Commission (Commission) alleging that the Trenton Board of Education (Respondent or Board) violated subsections 5.4a(2) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.(Act). The Charging Party filed an amended charge dated July 10, 2009, alleging that the Board violated subsections 5.4a(1),

(2), (3) and (5)^{1/} of the Act. By Complaint dated October 1, 2010, the Commission determined that the 5.4a(1), (3) and (5) allegations in the charge, if true, could constitute unfair practices (C-1). The Charging Party alleges that the Board abolished the secretarial position held by Ann Sciarrotta (Sciarrotta) and transferred Sciarrotta to another position in retaliation for her exercise of activities protected by the Act. The Charging Party seeks restoration of Sciarrotta to her former secretarial position and for the Commission to declare that the Board committed unfair practices in violation of the Act.

A Complaint and Notice of Hearing (C-1)^{2/} was issued on October 1, 2010, based upon a determination that the 5.4a(1), (3) and (5) allegations in the charge, if true may constitute unfair

1/ 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. (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. (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.

2/ "C" refers to Commission exhibits. "J" designates exhibits jointly submitted by the parties. "CP" refers Charging Party's exhibits and "R" refers to Respondent's exhibits.

practices. The Board filed an Answer (C-4) dated October 8, 2010, denying the allegations in the charge.

Hearings were conducted on June 7, 2011 and October 6, 2011.^{3/} Both parties filed post-hearing briefs dated February 15, 2012. Both parties filed reply briefs dated February 29, 2012.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The parties stipulated that the Board is a public employer and TESA is a public employee representative within the meaning of the Act (1T6-1T7).

2. The parties stipulated that Sciarrotta is a public employee within the meaning of the Act (1T7). Sciarrotta has been employed by the Board as a secretary for over forty years, beginning her employment in 1967 (1T12). Sciarrotta served as a secretary in various assignments until 1994, when she was assigned to the Accounting Department as an Administrative II Secretary (1T13). Effective July 1, 2009, the Board abolished the position held by Sciarrotta and created the title of Financial Analyst (J-2). Based on her seniority and applicable clauses of the parties' collective negotiations agreement, Sciarrotta selected an available Administrative secretary

^{3/} The transcripts will be referred to as 1T and 2T, respectively.

position in the Medical Department where she is still employed (1T114, 2T10).

3. Sciarrotta has been a TESA member since 1976, having held various positions within TESA until 2001, when she was elected Vice President, a position she has continuously held since that time (1T18-1T20). As Vice President, Sciarrotta has been involved in processing grievances, counseling employees concerning their rights under the collective negotiations agreement, and participating in collective negotiations with the Board on behalf of TESA (1T18-1T22). In its reply brief, the Board stated that it "does not dispute that it was aware of Sciarrotta's involvement with the union." (Board Reply Brief, p.2).

4. Sciarrotta recalled a number of incidents in which she interacted with Board management in her capacity as TESA Vice President. The first incident concerned Assistant Business Administrator Gerald Truehart (Truehart) allegedly assigning non-bargaining unit work to a Payroll Department TESA member. Sciarrotta spoke with Truehart about intermingling duties between separate units (1T24). Sciarrotta met with Human Resources Manager Pam Howard (Howard) (1T25) in April 2008 concerning Truehart's assignment of such work to TESA members who reported to Howard (1T36). The meeting was attended by Howard, Sciarrotta and Truehart. At the meetings, Howard responded to Sciarrotta by

stating that Howard did not want TESA members performing such work when other employees were already paid to perform such work (1T36). As a result of the meeting, Truehart ceased to assign non-bargaining unit work to the TESA member who reported to Howard (1T117-1T119).

5. Another incident concerned an interaction with Assistant Superintendent of Human Resources Patricia Lucas (Lucas) (1T25) in which TESA members were performing duties of security guards in September 2008. Sciarrotta indicated that TESA filed a grievance concerning those duties. Sciarrotta testified about another incident in which Lucas asked TESA members to sign a log every time they performed confidential work. Sciarrotta spoke with Lucas about the log, but it is unclear if Sciarrotta or TESA filed a grievance concerning this matter or if any action was taken by the Board or Sciarrotta as a result (1T30-1T33).

6. Sciarrotta met with Howard in April 2008 concerning attendance procedures in Georgette Bowman's department. Bowman was the Coordinator of Purchasing (1T38). Based upon a memorandum from Lucas about attendance procedures, Bowman relayed the information to her staff at a meeting, which included TESA members. Sciarrotta met with Lucas concerning the memorandum, which Lucas claimed was only distributed for guidance purposes (1T39-1T40). On cross-examination, Sciarrotta stated that she did not file a grievance concerning this issue (1T149-1T150). It

is unclear from the record whether Sciarrotta's meetings with Howard or Lucas alleviated Sciarrotta's concerns with regard to the issue.

7. Sciarrotta testified that Director of Special Services Andrew Morgan telephoned her on occasion, raised his voice to her, and told her not to interfere with the functions of her department. Sciarrotta also claimed that she once heard Morgan state that TESA will fight for its members even if the member is wrong (1T42). Sciarrotta stated that in 2009, she met with Morgan to discuss the alleged harassment of two secretaries that reported to him. Upon being confronted with such claims, Morgan became irate with Sciarrotta and the secretaries making such claims (1T49-1T51). Despite the meeting not being resolved to Sciarrotta's satisfaction, it is unclear if Sciarrotta pursued the secretaries' claims beyond the meeting with Morgan. On cross-examination, Sciarrotta claimed to have filed grievances on behalf of each secretary, but could not recall the outcome of either grievance (1T147-1T148).

8. During cross-examination, Sciarrotta claimed that she spoke with Morgan in January 2009 about secretaries being assigned non-bargaining unit work. Morgan allegedly became very angry and stated that if Sciarrotta did not negotiate with him, he would abolish secretarial positions (1T140-1T141). Sciarrotta apparently did not pursue this matter further. I do not credit

this testimony. Sciarrotta testified to this interaction for the first time on cross-examination, it is not corroborated by any other evidence, nor was any documentary evidence submitted to support that the interaction occurred.

9. Sciarrotta testified that in November 2006, former Superintendent Rodney Lofton held a meeting during which Lofton stated that employees should ignore their union's advice and support the Board. Lofton was bent down towards Sciarrotta as he made that statement. As a result, Sciarrotta contacted TESA's NJEA Representative Jim Loper, who drafted a letter to Lofton, claiming that Lofton's statement "borders on anti-union animus." (CP-1, CP-2) Sciarrotta was summoned to Lofton's office, at which point Lofton allegedly shook the letter in the air and asked Sciarrotta "is this the way you want to do business?" (1T33-1T35, 1T45) Sciarrotta was unclear as to what Lofton was allegedly asking employees to do against union advice.

10. In April 2008, Truehart informed Sciarrotta that she could no longer conduct union business during the work day (1T56). It was unclear from Sciarrotta's testimony if Truehart ever prevented Sciarrotta from doing so. On cross-examination, Sciarrotta stated that she never filed a grievance for not being allowed to conduct union business during the work day (1T89-1T90).

11. Sciarrotta testified that she always had access to Truehart's calendar until sometime in March 2009. Sciarrotta spoke with a technician about regaining access to Truehart's calendar and was informed that Truehart could grant such access. Sciarrotta never requested that Truehart do so (1T59-1T61). It is unclear why Sciarrotta required access to Truehart's calendar to perform her duties in March 2009. It is also unclear if Truehart was even aware that Sciarrotta no longer had access to his calendar.

12. By memorandum from Lucas dated March 19, 2009, Sciarrotta was asked to attend a meeting on March 20, 2009 to discuss her employment status for the 2009-2010 school year. (CP-3; 1T62). Sciarrotta responded to Truehart, stating that she was "unable to meet with him." (CP-4; 1T63). Lucas approached Sciarrotta and informed her that Sciarrotta needed to speak with Truehart about her position for the upcoming school year. Sciarrotta did not want to meet with Truehart because in Sciarrotta's experience, the Human Resources Department handled employee meetings concerning employee assignments. Sciarrotta testified that employees do not speak directly to their immediate supervisors, in this case Truehart, unless it is a "courtesy of the immediate supervisor to advise you that this is the plan." (1T61-1T67). Instead of meeting with Truehart, Sciarrotta met with Lucas, Owens, NJEA Representative Jim Loper, and TESA

President Patricia Vogt. At that meeting Sciarrotta was informed that her position "was being recommended to be abolished for the coming school year" (1T68). Sciarrotta testified that the normal procedure in the Business Division is for the Business Administrator to recommend the abolishment of a position to the Superintendent, who places the recommendation on the Board agenda for a vote (1T70). Sciarrotta asked Truehart who abolished her job. Truehart stated that he could not answer that question (1T70-1T71). Lucas informed Sciarrotta by letter dated April 9, 2009, that her position was abolished "due to severe budgetary constraints" (1T73; CP-5). Sciarrotta testified that the basis for the at-issue unfair practice charge in this matter is that her immediate supervisor could not tell her who abolished her position and all of the events that led up to the time her position was abolished (1T76-1T77). During cross-examination, Sciarrotta stated that she was given a reason by Lucas for the abolishment of her position prior to Sciarrotta asking Truehart who abolished Sciarrotta's position (1T79-1T81).

13. As a result of the abolishment of her position, Sciarrotta was allowed to choose another position for the next school years, based on her seniority and as per the collective negotiations agreement between TESA and the Board. Sciarrotta chose an Administrative II Secretary position in the Health Services Department (1T113-1T114).

14. Pamela Owens (Owens) has been the Human Resources Manager for the Board for over seven years and is familiar with Sciarrotta (1T8). Owens testified that Lucas was the Assistant Superintendent of Human Resources, but left the Board in June 2009 (2T10-2T11). Director of Special Education Andrew Morgan commenced his employment on July 2008, but resigned from the Board after one year (2T11). Superintendent of Schools Rodney Lofton became Superintendent in September 2006 and left the Board in October 2010 (2T11-2T12).

15. Leodito Yanogacio, Jr. (Yanogacio) testified that he was hired by the Board on July 1, 2009 as a financial analyst in the accounting department (2T17-2T19, 2T23). Truehart was Yanogacio's supervisor (2T18-2T19). Yanogacio performed job duties consistent with a financial analyst upon hire, including analyzing data, forecasting budgets, and checking for discrepancies in accounts. Yanogacio has not performed any secretarial duties since being hired. Yanogacio is currently the Board's assistant comptroller. There have been no secretarial positions in the accounting department since Yanogacio was hired (2T19-2T24). Yanogacio was not involved in the decision to abolish Sciarrotta's position (2T25).

16. Jayne Howard has been the school business administrator board secretary for over four years (2T27-2T28). Prior to that, Howard and Sciarrotta worked together in the accounting

department (2T28-2T29). Howard testified that in 2009, approximately two hundred positions were abolished by the Board, including teachers, vice principals, secretaries, custodians, and security personnel. Howard testified that Truehart, who had been serving in his position for approximately one year, requested an abolishment of his secretary's position in exchange for the addition of a fiscal analyst. According to Howard, Truehart reasoned that since the Board was under strict scrutiny because of accountability regulations and efficiency standards, a fiscal analyst would be helpful to analyze costs that had never before been analyzed. The accountability regulations, which were created by the State in 2008 and 2009, imposed efficiency standards on the Board, and the accounting department in particular, that had never been in place. This impacted the workload of the accounting department. Truehart created the job description for the fiscal analyst position, which was approved by the Board. Howard, along with Truehart, met with the superintendent and the assistant director of human resources concerning the proper way to draft the fiscal analyst job description. On May 4, 2009, the Board approved the fiscal analyst position and abolished the administrative II secretary position held by Sciarrotta. According to Howard, Sciarrotta is currently an administrative II secretary in the medical department, earning the same rate of pay she received prior to

the abolishment of her position in the accounting department. Howard stated that the Board had a budget deficit of \$1.9 million in 2008/2009 and a surplus of \$3.4 million in 2009/2010, crediting the creation of the fiscal analyst position with aiding, in part, that improvement (2T30-2T40).

17. Howard testified that Harper was Howard's administrative II secretary in the business department. Howard denied ever stating that she would punch Harper in the face. Howard also denied ever making a statement to Harper about transferring Sciarrotta around until Sciarrotta retired (2T52-2T53). Howard claimed that she and Sciarrotta had a great relationship and attended social functions together.

18. Howard denied ever interfering with any legitimate union activities. Howard was aware of an incident in 2008 or 2009 in which Truehart told Sciarrotta not to conduct union business during the workday. Howard was Truehart's supervisor in the business office and so directed Truehart to allow Sciarrotta to conduct union business during the day as long as work flow was not interrupted. On another occasion, Howard needed to instruct Truehart not to assign a secretary certain work more properly performed by another title. Truehart followed that instruction. No secretarial position has existed in the business office since Sciarrotta's position was abolished.

ANALYSIS

The issue in this case is whether the Board abolished Sciarrotta's position because of her exercise of protected conduct.

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), 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. The Court in Bridgewater found that the mere presence of anti-union animus is not enough. The employee must establish that the anti-union animus was a motivating force or substantial reason for the employer's actions. 95 N.J. at 242.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record,

that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The decision on whether a Charging Party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

The Charging Party takes issue with Truehart's failure to inform Sciarrotta exactly why her position was abolished, despite Sciarrotta's admission that she was informed about the underlying reasons for her position's abolishment by another source. In fact, Sciarrotta was told exactly why her position was being abolished by letter dated April 9, 2009 (CP-5). Moreover, she was asked by Truehart to attend a meeting to discuss her employment for the 2009/2010 school year and Sciarrotta refused to attend, claiming that direct supervisors did not speak to subordinates about positions unless the supervisor extended that courtesy. It is unclear whether Truehart would have extended

such "courtesy," however, he was not given the opportunity, because Sciarrotta refused to meet with him.

The Charging Party points to a number of instances in which Sciarrotta acted on behalf of TESA members in combating what she perceived to be violations of the collective negotiations agreement or unfair treatment of her members. It is clear that Sciarrotta engaged in protected conduct. The Board has conceded as much in this matter. Sciarrotta fails, however, in establishing that any causal connection existed between the exercise of that protected conduct and the Board's adverse employment action, as will be more fully explained in the analysis below.

Both parties relied on the Bridgewater requirements to support their respective cases. The Charging Party argued it made its prima facie case of hostility, claiming that the Board engaged in a pattern of hostile conduct toward Sciarrotta. I disagree. Sciarrotta indeed cited many instances in which she engaged in protected activity. There is no evidence, direct or circumstantial, that indicates that the Board or agents of the Board acted with hostility towards the exercise of those rights. Sciarrotta admitted that she resolved many instances of disagreement with many Board administrators by meeting with them. Truehart, for example, initially believed that he could restrict Sciarrotta from conducting union business during the work day.

According to Sciarrotta, once Truehart was informed that the Board had always allowed union officers to conduct union business during the day, Truehart allowed her to conduct such business. Similarly, Truehart ceased assigning duties to members of TESA once he was told by Howard that he had distributed such tasks inappropriately.

Likewise, Sciarrotta described an incident with Lucas that was resolved amicably. Sciarrotta claims that comments were made by the former superintendent Lofton, Morgan, and Howard that demonstrated anti-union animus, however, even if I were to credit Sciarrotta's claims in that regard, those individuals did not make the decision to abolish Sciarrotta's position. Truehart made that decision.

The Charging Party has not shown that Truehart's decision to abolish Sciarrotta's position and create the position of fiscal analyst was in response to Sciarrotta's protected activity. Sciarrotta described a number of instances in which she and Truehart met concerning Truehart's ignorance of the collective negotiations agreement, however, all of the described instances were resolved amicably. Sciarrotta's own testimony revealed that Truehart complied with the terms of the collective negotiations agreement after he was counseled by Sciarrotta and Howard. Thus, while it is clear that Sciarrotta engaged in protected activity,

I fail to see any causal connection between that activity and the Board's decision.

Consequently, I conclude that the Charging Party did not prove hostility to Sciarrotta's protected conduct, and thus the Charging Party never established a prima facie case that the abolishment of Sciarrotta's position in the business office was motivated by such protected activity. The burden of proof never shifted to the Board.

Moreover, Howard was helpful in describing how the addition of the fiscal analyst position has been valuable to the business department. Her testimony did not reveal any evidence that Truehart was eliminating Sciarrotta's position for anything other than improvement in the operation of the business office. According to Howard, accountability regulations created by the State in 2008 and 2009 imposed new efficiency standards, which tremendously impacted the workload of the accounting department. Truehart created the job description for the fiscal analyst position, which was approved by the Board at the same time the Board abolished the administrative II secretary position held by Sciarrotta. Howard stated that the fiscal analyst has helped the Board eliminate a budget deficit and create a budget surplus. Regardless of the success of the decision to create the fiscal analyst position, it is clear that at the time the decision was made, legitimate operational reasons existed.

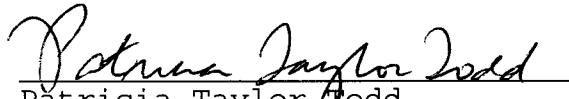
While the Charging Party's concern that Truehart did not give Sciarrotta an explanation as to why her position was abolished, based upon the above findings and analysis, there is insufficient evidence to conclude Truehart was acting in response to Sciarrotta's exercise of protected conduct. The charge must therefore be dismissed.

CONCLUSIONS OF LAW

The Board did not violate 5.4a(1), (3), and (5) of the Act by abolishing Sciarrotta's position.

RECOMMENDATION

I recommend that the Commission ORDER that the Complaint be dismissed.


Patricia Taylor Todd
Hearing Examiner

DATED: July 17, 2012
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 July 27, 2012.