

H.E. No. 2009-6

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

In the Matter of

STATE OF NEW JERSEY,
JUVENILE JUSTICE COMMISSION,

Respondent,

-and-

Docket No. CO-2007-040

CWA LOCAL 1040,

Charging Party.

SYNOPSIS

The Hearing Examiner recommends that the Public Employment Relations Commission find that the State of New Jersey, Juvenile Justice Commission (JJC), did not violate 5.4a(1) and (3) of the Act when it reassigned CWA Local 1040 shop steward Ed Nomejko from performing educational testing to a classroom assignment. CWA had alleged that JJC transferred Nomejko in retaliation for filing grievances on behalf of CWA unit members concerning a JJC memorandum on employee time and attendance. The Hearing Examiner found that Nomejko was reassigned as part of a department wide initiative of the JJC's Department of Education to ensure that the JJC's most qualified teachers were assigned to classrooms rather than non-teaching duties. The Hearing Examiner found that neither the JJC officials who decided Nomejko would be reassigned, nor those who were aware of the grievances, had any hostility toward Nomejko because of his protected activities. The Hearing Examiner also determined that the Board independently violated 5.4a(1) when JMSF Administrator Sheila Thomas referred to Nomejko as "a shop steward" or "Mr. Shop Steward" in a derisive manner, in the presence of JJC education supervisor Tom Sawyer, at a meeting concerning a safety and security concern on or about June 15, 2006. The Hearing Examiner recommended that all other allegations be dismissed.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's

findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,
Anne Milgram, Attorney General
(Sally Ann Fields, Senior Deputy Attorney General)

For the Charging Party,
Weissman & Mintz, attorneys
(Jason Jones, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On August 8, 2006, CWA Local 1040 filed an unfair practice charge with the Public Employment Relations Commission ("PERC" or "Commission") against the State of New Jersey, Juvenile Justice Commission ("JJC"). The charge alleged that the JJC discriminated against Ed Nomejko, a CWA shop steward, by transferring him in retaliation for filing grievances on behalf of CWA unit members, and when a JJC administrator berated Nomejko and referred to him as "Mr. Shop Steward", during a meeting

concerning a safety and security issue, in violation of N.J.S.A. 34:13A-5.4a(1), (2), (3) and (7).

On May 7, 2007, a Complaint and Notice of Hearing issued on the a(1) and (3) allegations (C-1).^{1/} The JJC filed an Answer on May 24, 2007, generally denying the charge and asserting separate defenses (C-2). Hearings were conducted on February 13, April 8, and April 29, 2008.^{2/} At the conclusion of CWA's case on April 8, the JJC made a motion to dismiss which was denied (C-3). After an extension of time, post hearing briefs and replies were received by July 24, 2008. Based upon the entire record, I make the following:

FINDINGS OF FACT

JJC Generally

1. The Juvenile Justice Commission of the State of New Jersey (JJC) was created in 1995 (3T5, 3T71, 3T174). The JJC houses and educates children who are adjudicated by the court as

1/ These subsections 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."

2/ The transcripts are referred to as 1T (February 13, 2008), 2T (April 8, 2008) and 3T (April 29, 2008). Exhibit designations are as follows: C -- Commission; J -- Joint; CP -- Charging Party; R -- Respondent.

juvenile delinquents, in programs and facilities ranging from community programs to full custody (3T32).

JJC's secured facilities include the Juvenile Medium Security Facility ("JMSF") and the Juvenile Records Assessment Center("JRAC") both located in Bordentown (1T89,3T36,3T71). JRAC is the reception center for all incoming JJC students (3T36). Other secured facilities include the Jamesburg Home for Boys ("Jamesburg", also known as the NJ Training School for Boys or the NJ Training School at Monroe Township) and Hayes (1T82-1T83, 2T18). Spruce Street is the location of JJC's central office and the location of its former records center (2T37).

Through its Office of Education, the JJC provides a state Department of Education approved high school course of study in cooperation with the Mercer County Juvenile Detention Center (3T175).

2. There are several teacher titles within the JJC's Office of Education. Teacher 1 (T1) are certified academic or vocational teachers, and are considered the most experienced teachers (3T117, 3T50; R-2). A Teacher 2 (T2) is a certified academic or vocational teacher who is less experienced than a Teacher 1, and a Teacher 3 (T3) is a non-certified teacher who functions as a substitute teacher (3T112). A teacher assistant (TA) is a support staff person who is assigned to assist a

teacher but is not a certified teacher and does not teach independently (3T125).

JJC Plans Realignment of Teaching Staff

3. In 2005, Jack Amberg, the then-Director of the JJC's Department of Education, found that some teachers who were certified to teach were not actually teaching in the classroom (3T113). Amberg set out to identify a way to get teachers assigned and aligned in a fashion that would most benefit instruction for the students (3T111).

In or around spring 2005, Amberg's office constructed a document to determine its needs. The office identified each teaching title and determined how many students would be aligned under that title, to ensure appropriate ratios of teachers to students (3T111, 3T145). The ratios were based on a formula developed for determining budget/funding through the Department of Education (3T113, 3T177; J-3). Amberg and his staff also determined how many staff were assigned in the program at each JJC location and whether the location was over or understaffed for each title (3T114).

4. Don Klein is the Executive Vice President of CWA Local 1040 in Trenton (1T16). His duties include processing grievances, defending members who have been disciplined and negotiating with employers (1T17). William Kauffman is a staff representative for CWA Local 1040 (1T78-1T79).

5. Thomas Flanagan is the Deputy Executive Director at the Juvenile Justice Commission (3T31). His duties include overseeing and running the day to day operations of the JJC (3T32). The Office of Education is within Flanagan's area of responsibility (3T50).

6. On April 19, 2005, Amberg held a meeting at the JJC Spruce Street offices to discuss the JJC's plans to re-align teaching staff throughout the state (1T79). Kauffman, Klein and Flanagan attended the meeting, along with representatives of other CWA locals (1T86).

At the meeting, Klein and Kauffman received copies of documents detailing the JJC's intent to realign teaching staff (1T25-1T26, 1T86; J-3). Klein understood the plan to be a "massive reorganization," but neither Klein nor Kauffman specifically recall being told at the meeting that the goal of the reorganization was to get teachers back into the classroom (1T31, 1T81, 1T82). I find that as a result of the meeting, Klein was generally aware of JJC's intent to reorganize/realign its teaching staff.

7. Amberg identified a list of employees in the Teacher 1 title who were serving as Guidance Counselors or Juvenile Parole Transition Specialists prior to the realignment project (3T116, 3T118, 3T178-3T179; J-1). These employees represented the first "wave", or group, of transfers (3T119, 3T145).

After determining the appropriate ratios, and identifying JJC sites where teachers were either overstaffed or understaffed, the Office of Education issued a job posting entitled Lateral Reemployment Opportunity (3T115; J-3). The purpose of the posting was to encourage lateral transfers to accomplish the goal of the realignment as fairly as possible (3T114). Amberg hoped that teachers would respond to the posting voluntarily, however, his intent was that teachers who did not apply would be reassigned (3T116-3T117, 3T148). The posting noted the availability of vacancies for academic Teachers 1, 2, and 3 at JRAC (J-3).

Klein and Kauffman received copies of the posting at the meeting (1T26-1T27; J-3). Klein understood the Lateral Reassignment Opportunity posting to provide "options" to affected staff to choose new locations from the list (1T27).

8. Flanagan was aware that the Office of Education was conducting a review of teacher assignments in 2005, and that Amberg's successor, Margie Brown, continued the review after her appointment in 2006 (3T49, 3T51). He understood the purpose of the review to be to examine the current assignments and job functions, and certifications of teachers, to ensure that teachers were teaching the appropriate courses (3T49). The focus began at Jamesburg, where it was found that some Teacher 1s and 2s were filing and doing clerical work rather than working in the

classroom (3T50). Flanagan understood the goal of the review was to get Teacher 1s and 2s, which Flanagan described as the JJC's "best teachers," back into the classroom so that they would do the job they were being "paid to do" (3T50). However, according to Flanagan, he was not involved in any of the specific details of returning teachers to the classroom; JJC's Office of Education was responsible for that determination (3T70). I credit Flanagan's testimony.

9. Among the employees identified on J-1 were Ed Hilaire, Elizabeth (Lisa) Rockoff, and Judy Tredway.

Ed Hilaire is a Teacher 1, previously assigned to Spruce Street as Juvenile Parole Transition Specialist. In that position, he served as a liaison between Jamesburg and JJC education staff in the field. Hilaire was told there would be a reorganization, and while not specifically told, learned that the goal of the reorganization was to get teachers "out of the field and into the classroom" (1T91). Hilaire responded to the Lateral Reassignment Opportunity posting. He doesn't recall how he saw or received the posting, but assumed all teachers knew about it and would respond or be reassigned (1T98). Upon responding to the posting, Hilaire and was given a chart showing his options for transferring back into the classroom (1T90). Hilaire did not get his first choice for reassignment because the person in that position decided not to retire. Hilaire then made another

request and got a letter from Amberg advising that his request had been approved and telling him where to report (1T91; CP-1). Hilaire was reassigned to a classroom in JMSF's AGAPE Unit (CP-1). Hilaire was "well aware" the move would be made and "knew" that if he did not choose or request a location he would be reassigned "somewhere" (1T93, 1T95).

Elizabeth (Lisa) Rockoff is a Teacher 1, currently assigned to the English lab at JMSF, formerly known as the computer lab (2T4). In this assignment, she teaches six classes per day of six to eight students each, using English software (2T4). Prior to teaching in the English lab full time, Rockoff served as a Guidance Counselor at JMSF, and from 2002-2005, worked two days a week in the Child Study Team (CST) processing student records (2T5; J-1).

Around late April or early May 2005, Rockoff "heard" from a co-worker that there was a directive that teachers were to be placed back into classrooms and not perform non-teaching duties. Rockoff asked her supervisor, Kelley Michalowski, Supervisor of Education Programs if the rumor was true (2T6, 2T8). Michalowski confirmed that the JJC wanted teachers back in classrooms but told Rockoff that she could continue to work in the CST twice a week if she desired (2T6). Rockoff declined. Rockoff's understanding was that Teacher 1s, 2s and 3s were all doing the same work as Youth Transition workers, and that the issue arose

because a Teacher 3 working as a Youth Transition Worker was asking to be compensated for doing the same duties as Teacher 1s; the request was denied but as a result, all teachers had to go back to the classroom (2T6-2T7). Rockoff thought it would be unfair to continue the CST work when her colleagues were being removed from assignments they enjoyed "to be placed somewhere else they really didn't have much of a say over" (2T7).

I infer that by her reference to Youth Transition workers, Rockoff was referring to Juvenile Parole Transition Specialists, the job title listed on J-1.

Judith (Judy) Tredway is a Teacher 1 currently assigned to a JRAC classroom (J-1). Prior to her classroom assignment, Tredway was a Juvenile Parole Transition Specialist assigned to the records center at JJC's central office at Spruce Street (3T47). Tredway was notified that she would be reassigned to a classroom on June 22, 2005 and April 11, 2006. Due to personal issues which required Tredway to be on leave, she did not begin her classroom assignment until April 24, 2007 (3T118; J-1).

Margie Brown becomes Director of JJC's Office of Education

10. After taking sick and terminal leave, Amberg retired around December 2005 (3T170, 3T173, 3T175). Margie Brown became Director of Education effective February 1, 2006 (3T119, 3T134-3T135, 3T175). Brown was aware that the issue of teachers doing

out-of-title work had been a long-term issue and determined to address it "immediately" (3T182).

Brown had her educational managers review all the roles of the educational staff to be sure that they were acting in title - that teachers were in the classrooms and not doing other duties, that teachers had full time schedules, and that substitute teachers were serving as substitutes, not teaching (3T119, 3T168, 3T180-3T181; R-9). Brown was trying to make sure that all staff, not just Teacher 1s, were functioning in line with their job titles (3T179, 3T188).

11. Shortly after Brown became Director, Donna Thatcher assumed the position of Executive Manager of the JJC Office of Education (3T108). Thatcher has been employed by the JJC for ten years, and her duties and responsibilities include managing the secured care or lock up programs provided by the JJC, as opposed to its unsecured, day community programs (3T108, 3T109). She also teaches in one of the secured facilities, the Juvenile Reception Center (JRAC) (3T109).

12. On March 7, 2006, Brown emailed Education Office staff to ask them to begin reviewing staff and teacher schedules at community programs and secured facilities, including stopping Teacher 3's from serving as classroom teachers and redistributing staff whose credentials/skills were being inappropriately utilized (3T122; R-9).

On March 13, 2006, Brown emailed the education supervisors, to inform them that Thatcher and another education manager, Mary Hawkins, would be reviewing schedules and recommending changes for operational effectiveness (3T123-3T124, 3T181; R-10). Brown assigned Thatcher to this project at the secured facilities under Thatcher (3T122). Thatcher was already familiar with the facilities, including JRAC, because she had been assigned there during her career at JJC and knew which teachers were "not teaching" (3T135).

The March 16, 2006 Attendance Memorandum

13. In or around February 2006, Howard Beyer, the Executive Director of JJC, and Flanagan determined to address a number of time and attendance related issues in the JJC including teachers not coming to work, and employees who had exhausted sick and vacation time and who were in no pay status (3T41). The JJC's Jamesburg facility was the main focus at the time (3T41). Flanagan and Beyer contacted and met with union representatives, including representatives of CWA Local 1040, to let them know that they were going to start to take time and attendance very seriously, and that they wanted teachers to come to work (3T42).

14. In or around mid-February, 2006, Flanagan conducted a meeting at the Spruce Street location with a number of union representatives, including Don Klein. Flanagan indicated to the unions that the JJC was going to send a letter requiring medical

documentation to those who had "significant" time and attendance problems (3T60). The unions were given an advance copy of the letter (3T42). At the meeting, Klein indicated to Flanagan that CWA did not "condone" absenteeism (1T50).

15. On March 16, 2006, JJC's Human Resources Department issued a memorandum entitled Notice of Medical Documentation Requirement (CP-2). The memorandum notified staff who had exhausted their 2005 sick leave that a doctor's note would be required for any sick leave used through July 2006. The memorandum was sent by the Human Resources Department based upon its information on individuals' time and attendance.

In Flanagan's view, the letter didn't call for discipline, but stated that because of an employee's time and attendance problems, "the next time you call out sick you need to provide medical documentation to verify you were really sick" (3T42). Flanagan testified that other than having participated in the discussion which formed the basis for the memo, he had no role in drafting or disseminating it (3T59). I credit Flanagan's testimony.

16. Flanagan has known Don Klein since Klein represented CWA at the Department of Motor Vehicles when Flanagan was previously employed as an investigator by the Attorney General's Office (3T32-33). Flanagan and Klein communicate about union issues anytime between once per week and three times per day

(3T55). Flanagan described his working relationship with Klein as "always professional and cordial" (3T33).

17. According to Don Klein, Flanagan promulgated the policy in CP-2 and he and Klein were "at odds" over it (1T21). The two discussed the memo after its issuance (1T50). Flanagan said to Klein that CWA "gave him permission" to write the memo (1T50). Klein said to Flanagan that CWA did not condone absenteeism but that management had other tools at its disposal to address it (1T50-51).

I credit Klein's testimony generally that he and Flanagan disagreed about the attendance policy. Since I have credited Flanagan's testimony that he had no role in drafting the memorandum, I find that Klein's testimony paraphrases a previous discussion he and Flanagan had prior to the JJC's issuance of the attendance memorandum regarding JJC's intention to issue such a memorandum.

Ed Nomejko

18. Ed Nomejko is a Teacher 1 currently assigned to Pod 4 at JJC's JRAC unit (3T74). He possesses certifications in elementary education and as a social studies teacher, and as a teacher of the handicapped (3T129; R-11).

Nomejko began work at JJC as a teacher assistant in 1977, was promoted to Teacher 2 around 1979 after receiving his bachelor's degree in Criminal Justice, and was promoted to

Teacher 1 in 1981 after receiving a masters degree in Student Personnel Services (2T12, 2T13-2T14).

Prior to June 2006, Nomejko was assigned to administer learning assessment tests to juveniles under the JJC's jurisdiction in the JJC's JRAC unit(2T14). The tests assess a student's learning style, permitting a teacher to understand students' strengths and weaknesses (2T14, 2T15-2T16; 3T80). In that function, Nomejko would test one to two students at a time, explain, administer and score the test, then enter the information into an internet database in Washington (2T144 - 2T148; 3T81). Nomejko would complete testing for between ten and sixteen students per day (2T148). Initially the JJC utilized a test called Inteleque; at some point it discontinued utilizing Inteleque in favor of the MAP (Measure of Academic Performance) test, which Nomejko also administered (3T132). Nomejko volunteered for the testing assignment in September 2000 (2T15). Nomejko describes himself as a test assessor and thought the assignment would be until he retired (2T16).

Nomejko has been a shop steward in the State Professional Bargaining Unit represented by CWA Local 1040 on the JMSF campus since September 2000(2T16, C-1). As shop steward, he receives and attempts to resolve complaints from employees concerning supervisors or the collective bargaining agreement between CWA

and the JJC (2T17). Nomejko believes he is known to be "pretty aggressive" as a shop steward (2T18).

CWA files grievances over the attendance memorandum

19. Nomejko received copies of the March 16, 2006 attendance memorandum from various individuals who wanted him to represent them on a grievance (2T17). In response he wrote up a "generic" grievance form showing employees the article in the collective agreement Nomejko thought the administration had violated, and requesting that the memorandum issued to the employee be withdrawn (2T18; CP-3). Nomejko told employees who contacted him to sign their name and to produce any documentation regarding why or whether they had exhausted sick time (2T19). Nomejko also left blanks of the "generic" grievance at all three of the JJC's secured facilities - JMSF, JRAC and Hayes - so that anyone who hadn't talked to him could merely sign (2T18).

20. Marie Kraus has been the Manager of Employee Relations for the Juvenile Justice Commission since 2005 (3T5). Her duties include the timely scheduling and processing of grievances (3T5, 3T9). Fourteen to sixteen grievances were filed; Nomejko faxed them to Kraus (2T20).

At some time between March 17 and April 27, 2006, after receiving the grievances, Kraus and Klein had a telephone conversation concerning the grievances.

Kraus testified that she called Klein to discuss a strategy for scheduling the 14 grievances within the ten day time frame specified by the collective agreement (1T33-1T35; 3T7; J-1).

She stated that multiple grievances on the same topic can usually be handled as a group grievance, but after speaking with Klein, they agreed this could not be done because of the nature of the grievances, involving individual circumstances and confidential medical documentation (3T8). Klein suggested scheduling the individual hearings over two days and stated that Nomejko would represent the union (3T7, 3T9). Kraus initially told Nomejko she wanted it to be a group grievance but ultimately scheduled them separately as he and Klein requested (2T82, 2T65).

Kraus testified that the conversation with Klein was a "normal business conversation" and says she was not angry or perturbed (3T9). She just wanted to get the grievances "done" (3T21). After her conversation with Klein, Kraus testified that she turned the matter over to her assistant to schedule the hearings (3T9).

Klein testified that at sometime between March 17 and April 27, 2006, around the time that the grievances were filed, Kraus stated to Klein during a telephone conversation words to the effect that "Nomejko was twisting people's arms" to get them to file grievances over the attendance memorandum (1T33-1T35, 1T45-1T46; CP-2). Klein says that during the telephone conversation,

Kraus was "clearly angry" and "perturbed" at Nomejko (1T22, 1T39).

Klein does not recall when he spoke to Kraus, or who called whom, but thinks it was sometime between March 17 and April 27, 2006, either shortly before or shortly after he received copies of the grievances in his office (1T33-1T34, 1T35). Klein doesn't recall his response or anything else about the conversation. Klein testified that he didn't ask Kraus why she would say what she allegedly said.

Kraus denies stating to Klein or Nomejko that Nomejko was "twisting arms" and says she never commented on the filing of the grievances (3T6, 3T11, 3T20).

I find that Kraus and Klein testified about the same telephone conversation, concerning the scheduling of hearings on the grievance. I credit Kraus' testimony. I find that Klein's testimony is less reliable than Kraus, who had a better recollection of the substance and context of the conversation. I further find that while Kraus may have suggested a group grievance to either Nomejko or Klein or both, she did not insist upon it.

21. Klein later told Nomejko that CWA's desire to proceed on the grievances individually did not "set well" with Kraus, who wanted it to be a group grievance, and made a remark to Klein indicating that she was "pretty ticked off" about it, and

extremely upset that the grievances would proceed individually because that would take too much time (2T20, 2T83).

22. At some point prior to April 6, 2006, Nomejko called Flanagan to set up a time to discuss settling the grievances. Nomejko questioned whether some employees in his shop who had received letters had actually abused or exhausted their sick time (3T42). Flanagan told Nomejko that he would be happy to see any additional information Nomejko had, and that if the JJC was wrong, they would correct the error (3T38, 3T43).

23. Within two weeks of Klein's conversation with Kraus and after Flanagan communicated with Nomejko, Klein called Flanagan to discuss the grievances. Flanagan told Klein he had spoken to Nomejko about reviewing the additional information. According to Flanagan, Klein "wasn't very happy with that" and said "we're not settling nothing (sic), we're going to take the grievances all the way" (3T39).

Klein testified that during the conversation Flanagan stated words to the effect that Nomejko was "twisting people's arms" to get them to file grievances over CP-2, sounding angry and perturbed, as had Kraus (1T44-1T45, 1T48). Klein thought to himself that Kraus had said the same thing and made a mental note (1T49). Klein does not usually take notes of telephone conversations and has no written notes of his conversation with Kraus or Flanagan (1T38, 1T45). He recalls the context of the

conversation because when management expresses issues about grievances, as a union representative it "raises a flag" with him and he clearly remembers it (1T71).

Flanagan "emphatically" denies ever having said that Nomejko was "twisting arms" to get people to sign grievances (3T34, 3T54).

Flanagan testified that after the grievances were filed, he did tell Klein on the telephone that a supervisor had reported a staff member saying that Ed Nomejko was signing grievances on employees' behalf without their permission (3T34). He passed this information along to Klein because he thought Klein should know this information (3T34). According to Flanagan, he wasn't "accusing" Nomejko, just reporting what a supervisor had told Flanagan (3T55).

According to Flanagan, both men's tone during the conversation was professional and cordial, as always (3T35).

I infer that Flanagan and Klein testified about the same conversation. I credit Flanagan's version because he had a better recollection than Klein. I further infer that after Flanagan told Klein what the supervisor said about Nomejko, Klein became angry and said CWA was not interested in settling the grievances; and that in his recollection, he may have interpreted Flanagan's report of the supervisor's comment as Flanagan's suggestion that Nomejko was "twisting arms". I specifically

credit Flanagan's testimony that he told Klein of the supervisor's comment as a point of information, and not as an expression of animus to Nomejko's protected activity.

Nomejko and Flanagan discuss the attendance grievances

24. On the morning of April 6, Nomejko sent Flanagan an email to follow up on providing additional information on the grievances (3T38, R-4). Flanagan then responded to Nomejko via email later that morning, saying that Klein had indicated he wanted to go straight to a hearing on these issues (R-4).

I find that Flanagan did not express to Nomejko or Klein that he was upset by the filing of the grievances - he felt the grievances were in the "normal, routine course of business" (3T40).

25. On April 7, 2006, as a further reply to R-4, Nomejko emailed Flanagan to question why Judy Tredway, a Teacher 1, was assigned to JMSF but still working at Spruce Street, doing out-of-title work in the since-disbanded records center (2T36-2T37, 2T38).

Flanagan replied that Tredway had a personal issue and would return to JMSF/Bordentown on April 24, 2006 (2T37-2T38). Nomejko felt to delay Tredway's reassignment was "hypocritical" of Flanagan, since Tredway's absence from JMSF was like someone calling out sick daily rather than being with other teachers "in the trenches trying to make a difference" (2T112-2T126).

Flanagan testified that Tredway had worked at a student records center at JJC's central offices at Spruce Street. After management decided to disband the records center, a number of teachers were placed into classroom assignments, but Tredway remained (3T47, 3T65). Tredway is a teacher but was not performing teaching duties while assigned to Spruce Street (3T66). Flanagan explained that Tredway's husband had been number one or two on a critical organ transplant list, so she had asked Flanagan if she could remain at the Spruce Street location in order to be closer to home and to be able to transport her husband to Philadelphia quickly if they received a call for the transplant (3T48). Flanagan granted her request but told her that after the transplant issue was resolved she would be transferred back to Bordentown (3T48). To Flanagan's understanding, Tredway was transferred back to Bordentown after her husband's transplant surgery (3T49). I credit Flanagan's testimony.

26. Groups of classrooms within JRAC are known as pods. Nomejko testified that shortly after the attendance grievances were filed, he saw Flanagan in the hallway at JRAC as Nomejko was exiting the pod and that Flanagan put out his hand and said "what are you doing?" Nomejko said, "I think you guys are wrong. You're violating the contract," and Flanagan said "they're not doing it at Jamesburg." (2T21). Nomejko replied that the

collective agreement between JJC and CWA did not, in his opinion, permit the issuance of the attendance memorandum (2T21).

According to Flanagan, Nomejko's tone during this conversation was businesslike and cordial (3T37). Flanagan doesn't recall having said "what are you doing," and believes he may have said "How are you doing" (3T37, 3T56-3T57, 3T56).

I credit Flanagan's testimony that he did not say "what are you doing?" in reference to the grievances. I credit Nomejko's testimony that Nomejko said "you're violating the contract" and Flanagan replied "they're not doing it at Jamesburg". In so doing, I infer that Flanagan was referring to whether grievances were being filed over the absenteeism memo at Jamesburg, in response to Nomejko having raised the issue of the grievances by saying "you're violating the contract".

27. At some point after the conversation in which Klein told Flanagan CWA did not wish to settle the attendance grievances, Klein told Nomejko that Flanagan said Nomejko was "twisting arms" to encourage employees to file grievances.

28. A few days after Flanagan and Nomejko's conversation in the hall at JRAC, Nomejko saw Flanagan entering the men's room and decided, in Nomejko's words, to "confront" him (2T22). Nomejko said to Flanagan, "Tom, I heard that you think I'm twisting arms to get people to sign this . . . I want you to know up front these people did this voluntarily. I am just their

vehicle. I really don't like people insinuating and fabricating something that is not true." (2T22). Nomejko then accused Kelly Michalowksi, Supervisor of Education Programs, of having made the comment (2T75). According to Nomejko, Flanagan was caught off guard and said, "no, I haven't heard anything like that" (2T75-2T76).

Flanagan testified that he saw Nomejko in the hallway at JRAC and Nomejko stopped him and said something to the effect that Klein had called Nomejko and said that Flanagan accused Nomejko of filing false grievances (3T36). Flanagan said "that's not what I said" and told Nomejko what the supervisor had reported and Nomejko said "OK" (3T36).

I credit Nomejko's testimony that he decided to confront Flanagan based upon Klein's report of the statement. I have already credited Flanagan's testimony that he told Klein of a supervisor's remark concerning Nomejko filing grievances without permission, and drawn an inference concerning Klein's interpretation or recollection of Flanagan's statement; Flanagan's testimony of his response to Nomejko is consistent with that earlier testimony.

The Staff Realignment Process Continues

29. As part of the continuing realignment of teaching staff, the office's MAP coordinator requested a list from each site supervisor to determine which staff were administering MAPs

testing (3T178-3T179, 3T189-3T190). The Office had not previously been aware of which individuals were doing so because the site supervisors previously assigned the testing duties. In or around April 2006, based on the information reported to her by Thatcher, Brown constructed a second list of teachers who were assigned as MAPs proctors at various locations, rather than teaching as their primary role (3T119, 3T178; J-2). According to Brown, if it was found that the individual administering testing was a teacher, the supervisors were told to assign the testing duty to someone else (3T190). Brown was not previously aware that these individuals were working out-of-title (3T187). Brown made the ultimate decision regarding which teachers were to be reassigned (3T135, 3T182). Thatcher described J-2 as the second "wave" of transfers (3T119).

30. Alan Berndt and Ed Nomejko were included on the list as full time MAP proctors assigned to JRAC Unit of JMSF (3T120). Only Nomejko and Berndt were doing test proctoring full-time (3T188; J-2). Berndt was administering math placement testing (3T83). Other teachers were administering testing to individual students on an as needed basis, and classroom teaching the remainder of the time (3T188).

31. Kelley Michalowski is the Supervisor of Education for JJC's Johnstone campus, which includes JRAC (3T83).

Thatcher spoke with Michalowski to tell her to reassign Berndt, Nomejko, and Tredway (who was still in a non-teaching position at Spruce Street) (3T124).

32. Tom Sawyer is the site supervisor of education at JRAC (3T71). Michalowski is his supervisor (3T83). Michalowski called Sawyer to report that Thatcher told her to have the site supervisors transition all teachers back into the classroom full-time, including Tredway, Berndt and Nomejko (3T71, 3T125, 3T83, 3T85; R-8). Sawyer and Michalowski had previously discussed that Nomejko and Berndt were two teachers who would be moved (3T85). Michalowski told Sawyer that two Teacher 3s would be trained to perform the testing that Berndt and Nomejko had been doing to avoid a lapse in the testing program (3T125; R-8). Michalowski told Sawyer that Tredway's transition would take place later (3T99).

33. Donna Thatcher was Judy Tredway's supervisor at the time of the realignment project. After the resolution of the situation involving her husband's organ transplant, Tredway had to take additional leave due to the death of another close family member - a child (3T118, 3T172). As soon as Tredway returned from the second leave, she was assigned to a classroom at JRAC effective April 24, 2007 (3T118, 3T119; J-1). When Sawyer asked if Tredway could work on student records part-time upon her

return to JRAC as a teacher, because of her previous experience at Spruce Street, Thatcher said no (3T162; R-11).

34. Thatcher is familiar with Lisa Rockoff as a teacher who taught part of the day and worked on student records part-time (3T136). When Flanagan told Thatcher that Michalowski might have offered Rockoff the opportunity to continue on student records part-time; Thatcher spoke to Michalowski and told her that Rockoff was to teach full time (3T136). Michalowski confirmed this conversation by an email to Sawyer on April 24, 2006 (R-8).
Nomejko is reassigned

35. Tom Sawyer has been Nomejko's direct supervisor since approximately 2002 (3T73). Sawyer describes his working relationship with Nomejko as "very good" (3T74).

Sawyer states that it was "pretty much common knowledge" that changes involving relocation and resumption of classroom teaching duties were "coming" but the staff did not know exactly when. Sawyer was aware of "talk" that teachers were to be transitioned back into classrooms in "waves" but was only involved in conversations about the teachers in his building (3T77, 3T79, 3T92, 3T97).

On or around April 24, 2006, after speaking to Michalowski, Sawyer called Nomejko into his office. Nomejko testified that Sawyer "abruptly" told him that the JJC wanted all teachers back in the classroom (3T176, 3T23-3T24). Nomejko testified that he

asked "where (the directive) was coming from but Sawyer wouldn't say and said "I don't have to tell you" or put it in writing. Sawyer told Nomejko that his reassignment would be effective once he had trained a teaching assistant to perform the testing function (2T23).

Sawyer denied that the conversation was "abrupt" and testified that he actually felt somewhat apologetic about having to inform Nomejko that he was to return to the classroom, because Sawyer felt that Nomejko was in a position that he enjoyed and was providing a needed service (3T88, 3T105; C-1).

I credit Sawyer's testimony that the conversation was not "abrupt". I also credit Nomejko's testimony that Sawyer said that he did not have to tell Nomejko the origin of the directive or confirm it in writing.

Sawyer gave Nomejko a choice of which pod he would go to in order to make the transition as easy as possible (3T81). Nomejko chose Pod 4 because he already had a good relationship with the person working there (2T52).

Sawyer told Nomejko to take his time training the T-3 and do a thorough job (2T25). After about three to four weeks, Ed informed Sawyer that the T-3 was "okay" (3T84-3T85; 2T252). After completing the training, Nomejko officially returned to the classroom on or around June 1, 2006 (2T125).

Sawyer also spoke with Berndt about returning to the classroom, although perhaps not the same day he spoke to Nomejko (3T93). According to Sawyer, he treated both Nomejko and Berndt the same in being transitioned back into the classroom (3T83).

Sawyer did not believe that Nomejko's union activity had anything to do with his return to the classroom. Sawyer's previous employment history includes union membership in Teamsters and Ironworkers, approximately ten years service as the first CWA branch president at Jamesburg, and employment as a CWA organizer (3T72). Sawyer stated that as a lifelong union member, he is personally particularly sensitive to people being treated unfairly, particularly in retaliation for union activity, "he wouldn't stand for that" if he saw it happening, and "didn't see it happening" (3T86, 3T100). However, Sawyer has had "countless" employees come to him to complain about Nomejko's actions as a shop steward (3T103). The employees complained that they didn't really want to file particular grievances, but that Nomejko had "pushed the issue" by trying to get them to file a grievance, and many unit members felt he was "too aggressive" (3T104). I credit Sawyer's testimony.

Nomejko's grievances

36. On April 25, 2006, Nomejko filed a grievance that his reassignment was retaliatory for having filed grievances over the attendance memo (2T25; J-6).

Nomejko called Klein and said "They took me out of my job." (2T25) Klein replied, "they are retaliating against you because of this (the absenteeism grievances)" (2T25).

At Klein's direction, Nomejko confirmed his conversation with Sawyer about Nomejko's reassignment in a memo to Sawyer dated May 3, 2006 (2T22-2T23, 2T24, 2T25, 2T27; CP-4).

37. At some point prior to April 28, Nomejko called Thatcher to explain the importance of his role as a test assessor and to ask if he could continue testing and not be put in a classroom at JRAC (3T128). Thatcher described the conversation as

come on Donna, why can't I continue along the lines, why can't I continue to test, you're really hurting me by not allowing me to continue to test. Why do I have to go back into the classroom, there's other people who could do this instead of me, you know, or at least . . . let me be assigned to the computer room and work in the computer room with teachers . . . (3T127).

Thatcher told Nomejko that teachers needed to teach. Nomejko then asked if he could be assigned as a teacher in the computer room, saying that the teacher in that room, a Teacher 3, was not certified as a computer teacher (3T127, 3T130). Thatcher told Nomejko that she and Sawyer had not discussed reassigning the staff person assigned to the computer room, and that Nomejko's certifications were best suited for regular classroom instruction, rather than administering testing which didn't

require a teaching certification, or "being in the computer room watching kids test" (3T129, 3T128; R-11). Nomejko told Thatcher that he knew he was a very good teacher but that he preferred to continue with testing (3T130). Thatcher described teaching in a classroom as a more skilled job than test proctoring (3T81, 3T131-3T132, 3T141). Thatcher took Nomejko's statement of being "hurt" to mean that he just really wanted to continue testing, that he was more comfortable administering tests in a one-on-one situation, as well as having his own office and phone and that he did not want to go and teach in a pod classroom (3T128, 3T129).

38. Brown later inquired of Thatcher whether Tredway, Nomejko and Berndt had been moved (3T126). On April 28, 2006, Thatcher sent Brown an email outlining her communications with Michalowski and Sawyer, confirming that Nomejko and Berndt were to be reassigned and their class schedules (3T122, 3T181-3T182; R-11). Thatcher also reported that she had refused Sawyer's request for Tredway to continue to work on records part-time when she returned to JRAC, telling him that all three teachers had to go back to the classroom (3T127, 3T162). Thatcher also summarized her previous communication with Nomejko about his requests for an alternative assignment (R-11).

Brown and Thatcher discussed Nomejko's request. Brown was adamant that all teachers should be in the classroom with no exceptions (3T182). Although Brown knew Nomejko as a teacher and

a basketball official, she was not aware that Nomejko was assisting employees with the filing of grievances (3T175, 3T183). Brown testified that she did not consider Nomejko's union activity or position in deciding that Nomejko should return to a classroom teaching position (3T183, 3T185). I credit Brown's testimony.

39. Soon after the telephone conversation and after Nomejko started his classroom assignment, Thatcher was walking through the facility observing classrooms and talking with staff. Nomejko came out of his classroom and "confronted" her, shouting across the hall and insisting on speaking with her although she was in conversation with someone else (3T166, 3T133). Nomejko again asked Thatcher why he had to go back to the classroom, asking "whose decision was it, come on, you can own up to this" (3T133). Thatcher told him that she had identified the title and conferred with Margie Brown, who made the ultimate decision (3T134). Thatcher recalled Nomejko's approach as "very confrontative [sic] . . . very demanding. It was just his way with union issues, union issues are his heart." (3T167).

Nomejko's Reassignment Grievance

40. On May 1, 2006, Lisa Bell, Human Resources Manager, wrote to Nomejko to schedule Nomejko's April 25 grievance for hearing on May 8 (3T12; J-5).

On May 2, 2006, Nomejko emailed Bell requesting the professional titles of a list of employees Nomejko claimed continued to proctor the MAPS test in preparation for his grievance hearing (2T29; CP-6). Attached to CP-6 is an undated document with lists of persons in titles of Teaching Assistant, Teacher 1, Teacher 2, Teacher 3 and EPS 2.

Nomejko initially testified that Bell emailed him the list attached to CP-6 (2T30), then subsequently testified that he sent it to her and she sent it back (2T31 -2T32, 2T85-2T87; CP- 6).

Kraus testified that she is unfamiliar with the list of employees in CP-6 and that to her knowledge, Lisa Bell has "no idea" what the list of employees in CP-6 is; further, from Kraus' experience, a response from Human Resources would have been in a much more formal format (3T19). Bell did not testify.

Thatcher has "never seen" CP-6, recognizes the names on it, but doesn't know what it represents (3T137). Thatcher notices that it contains the fax number of the JRAC child study team and a CWA marking, which to Thatcher means it did not come from Lisa Bell's office (3T168).

Based upon the testimony, I find that Nomejko was the author of the list of employees attached to CP-6, and that there is no evidence that Bell or anyone on behalf of JJC had any input into the list. It appears that the list of employees was attached to

an email Nomejko sent Bell and remained attached to Nomejko's original email when Bell replied.

I rely on the list of employees in CP-6 only to the extent that I conclude that Nomejko wrote it in the belief that it was a list of teachers who were still doing MAPs testing which was never confirmed by Bell or anyone else on behalf of JJC. I cannot rely on CP-6 as evidence of which employees continued doing the MAPs work as he alleged.

41. Nomejko perceived that the people listed in CP-6 were teachers who had not been reassigned and was suspicious that MAP people were only reassigned after he inquired of Bell (2T108; CP-5). Nomejko felt that there were other teachers around campus who were still doing out-of-title work (2T109). He attempted to file a grievance on behalf of a T3 who was working in the JRAC Records Center and Bell sent it back to him, saying that individual had to file on her own behalf (2T109). Nomejko filed the grievance without consulting the individual because although Nomejko was aware that the individual preferred the position, he felt that management should be aware that they were "saying one thing and doing another" by saying all teachers had to be in the classroom yet "permitting an individual in a teaching position to do out-of-title work." (2T110).

Nomejko testified that Lisa Rockoff was not affected by the reassignment and that Rockoff felt she was being retaliated

against by Michalowski for not continuing to do out-of-title work for the Child Study Team because Rockoff felt it was against her "union brethren"; Nomejko felt Michalowski retaliated against Rockoff by putting her in a classroom with no books or materials (2T32-2T33, 2T34-2T35). Nomejko testified that Rockoff sent Nomejko an email saying another teacher was now doing the Child Study Team assignment; Nomejko felt it was unfair that teacher was not being required to work with students (2T35-2T36). Rockoff was a witness but did not testify to these facts. Therefore, I consider this aspect of Nomejko's testimony relevant only insofar as it illustrates Nomejko's perception that not all teachers doing so-called "out-of-title work" or using software were reassigned.

42. On May 8, 2006, at the hearing scheduled for Nomejko's reassignment grievance, Nomejko and Klein withdrew the grievance with prejudice (3T13; J-7) . Nomejko explained that he and Klein withdrew the grievance in favor of pursuing an unfair practice charge (2T42).

JJC and CWA Resolve the Attendance Memorandum Issue

43. In or around early May 2006, Klein, Beyer and Flanagan met to discuss the attendance memorandum (3T45). In the phone call to set up the meeting or at the meeting, Klein told Beyer that Flanagan had misrepresented their conversation at the February 26 meeting in which Klein said that CWA did not condone

absenteeism (1T50). At the May meeting, Klein suggested to Beyer that rather than issuing the "blanket memorandum" requiring a doctor's note that Klein felt Flanagan wanted, that the issues be handled on a case by case basis depending upon the specific facts, and that a supervisor could talk to an employee about a developing attendance problem (1T51). Klein asked Beyer to withdraw the letters (3T45).

Flanagan objected, saying that the letters should remain in employees' files, because there was ample documentation to support them and that employees were in a no-pay status still receiving State benefits, while classes were empty and education was not being provided (3T45-3T46). Flanagan expressed that a number of employees were abusing sick time and the medical documentation requirement "would verify the fact that they were really sick as opposed to abusing the system." (3T62). Flanagan felt and said that the letters had been "well vetted" with the union (3T45). Flanagan was surprised that Klein didn't seem to recall the issue having been discussed before the letters were issued (3T45).

On May 22, 2006, Beyer and Klein executed a memorandum of agreement specifying that the JJC would rescind the March 16 memorandum concerning time and attendance in exchange for CWA's withdrawal of all related grievances (J-4; 1T22).

According to Flanagan, as a result of the rescission of the memorandum, "our attendance issues just continued to move on. We continued to have . . . as much as 50 percent absence at Jamesburg. Those people who continued to abuse the system continued to abuse it." (3T44, 3T61, 3T62). Flanagan felt the rescission of the memo was "counterproductive" and a "wrong decision" by Beyer, but stated ". . . he's my boss" (3T62, 3T63).

Nomejko meets with JMSF Administrator Thomas

44. On June 15, 2006, after beginning his classroom assignment, Nomejko attended a meeting with JMSF Superintendent Sheila Thomas (C-1). Thomas requested the meeting after Nomejko reported a problem he was having with a student which Nomejko felt impacted Nomejko's health and safety (2T38-2T39). Nomejko's supervisor Tom Sawyer also attended the meeting (2T38).

Nomejko testified that, at the commencement of the meeting, Thomas said "Have a seat, Mr. Nomejko. I am going to beat you up for a while," and then "beat (him) up" for 40 minutes allegedly referring to him as "Mr. Shop Steward" or saying "you're a shop steward," criticizing his writing skills and grammar, and chiding him for not providing copies of his report to certain other departments (2T38-2T39, 2T40, 2T41-2T43). After the meeting, Nomejko felt as if "someone had just turned their back on (him)" and that Thomas was "getting back at him" for his various protected activities (2T41-2T42).

45. On June 16, 2006, at Klein's instruction, Nomejko filed four grievances against Thomas as a result of the meeting. On October 24, 2006, the hearing date set for the grievances, 3 of the grievances were settled by written apology and Nomejko withdrew the one concerning the "Mr. Shop Steward" comment (3T15-3T16, 3T23; R-5). Nomejko believed that Klein intended to pursue those issues in another forum (2T98).

Beyer declines to return Nomejko to the testing assignment

46. At some point after Nomejko's reassignment, Klein called Beyer and in or around early July, 2006, Klein and Nomejko met with Beyer to discuss the reassignment (1T53-1T54, 2T28). Beyer told Flanagan that Klein wanted Nomejko returned to his original assignment (3T52). According to Flanagan, Beyer was "well aware" of the rationale for returning teachers in non-teaching positions to the classroom (3T52). Beyer included the JJC's Affirmative Action Officer, Francine Williams, in the meeting; Klein felt that it was not an affirmative action issue but that Beyer trusted Williams to investigate the issue and felt she was unbiased (1T54, 1T56-1T57, 2T28).

At the meeting, Klein told Beyer that Nomejko was reassigned because Flanagan was "pissed" at Nomejko for having filed grievances over the attendance memo, and that the reassignment limited Nomejko's movement as a shop steward. Nomejko stated his

credentials and that he felt the move was unfair. Beyer did not respond concerning the retaliation allegation (1T63-1T64, 1T72). Klein requested that the move be rescinded (1T58).

After meeting with Klein and Nomejko, Beyer talked to Brown about Nomejko's request. Brown explained to Beyer that Nomejko was a senior teacher and people with his skills were needed in the classroom (3T185). Brown also tried to make Beyer see that it was important to be

consistent and fair with all staff. And that we were making such progress, maybe for the first time ever everybody would be doing the job they're supposed to do. And to make an exception in this case would undermine my authority for anything else I might be trying to do (3T184).

About three weeks after the first meeting, Beyer again met with Klein and Nomejko (1T60, 2T28). Beyer said he thought about it and decided that Nomejko would remain where he was (1T60). Beyer confirmed his response by letter of July 27, 2006, saying he had conferred with Brown and the JJC's position is that teachers should be in the classroom teaching, so Nomejko would not be returned to the test proctoring position (1T61, 1T73, 2T28; R-1). After investigating, Klein believed that Beyer concluded that Nomejko's grievance activity was not the reason for the reassignment (1T65). When he saw that affirmative action officer Williams' name was not mentioned, he felt that Beyer had talked to Brown and could not be convinced to reassign Nomejko,

and did not believe the assignment was retaliatory (1T65, 2T28). Klein did not respond to R-1 (1T67).

47. While in the testing position, Nomejko explained that he had his own office with a phone and "incredible" accessibility to campus, and that it is now harder for employees to reach him as a steward in a confidential and private manner (2T26, 2T84-2T85). He felt that the reassignment was an attempt to make it as hard as possible for employees to get in touch with him and that the move was too coincidental with the grievances (2T26, 2T27). Nomejko believed that he was a "thorn" in management's side because of the recent grievances as well as previous grievances and his actions as shop steward (2T26-2T27). In particular, Nomejko felt that Flanagan sought to retaliate against him because Flanagan was aware that Beyer was going to "side with" CWA and "withdraw Mr. Flanagan's edict" concerning absenteeism (2T27; CP-2).

ANALYSIS

In re Bridgewater Tp., 95 N.J. 235 (1984), articulates the standards for assessing allegations of retaliation for engaging in protected activity. No violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the

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

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner, and then the Commission, 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).

Timing is an important factor in assessing motivation and may give rise to an inference that a personnel action was taken in retaliation for protected activity. Camden Board of Education, P.E.R.C. No. 2003-77, 29 NJPER 223 (¶68 2003); City of Margate, P.E.R.C. No. 87-145, 13 NJPER 498 (¶18183 1987) (violation found where lifeguards filed suit against the City in September 1995, entered into a consent order in November 1995 settling the suit and were informed in March 1996 that they were not rehired for the summer 1996 season). Bor. of Glassboro, P.E.R.C. No. 86-141, 12 NJPER 517 (¶17193 1986); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). Timing may also be indicative of motive. University of Medicine and Dentistry, P.E.R.C. No. 2001-65, 27 NJPER 247, (¶32088 2001), citing H.E. 2001-15, 27 NJPER 80, 86-87 (¶32032 2000). Timing alone, however, cannot support such an inference. See Camden, supra (where timing of a transfer within 6 months of grievance filing, together with conflicting reasons for transfer, supported inference of hostility).

CWA has proved the first two parts of the Bridgewater test - it is undisputed that Nomezko engaged in protected activity by his position as a CWA shop steward at JJC's JRAC location since 2002, and that the JJC knew of this activity. Flanagan, Kraus,

Thatcher and Sawyer all acknowledged being aware of, or interacting with, Nomejko in his role as a CWA shop steward.

The inquiry, therefore, turns to the last component of the Bridgewater test - whether the JJC was hostile to Nomejko's protected activity.

For the reasons that follow, I find that CWA has not sustained its burden of proving that JJC was hostile to Nomejko's protected activity, or that hostility to protected activity motivated Nomejko's reassignment. To the contrary, the evidence shows that Nomejko was reassigned for a reason independent of and unrelated to his protected activity by decision makers who were not hostile to that activity. Moreover, neither direct nor circumstantial evidence that I have credited establish that the JJC was hostile to Nomejko's exercise of his protected rights. Nomejko Was Reassigned As Part Of The JJC's Realignment Of Its Teaching Staff.

This case turns on the credibility of the witnesses as well as the nexus between the alleged adverse action and the protected activity.

The record reflects that Nomejko was reassigned as part of a previously announced, department wide initiative of the JJC's Department of Education aimed at ensuring that its teaching staff was appropriately assigned and aligned for the delivery of educational services to JJC students. A primary goal of the initiative was an attempt to ensure that all of the JJC's Teacher

1s, its most qualified teachers, were assigned teaching duties in the classroom and not out-of-title non-teaching or clerical duties, and also that the ratio of teachers to students was corrected at each location.

Teachers who were identified as performing out-of-title, or non-teaching, duties were offered the opportunity for voluntary transfers via response to the Lateral Reassignment Opportunity posting, and those who did not respond or who were identified after the posting were involuntarily reassigned. Nomejko was identified as one of a group of teachers who were performing educational testing, a task which the Office of Education deemed an out-of-title assignment inappropriate for performance by a certified teacher. Nomejko was one of only two Teacher 1s performing this task as a full time duty assignment and the other teacher, Alan Berndt, was also reassigned to a classroom.

This case is similar to State of New Jersey (Judiciary), P.E.R.C. No. 2003-41, 28 NJPER 588 (¶33183 2002). In that case, the Commission found that the union did not prove that the state judiciary system reassigned probation officers, who were also union officials, to different divisions in retaliation for their protected activity. In 1995, the Judiciary engaged in a strategic planning process which in 1998 culminated in a report recommending, in part, the use of employee teams. To implement the team concept, a vicinage policy team decided to reassign

three senior probation officers from each of its three divisions for the purpose of cross-training. The Commission adopted the Hearing Examiner's finding that the Judiciary implemented this reassignment/transfer program "for legitimate business reasons devoid of hostility or discriminatory motives" toward the union or the nine affected employees. 28 NJPER at 589.

CWA relies on Camden Board of Ed, supra. In Camden, the Hearing Examiner and the Commission found that the timing of a transfer, together with the "shifting reasons" offered to justify it, supported an inference of hostility. The Commission further identified a nexus between the charging party's filing of an acting pay grievance on her own behalf and her transfer as a vice principal to a position at another school. Camden is distinguishable because, in this instance, the employer offered one consistent reason for Nomejko's reassignment - the realignment process which had as one of its goals the return of Teacher 1s from assignments which were considered out-of-title to classroom duties. An examination of the totality of the circumstances as the Commission required in Camden, leads to the conclusion that there was insufficient nexus between Nomejko's protected activity and his reassignment to support an inference of hostility.

CWA asserts in its brief that:

assuming arguendo that the JJC has had an interest in placing all persons employed in the Teacher 1

job title in teaching positions since 2005, it belies logic that Nomejko would not have been reassigned in April or May of 2005. . . CWA submits that the actual impetus for the Respondent's reassignment of other Teacher 1s working in testing areas to teaching positions was Nomejko's email to the JJC administration inquiring why he was reassigned from his testing position while other Teacher 1s continued to work in testing areas throughout the JJC, and not the purported business justification asserted by the Respondent . . . (R)espondent conceded that it allowed Judy Tredway, a Teacher 1, to work in a non-teaching capacity until April of 2007. . . . Further, Nomejko's supervisor refused to provide him with written notice of this reassignment . . . despite the fact that the JJC provided employees with written notice detailing the terms of their reassignments during a reorganization of employees that occurred at the JJC a year earlier.

(CWA post hearing letter brief at 4, 13-14.)

The record shows that response to the 2005 Lateral Reassignment Opportunity was entirely voluntary, and only those who responded were reassigned in accordance with it; likewise, only those employees were provided with written notification of whether their requested transfer had been approved. There is no evidence that written notice was required, pursuant to the parties' collective agreement or otherwise, or that Nomejko was treated any differently than other employees who were reassigned when Sawyer declined to provide him written notice upon his request.

I find that those employees whom the Office of Education identified as working out-of-title were placed in classrooms

without exception. After Michalowski offered Rockoff the opportunity to continue working with the CST without the knowledge of the Office of Education, Thatcher told Michalowski that Rockoff had to be in the classroom; Sawyer was told the same concerning Tredway. CWA presented no facts to refute the credible evidence JJC presented to justify the temporary exception it made for Tredway, or to establish that the Office of Education made other exceptions.

The credible evidence of record supports that Teacher 1s administering testing, including Nomejko, were not identified until after Margie Brown became Director of Education, well before Nomejko's May 2, 2006 email to Bell. Except for Nomejko's testimony, CWA presented no additional evidence in the record to corroborate the assertion that other Teacher 1s continued to perform testing full-time.

JJC Officials Were Not Hostile To Nomejko's Protected Activities.

Moreover, an examination of the facts surrounding the issuance of the attendance memo reveals a lack of evidence, direct or circumstantial, that JJC officials were hostile to Nomejko. Neither the grievances related to the memo or any other protected activity played any part in the decision to reassign Nomejko.

The decision to reassign Nomejko, among other affected teachers, was initiated by Brown and Thatcher of the JJC's Office

of Education; there is no evidence that anyone other than Brown was the final decision maker. Brown was unaware of Nomejko's grievance activity. The record does not reflect that any other JJC staff had a role in determining who would be reassigned. The decision was communicated to Michalowski and Sawyer, who in turn communicated with Nomejko. None of those individuals was shown to have any hostility toward Nomejko, Nomejko's protected activity or CWA. Although JJC's Office of Education fell under Flanagan's purview, the record does not show that he had any role in determining who would be reassigned and no connection to the decision to reassign Nomejko.

Nomejko was a self described aggressive shop steward, which was corroborated by other testimony. Much of the testimony presented by CWA centered around the perceptions of Nomejko and Klein that JJC management considered Nomejko "a thorn in (its) side" due to his aggressive stance as a shop steward.

CWA argues that Nomejko was engaged in protected activity under the Act and that "(JMSF) Administrators such as Thomas, Kraus and Flanagan were quite hostile toward Nomejko's vigorous representation of employees at the JMSF." (CWA's post-hearing letter brief at 9.) CWA sought to prove that less than six weeks after Nomejko filed the subject grievances, both Kraus and Flanagan appeared to be angry at Nomejko and communicated to Klein that Nomejko was "twisting people's arms," or improperly

influencing employees, to file grievances, and Nomejko was informed he would be reassigned. (CWA post-hearing brief at 9-10.) I did not credit testimony that Kraus and Flanagan made the alleged statements.

The record shows that Nomejko communicated with both Kraus and Flanagan within a short time after the grievances were filed, and within the time frame Klein testified they both expressed their "anger" to him about Nomejko. But the record shows that those communications had a pleasant businesslike tone. Nomejko did not testify that either communicated anger to him. Of the four, including Nomejko, only Klein testified to Kraus and Flanagan's "anger." I found a lack of evidence that Kraus or Flanagan were hostile to Nomejko's protected activity.

Any concerns Flanagan or Kraus had about the grievances were unconnected to Nomejko's protected activity. Kraus was concerned about scheduling the multiple grievances expeditiously and within contractual time lines. Even with time concerns in mind, Kraus agreed to schedule the grievances individually as CWA preferred, and did not insist upon a group grievance.

Flanagan was interested in achieving a managerial goal of reducing absenteeism. Flanagan's concerns about absenteeism do not lead to an inference of animus against Nomejko for filing the grievances challenging the attendance memorandum. To the contrary, the facts show that Flanagan and Nomejko had a

generally cooperative relationship. Nomejko felt free to reach out to Flanagan to discuss resolving the grievances. Flanagan expressed willingness to listen to Nomejko and to make adjustments based on the evidence Nomejko presented. Flanagan responded courteously and promptly to Nomejko's followup emails on the grievances, as well as to Nomejko's inquiry concerning Judy Tredway.

Additionally, both Klein and Flanagan testified to a cooperative business relationship. When Klein indicated that he wanted to go forward on the grievances rather than discussing settlement, Flanagan respected Klein's position and communicated it to Nomejko. While the record shows that Klein and Flanagan disagreed over the attendance memo, their disagreement was unrelated to Nomejko's reassignment.

Even if Kraus and Flanagan made the alleged statements, the realignment/reassignment process was initiated, communicated and implemented by several individuals independent of Flanagan - namely Brown, Thatcher, Michalowski, and Sawyer. There are no facts in the record connecting Kraus to the realignment process.

Moreover, although CWA asserts that "(s)ome representatives of the Respondent, including Flanagan, were angered that Beyer settled the sick leave matter with CWA," (CWA's posthearing letter brief at 6), the settlement of the absenteeism memorandum issue between Klein and Beyer was discussed and finalized on May

22, 2006, well after Nomejko was advised of his reassignment which, therefore, appears irrelevant to a determination of the motivation for that action.

CWA also relies on Atlantic City Bd. Of Ed, P.E.R.C. No. 98-119, 24 NJPER 209 (¶29099 1998). In Atlantic City, the Commission adopted the hearing examiner's finding that a principal's threat to reprimand a teacher if she did not follow the grievance procedure constituted direct evidence of hostility in violation of 5.4a(1) and (3), and that the Board independently violated 5.4a(1) when it refused union representation to the three representatives during investigatory interviews and when it issued the notice to staff. P.E.R.C. NO. 98-119, 24 NJPER 209 (¶29099 1998), citing H.E. 98-5, 23 NJPER 580. Unlike Atlantic City, I have found that there is insufficient direct evidence of discrimination or hostility to support the finding of a violation here.

Timing

The remaining issue is whether there is circumstantial evidence of union animus in the record, and, if so, whether that hostility had anything to do with the decision to reassign Nomejko.

Although timing is an important factor, the record reflects that the JJC's decision to realign all staff including returning

Teacher 1s to the classroom was made well in advance of and had no nexus to the grievances filed by Nomejko.

I have noted that timing may be a significant factor in assessing motivation. The timing in this case appears to be the only real circumstantial evidence that Nomejko's protected activity motivated his reassignment; however, an examination of the record herein reveals that the timing of Nomejko's reassignment and his grievance activity were at best, coincidental. The staff realignment project was first contemplated by JJC's Office of Education in April 2005; the first "wave" of employees to be transferred was identified and notified by June of that year (J-1); a second group of employees administering educational testing, including Nomejko, was identified by April 2006 (J-2). Nomejko's participation in filing grievances based on the attendance memo issued by JJC's human resources department on March 16, 2006 was parallel to this process. Nomejko was notified that he would be reassigned to the classroom on approximately April 25, quite close in time to the filing of the grievances; however, by examining the facts surrounding the JJC's realignment goals, along with my findings concerning the alleged conversations between Klein and Kraus and Klein and Flanagan, I am unable to infer that hostility to Nomejko's grievance activity played any part in the JJC's decision to reassign him to a classroom position.

Finally, CWA argues that Nomejko's reassignment made it less convenient for members to contact Nomejko as a shop steward. While I have no reason to doubt that assertion, no evidence suggests that the parties' collective agreement entitled Nomejko to any particular assignment or emoluments in his shop steward role, nor does inconvenience constitute evidence of animus. See, e.g., Union County Regional Board of Ed., P.E.R.C. No. 92-1, 17 NJPER 372 (¶22173 1991) (employer not required to provide union president any more time for union business than negotiated; unwritten practice cannot supersede negotiated agreement); State of New Jersey (Judiciary), at H.E. No. 2003-5, 28 NJPER 382, 393(¶33140 2002) (hearing examiner found that mere fact that employees could not reach union president for a few days after president's transfer, especially given the lack of evidence that hostility motivated transfer, was not evidence of animus).

Administrator Thomas' "Shop Steward" comments:

I next consider whether the Board independently violated 5.4a(1), when, at a June 2006 meeting concerning Nomejko's health and safety complaint, Administrator Sheila Thomas informed Nomejko of her intent to "beat him up for a while" and criticized him for approximately 40 minutes while derisively referring to him as "a shop steward" or "Mr. Shop Steward".

A public employer independently violates section 5.4a(1) of the Act if its actions tend to interfere with an employee's

exercise of protected activity. N.J. Dept. Of Human Services, P.E.R.C. No. 2001-52, 27 NJPER 177 (¶32057 2001); 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 College of Medicine and Dentistry, P.E.R.C No. 79-11, 4 NJPER 421, 422 (¶4189 1978); N.J. Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550, 551 (n.1) (¶10285 1979). Proof of actual interference, intimidation, restraint, coercion or motive is unnecessary. Mine Hill Tp.

CWA argues that "the JJC's hostility toward Nomejko for exercising his rights under the Act was exhibited by JMSF Administrator, Thomas." Thomas' comments demonstrate "the JJC's failure to provide a workplace committed to fostering the exercise and protection of employees' rights under the Act." (CWA post hearing brief at 10, 11.) The JJC argues that CWA's allegations concerning Sheila Thomas are "at most an unrelated side issue" in the charge which was not corroborated by any other witness to the comment, and that CWA failed to provide any evidence to support its position. (JJC post-hearing brief at 25, 26.)

While the JJC denies the allegations constitute a violation, the facts are not truly in dispute. The State didn't specifically rebut the allegations of the Complaint or otherwise rebut Nomejko's testimony. Significantly, it did not call Thomas

as a witness. A trier of fact may draw a negative inference from a party's failure to call or question a witness. State v. Clawans, 38 N.J. 162, 170 (1962). For an inference to be drawn from the non-production of a witness, the witness must be "within the power of the party to produce" and the proffered testimony must be "superior to that already utilized in respect to the fact to be proved." Id. at 171. Sawyer testified at hearing on behalf of CWA and was cross-examined by Respondent, but was not questioned or recalled to corroborate or dispute testimony concerning the meeting with Thomas, which he attended. Since the Respondent did not provide or elicit testimony to rebut CWA's proofs, I credit Nomezko's testimony. A trier of fact can credit a witness' testimony, particularly when it is unrefuted. Compare, City of New Brunswick, P.E.R.C. No. 83-26, 8 NJPER 555 (¶13254 1982); Clark Tp. and Xifo, P.E.R.C. No. 80-117, 6 NJPER 186 (¶11089 1980), aff'd NJPER Supp. 2d 91 (75 App. Div. 1981). Therefore, I infer that additional testimony concerning the meeting between Nomezko, Thomas and Sawyer may not have favored the Respondent. See also Cohen v. Community Medical Center, et. al., 386 N.J. Super. 387 (App. Div. 2006).

I find Thomas' statements to Nomezko in the June 15 meeting, referencing his shop steward status although that status was unrelated to the purpose of the meeting, "inevitably (have) the tendency to intimidate any employee from engaging in such

activity." See Willingboro Tp. Bd. of Ed. and Employees Ass'n of the Willingboro Schools and Joann Phelps, P.E.R.C. No. 98-113, 24 NJPER 171, 173 (¶29085 1998); aff'd and rem'd on remedy, 25 NJPER 322 (¶ 30138 App. Div. 1999).

In Black Horse Pike Reg. Bd. Ed., P.E.R.C No. 82-19, 7 NJPER 502 (¶12223 1981), the Commission explained that an employer must differentiate between an employee's status as an employee representative, and the individual's status as an employee of that employer. The Commission wrote:

. . . where the employee's conduct as a representative is unrelated to his or her performance as an employee, the employer cannot express its dissatisfaction by exercising its power over the individual's employment. Id. at 503.

The Commission further explained that an employer could criticize the employee representatives for their conduct, but it must do so appropriately. An employer cannot:

. . . use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. Id. at 504.

Under Black Horse Pike, Thomas' apparently derisive characterization of Nomezko as "a shop steward" or "Mr. Shop Steward" constituted inappropriate criticism of Nomezko's role in a manner unrelated to the purpose of the meeting. Therefore, I find that the JJC independently violated 5.4 a(1).

In Atlantic City, the Commission found that the hearing examiner had discretion to consider evidence of hostility following an adverse employment action, saying, "Hostility does not necessarily cease once an unfair practice is committed. A Hearing Examiner has discretion to admit such evidence when appropriate and give it such weight as may be fitting in a particular case." In re Atlantic City Bd. Of Ed, 24 NJPER at 212, n2. Unlike Atlantic City, where the Commission found an initial violation, I have found that there is insufficient direct evidence of discrimination to support a violation on the facts surrounding Nomejko's reassignment. Moreover, there is no evidence that Thomas' statements and conduct were motivated by the attendance grievances. While I have found an a(1) violation in Thomas' words and actions which occurred after the fact of Nomejko's reassignment, I have no basis to, and therefore do not, impute that later evidence of intimidation to JJC's earlier action in reassigning Nomejko.

For the foregoing reasons, I make the following:

CONCLUSIONS OF LAW

The State of New Jersey, Juvenile Justice Commission, independently violated 5.4a(1) of the New Jersey Public Employer-Employee Relations Act when JMSF Administrator Sheila Thomas referred to CWA Shop Steward Ed Nomejko as "a shop steward" or "Mr. Shop Steward" in a derisive manner in the presence of JJC

Tom Sawyer at a meeting concerning a safety and security concern on or about June 15, 2006.

The State of New Jersey, Juvenile Justice Commission, did not violate 5.4a(1) and (3) when it reassigned CWA shop steward and Teacher 1 Ed Nomejko from a test assessor position to a classroom assignment.

I recommend that the remaining allegations of the Complaint be dismissed.

RECOMMENDATION

I recommend the Commission ORDER that:

A. The State of New Jersey, Juvenile Justice Commission cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly when JMSF Administrator Sheila Thomas referred to CWA Shop Steward Ed Nomejko as "a shop steward" or "Mr. Shop Steward" in a derisive matter in the presence of JJC education supervisor Tom Sawyer at a meeting concerning a safety and security concern on or about June 15, 2006.

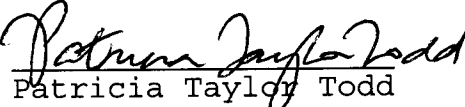
B. Take the following action:

1. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as appendix "A". Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof,

and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. Dismiss the remaining allegations.


Patricia Taylor Todd
Hearing Examiner

DATED: February 2, 2009
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 13, 2008.



NOTICE TO EMPLOYEES



**PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,**

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly when JMSF Administrator Sheila Thomas referred to CWA Shop Steward Ed Nomejko as "a shop steward" or "Mr. Shop Steward" in a derisive manner in the presence of JJC education supervisor Tom Sawyer at a meeting concerning a safety and security concern on or about June 15, 2006.

Docket No. CO-2007-040

State of New Jersey (JJC)
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.
If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372