

P.E.R.C. NO. 2011-65

STATE OF NEW JERSEY  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CUMBERLAND COUNTY COLLEGE,

Respondent,

-and-

Docket No. CO-2009-204

CUMBERLAND COUNTY COLLEGE  
STAFF ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts, with modification, the decision of a Hearing Examiner dismissing the Complaint issued in an unfair practice case filed by the Cumberland County College Staff Association against Cumberland County College. The charge alleges that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it monitored the CCCSA president and then reorganized the College's academic departments resulting in the elimination of the CCCSA president's position. The Commission rejects the Association's exceptions and holds that the College established that it would have reorganized the departments even absent the hostility to protected conduct.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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Appearances:

For the Respondent, Basile & Testa, attorneys (Todd W. Heck, of counsel)

For the Charging Party, Selikoff & Cohen, attorneys (Keith Waldman, of counsel)

DECISION

On October 12, 2010, the Cumberland County College Staff Association (CCCSA)<sup>1/</sup> filed exceptions to a Hearing Examiner's Report and Recommended Decision, H.E. No. 2011-2, 36 NJPER 381 (¶150 2010). In that decision, Hearing Examiner Steven Katz concluded that Cumberland County College had not engaged in conduct that violated the New Jersey Employer-Employee Relations Act, as amended, when it took certain personnel actions affecting CCCSA President Sharon Lind. The College filed a response that

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<sup>1/</sup> The Hearing Examiner used this abbreviation, rather than "Association," because some of the testimony involved the activities of the Cumberland County College Faculty Association, a separate collective negotiations unit.

addresses, point-by-point, the CCCSA's exceptions to the Hearing Examiner's findings of fact and legal analysis.<sup>2/</sup>

After an independent review of the record, we adopt the Hearing Examiner's recommendation to dismiss the alleged violation of N.J.S.A. 34:13A-5.4a(3) based upon his findings and conclusion that, although the College administration was aware of and hostile to Lind's protected activity, the College's reorganization of its academic divisions, which eliminated Lind's position, would have taken place absent her protected conduct.

We also adopt, with a modified analysis, his recommendation to dismiss the allegation that the College independently violated N.J.S.A. 34:13A-5.4a(1).

On December 9, 2008 and February 24, 2010, the CCCSA filed an unfair practice charge and an amended charge against the College. The charge, as amended, alleges the College violated N.J.S.A. 34:13A-5.4a(1) and (3)<sup>3/</sup>, when it transferred secretary and CCCSA President Sharon Lind between offices, changed her work assignments, and advised her that she would be slated for

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<sup>2/</sup> Both parties have also submitted their post-hearing briefs.

<sup>3/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

termination "under the guise of a reorganization." The CCCSA alleges that Lind's protected activity was a substantial, motivating factor in the College's actions.

On June 5, 2009 a Complaint was issued. On June 12, the College filed an Answer denying the allegations and asserting that it acted without regard to Lind's protected activity.

Hearings were held on February 23, 24, and April 6, 2010.<sup>4/</sup> Post-hearing briefs were filed by August 19. On October 1, the Hearing Examiner issued his Report and Recommended Decision.

We summarize the facts as found by the Hearing Examiner.

Beginning in 2002, Lind became President of the CCCSA and held that position until she resigned her job as a Secretary II on December 12, 2008. As CCCSA President, Lind was the chief spokesperson during negotiations for the 2006-2010 collective negotiations agreement. She also engaged in a variety of other activities on behalf of the CCCSA, of which College officials had knowledge, including: contacting elected officials and the press after the College, based on Ender's recommendation, declined to implement the terms of a memorandum of agreement; organizing and engaging in informational picketing; speaking at a Board of Trustees meeting regarding the failed negotiations; and urging that the College negotiate with a coalition representing all the

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<sup>4/</sup> Transcript References to hearing dates are "1T" through "3T", respectively.

collective negotiations units, as opposed to engaging in separate negotiations with the representatives of each unit.

In 2007, not long after Lind engaged in protected activity in response to the College's rejection of the memorandum of agreement, but after a new collective negotiations agreement was executed, the College initiated a reorganization of its academic departments. The Hearing Examiner found that the primary impetus for this realignment was to respond to increased enrollment and to address the effect of the June 2007 resignation of the Chair of the Division of Business, Computer Science, and Mathematics.

Maryann Westerfield is the Dean of the Science, Technology, Engineering, and Mathematics (STEM)/Health Division at the College. Prior to the reorganization of the College's academic divisions, she was the Chair of the Health and Science Division. Lind was Westerfield's secretary from 2006 until Lind resigned in December 2008.

Ultimately, the College decided to replace its pre-existing four Division Chairs with three Academic Deans and redistribute the disciplines of each chair to the deans. In addition, the College determined that the deans would need higher level clerical support. The College decided that each dean would be aided by an administrative assistant, rather than a secretary. New job descriptions for both academic and clerical positions were prepared and the current staff was advised that they could

apply for the new positions. All employees, including Lind and Westerfield, were required to apply for the new positions.

The job description for administrative assistant includes proficiency in "Microsoft Access." Lind was not familiar with that software. She did not apply for the new job.

Both before and after the reorganization, Lind and Westerfield worked together. However, after the reorganization they worked in the same building as Dr. Thomas Isekenegbe, a College administrator.<sup>5/</sup> In 2006 and 2007, even though he worked in a separate building, Isekenegbe frequently monitored Lind's whereabouts, questioning Lind and Westerfield when Lind did not answer his calls or was not present at her desk. The Hearing Examiner found that this monitoring was intended to determine whether Lind was pursuing CCCSA activities while at work.

#### CCCSA's Exceptions

The CCCSA exceptions raise specific challenges to some of the Hearing Examiner's findings of fact and also assert that errors were made in portions of his legal analysis.<sup>6/</sup>

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5/ At the time of the hearing, Isekenegbe had become President of the College. During the period of time covered by the record, his position was Vice-President for Academic Affairs and Human Services.

6/ CCCSA seeks modifications in these findings of fact and/or the significance given by the Hearing Examiner to the events described in the findings: Nos. 11, 16, 16 n.11, 18 through 21 and 33. We adopt all of the challenged findings of fact except for No. 33 which we clarify as discussed infra.

The CCCSA asserts: that the Hearing Examiner failed to give sufficient weight to the faculty's "no confidence" vote taken after the then-College President Dr. Kenneth L. Ender had recommended that the Board of Trustees reject a tentative agreement reached between the College's negotiators and the CCCSA;<sup>7/</sup> that, as the reorganization began just after negotiations and agreement on a contract occurred and was spearheaded by administration members who were found to be hostile to Lind's protected conduct, the Hearing Examiner should have factored in the timing of these events in his analysis of hostility to protected conduct;<sup>8/</sup> that the Hearing Examiner should have found that there were actually two reorganization plans--The first would not have deprived Lind of her job, but the second, devised by Isekenegbe and Ender, the administrators who were hostile to the CCCSA President's protected activity,

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<sup>7/</sup> The Hearing Examiner found that because the vote was taken by the faculty and not employees represented by the CCCSA, it was not relevant to the charge. Finding of Fact No. 16, n.11, 36 NJPER at 388. The CCCSA's exceptions point out that the faculty and the CCCSA attempted to jointly negotiate with the College which made the faculty's action relevant because the College viewed the Faculty Association and the CCCSA as working in conjunction with one another.

<sup>8/</sup> The Hearing Examiner found that Ender resisted the attempt by the Faculty Association and the CCCSA to engage in coalition bargaining and that Ender, at a staff orientation on the first day of the 2006-2007 academic year, identified Lind and the chief negotiator for the Faculty Association, as the persons responsible for the lack of new contracts. Finding of Fact Nos. 8, 10, 36 NJPER at 382-383.

resulted in the elimination of her position; and the Hearing Examiner failed to recognize and give sufficient weight to continued monitoring of Lind by Isekenegbe occurring within six months of the filing of the unfair practice charge.

We adopt the Hearing Examiner's Findings of Fact, including those challenged by the CCCSA in its exceptions, save for No. 33 which we clarify.<sup>9/</sup>

Finding No. 33 provides:

In September 2008, Lind was moved from the science building to the academic building and was given additional responsibilities. The move required her to travel between buildings because the faculty she worked for were in both locations. Her new office had no windows and it was smaller than her former one (1T140).

The parties presented conflicting testimony on the proximity of Lind's new office to Isekenegbe's office. Lind

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<sup>9/</sup> We reject the exceptions to these Findings: No. 11; No. 16; No. 16, n.11; No. 18; and Nos. 19 through 21. With regard to Finding 11, we note that the Hearing Examiner credited Lind's testimony and did not believe that Isekenegbe didn't remember the events described in that finding. It is therefore unnecessary to make additional statements about Isekenegbe's credibility on this point. We reject the CCCSA's argument, concerning Findings No. 19 through 21, that two reorganizations occurred and the second one was controlled by Ender and Isekenegbe who were found to be hostile to Lind's protected conduct. The record shows that the reorganization was an ongoing process begun in response to increased enrollment and the loss of a Division Chair. Although he did not rely on the juxtaposition of the contentious round of collective negotiations and the beginning of the reorganization, the Hearing Examiner found that Ender and Isekenegbe were hostile to Lind's protected conduct. H.E. No. 2011-2 at 22, 36 NJPER at 386.



testified that it was close enough to Isekenegbe's office that he could monitor her (1T141). Brining testified that Isekenegbe would not be able to see Lind from his office (3T156).

Brining testified that Lind's relocation was a result of the reduction in division chairs which required Westerfield to take on additional responsibilities and necessitated Westerfield's relocation. As Westerfield's secretary, Lind moved with her (3T154-3T155).

I credit Brining's testimony regarding the reason Lind was moved, and, therefore, find whether or not Isekenegbe could see Lind from his office immaterial.

[36 NJPER at 385].

The Hearing Examiner found that the record contained conflicting testimony on whether, after Lind relocated to the Administration building, Isekenegbe was able to watch her work area from his office. We note that the testimony of Human Resources Director Patricia Brining that Isekenegbe could not see Lind from his office seems to have been based on a blueprint, rather than actual observation (3T156). However, the key issue is not whether Isekenegbe had a line-of-sight view of Lind's work area in the new location, but rather whether, in the fall of 2008, the monitoring of Lind's activities continued in the same, or a similar, manner to the events of 2006 and 2007. While Isekenegbe frequently walked in and out of his office in proximity to both Lind and her supervisor, the record does not establish that this activity was coercive. We conclude that

Lind's testimony regarding her interactions with Isekenegbe in the fall of 2008 is not qualitatively the same as his monitoring activities that began in the fall of 2006 and continued into 2007, reflected in the Hearing Examiner's Findings Nos. 10 and 11.<sup>10/</sup>

ANALYSIS

The Association's asserts that the Hearing Examiner should have found a violation of N.J.S.A. 34:13A-5.4a(3). It contends that the reorganization was a pretext to terminate Lind for her protected activity.

The Hearing Examiner analyzed this part of the complaint in accordance with Bridgewater Tp. v. Bridgewater Public Works

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10/ Testimony about interactions between Lind and Isekenegbe after the move is reflected in this exchange (1T141):

Q Did anything happen at that building that involved Dr. Isekenegbe?

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A He just came in and out all the time, because my supervisor was also in that same area.

Q You were in the academic building at that time?

A Correct. I was downstairs. Where our office was, he was just caddy-corner, so it was easy access back and forth.

Q So he was in close proximity to you?

A Yes.

Q He could watch what you were doing?

A Yes.

Assn., 95 N.J. 235 (1984). Under Bridgewater, no violation will be found unless the charging party has proven, 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 proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that 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 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 Hearing Examiner concluded that the facts demonstrated that this case involves dual motives. He found that the CCCSA had shown that it, and Lind, its President, had engaged in protected activity, known to the College administration and that the College was hostile to that activity. However, he reasoned that the reorganization was not a pretext and would have occurred absent the protected conduct. The reorganization resulted in an upgrading of the positions of Lind and other employees in her pre-reorganization job title. The Administrative Assistant job description required computer software skills (Microsoft Access) that Lind did not possess. This caused her to resign from the College. We adopt the Hearing Examiner's recommendation that the alleged violation of N.J.S.A. 34:13A-5.4a(3) be dismissed.

The Association also argues that the evidence demonstrates that the College engaged in an independent violation of N.J.S.A. 34:13A-5.4a(1).

An employer independently violates subsection 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification.

Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exhibition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Proof of actual interference, intimidation, restraint or coercion is unnecessary. The tendency

to interfere is sufficient to prove a violation. Mine Hill Tp. Thus, a party asserting an independent violation of 5.4a(1) must establish that the employer engaged in some action that would tend to interfere with, intimidate, coerce or restrain an employee in the exercise of statutory rights.

As discussed in connection with CCCSA's exception to Finding No. 33, the record does not support a finding that, in the fall of 2008, after Lind and her supervisor were moved to Isekenegbe's building, he continued the type of monitoring and scrutiny of her CCCSA activities that had occurred in 2006 and 2007. Had the College, through Isekenegbe, continued to persistently monitor and scrutinize Lind's protected activity in the fall of 2008 as it had in 2006 and 2007, then the record would support a finding of an independent violation of N.J.S.A. 34:13A-5.4a(1).

CCCSA claims that the College's monitoring of Lind in the fall of 2008 presents a remediable issue because the unfair practice charge was filed within six months of the events occurring in the fall of 2008. However, even if we agree with the CCCSA's timeliness argument, we find that the record does not establish that interactions between Isekenegbe and Lind in the fall of 2008 independently violated N.J.S.A. 34:13A-5.4a(1).<sup>11/</sup>

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<sup>11/</sup> Lind's resignation, and consequent relinquishment of the CCCSA presidency, was the product of her decision not to apply for an administrative assistant position because she did not have all the necessary qualifications.

We adopt the recommendation to dismiss the portion of the Complaint alleging an independent violation of N.J.S.A. 34:13A-5.4a(1).

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Colligan, Eaton, Eskilson, Kregel and Voos voted in favor of this decision.

ISSUED: February 24, 2011

Trenton, New Jersey