

H.E. NO. 2016-2

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

In the Matter of

NEWARK STATE OPERATED SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CO-2011-220

NEWARK TEACHER'S UNION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends dismissal of an unfair practice charge alleging that the Newark State Operated School District violated 5.4a(1), (3), and (4) of the Act when it laid off unit employees in retaliation for their participation in and/or being the subject of an unfair practice charge contesting the District's failure to pay salary increments to unit employees upon expiration of the parties' collective negotiations agreement. The Hearing Examiner found that the layoffs at issue were motivated by economics and not in retaliation for the Union having filed an unfair practice charge or otherwise engaging in protected activity.

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.

H.E. NO. 2016-2

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

In the Matter of

NEWARK STATE OPERATED SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CO-2011-220

NEWARK TEACHER'S UNION,

Charging Party.

Appearances:

For the Respondent,  
Scarinci Hollenbeck  
(Sean Dias, Esq., of counsel)

For the Charging Party,  
Zazzaki, Fagella, Nowak, Kleinbaum & Friedman  
(Colin Lynch, Esq., of counsel)

**HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION**

On November 30, 2010, November 18 and December 8, 2011, and May 14, 2013, the Newark Teachers Union, Local 481, AFT, AFL-CIO (NTU, Union or Charging Party) filed an unfair practice charge and amended unfair practice charges against the State-Operated School District for the City of Newark (District or Respondent). The charge as amended alleges that the District violated section 5.4(a)(1), (3), and (4)<sup>1/</sup> of the New Jersey Employer-

---

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

Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq., when it laid off unit employees in retaliation for their participation in and/or being the subject of the original charge contesting the District's failure to pay salary increments to unit employees upon expiration of the parties' collective negotiations agreement. (C-1 and C-2).<sup>2/</sup>

The unfair practice charge was accompanied by an application for interim relief seeking an order requiring the immediate payment of the aforementioned salary increments. On May 11, 2011, a Commission Designee issued a decision, granting the application for interim relief with respect to the aides and per diem substitutes at-issue in this matter, ordering that the Board immediately pay the 2010-2011 automatic salary increments to unit employees retroactively to July 1, 2010. State-Operated School District of the City of Newark and Newark Teachers Union, Local 481, I.R. No. 2011-43, 37 NJPER 188 (¶59 2011).

---

1/ (...continued)  
rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

2/ Commission exhibits are referred to as "C- "; Charging Party's exhibits are referred to as "CP-; Respondent's exhibits are referred to as "R- ".

On December 29, 2010, the Union also filed a Petition for Declaratory Ruling with the Commissioner of Education. State-Operated School District of the City of Newark and Newark Teachers Union, Local 481, P.E.R.C. No. 2013-58, 39 NJPER 421 (¶133 2013). That matter was transmitted to the Office of Administrative Law (OAL) on February 24, 2011. On January 6, 2012, a Complaint and Notice of Hearing issued on the unfair practice charge (C-1). A Joint Order of Consolidation and Predominant Interest was issued on October 4, 2012, consolidating the unfair practice charge and the petition for declaratory ruling before a Hearing Examiner designated as a Special Administrative Law Judge. State-Operated School District of the City of Newark and Newark Teachers Union, Local 481, P.E.R.C. No. 2013-26, 39 NJPER 198 (¶63 2012). The parties then engaged in settlement discussions and ultimately entered into a settlement agreement that fully disposed of all issues in controversy, except the portion of Count Two of the December 8, 2011 Second Amended Unfair Practice Charge, which specifically incorporated those allegations contained in Count Two of the November 18, 2011 First Amended Unfair Practice Charge. Those allegations related solely to the alleged layoff and failure to rehire 6-hour teacher aides by the District. The January 24, 2013 Initial Decision of the Special Administrative Law Judge recommended that the Commission approve of the parties' settlement. The Initial

Decision was adopted by the Commission, which remanded the remaining severable allegations in the complaint to the Deputy Director of Unfair Practices for assignment to hearing. State-Operated School District of the City of Newark and Newark Teachers Union, Local 481, P.E.R.C. No. 2013-58, 39 NJPER 421 (¶133 2013).

On March 23, 2013, I informed the parties that I was scheduling a prehearing conference for April 30, 2015 and a hearing for May 28, 2013. At the April 30 prehearing conference, we discussed the possibility of the charge being amended. As a result, on May 2, 2013, I sent a scheduling letter to the parties, which included a directive for the Union to amend the unfair practice charge by May 10, 2013, if Union chose to do so. By letter dated May 9, 2013, the Union sought to amend the original unfair practice charge to remove from the charge those matters that had either been settled or otherwise resolved. The charge was thus amended on May 14, 2013 to include allegations that the District violated N.J.S.A. 34:13A-5.4(a) (1), (3), and (4) of the Act when it laid off unit employees in retaliation for the employees' participation in and/or being the subject of the original charge filed in this case.<sup>3/</sup> Thus, the May 14, 2013

---

<sup>3/</sup> After the Union filed its May 14, 2013 Third Amended Unfair Practice Charge, the District filed a motion for summary judgment dated June 19, 2013, which was denied by me on November 20, 2013. The District sought leave for special  
(continued...)

Third Amended Unfair Practice Charge contains all of the allegations currently before me.

The May 14, 2013 Third Amended Unfair Practice Charge incorporated the language from Count Two of the November 18, 2011 First Amended Unfair Practice Charge. The District filed its answer to the November 18, 2011 First Amended Unfair Practice Charge on January 24, 2012 (C-3), denying any unlawful actions. The answers contained in C-3 are responsive to the language contained in both the November 18, 2011 First Amended Unfair Practice Charge and the May 14, 2013 Third Amended Unfair Practice Charge. I informed the parties on the first day of hearing, February 19, 2014, that I was inclined to treat C-3 as the District's answer in this matter. C-3 was admitted into evidence as the District's answer without objection and will serve as the answer in this matter. A hearing was held on

---

3/ (...continued)

permission to appeal my summary judgment decision on November 27, 2013. The Commission denied the District's request for special permission to appeal, finding that "In establishing the District's motive for the layoff, the Hearing Examiner will determine whether the union has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the layoff, the District knew of this activity and was hostile toward the exercise of the activity. In re Tp. of Bridgewater, 95 N.J. 235, 246 (1984). However, even if those grounds are established, the District 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. Conflicting proofs concerning the District's motives are for the Hearing Examiner to resolve."

February 19 and March 19, 2014, at which time the parties were given a full opportunity to present testimonial and documentary evidence. The parties submitted simultaneous written summations, which were received by me on May 30, 2014. Based upon the record in this case, I make the following:

**FINDINGS OF FACT**

1. The parties are signatories to a collective negotiations agreement covering the period of July 1, 2009 to June 30, 2010; the parties entered into a subsequent agreement in October 2012 (1T13-1T14; CP-1). After the expiration of the collective negotiations agreement on June 30, 2010, the District did not pay NTU members automatic salary increments (CP-3). As a result, on November 30, 2010, the NTU filed an unfair practice charge against the District, together with an application for interim relief (CP-2). By decision dated May 11, 2011, a Commission Designee granted the NTU's application, in relevant part, ordering that the District was required to pay the aide/per diem substitute unit the 2010-2011 automatic salary increments retroactively to July 1, 2010 (CP-3).

2. The parties stipulated that the District is a public employer within the meaning of the Act and that the NTU is a public employee representative within the meaning of the Act (1T9).

3. The NTU called John M. Abeigon as its only witness (1T11). Abeigon is employed by the NTU and has held the title of Director of Organization for five years. (1T12). Prior to that title, Abeigon was employed by the NTU as a Legislative Representative, a Vice President, and a Staff Representative (1T13).

4. The NTU represents teacher aides ("aides"), including classroom aides, shared aides, and one-on-one aides (1T19). CP-18 is the Department of Personnel Job Specification for "Teacher Aide" (CP-18). The District also employs per diem aides as at-will employees; per diem aides do not receive the same level of benefits as full-time aides but are part of the bargaining unit (1T19-1T20; 1T42).

5. The District implemented a layoff of unit members on May 12, 2011, the day after the Commission Designee's Order on May 11, 2011 granting interim relief (1T17). On May 12, 2011, District Director of Human Resources Ann Miller sent an email to all staff informing them that the District expected one hundred thirty nine (139) civil service employees would be affected by the layoff (CP-4). Abeigon stated that the District claimed that the layoffs of the aides was due to "budgetary hardship;" however, Abeigon claims that the "budgetary hardship was not existent, and if it was at all existent it was of their own creation" (1T24:6-9). Abeigon claims that the District is



overburdened by the cost of consultants (1T24). I do not credit the claims of Abeigon. As will be fully explained in my analysis below, the District demonstrated that a budgetary hardship did indeed exist.

6. In July, 2011, the District laid off aides, custodians, clerks, and security guards (1T71; CP-4). In September 2011, thirty three (33) laid off aides were rehired in accordance with the civil service recall list (1T72-1T73).

7. In October 2011, the NTU asked the District via email why the District had not paid the increments mandated by the Commission Designee's Order dated May 11, 2011. In November 2011, the NTU sought enforcement of that Order with the Commission (CP-6). CP-9 is a Consent Order dated February 24, 2012, signed by a Commission Hearing Examiner, mandating the payments of automatic salary increments to members of the NTU. Abeigon admitted that the District paid increments required by the Order, though "not when they were ordered to do so" (1T76).

8. The District's budget increased by 3.2%, or approximately thirty million dollars, in the 2011-2012 school year, the majority of the increase coming from federal revenue (1T26; CP-10). The federal revenue was a one-time stimulus payment to maintain educational jobs (1T27). By letter dated September 20, 2010, the District was aware that it would receive

approximately twenty four million dollars in federal aid that was then incorporated into the 2011-2012 budget (1T30; CP-11, CP-12).

9. The District was provided with guidance as to how the federal aid money should be used; specifically, CP-14 is entitled "Education Jobs Fund Guidance - New Jersey" and provides that the District must use its funds only for compensation advances and other expenses such as support services necessary to retain existing employees, to recall or rehire former employees, and to hire new employees, in order to provide early childhood, elementary, or secondary educational and related services (CP-14; 1T32).

10. The District enjoyed other revenue increases for the 2011-2012 budget, including an increase in the local tax levy and money not spent paying teachers and clerks (1T33).

11. Per diem aides substitute for regular aides who are out for medical or other reason and as such, per diem aides should not be considered permanent employees (1T39-1T40). At the beginning of the 2011-2012 school year, there was a shortage of aides that was alleviated in late September 2011, when the District allowed administrators to call in per diem aides (1T44). Per diem aides were being called in as substitutes to replace regular aides, one-on-one aides, and school aides, depending upon what aide in a particular school had been laid off (1T45). Abeigon was aware of what was occurring because he visited

schools on a daily basis and personally observed per diem aides being utilized in this fashion (1T45-1T46).

12. The District hired ninety one (91) per diem aides for the 2011-2012 school year, about the same number of aides that were previously laid off (1T47; CP-17).

13. An individualized education plan (IEP) is a "plan which is outlined by a child study team based on the diagnosis of a particular special needs student" (1T53). An IEP instructs aides as to what the aide should and should not do with a particular student during the day (1T53). For example, an IEP could instruct an aide to assist a child with turning the pages of a book, but not to assist that child with reading (1T53).

14. Personal aides are specifically assigned to a student because an IEP dictates assistance for whatever that child needs during the day (1T52). The District also utilizes shared aides, which are shared between classrooms, and classroom aides, which are assigned to a single classroom (1T53-1T54). The number of students in a classroom might require that an aide be utilized (1T:55).

15. CP-15 is a May 15, 2012 letter from the State of New Jersey Department of Education that details a complaint investigation in which the District, among other things, was not providing aides to students whose IEPs required that the students be provided with aides, per state regulation (CP-15).

16. Charter schools are approved by the State (1T56). The charter schools in the District employ non-union employees (1T66). The District's budget includes funds for charter schools (1T67).

17. The District is a State Operated District (1T67). A charter school must apply to the Department of Education for a license to open a charter school (1T67). Abeigon reasoned that the District is operated by the same State that grants or denies charters (1T67-1T68). The District can oppose the establishment of a charter school, but never has (1T68).

18. On cross-examination, Abeigon stated that charter schools have a right to file for a license with the State and that in most districts, the charter school does not need permission from the district in which it is located in order to do so (1T70). I do not credit Abeigon's testimony regarding charter schools. His reasoning that the District has some ability to determine whether a charter school has the ability to operate within the District because the District is under State control is not based on any credible evidence and is speculative, rather than factual.

19. Valerie Wilson has been employed by the District for eighteen years and has been employed as the school business administrator since December 2009 (2T10). Wilson is responsible for major operational areas, including facilities, security,

people in transportation services, food service, and has financial responsibility for the District, including development and planning of the budget, management of the financial areas of the budget, accounts payable, and accounting (2T10).

20. R-1 is a letter received by Wilson from Interim State District Superintendent Deborah Terrell dated March 14, 2011, in which the District notified the Civil Service Commission of its possible layoff (2T11). R-1 states the reason for the layoff as "Economy and Efficiency," describing the District as being faced with a budget shortfall. In order to address such financial constraints, the District conducted a review and determined that the abolishment of positions would achieve significant cost savings. R-1 states that "[w]ithout significantly jeopardizing the District's overall educational standards, the District proposes to abolish 143 Civil Service positions." The 143 positions were in 22 titles. Of the 143 positions, 92 were aide positions. The District also stated that it would continue "to seek alternatives and reduce the number of actual terminations as additional future separations from the District are realized." The District was planning, as of March 14, 2011, to inform employees of potential layoffs on or before May 11, 2011 and the layoffs would then be effective June 30, 2011. The District planned to layoff employees in twenty two (22) titles. R-1 also states that the District met with union representatives on March

8, 2011, at which time the District informed the unions of its intention to abolish various positions and sought input from the Union concerning the District's plans. The positions to be abolished included aides, security guards, carpenters, custodians, clerk typists, and parent liaisons, among others. The District provided the Civil Service Commission with a sign-in sheet for such meeting, which reveals that a representative from the NTU, Pietro Petino, was present at such meeting. R-1 included a request that the Civil Service Commission approve the District's plan so that it could issue notices of layoff to affected employees by May 12, 2011.

21. The Civil Service Commission approved the layoff plan by letter dated April 15, 2011 (R-2). Joseph Del Grosso, who is listed in R-1 as President of the NTU, was copied on that letter (R-2).

22. The District's fiscal year runs from July 1 to June 30. (2T12:14-15). Wilson was involved in developing the budget preceding the 2011 layoffs (2T12). In planning the District's budgets, information from past budgets assist in planning for subsequent budgets, specifically to forecast what the budgetary gap might be at the end of one year heading into the next year (2T13-2T14).

23. R-3 is the District's "Budget Presentation" for fiscal year 2009-2010 (2T13). Wilson stated that R-3 indicates a

decrease in State aid and rising District costs (2T16). The District reduced the number of positions and programs, reallocated funds to cover some increased costs for tuition and utilities, closed and consolidated schools, reallocated and reduced staff, funded new staff and programs with grant dollars that may have been available (2T16-2T17. R-3 describes a summary of the anticipated major cost increases, including salaries, and revenue reductions, which went up in the budget by \$14.9 million over the previous year (2T17). For the 2009-2010 budget, charter school payments increased by \$13.9 million, \$2.7 million was needed for new initiatives, student information system costs increased by \$1 million, general funds were reduced by \$3.7 million (2T18).

24. In New Jersey, districts are required to balance their budgets in each year (2T19). For the 2009-2010 budget, the District consolidated staff, reduced School Leadership Teams, eliminated 6 vice principal positions, eliminated 61 support positions in the central office, eliminated 21 technology coordinators, and eliminated 22 positions by closing a middle school (2T20-2T21). The District needed to make such reductions in the 2009-2010 budget because it had a gap of \$43.8 million<sup>4/</sup>

---

<sup>4/</sup> Wilson testified that R-3 showed a gap of \$42.8 million, but R-3 shows a gap of \$43.8 million.

(2T21-2T22; R-3). The 2009-2010 budget forecast a budget shortfall of \$62.4 million for the 2010-2011 budget. (2T22).

25. R-4 is the District's Budget Presentation for 2010-2011 (2T23). R-4 reflects a change to state laws covering pension, sick and vacation accrual, and health benefits for public employees; the State required that public employees contribute 1.5% of their salary to reduce the cost of health benefits, changed the formula for pensions, and capped payouts for accumulated sick time (2T24-2T25). The State of New Jersey was facing a \$10.9 billion budget gap for 2010-2011; District aid was reduced by \$42.4 million (2T25). As a result, the District had to reduce its budget (2T26). In addition, the District was not allowed to carry over a fund balance of \$11.8 million; necessitating that the District reduce its budget further (2T26-2T27). The District's fund balance dropped from \$24 million in the 2008-2009 budget to \$12.1 million in the 2010-2011 budget (2T27-2T28). The total operating budget was reduced by a little over \$50 million in 2010-2011 (2T28).

26. For 2010-2011, the District had to consider reducing positions and programs, reallocating funds to cover increases in non-discretionary costs, consolidating schools, reallocating and reducing staff, and funding staff, where applicable, with grant money (2T29; R-4). The District also experienced cost increases in health benefits, charter schools, and the opening of a new



school, the total of which was \$20 million (2T29-2T30). The reduction in State aid and the fund balance, plus the increased costs, resulted in a budget shortfall of \$77 million in 2010-2011. The cost for charter schools in 2010-2011 was \$16.2 million (2T27). The District reassigned 158 non-classroom central office personnel to classrooms, eliminated 50 classroom teachers for staffing reconciliation, and laid off 205 non-tenured teachers; in total, the District laid off 255 employees (2T30-2T31). The District eliminated an additional 158 central office clerical and administrative employees, eliminated certain titles such as substance abuse coordinators, child study team, social workers, job developers, psychologists, and learning - special education, eliminated 23 aides during a staffing reconciliation, eliminated 37 non-mandated aides, eliminated 33 principal and supervisor employees, eliminated 2 school clerk positions, eliminated 28 budgeted vacancies, and consolidated schools (2T31-2T32).

27. Wilson identified CP-10 as the District's "Budget Presentation" for 2011-2012 (2T33-2T34). Included in CP-10 is "education jobs aid," which was money provided by the federal government to support educational aid for retaining jobs for the District (2T34). This money was a one-time "infusion of cash from the Federal government" in March 2011 (2T35). The Department of Education advised the District to retain such

money, if at all possible, to incorporate it in the 2011-2012 budget, so that if the State make significant aid cuts, the District would be able to "weather the storm" (2T35). The District saved the money to balance the budget in 2011-2012 (2T36). CP-10 indicates that there was a budget gap of \$72 million for 2011-2012. The jobs aid money was used to address the budget gap. Included in CP-10 are budget reductions that were being considered by the District to alleviate the projected budget gap, including the reduction of 150 teaching positions, 70 parent liaisons, 36 school clerks, and the outsourcing of custodial services in order to reduce 176 custodial staff (2T36-2T37). CP-10 included a projected budget shortfall for 2012-2013 of \$72.3 million (2T38).

28. The layoff letter, R-1, was sent to the Civil Service Commission on March 14, 2011, prior to the annual budget meeting on March 23, 2011 (2T37; R-1; CP-10).

29. The budget for 2011-2012 was impacted, in part, due to an increase in charter school payments, which, according to Wilson, has occurred each year since 2007 (2T42-2T43). Parents decide whether to send their children to District or charter schools (2T19). Wilson described payments for charter schools as follows:

Charter schools are funded, as are other public schools in New Jersey, what we call per pupil (sic) funding, so the money travels with the child. Charter school enrollment

predominantly comes from the traditional public school enrollment, parents choose charter, so when the children go from the public school to the charter school the funding goes with them, so as more children leave for charter that increases the payment that the District has to make.

(2T43). Charter school funding comes out of the District's budget and the number of charter schools have been increasing in Newark (2T43-2T44). Employees of the charter schools are not represented by labor organizations (2T46).

30. Wilson was aware of the May 11, 2011 Commission Designee Order, but did not specifically recall why it took months for the District to comply with the order that increments be paid to the aides (2T59).

31. Omer Breton has been employed by the District for over fifteen years and is currently an executive legal assistant, overseeing the operations of the Record and Verification Department, the Benefits and Compensation Department, and Administrative Operations Services Department (2T62-2T63).

32. Breton testified that after civil service employees are laid off, their names appear on a special reemployment list in order of seniority; if positions become available, employees on the special reemployment list are called in order of seniority to inquire as to whether or not the employee wishes to return to duty (2T63-2T64).

33. CP-19 is entitled "New Jersey Civil Service Commission Confirmation of Layoff Report" and shows that certain aides that were laid off on June 30, 2011 were rehired by the District in September 2011 (CP-19; 2T64-2T66). CP-19 reveals that eighty six (86) aides were laid off and thirty two (32) aides were rehired either as aides or community aides, although 1 employee on the layoff list seemingly was not laid off, as a notation reads "This employee was not laid off - Wrong title." Breton testified that per diem aides receive no benefits and make less money than full-time aides(2T71). In addition to aides, clerks were laid off in 2011 (2T72). Subsequent to the 2011 layoff, the District has laid off additional employees (2T77).

#### **ANALYSIS**

The Charging Party asserts that the Borough violated 5.4a(1), (3), and (4) of the Act when it laid off aides in retaliation for having "participated in and/or having been a subject of the original charge against [the District] filed on November 30, 2010, and/or in retaliation for their having successfully obtained the interim relief with respect to payment of their automatic salary increments." The NTU seeks reinstatement, along with all benefits and seniority, for all affected unit members. The NTU asserts that shortly after the Commission Designee ordered that the District pay all automatic

salary increments to NTU members on May 11, 2011, the District advised the NTU that layoff notices were going to be issued to unit members. The layoff notices informed unit members on May 12, 2011 of a potential layoff that would terminate unit members' employment on July 1, 2011. After the layoffs, according to the NTU, the District, in lieu of recalling previously laid off aides, commenced in the hiring of per diem substitute aides in September 2011. Per diem substitute aides are not entitled to automatic salary increments pursuant to the parties' collective negotiations agreement. The NTU claims that the per diem substitute aides are performing most, if not all, "of the job duties and employment functions previously performed by the" aides.

In re Bridgewater Tp., 95 N.J. 235 (1994) articulates the standards for determining whether personnel actions were motivated by discrimination for the exercise of protected activities under 5.4a(1) and (3). A charging party must prove, by a preponderance of evidence on the entire record, that protected conduct was a substantial and motivating factor in the adverse personnel action. This may be done by direct or circumstantial evidence showing that the employee(s) engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise of 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. Id. at 242.

If the employer presents no evidence of a non-discriminatory or legal motive for its action(s) 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 the hearing examiner 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). In addition, the Commission found in

Downe Township Board of Education, P.E.R.C. No. 87-154, 13 NJPER 576, 577 (¶18211 1987), that the Bridgewater analysis is also applicable to alleged violations of Section 5.4(a)(4) of the Act. See also, Hunterdon County Board of Chosen Freeholders, P.E.R.C. No. 87-150, 13 NJPER 506, 507 (¶18188 1987).

It is clear that the NTU engaged in protected activity when it filed its initial unfair practice charge seeking interim relief for the District's failure to pay increments after the expiration of the parties collective negotiations agreement. It is also clear that the District was aware of the NTU's protected activity. The District contested the matter and were engaged in litigation concerning the issue for quite some time. Ultimately, the District was ordered to pay automatic salary increments to certain unit employees represented by the NTU.

The remaining initial inquiry warranting my attention is whether the District was hostile towards the Union's exercise of its protected rights. The District has argued that the layoffs were effectuated solely in response to its budgetary shortfall. Based on the evidence, I find that the layoffs were not in retaliation for protected activity, but resulted from the District's efforts to address fiscal constraints. These efforts were credibly recounted in Wilson's testimony, in which she stated that she participated in developing and planning the budget. Wilson stated that the District's March 14, 2011 request

to the Civil Service Commission for approval of the District's layoff plan was based on reasons of economy and efficiency. The request to the Civil Service Commission states that the District was faced with a budget shortfall and that in order to address that shortfall, the District conducted a review and determined that the abolishment of positions would achieve significant cost savings. The request to the Civil Service Commission states that "[w]ithout significantly jeopardizing the District's overall educational standards, the District proposes to abolish 143 Civil Service positions."

The District's actions are attributable to the implementation of cost savings initially set forth in the letter to the Civil Service Commission and not to union animus. Wilson testified that she was involved in the development of the budgets preceding the 2011 layoffs at issue in this matter. Wilson demonstrated that the 2009-2010 budget had a gap of over \$40 million, necessitating consolidation of staff and a significant reduction in positions, closing of schools, and reduced programs. The 2010-2011 budget needed to be reduced because State aid was reduced by over \$40 million and the District's fund balance dropped from \$24 million to \$12.1 million. The total operating budget was reduced by approximately \$50 million. The District laid off 255 employees as a result, in addition to taking other actions to reduce costs.



The 2011-2012 budget, which was discussed at the annual budget meeting on March 23, 2011, proposed the elimination of 150 teaching positions, 70 parent liaisons, 36 school clerks, and the outsourcing of 176 custodial positions. I find that the budget gap of \$72 million for 2011-2012 accounted for the District's actions in seeking to make such cuts. In addition, the District was also facing a projected budget shortfall for 2012-2013 of \$72.3 million. Based on the financial evidence presented at the hearing, I find that the District has shown that laying off employees was a choice made in response to its fiscal woes, rather than to any union activity.

Abeigon stated at the hearing in this matter that the budgetary shortfall claimed by the District was imaginary and that to the extent that a budgetary shortfall existed, it existed only due to the District's actions. I disagree. The District amply demonstrated at the hearing that its budget was compromised and that it was attempting to address its budget shortfalls by eliminating positions, in addition to other cost saving measures.

The Union has also argued that the timing of the layoffs was suspect. I agree that at first blush, the layoff notices that were sent to employees seemed to be in retaliation for the NTU having filed for interim relief, which resulted in the Commission Designee's order dated May 11, 2011. The evidence; however,

reveals that the District was planning layoffs far in advance of receiving the May 11, 2011 Order.

On March 8, 2011, the District met with various union representatives, at which time the District informed the unions of its intention to abolish various positions. A sign-in sheet reveals that a representative from the NTU was present at that meeting. By letter dated March 14, 2011, the District sought approval of its layoff plan from the Civil Service Commission. That letter states that employees in 22 titles would be affected by the potential layoff and that a total of 143 employees could be laid off. Of the 143 positions, 92 were aide positions. Ultimately, 86 aides were laid off. The District requested that the Civil Service Commission approve the layoff plan so that notices of layoff could be issued to affected employees by May 12, 2011. The layoff plan was approved by letter dated April 15, 2011. A representative of the NTU, Joseph Del Grosso, was copied on that letter. Although employees received layoff notices on May 12, 2011, which was one day after the Commission Designee issued its order in this matter, I find that the timing was merely coincidental. According to the April 15, 2011 letter from the Civil Service Commission, the District needed to distribute its layoff notices to employees by no later than May 16, 2011. The District, in its submission to the Civil Service Commission on March 14, 2011, specifically requested that its layoff plan be

approved so that affected employees could be notified by May 12, 2011.

I find that the District was simply following the plan it had set in motion on March 14, 2011. Moreover, the NTU met with the District on March 8, 2011, over two months prior to employees receiving layoff notices. The NTU was also copied on an April 15, 2011 letter from the Civil Service Commission that approved the District's layoff plan. I find that the NTU was aware that the District was in the process of effectuating a layoff plan well before employees received layoff notices. The timing of the layoff notices, then, is coincidental and not in retaliation for having received the May 11, 2011 Commission Designee decision.

The District knew from the NTU's November 30, 2010 charge that it was seeking the payment of salary increments for unit employees. The NTU later alleged that the District violated N.J.S.A. 34:13A-5.4(a)(4) of the Act when it laid off employees for having participated in the charge against the District in which the NTU sought automatic salary increments. While it is clear that the District opposed the unfair practice charge and argued that it should not be required to pay increments to unit employees after the expiration of the parties' collective negotiations agreement, there has been no evidence presented indicating that the District laid off employees in retaliation for the NTU having filed the initial charge. A review of the

interim relief decision reveals that the District argued against the payment of the increments due to financial constraints. No facts were presented to rebut the District's claim.

The Union has demonstrated that it was engaged in protected activities by virtue of the filing of the original charge in this matter. The District was aware of these activities, as it defended itself in the proceeding that resulted in the issuance of the May 11, 2011 Order. It is unclear who made the decision to lay off the employees based on the evidence before me, as that fact was not established at the hearing. However, because of the protracted litigation that ensued after the Union filed the original charge in this matter, the District was certainly aware that the Union had engaged in protected activity and the District was also aware that the Union advanced its position that aides were entitled to salary increments upon the expiration of the parties' collective negotiations agreement when it filed the original unfair practice charge. The District was further aware that when it instituted the at-issue layoffs, unit employees would be affected. Nevertheless, the issue here was whether the District was hostile to these protected activities and whether hostility was the substantial or motivating reason for the layoffs. I have determined it was not, as there has been no evidence submitted that the District was hostile towards the NTU for having asserted its claim. As stated, the District disagreed

with the NTU and litigated the matter, but that alone does not indicate that the District was hostile towards the NTU's assertion of its rights. Moreover, the District actually rehired some of the laid off employees in September 2011, further mitigating the claim that the District harbored anti-union animus for the aides having asserted its rights. Breton testified that of the 86 aides that were laid off, 32 were rehired either as aides or community aides.

The NTU argues that per diem aides were hired to replace the laid off aides, however, no evidence was presented to me showing that per diem aides performed the same work, the number of hours worked by the per diem aides, or any other information to substantiate its claim that the per diem aides are performing all of the work previously performed by the aides.

The NTU also argues that anti-union animus should be found because subsequent to the Commission Designee's order on May 11, 2011, the District continued to refuse to pay unit members their salary increments and did not comply with the Order until February 2012, after the NTU sought enforcement of the Commission Designee's order in November 2011. While I find that there was some delay in payments, there is nothing to indicate that payments were withheld because of anti-union animus or in retaliation for the NTU having asserted its protected rights. No facts were presented for me to ascertain why there was a delay in

making those payments. Based on the scant information before me, I cannot make a determination that the District delayed the payments as a result of anti-union animus.

Even if I were to find that the District was hostile towards the exercise of the NTU's protected rights, I find that the District has provided a legitimate business reason for its actions. Specifically, the District established at the hearing that the motivation underlying its decision to layoff NTU employees, and many other employees, was a budgetary shortfall.

The District acted upon its economic situation in order to handle its budgetary needs. The District established that there had been budget shortfalls in two budgets prior to the budget at issue. Hundreds of employees were laid off as a result in each budget year that was presented to me. Based on the record before me, I find that the layoffs at issue in this matter were motivated by economics and not in retaliation for the Union having filed an unfair practice charge or otherwise engaging in protected activity.

#### **CONCLUSIONS OF LAW**

The Newark State Operated School District did not violate 5.4a(1), (3), or (4) of the Act.

**RECOMMENDATION**

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

---

Timothy Averell  
Hearing Examiner

DATED: July 23, 2015  
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 August 6, 2015.