

H.E. NO. 2016-17

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

In the Matter of

STATE OF NEW JERSEY
DEPARTMENT OF ENVIRONMENTAL PROTECTION,

Respondent,

-and-

Docket No. CO-2013-340

COMMUNICATIONS WORKERS OF
AMERICA LOCAL 1037,

Charging Party.

SYNOPSIS

The Hearing Examiner recommends that the Complaint be dismissed. Specifically, she found that although there was some protected activity the decision maker was neither aware of or hostile to that activity. Therefore, Charging Party failed to meet the Bridgewater standard.

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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Charging Party.

Appearances:

For the State of New Jersey
John Jay Hoffman, Acting Attorney General
(Nicole M. DeMuro, Deputy Attorney General)

For CWA Local 1037
Weissman & Mintz, attorneys
(William Schimmel, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On May 31, 2013, Communication Workers of America, AFL-CIO, Local 1037 (CWA) filed an unfair practice charge against the State of New Jersey, Department of Environmental Protection (State or DEP). The charge alleges that the State violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically, 5.4a(1) and (3),^{1/} when it transferred Thomas

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

Mark Pitchell to Monmouth Battlefield State Park (Monmouth Battlefield) in retaliation for union activity.

On February 27, 2014, a Complaint and Notice of Hearing was issued (C-1). On March 24, 2014, the State filed an answer denying the allegations and asserting, among other defenses, that the State's actions were based upon legitimate, governmental and business justifications, and that it did not retaliate against Pitchell for protected activity (C-2).

Hearings were held in this matter on October 3 and October 8, 2014^{2/} and April 1, 2015.^{3/}

The parties submitted post-hearing briefs by June 15, 2015. Based upon the record in this case, I make the following:

1/ (...continued)
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."

2/ This matter was originally assigned to Hearing Examiner Deirdre K. Hartman who heard the testimony on October 3, 2014 and October 8, 2014. Due to an intervening conflict, on December 5, 2014, the case was reassigned to Hearing Examiner Wendy L. Young. N.J.S.A. 19:14-6.4.

3/ Transcript references to hearing dates are "1T" through "3T," respectively.

FINDINGS OF FACT

BACKGROUND

1. The State and CWA, are, respectively, a public employer and public employee representative within the meaning of the Act (1T7-1T8).

2. Thomas Mark Pitchell is a public employee within the meaning of the New Jersey Employer-Employee Relations Act (1T8). He has been employed by the State for 43 years (2T6).

3. Pitchell began employment with the State as a seasonal worker at Island Beach State Park (IBSP) in 1971 (2T7-2T8).

4. Pitchell became a full time employee in 1975, as an Assistant Superintendent at IBSP, and remained in that position until 1977 (2T8).

5. Subsequently, Pitchell became an Assistant Forester with the Division of Parks and Forestry for 3 or 4 months (2T8-2T9).

6. Thereafter, Pitchell moved back to the Division of Parks and Forestry, working at Monmouth Battlefield as a Superintendent 3 until 1990 (2T9-2T10).

7. In 1990, Pitchell was promoted to Superintendent 1 at Ringwood State Park where he remained until 2003 (2T10).

8. In 2003, Pitchell moved to IBSP as a Superintendent 1 where he remained working until 2011 (2T10-2T11).

9. From December 2011 until December 2012, Pitchell was assigned to a special project at an office in Toms River (2T11).

10. In December 2012, Pitchell was transferred to Monmouth Battlefield where he is currently stationed (2T11).

11. Bob Martin is the Commissioner of the DEP (2T12).

12. Amy Cradic commenced employment with the Division of Parks and Forestry in 1998 or 1999, and was the Assistant Commissioner of National and Historic Resources for the DEP from 2006 through March 2012 (3T7-3T8, 3T13). Cradic was responsible for oversight of numerous Divisions, including but not limited to Parks and Forestry, Fish and Wildlife, Natural and Historic Resources, Green Acres, and Coastal Engineering (3T7).

13. John Trontis is the Assistant Director, Parks & Forestry, for the State Parks Service, a position he has held since September 11, 2010 (2T129). Trontis has 34 years experience in Parks; 5 years at Union County Parks, 13 years at the Meadowlands Commission, 10 years in Hunterdon County and 2 years in Wayne Township (2T129). He has a national certification as a park and recreation professional (2T129).

14. At the time Trontis was hired, there was no Director and therefore he reported directly to Assistant Commissioner Amy Cradic (2T129-2T130). Subsequently, Director Mark Texel was hired and Trontis reports to him. Trontis' duties involve managing the operation of the State Park Service (2T129).

15. Trontis has worked with Pitchell since he was hired, but Trontis knew Pitchell socially through the New Jersey Recreation Park Association "over the years" (2T130).

16. Mark Texel has been the Director of State Park Service since August 2012 (2T70-2T71). As Director he sets policies, directives and recommends and approves personnel decisions (2T71). Texel met Pitchell in August 2012 for the first time (2T72).

17. Annette Timmerman has been a seasonal employee at IBSP since April 2014. Prior thereto she worked as an executive assistant for DEP, Division of Parks & Forestry from June 1980 to July 2013 (2T103). As executive assistant Timmerman performed various administrative duties (2T105).

18. Timmerman and Pitchell were coworkers for over 33 years (2T106).

19. Timmerman worked on policies regarding housing; specifically the Natural Resources and Historic Resources Policy Directives 2007-01 and 2007-02 ("NHR") (R-4, R-5; 2T105-2T108). The NHR sets forth the policy and procedure on how to post vacant employee housing (2T108).

20. Ray Bukowski is a Management Improvement Specialist. He is the only person with that title working for the State Park Service (2T83). Bukowski replaced Pitchell at IBSP in December 2011. Bukowski was not a Superintendent 1 (2T19-2T20; CP-2).

According to Texel, Bukowski's responsibilities are essentially the same as a Superintendent, namely overseeing daily operations, budget, emergency and staffing of the park (2T83).

UNION ACTIVITY

21. Pitchell is a member of CWA. He has been a CWA shop steward since 1983. His CWA unit represents park superintendents and park maintenance supervisors. He is also the chair of the local election committee (2T41).

22. Pitchell has filed and processed grievances. He filed grievances on his own behalf in 2008 and 2009 (2T42-2T44). One grievance was regarding vacation authorization which was eventually granted (2T42). Another grievance was regarding discipline issued to Pitchell which was rescinded (2T44).

Pitchell also filed grievances related to his transfer to Toms River in 2011 and the extension of that transfer (2T25).

PRIVATIZATION

23. While at IBSP Pitchell became aware of plans to privatize the parks (2T12). Specifically, Pitchell heard there were going to be additional concession areas and increased activities for which the public would be charged (2T12). IBSP was to be the pilot park for the privatization program (2T12).

24. Pitchell was concerned about the plan. He did not feel that the State of New Jersey should be charging fees for many different activities (2T12).

25. In May of 2011, Pitchell had a brief conversation with DEP Commissioner Martin wherein Pitchell expressed his concerns about the plan to privatize the parks (2T14).

26. Pitchell also had discussions with Jeff Tittle, the Director of the New Jersey Sierra Club, wherein Pitchell expressed his concerns about privatization of the parks (2T22-2T23). Pitchell also expressed concerns about Bukowski's qualifications to Tittel (2T23; CP-3). Tittle published a commentary on February 7, 2012 entitled, "Christie administration's attack on N.J. State Parks begins" (CP-3). The article states in pertinent part:

The battle over our state parks has begun with the opening battle being the privatization of one of our most popular state parks, Island Beach State Park. The first step is the State Department of Environmental Protection replacing the current highly qualified Superintendent of Island Beach State Park, with a clear political appointed replacement, Ray Bukowski. The former Superintendent, Mark Pitchell, has raised concerns about the administration's plans to privatize our state parks.

* * *

Mark Pitchell has 35 years of experience running state parks, starting as a summer ranger in 1971 at Island Beach, 13 years as superintendent of Monmouth Battlefield in Freehold and another 13 years running Ringwood State Park in Ringwood, where we worked closely with him. During his career, Mr. Pitchell has had significant experience with successful privatization activities such as food concessions, boat rentals, and

including shepherding the creation of a very high-end commercial catering arrangement at the Skylands Mansion at Ringwood State Park, which was the first of its kind for any New Jersey State Park. However, while Mr. Pitchell understands some privatization of certain park operations is inevitable, we believe concerns were raised regarding the privatization plans of the current administration.

What we see happen already is the removal of professional staff being replaced by a political appointee. Parks was never a place for politics since they have always stood up for the resource of everyone and above politics. Now with the plan for privatization of our state parks they are being looked at as a business rather than a natural sanctuary for the public to enjoy.

On the other hand Mark Pitchell's replacement Ray Bukowski has no parks or forestry background nor has he ever worked in a park. He worked for Irene Kropp as an assistant [He] also worked at site remediation program and air program, but has never worked in natural resources and parks. However, he has been working on the DEP's park privatization process, titled "Sustainable Funding Strategy for State Parks". This is a perfect example of the fox in charge of the hen house.

Under state civil service provisions, in order to qualify to run a state park like Island Beach, a candidate must have a four-year degree in Forestry, or Parks and Recreation and significant experience in a natural resources program. Mr. Bukowski does not meet any of these qualifications, and yet he will be running Island Beach State Park. For an ocean front park, spring time is the most critical time for hiring summer employees and getting the park ready for the very busy summer season apparently Mr. Bukowski will not be preparing for neither.

However Ray Bukowski is not the only employee at the DEP without proper background for their position. Commissioner Martin has no environmental education or experience. The Assistant Commissioner for Natural Lands, Amy Cradic, who oversees parks, fish and wildlife and historic sites has no degree in an environmental related field, instead majored in public relations.

By state law, the Division of Parks and Forestry is required to be run by a "director", who "shall be a person qualified by academic training and at least seven years of responsible professional experience in the management of public parks, forest, and outdoor recreation facilities." The position of director of Parks and Forestry has been empty for the [sic] at least the last 10 years and is currently empty. During part of this period, Assistant Commissioner Cradic installed two "acting" directors, who again [were] politically appointed with no parks and forestry degrees or experience. There is currently no one with environmental or parks and forestry background in the top positions overseeing this privatization process, and now they have reached down to the day-to-day operations level to install an unqualified political yes-man to do their bidding at Island Beach.

TRANSFER TO TOMS RIVER/SPECIAL PROJECT

27. Per a memorandum dated November 10, 2011, from Amy Cradic, Assistant Commissioner of DEP, to John Trontis, Assistant Director of State Park Service, Pitchell was to be transferred effective December 17, 2011 from IBSP to Toms River to update the "Area Management Classification System" (AMCS) (CP-1). He was also to develop an operations plan for each park (2T16). The

transfer was to be for a period of 6 months and then reevaluated for a possible extension based upon "need and progress" (CP-1).

28. Cradic made the decision in the fall of 2011, to reassign Pitchell to Toms River and to assign Bukowski to IBSP (2T167, 3T9, 3T14). She made the decision to reassign Pitchell after Hurricane Irene, based upon a need to make improvements, such as a consistent statewide management and operations plans (3T9-3T11). Cradic chose Pitchell for the assignment based upon his significant experience at major state parks and his status as the most senior superintendent (3T11).

At the time Cradic decided to reassign Pitchell, she was not aware of the concerns Pitchell expressed to Commissioner Martin in May 2011 regarding privatization of the parks (3T15). Cradic, therefore, denies transferring Pitchell to Toms River because of any statements he made to the Commissioner (3T15).

29. Trontis became aware that Pitchell was going to be reassigned to Toms River in November of 2011 through a discussion with Assistant Commissioner Cradic (2T131). Pitchell's reassignment was memorialized in a memorandum from Cradic to Trontis, along with the involuntary reassignment of a staff member at Liberty State Park (2T131, 2T133; CP-1). Pitchell's reassignment was also noted in a memo from Cradic to all NHR managers, regarding restructuring for better effectiveness (2T131-2T132; CP-2).

30. Before Pitchell was reassigned, Trontis testified he had a discussion with Cradic about finding the closest, vacant office space to Pitchell's home (2T135). Trontis was Pitchell's direct supervisor during Pitchell's assignment at Toms River (2T140).

31. In December 2011 there were 20 personnel moves including Pitchell; some permanent, some temporary (2T138; R-8). Other than Gallagher and Pitchell, Trontis was unaware if any of the other transfers were involuntary (2T176).

32. The AMCS helps to determine the classification of state parks (2T51). AMCS includes forty to fifty criteria, such as permanent staff, seasonal staff, budget, visitation, acreage, roadway, trails, building, dams, homes, picnic tables, tours and swimming areas (2T51-2T52, 2T66-2T67). The number of staff and amount of visitation may fluctuate over time (2T51).

33. Pitchell had previously worked on such a project. He helped establish the AMCS in 1978-1980, and he revamped the AMCS system in 2011 (2T17).

34. 2011 was the first time DEP worked to develop operational guides (2T49). The operational guides are manuals for the operation of each park (2T141). They provide information such as personnel, shut off valves, etc. (2T141-2T142). They include the monthly, seasonal and annual responsibilities (2T143).

35. Pitchell testified he could have performed the special project work from IBSP and did not need to be transferred to Toms River (2T18).

36. Under the 1978 AMCS, which was adopted in 1984, and is still currently in effect, IBSP requires a Superintendent 1 (2T45, 2T53-2T54; R-1).

37. Pitchell's AMCS project was completed within the six months projected (2T24). However, the operations plan project was not completed. Therefore, by memorandum dated June 4, 2012, from Trontis to Assistant Commissioner Boornazian,^{4/} Pitchell's temporary assignment at Toms River was extended for another six months (CP-4, R-9; 2T24). Trontis and Boornazian had met with Pitchell to get a status update before determining to extend his temporary reassignment (2T145).

Pitchell completed the operational guides by December 2012 (2T147).

38. On February 2, 2012 (five days before the Tittel article quoting Pitchell was published), Pitchell received a telephone call from Assistant Commissioner Amy Cradic. Cradic was "under the impression" that Pitchell was interfering with the operations at IBSP and requested he stop. Cradic also told Pitchell that he was not to undermine Bukowski or to discuss his

^{4/} Boornazian eventually succeeded Cradic (2T32).

qualifications (2T33). Cradic stopped working for DEP in March of 2012 (3T13).

39. At the time of Pitchell's initial temporary transfer in December 2011, Pitchell told Trontis generally about the concerns he expressed to Commissioner Martin in May 2011 regarding privatization. Trontis cut Pitchell off and told him that "maybe there's validity" but that he was reassigned because of his experience and seniority. Trontis never heard anyone, neither Cradic nor Texel, discuss Pitchell's comments to the Commissioner, Tittle's article or Pitchell's filing of grievances (2T159-2T161).

TRANSFER TO MONMOUTH BATTLEFIELD STATE PARK

40. At the conclusion of the extended six-month special project in December 2012, Pitchell was told by Director Texel, that he would not be going back to IBSP, instead he would be assigned to Monmouth Battlefield effective December 15, 2012 (CP-10). Monmouth Battlefield is not classified as a "1" park (2T51). It was at Texel's direction that Pitchell was moved to Monmouth Battlefield (2T79).

41. Pitchell objected to his reassignment to Monmouth Battlefield (2T39). Specifically, he wrote to Texel on December 24, 2012 and also had a conversation with Texel (2T40; CP-11).

42. Earlier in 2012, Texel and Trontis had met to discuss priorities for the Park Service. There was a significant need at

Monmouth Battlefield, and they recommended to Assistant Commissioner Boornazian^{5/} to have Pitchell assigned there. Pitchell was just finishing his six-month assignment.

Texel believed Pitchell had skills, was a leader and took into consideration that Pitchell had previously worked there (2T78-2T79). Texel also did not feel Monmouth Battlefield was getting the appropriate attention needed. He wanted Pitchell to be the operational leadperson. Texel expected the park to grow once the visitor center opened and programming began (2T79).

Trontis also recommended Pitchell be assigned to Monmouth Battlefield (2T153-2T154). The State had spent \$7 million on a new visitors center at Monmouth, and there was new staff that needed to be supervised. Trontis believed that Monmouth Battlefield needed a full time superintendent with the Park and the "farm leases" (2T155).

43. Texel and Trontis met with Pitchell in early December 2012 to discuss his assignment to Monmouth Battlefield and to advise him of available housing opportunities (2T80; 2T84; CP-10).

44. Texel did not want Pitchell back at IBSP because it had monumental damage from Superstorm Sandy,^{6/} and Ray Bukowski, a

^{5/} Boornazian succeeded Cradic (2T32).

^{6/} I take administrative notice that Superstorm Sandy hit New Jersey on October 29, 2012.

management improvement specialist, was already coordinating with FEMA and other agencies to get it back up and running (2T81, 2T83). According to Texel, Bukowski was doing a good job at IBSP (2T82). Also, in November 2012 after Superstorm Sandy, Commissioner Martin had given a directive, that came from the Governor, that IBSP needed to reopen (2T93). Bukowski was well into meeting with FEMA representatives and the insurance company to assess damage and collect data (2T94). Sand removal began as quickly as mid-November (2T94). Additionally, Bukowski had been working with the volunteer groups at IBSP since January of 2012 (2T95-2T96).

Trontis felt that Bukowski had generally improved the management at IBSP (2T156). Specifically, Bukowski had been at IBSP for over one year, and Trontis observed that he had improved relationships with volunteers and staff and improved keeping the park open (2T157-2T158).

45. Texel only became aware that Pitchell had made comments the previous May or June of 2011 to the Commissioner regarding privatization after Texel transferred Pitchell to Monmouth Battlefield State Park (2T87-2T89). Pitchell spoke to Texel about the fact that maybe he was at Monmouth Battlefield because he made comments to the Commissioner. Texel did not engage Pitchell in such conversation because the comments were made before he [Texel] was at DEP (2T88-2T89).

46. Texel did not receive direction from the Commissioner when reassigning Pitchell (2T90). Moreover, Texel denies assigning Pitchell to Monmouth Battlefield State Park because of comments Pitchell made to the Commissioner (2T90).

Additionally, Texel was only aware in the winter or spring of 2013 that Pitchell had filed grievances against DEP, well after he made the decision to transfer Pitchell to Monmouth. Texel, therefore, denies transferring Pitchell to Monmouth because Pitchell had filed grievances against DEP (2T90-2T91).

47. There are currently 21 Superintendents of State Parks. There had been 39 at one time. Some of these superintendents oversee multiple park sites (2T74). There are superintendent 2s, 3s and 4s that are supervising "1" parks (2T77). Pitchell is the only Superintendent 1 involuntarily reassigned under Texel's time as Director (2T97).^{2/}

48. Monmouth Battlefield was undergoing renovations in 2012 when Pitchell was reassigned there (2T55). Since that time, visitation has increased (2T56). The new visitors center with a movie theater and interactive exhibits opened in June 2013 (2T55).

^{2/} Superintendents are managers of park sites. They are responsible for public programming, staff supervision, public safety, publicity, marketing, budget and interaction with related groups and agencies (2T75).

49. Pitchell's salary, title and benefits remained the same when he was reassigned to Monmouth Battlefield in 2012 (2T57).

HOUSING

50. Employee housing is for the benefit of the State because the employee provides some "in-kind" service such as security or a presence (2T109). The State Park Service makes an annual determination on whether housing should be mandatory or not (2T109-2T110). Mandatory housing requires an employee to reside in housing and to provide in-kind service in exchange for a fifty percent rental reduction.^{8/} Non-mandatory is when an employee resides in housing at full market value and provides no services (2T110). The annual recommendations go up the chain to the assistant commissioner (2T111).

Housing is determined through a posting process based upon the need in a given park (2T112).

51. In April 2012, Timmerman created a current list of houses designated mandatory and non-mandatory based upon the recommendations from the Assistant Director of State Park Services and forwarded the list to the Assistant Commissioner (2T114-2T115, 2T127). If an employee's housing status was changing from mandatory to non-mandatory, they would receive a letter advising of same (2T115).

^{8/} The fifty percent rental reduction is capped at twenty five percent of the employee's salary.

52. Trontis is on a 3-member State Park Housing Committee which evaluates housing needs for after hours service and makes annual recommendations on mandatory and non-mandatory housing status (2T147-2T148).

53. As of April 2012, there were 29 mandatory housing options and 6 non-mandatory, but with vacancies there were 22 employees actually living in such housing. Out of the 22, 3 were Superintendents of State Parks (2T115-2T116).

54. In April of 2012, 8 houses were slated to be removed from the housing program all together (2T118). Additionally, at that time, IBSP, along with 9 other houses, changed from mandatory to non-mandatory (2T118-2T119).

Trontis recommended the housing change at IBSP from mandatory to non-mandatory because it is the only state park where there is someone at the gate "24/7" (2T149). In addition, the park police have an office on the premises. Also, since Bukowski lived only 20 minutes away, he was readily accessible to cover emergencies in a timely fashion (2T150). Trontis believed it was an employee benefit not an operational need to have IBSP as mandatory housing (2T151).

55. While stationed at IBSP Pitchell received mandatory state housing (2T26). This allowed for a fifty percent reduction in rent in exchange for Pitchell's services, such as security, information to the public and emergency response (2T27).

56. By letter dated April 26, 2012 to Pitchell, he was advised by Assistant DEP Commissioner Rich Boornazian that effective July 2012 the status of his housing was changing from mandatory to non-mandatory (2T28-2T29; CP-5).

In response, by letter dated May 7, 2012 to Boornazian, Pitchell requested reconsideration of the decision to change the status of his housing from mandatory to non-mandatory (2T30-2T31; CP-6). Pitchell also wrote a memorandum to Trontis on May 1, 2012 requesting reconsideration of the decision to change the status of his housing from mandatory to non-mandatory (2T31-2T32; CP-7).

Despite these requests the decision was not changed, but Pitchell's residency at IBSP continued until Superstorm Sandy in October 2012 (2T65).^{2/}

57. After Pitchell's housing at IBSP was damaged in Superstorm Sandy, DEP assisted Pitchell in finding housing and provided him housing at Allaire State Park, although it was not required to do so (2T65-2T66).

Pitchell's housing at IBSP was eventually repaired, although it is no longer offered as park housing. It is used for a gathering place or meeting room (2T98).

^{2/} Although Pitchell's work was transferred to Toms River in December 2011, he continued residency at IBSP until Superstorm Sandy in October of 2012.

58. As of February 2013, there were 21 mandatory housing options and 14 non-mandatory; 20 employees total were actually living in such housing, 3 were Superintendents of State Parks (2T121-2T122).

59. In February of 2013, 9 houses were slated to be removed from state housing altogether (2T122). The trend is moving houses from mandatory to non-mandatory and then off the list altogether (2T127).

ANALYSIS

The issue in this case is whether Director Texel's decision to reassign Pitchell to Monmouth Battlefield was in retaliation for protected activity, specifically the filing of grievances and speaking out regarding privatization of the State Parks.^{10/}

Based on the foregoing facts, I do not find that the actions of DEP meet the criteria to establish a violation under our Act. 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

^{10/} The unfair practice charge timely alleges retaliation for Pitchell's reassignment to Monmouth Battlefield only. N.J.S.A. 34:13A-5.4c. Accordingly, although there was lengthy testimony concerning Pitchell's reassignment to Toms River, the six-month extension of that reassignment and the change in his housing status from mandatory to non-mandatory are not considered herein.

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 engaged in protected activity, the employer knew of this activity, and the employer was hostile towards the exercise of protected rights. Id. at 246.

If the employer presents no evidence of a non-discriminatory or legal motive for its action(s) 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 unlawful motives under the Act and other motives contributed to a personnel action. In these dual motive cases, the employer has not violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense is not considered unless the charging party first provides, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action.

Charging Party has satisfied the Bridgewater element that Pitchell was engaged in protected activity. Specifically, Pitchell was the CWA shop steward and chair of the local election committee. He filed several grievances, including one in 2011

related to his involuntary reassignment to Toms River and the extension of that reassignment.^{11/}

However, Charging Party has not proven that Texel knew of his protected activity. Texel first met Pitchell when he became the Director of State Park in August of 2012. Texel was the decision-maker; and made the decision to reassign Pitchell to Monmouth Battlefield in December of 2012.^{12/} Texel only became aware that Pitchell had made comments in the spring of 2011 to the Commissioner regarding privatization after Texel's decision to transfer Pitchell to Monmouth Battlefield. Moreover, Texel did not learn until 2013 that Pitchell had filed any grievances. No evidence supports that Texel was aware that Pitchell was engaged in protected activity before he made the decision to transfer Pitchell from IBSP to Monmouth Battlefield.

^{11/} Pitchell was quoted in a news article criticizing the decision to privatize park operations and was also very critical of the current State administration and DEP administration. I find these statements may be merely personal gripes and complaints over operational decisions which are managerial prerogatives. State of New Jersey (Office of the Public Defender) and Rau, P.E.R.C. No. 86-67, 12 NJPER 12 (¶17003 1985), recon. den. P.E.R.C. No. 86-93, 12 NJPER 199 (¶17076 1986), aff'd N.J. Supp.2d 1969 (¶148 App. Div. 1987). However, even if the news article statements were protected activities, it is not material since there is no evidence that the decision-maker Texel was aware of or hostile to Pitchell's comments when he made the decision to transfer him to Monmouth Battlefield.

^{12/} Trontis testified he also recommended Pitchell's assignment to Monmouth Battlefield; however, he was not the decision-maker.

". . . [W]ithout knowledge by a decision-maker of any union-related or protected activity . . . there is no violation of our Act. Elizabeth Bd. of Ed., H.E. No. 2016-12, ___ NJPER ___ (§___), citing UMDNJ, P.E.R.C. No. 98-127, 24 NJPER 227 (§29107 1998).

Next, even if I were to find that Texel was aware that Pitchell was engaged in protected activity, Charging Party has not demonstrated, by a preponderance of the evidence, that Pitchell's reassignment to Monmouth Battlefield was a result of Texel or DEP's hostility to the exercise of protected activity. I find that there was ample credible evidence that Texel's decision to reassign Pitchell was based upon operational determinations. Texel and Trontis testified that Pitchell had extensive experience at Monmouth Battlefield, and that the Park was undergoing a tremendous renovation and needed a strong supervisor. Texel expected the Park to grow once the 7 million dollar visitor center opened and programming began. Pitchell was the most senior and most experienced Superintendent 1. Moreover, Texel and Trontis both stated that Bukowski had made improvements at IBSP and they were pleased with his work and did not want to disrupt it. Bukowski had been at IBSP for over one year and had improved relationships with volunteers and staff. Not only was Texel unaware of any protected activity by Pitchell, he showed no evidence of hostility toward Pitchell in his decision to reassign him. To the contrary, simultaneously with Pitchell's notice of his reassignment to Monmouth Battlefield, the State provided

housing for Pitchell at Allaire State Park even though it was not required to do so.

Based on the above findings and the Bridgewater standards, I do not find that the Respondent violated the Act. I find Texel did not have knowledge of Pitchell's protected activity and therefore could not have been hostile thereto. Pitchell's transfer to Monmouth Battlefield was based on legitimate business reasons. Accordingly, I find that the DEP did not violate 5.4a(3) and, derivatively, 5.4a(1) of the Act, with regard to Pitchell.

CONCLUSIONS OF LAW

Respondent did not violate N.J.S.A. 34:13A-5.4a(1) and (3) by reassigning Pitchell to Monmouth Battlefield.

RECOMMENDATION

I recommend that the Commission dismiss the complaint.

/s/Wendy L. Young
Wendy L. Young
Hearing Examiner

DATED: February 4, 2016
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 February 16, 2016.