

H.E. No. 2010-6

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

In the Matter of

POINT PLEASANT BOROUGH,

Respondent,

-and-

Docket No. CO-2008-151

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 469 AND
JUDITH STODDARD,

Charging Parties.

SYNOPSIS

A Hearing Examiner recommends that the Commission find that Point Pleasant Borough did not violate N.J.S.A. 34:13A-5.4a(1) and (3) when it reduced the hours of tax clerk Judith Stoddard from full-time to part-time, thus removing her from the collective negotiations unit of full-time employees represented by Teamsters Local 469. The Hearing Examiner finds that the charging parties did not prove that the reduction in hours, and other personnel actions that were part of the record, were the result of hostility by the Borough or its representatives to any arguably protected conducted engaged in by Stoddard. The Hearing Examiner recommends that the Complaint 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.

H.E. No. 2010-6

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

In the Matter of

POINT PLEASANT BOROUGH,

Respondent,

-and-

Docket No. CO-2008-151

INTERNATIONAL BROTHERHOOD
OF TEAMSTERS, LOCAL 469 AND
JUDITH STODDARD,

Charging Parties.

Appearances:

For the Respondent,
Dasti, Murphy, McGuckin, Ultaky, Cherkos & Connor,
attorneys (Christopher Koutsouris, of counsel)

For the Charging Parties,
Richard C. Sciria, attorney

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 5, 2007, the International Brotherhood of Teamsters, Local 469 filed an unfair practice charge against Point Pleasant Borough alleging that the Borough violated N.J.S.A. 34:13A-5.4a(1) and (3)^{1/}, part of the New Jersey

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (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.

Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it first reduced, and then eliminated, the job of Judith Stoddard for the purpose of discouraging support of and/or membership in Local 469. Section 3 of the charge alleges:

Since on or about June 5, 2007 and continuously thereafter, [the Borough], a public employer within the meaning of the act has discriminated against employees whose exclusive representative for collective bargaining is Teamsters Local union No. 469, a labor organization, for the purpose of discouraging support of and/or membership in said labor organization. More specifically, by reducing and/or eliminating the job of employee Judith Stoddard, under the pretext of economic efficiency when its real purpose was to reduce the number of employees represented by said union and to protect the job of the daughter of Ms. Stoddard's direct supervisor, which job is not included in the unit the union represents.

The charge seeks Stoddard's reinstatement to a full-time position.

On July 8, 2008, a Complaint and Notice of Hearing was issued (C-1).^{2/} On May 28, 2008, the Borough filed an Answer and Affirmative Defenses denying the allegations of the Complaint and seeking dismissal of the charge. It asserts that the personnel actions taken with respect to Stoddard were an exercise of managerial prerogatives, were based on reasons of efficiency and

^{2/} "C" refers to Commission exhibits; "J" to joint exhibits; and "R" to Respondent's exhibits received into evidence at the Hearing. Transcript references identify the page and lines of testimony, e.g. (T.1-12 to T.2-15).

economy and were implemented with the express approval of the Department of Personnel, now the Civil Service Commission. It raises affirmative defenses, including that Stoddard failed to exhaust administrative remedies and that the charge is untimely.

On September 3, 2008, the parties agreed to hold the unfair practice charge in abeyance pending the outcome of a disciplinary proceeding in which the Borough sought to terminate Stoddard's employment. After the disciplinary proceedings concluded, the processing of the unfair practice charge resumed.^{3/}

During a pre-hearing conference held on August 17, 2009, counsel for Local 469 agreed to allow Stoddard's personal attorney, who had represented her during the Civil Service Commission appeal, to prosecute the unfair practice charge (C-3). Both parties also agreed to meet to work out a partial or complete stipulation of facts to be submitted on or before October 2, 2009. On that date the parties submitted this:

STIPULATION OF FACTS^{4/} (J-1)

1. Judith Stoddard was hired as an employee of the Borough as a tax clerk in the spring of 2003.

^{3/} On April 29, 2009, the Civil Service Commission approved Stoddard's voluntary withdrawal of her appeal from the termination of her employment.

^{4/} The stipulation covers some events that occurred after those recited in the charge. The charging party did not seek to formally amend the charge or the complaint. See N.J.A.C. 19:14-3.3. In addition, the stipulation has been edited to eliminate redundancy.

2. Stoddard was initially hired as a full-time employee.

3. Stoddard was hired as a civil service employee.

4. During Stoddard's employment, her supervisor was tax collector Bernadine Pearce.

5. Stoddard's job duties as a tax clerk included, but were not limited to, dealing with customers, receiving payments, providing information to the public, and answering phones.

6. Stoddard's position was reduced from full time to part time in June 2007.

7. Stoddard was a member of Local 469 until her full-time employment was reduced to part time.

8. Stoddard went on disability from April 2006 until August 2006.

9. Stoddard was never charged with any major disciplinary action by the Borough until her most recent charges resulting in termination from her employment.

10. On May 9, 2008 Stoddard was served with a preliminary notice of disciplinary action for removal by the Borough.

11. The preliminary disciplinary action notice contained eight separate charges and 279 specifications.

12. Stoddard had a hearing at the Borough concerning her disciplinary action on two separate dates, July 10, 2008 and September 3, 2008.

13. Stoddard received a final notice of disciplinary action on October 8, 2008 removing her from employment at the Borough of Point Pleasant effective on October 7, 2008.

14. Stoddard began receiving unemployment benefits effective immediately after her termination.

A hearing was held on October 17, 2009 at which the parties examined witnesses and presented documentary evidence. Post-hearing briefs were filed by January 11, 2010. Based on the record, I make these additional:

FINDINGS OF FACT

15. Prior to accepting a job with the Borough, Stoddard had worked for 25 years in banking. Her last position was Branch Manager/Assistant Vice President at the Bay Head branch of the Manasquan Savings Bank (T.101-1 to T.103-25). She then retired from the bank, but after a few years, her finances made her seek work. She took a part-time job at a garden center, but then sought a full-time position (T.103-24 to T.104-12).

16. Stoddard was hired into a vacant tax clerk position after the previous holder had been fired for stealing (T.123-6 to T.124-22). Stoddard was interviewed by Pearce and Borough Administrator David Maffei (T.166-16 to T.166-19). Pearce recommended that Stoddard be hired because of her 25 years of banking experience (T.166-20 to T.167-1). Stoddard was Maffei's second pick, but he backed Pearce's choice (T.208-1 to T.208-24).

17. Almost immediately, Stoddard had problems getting along with Pearce, her supervisor. Throughout her employment with the Borough, Stoddard consistently made work errors. These mistakes would have to be corrected by Pearce or other employees in the tax office (T.200-12 to T.201-14; T.202-1 to T.202-19). Over the course of her employment, Stoddard was frequently criticized by Pearce, both privately and in the presence of other employees (T.18-5 to T.20-18). Pearce chastised Stoddard for: making numerous work-related mistakes (T.19-6 to T.19-8; T.170-20 to T.173-21); for the manner in which she maintained her work area (T.15-18 to T.16-1); for having non-work related materials, including religious publications and prayer cards, and a "supermarket tabloid" in her work area (T.39-3 to T.40-4; T.135-18 to T.136-23); and for the timing and frequency of coffee and bathroom breaks and a perception that Stoddard would take a bathroom break just before noon only on days that Pearce was in the midst of her break, and would use a restroom out of Pearce's view, rather than one closer to Stoddard's work area (T.132-16 to T.134-24).

18. At the end of a workweek in February 2005, Stoddard, noticing how closely Pearce reviewed her transactions that day, became concerned that her cash drawer hadn't balanced out (T.18-5 to T.19-5). Although it turned out that a cash mistake had not been made on that occasion, Stoddard felt that she had to do

something to about Pearce's constant criticism of her (T.51-16 to T.52-8). She considered either going to Local 469 for help or meeting with Pearce individually. She opted for the latter (T.52-9 to T.52-21). After their chat, Stoddard felt the criticism lessened over the next few weeks (T.20-2 to T.20-18).

19. However, Pearce's criticisms of Stoddard soon returned to their prior frequency and tone, and, in May 2005, Stoddard decided to contact Local 469 for assistance (T.20-19 to T.21-3). On May 21, Stoddard met with Local 469 President Fred Potter at his home. She explained the workplace issues she was having and showed him related documentation (T.23-9 to T.23-25).

20. A meeting was held in June 2005 among Potter, shop steward Cathy Kelly, Stoddard and Borough Administrator David Maffei to discuss Stoddard's problems (T.24-2 to T.25-14). Topics of discussion included the manner Pearce criticized Stoddard's errors and her habit of frequently taking an extra bathroom break just before noon (T.24-20 to T.25-1).

21. Pearce was not present at the meeting but apparently learned about it before it took place. Stoddard testified that as of May 23, 2005, Pearce not only returned to the abusive manner in which she treated her, but increased the level of scrutiny of her work and the strident manner of rebukes and criticisms (T.25-4 to T.25-14). Although Pearce testified that she didn't think she treated Stoddard with any more animosity

following the meeting, (T.155-21 to T.155-24), I find that Stoddard felt that her work environment had grown substantially more uncomfortable. Pearce testified that she believed that Stoddard was trying to set her up for a harassment claim and was bothered that Stoddard was making allegations that were untrue (T.199-19 to T.200-11).

22. After the June 2005 meeting, Maffei instructed Pearce to maintain a written record of Stoddard's errors (T.25-15 to T.25-22; T.155-9 to T.155-14; T.176-19 to T.176-24).

23. Following Maffei's instructions, Pearce documented the errors in Stoddard's work (T.25-15 to T.25-22; T.203-22 to T.204-5; T.220-22 to T.221-22). Pearce was frustrated by Stoddard's mistakes and was hoping that the Maffei would take some action (T.178-20 to T.179-1). Pearce frequently spoke to Maffei about Stoddard's errors (T.203-18 to T.204-7).

24. In April 2006, Stoddard received a notice of minor disciplinary action calling for a three-day suspension because of her work errors (T.150-6 to T.150-22; T.204-8 to T.204-9; T.221-12 to T.222-15; R-7).

25. After receiving a notice setting the dates of her suspension, Stoddard was out of work for four months on a disability leave and the disciplinary suspension was never actually served (T.222-16 to T.222-22).

26. With Stoddard's hiring, there were four full-time tax clerks, the normal complement of employees in that job (T.156-20 to T.157-2). They were represented by Local 469 (T.222-16 to T.222-22). Pearce, a supervisor, was represented by the Transport Workers Union in a separate unit, and had been a shop steward for many years (T.148-5 to T.148-16).

27. Shortly before Stoddard's disability leave, the Borough sent one of its tax clerks to get advanced training, dropping the number of tax clerks to three and then, when Stoddard went on leave, down to two (T.156-15 to T.156-19; T.157-12 to T.158-13).

28. The tax clerk sent for advanced training took a higher position (tax collector) in another town and did not return to the Borough (T.157-12 to T.157-17). When there were only two clerks, Pearce added tax clerk work to her tax collector and supervisory duties and asked the Maffei about getting additional help as soon as possible (T.158-14 to T.158-21).

29. In July 2006, while Stoddard was still on leave, Eileen Barrett, Pearce's daughter, was hired as a part-time tax clerk working 18 hours a week. She continued as a part-time clerk after Stoddard's leave ended, up through the date of the hearing (T.31-1 to T.31-20; T.158-24 to T.160-11).

30. When Stoddard's leave ended, she returned to her full-time position (T.160-13 to T.160-25). Her work relationship with Pearce was unchanged (T.31-4 to T.32-16). Pearce continued to

document Stoddard's errors (T.32-17 to T.32-19; T.224-25 to T.225-7; R-7). In addition, Stoddard's workload declined (T.31-21 to T.32-5). Even though the other clerks did not want extra work, Pearce was reluctant to give Stoddard tasks that may have to be corrected after normal work hours because of Stoddard's habitual mistakes (T.177-12 to T.178-14).

31. During the early months of 2007, the Borough was exploring ways of coping with fiscal constraints (T.225-22 to T.226-21). In May, to avoid layoffs and reductions in hours, Maffei asked employees in various departments if they would be willing to take voluntary furloughs. Stoddard declined as did all other employees (T.34-1 to T.34-23; T.226-22 to T.227-18).

32. Maffei received a letter from the Department of Personnel (DOP) dated June 5, 2007, approving, with modifications of the advance notice and effective dates, a plan to reduce the hours of two clerks (R-8). The letter advised that Local 469 had been apprised of the DOP's approval of the prospective layoff.

33. Maffei signed a "General Notice of Layoff or Demotion," dated June 6, 2007, addressed to employees in the tax collector's office, advising them of the possibility that, for reasons of economy and efficiency, they may be laid off or demoted from their positions effective at the end of the workday on July 21 (R-2A). The notices refer, without further specificity, to the possibility that employees may have the right to displace other

employees and that their continued employment may be affected by standards relating to seniority, lateral displacement, demotion and re-employment as determined by the Department of Personnel.

34. Maffei signed an "Individual Notice of Layoff or Demotion," also dated June 6, 2007, addressed to Stoddard (R-2B). It advised that effective at the end of the workday on July 21, and for reasons of efficiency and economy, her work hours would be reduced to 18 hours per week. That change would take her out of the collective negotiations unit and leave her without health benefits except through COBRA (T.35-18 to T.35-25).^{5/}

35. Barbara Burns, a construction clerk in the Building Department, was also reduced to part-time status (T.71-24 to T.72-4). In addition, the Borough eliminated its senior citizen bus service and laid off the two-part-time drivers who had been assigned to it (T.226-11 to T.226-13).

36. On June 11, 2007, Stoddard completed and filed a grievance form, writing that her impending layoff (i.e. reduction to a part-time position) violated her rights and was unjust (R-5). On July 11, the Borough's solicitor wrote to Stoddard asserting that the issue was not grievable because the reduction

^{5/} I take administrative notice that COBRA is an acronym for the Consolidated Omnibus Budget Reconciliation Act that gives workers and their families who lose their health benefits the right to choose to continue group health benefits provided by their group health plan for limited periods of time under certain circumstances including reduction in work hours.

was a management prerogative based on reasons of economy and efficiency. His letter advised that any appeal of the action had to be made to the DOP (R-6).

37. A letter dated July 20, 2007 from the DOP to Stoddard advised that her name would be placed on a reemployment list for her title and that she had demotional rights to the position of part-time clerk. It also advised that she had a right to appeal the action within 20 days (R-3).

38. On May 5, 2008, Stoddard, along with Potter and Timothy Hott, Esq., counsel for Local 469, attended an exploratory conference conducted by a Commission staff member regarding this unfair practice charge (T.43-19 to T.44-5).

39. The specification accompanying the disciplinary charges filed by the Borough on May 9, 2008 seeking Stoddard's termination based on incompetence, concerned issues dating back to 2004 (T.44-6 to T.44-24). Stoddard appealed her termination to the Office of Administrative Law but it was subsequently withdrawn (T.93-18 to T.93-22).

ANALYSIS AND CONCLUSIONS

Based upon the following analysis I will recommend that the complaint be dismissed.

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 N.J.S.A. 34:13A-5.4a(3) and derivatively (1). A charging party must prove, by a preponderance of evidence on the entire record, that protected conduct was a substantial and motivating factor in the adverse personnel action. This may be done by evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile to 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 a pretext, there is sufficient basis for finding a violation without further analysis.^{6/}

An adverse personnel action may independently violate N.J.S.A. 34:13A-5.4a(1). The standard is whether the employer's actions had "the tendency" to interfere with an employee's protected rights and lacked a legitimate and substantial business justification. See e.g., Commercial Twp. Bd. Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

^{6/} 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. Bridewater at 242. This affirmative defense is not considered unless the charging party first proves, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action.

Although the unfair practice charge alleged that the Borough had engaged in discrimination in violation of N.J.S.A. 34:13A-5.4a(3) and (1), during the hearing and in its post-hearing brief, the charging party repeatedly characterized the Borough, primarily through the actions of Pearce, as having subjected Stoddard to a "hostile work environment." The charging party asserts in its post-hearing brief (p.5) that the record shows:

[T]hat the Borough of Point Pleasant engaged in a hostile work environment from the time [Stoddard] started until the time she was terminated. The transcript of the hearing shows overwhelming evidence that Ms. Stoddard was constantly criticized and harshly reprimanded for her mistakes rather than having proper oversight, training and guidance to improve her performance . . .

The Borough characterizes the charging party's case as consisting solely of its claim that Pearce's manner and tone of criticizing Stoddard was unacceptable. It argues that the charging party has not met its burden of showing, by a preponderance of the evidence, that Stoddard's reduction in hours, undertaken for reasons of economy and efficiency, was a pretext to cut the number of employees represented by Local 469.

The record shows that Pearce was "hostile" to Stoddard in a generic sense. To establish a violation of subsection 5.4a(3) and/or 5.4a(1), however, the charging party must prove that the "hostility" was directed at activity protected by the Act or that it has a tendency to coerce employees in the exercise of

protected rights. These events could arguably be activity protected by N.J.S.A. 34:13A-5.3:

1. Stoddard's meeting with Pearce in February 2005 about Pearce's treatment of Stoddard;
2. The meeting, with Stoddard present, among union officials Potter and Kelly and Borough Administrator Maffei in June 2005 about Pearce's treatment of Stoddard and the Borough's objections to the timing and manner of Stoddard's work breaks;
3. The taking of a four month disability leave by Stoddard from April to August 2006;
4. The grievance filed by Stoddard in June 2007 challenging the impending reduction of her position from full-time to part-time;
5. Stoddard's attendance at an exploratory conference on this unfair practice charge in May 2008 followed by the initiation of proceedings to terminate her employment.

Only Stoddard's 2007 reduction from a full-time employee to part-time status is alleged in the unfair practice charge as a violation of the Act.^{7/} Because it does not represent part-time jobs, Local 469 asserts that the reduction was unlawfully aimed

^{7/} Local 469 seek did not amend the complaint to include the events (including Stoddard's termination, initiated a few days after the conference on this charge) that occurred after Stoddard was reduced to part-time or to allege that Pearce's consistently hostile treatment of Stoddard was a continuing unlawful response to the protected activity occurring in 2005. As I conclude that the case should be dismissed, I need not determine if the complaint should be deemed to have been amended because allegations that were not specifically pleaded may have been fully and fairly litigated by both parties. See Roselle Bd. of Ed., P.E.R.C. No. 98-145, 24 NJPER 307, 309 (¶29147 1998).

at reducing union membership and protecting the part-time job of Pearce's daughter.

Assuming, arguendo, that all these actions, known to the Borough through its representatives, were protected by the Act and could be remedied, I find that the evidence does not prove that the Borough was hostile to them.^{8/}

It is undisputed that, shortly after beginning her job as a tax clerk, Stoddard performed below expectations. Her frequent mistakes had to be corrected by Pearce and/or other tax clerks and resulted in extra work and extra hours.

Stoddard was Pearce's first choice to fill the position left vacant by the tax clerk who had stolen tax payments. The record does not show why Pearce was so strident in criticizing Stoddard.

I need not divine the reasons behind their tense relationship because Pearce's hostility had no relation to activity protected by the Act. Evidence of personal animosity is insufficient to support a finding of illegally motivated personnel actions. Irvington Bd. of Ed., H.E. No. 2001-11, 27 NJPER 105 (¶32041 2001), aff'd 28 NJPER 157 (¶33055 App. Div. 2001); Fairview Bd. of Ed., P.E.R.C. No. 87-107, 13 NJPER 542 (¶18200 1987). While the record shows that Pearce urged Maffei

^{8/} Stoddard's meeting with Pearce in February 2005 and the June 2005 meeting among Stoddard, Local 469 officials and Maffei preceded the proposed, but not implemented, suspension by 10 months and the filing of the charge by two years.

to address the problems surrounding Stoddard, there is no evidence that those requests were motivated by anything other than Stoddard's poor performance and the impact it was having on other tax office personnel.

In 2006, after the number of clerks in the tax department quickly fell from four to two with the training and departure of one clerk, and Stoddard's four month disability leave, Pearce was forced to add tax clerk duties to her tax collector workload and, with the Borough's approval, hired her daughter as a part-time tax clerk. When Stoddard returned, she remained in her full-time position. Pearce's daughter continued as a part-timer because the tax office remained understaffed.

The charging party has failed to demonstrate that the Borough's 2007 plan, submitted to and approved by the DOP, to layoff two part-time bus drivers and reduce the hours of Stoddard and a clerk in another department from full-time to part-time, were based on anything other than financial constraints. Stoddard received a statement of her options as a civil service employee including the right to appeal the action, just before the reduction in hours became effective.

I also conclude that the Borough's actions did not tend to interfere with, restrain or coerce employees in the exercise of rights protected by the Act. The DOP approved the plan reducing

Stoddard and another employee to part-time hours because of efficiency and economy.^{2/} Those are valid operational reasons.

Local 469 has not substantiated its allegation that the real reason was to cut the number of employees in its negotiations unit. Local 469 only represents full-time employees. Any reduction of a position from full-time to part-time will necessarily reduce the number of employees Local 469 represents. Given these circumstances and absent proof of hostility to protected conduct, no inference of anti-union discrimination can be drawn from a reduction in positions from full-time to part-time. That action was approved by an administrative agency with jurisdiction to oversee the personnel actions taken by civil service jurisdictions.

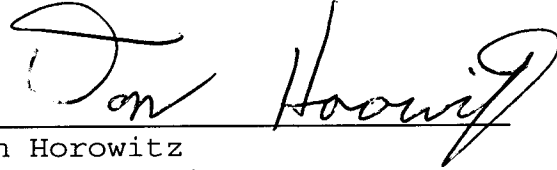
Finally, the close timing of the May 5, 2008 exploratory conference and the issuance, on May 9, of a preliminary notice of disciplinary action calling for Stoddard's termination is not sufficient to support a violation of the Act. The specifications accompanying the termination notice date back to 2004. The record is clear that, beginning in 2005, Pearce maintained a written log of Stoddard's errors. And, in 2006, the Borough attempted to discipline Stoddard for her poor performance but did not implement the three-day suspension when Stoddard went on a

^{2/} The record does not show whether Stoddard appealed that determination.

disability leave. Stoddard initiated an appeal after Borough finalized her termination but it was withdrawn.

RECOMMENDATION

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



Don Horowitz
Hearing Examiner

Dated: March 10, 2010
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 March 22, 2010.