

H.E. NO. 2011-9

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

In the Matter of

WEST NEW YORK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2009-452

WEST NEW YORK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss the 5.4a(1) allegation regarding an alleged threat made by a math supervisor against a math teacher finding that the Association had not met its burden of proof. She drew a negative inference from the Association's failure to call two witnesses and produce a corroborating writing. As to the allegation that the math supervisor told teachers at a department meeting that the issue of a master teacher was not a union issue and that they should keep it amongst themselves, the Hearing Examiner recommended that the Commission find that the Board violated 5.4a(1) of the Act.

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. 2011-9

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

In the Matter of

WEST NEW YORK BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2009-452

WEST NEW YORK EDUCATION ASSOCIATION,

Charging Party.

Appearances:

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

For the Charging Party,  
Oxford Cohen, attorneys  
(Gail Oxford Kanef, of counsel)

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

On June 4, 2009 and April 15, 2010, the West New York Education Association (Charging Party or Association) filed, respectively, an unfair practice charge and amended charge (C-1)<sup>1/</sup> against the West New York Board of Education (Respondent or Board). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et

---

<sup>1/</sup> "C" refers to Commission exhibits received into evidence at the hearing in this matter. "R" refers to Respondent's exhibits received into evidence at the hearing. The transcript of the hearing is referred to as 1T and 2T.

seq., specifically, 5.4a(1) and (3)<sup>2/</sup> when, on or about December 15, 2008, having learned that math teacher Janet Saito complained about her supervisor, Donna Mirabelli, to the Association, Mirabelli threatened Saito that if she ever went to the union to complain about her again, Saito would be sorry. Charging Party contends that Saito did not relay this December 15 threat to the Association until May 15, 2009 when she spoke to Association President Lois Tarr about it, because Saito felt intimidated by Mirabelli's threat.

Finally, Charging Party alleges that at an October 21, 2009 math department meeting and in response to teachers' questioning whether the role of the newly-hired master teacher violated the parties' collective negotiations agreement, Mirabelli told the teachers not go to the union and make the master teacher issue a union matter. It is alleged that Mirabelli's comment constituted a threat and intimidated the teachers.

On August 6, 2010, a Complaint and Notice of Hearing issued (C-1). On August 30, 2010, the Board filed its Answer generally denying that Mirabelli made the alleged statements or threatened

---

2/ 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."

Saito individually on December 15, 2008 or the staff at the October 21, 2009 department meeting (C-2). The Board raises various affirmative defenses, including statute of limitations.

At the pre-hearing conference conducted on January 5, 2011, Charging Party withdrew the 5.4a(3) allegation.

A hearing was held on March 8 and 22, 2011 at which the parties called witnesses and presented documentary evidence. I granted Respondent's request with the consent of Charging Party to sequester witnesses. The parties were permitted one resource person who was present throughout the hearing to assist counsel. Association President Lois Tarr was Charging Party's resource person, while Alan Roth acted as Respondent's resource person. Briefs were filed by April 25, 2011. Based on the record in this matter, I make the following:

#### **FINDINGS OF FACT**

1. The West New York Board of Education and the West New York Education Association are, respectively, public employer and public employee representative within the meaning of the Act. Similarly, Janet Saito is a public employee within the meaning of the Act (1T8).

2. Janet Saito is a special education math teacher employed by the Board since September 1992 (1T20). For approximately the last six years until June 2009, Janet Mirabelli, as District

Supervisor of Math in grades 7 through 12, was her direct supervisor (1T21).

3. Mirabelli has been employed by the Board since September 1973 (1T106). From 1973 until September 1994, she held the position of math teacher in the high school and was a member of the Association. Since then she has held the title of district supervisor of math, grades 7 through 12 (1T107-1T108).

From 1994 to 1997, Mirabelli held the position of treasurer under Lois Tarr who at that time was Association president (1T27).<sup>3/</sup> Sometime in 1997, the West New York Supervisor's Association was formed. As a supervisor, Mirabelli became a member of that unit and has held the position of president for the past seven and a half years (1T108).

For the past five years, Mirabelli has served on the executive board of the New Jersey Education Association (NJEA) and sits on the property and personnel committees. In October 2010, Mirabelli was elected to the board of directors of the National Education Association (NEA) (1T109-1T110). Mirabelli has attended workshops regarding what employer's can and cannot

---

<sup>3/</sup> Tarr who was hired as a teacher by the Board in September 1970 is currently on full-time relief from her teaching duties to serve as Association president pursuant to the parties' collective negotiations agreement (1T88). Tarr has been president for the last ten years and was previously president serving a separate three-year term (1T89).

do with respect to employees' union rights and denies prohibiting Saito from exercising her rights as a union member (1T120).

4. As Saito's primary supervisor, Mirabelli has never given Saito an "unsatisfactory rating" or recommended that Saito be disciplined (1T112, 1T116). In May 2008, Mirabelli gave Saito a teacher evaluation based on an April 16 classroom evaluation (R-1; 1T43-1T44). Out of 36 categories, Saito received 34 ratings of "satisfactory" and two ratings of "improvement needed." Among the categories in R-1, Mirabelli gave Saito a "satisfactory" in "complies w/district dress code" (R-1).

In the teacher comment area, Saito wrote that April 16 was the day she returned to school after being absent on sick leave for a couple of days due to a migraine. Saito further commented that she was surprised when Mirabelli came to her classroom to observe that day and that she (Saito) was extremely nervous and still had a headache. As a result, Saito explained, she was not as organized as she usually was because of her absence (R-1).

Saito feels that Mirabelli's April 16 observation was a continuation of the harassment that she has experienced over the years from Mirabelli, who, Saito believes, unfairly judges her performance on the job (2T26-2T27, 2T29). For instance, the observation (R-1) includes several statements that Saito disagreed with, including that her cell phone rang during a lesson, that she needed to write out her lessons to avoid

disorganization and that Saito needs to use hands on activities to motivate her students (2T30-2T31). Saito, however, did not mention these items, that she considered to be harassing, in her commentary to R-1 (R-1; 2T33).

5. Beginning in and continuing throughout the fall of the 2008-2009 school year, Saito states that Mirabelli commented regularly that she should not wear open-toed shoes as that violated the district dress code (1T23, 2T19). Saito explained to Mirabelli that she had a doctor's note permitting her to wear sandals and that the note was in the principal's office (1T23). According to Saito, despite her explanation for the footwear, Mirabelli continued to question her about the shoes and suggested that Saito did not have a doctor's note (1T23). Indeed, Saito relates that Mirabelli was coming into her classroom daily to complain loudly in front of her students about Saito's open-toed shoes, stating that Saito should know better (1T92).

6. Mirabelli generally denies harassing Saito about her footwear and specifically denies going into Saito's classroom and observing what shoes she was wearing or yelling at Saito in front of her students (1T120). She testified that Saito's classes were on a different floor in the high school building from Mirabelli's office on the second floor (1T119). Mirabelli admits, however, that she commented to Saito somewhere between one and three times

about her footwear not being appropriate in the fall of 2008, although she never put those concerns in writing (1T133).

Whether Mirabelli came into Saito's classroom on a daily basis to complain about Saito's footwear or commented several times to Saito about it, is immaterial. Saito viewed Mirabelli's actions as harassment.

7. As a result of Mirabelli's comments, however, Saito went to another doctor and got a second note about her medical condition and also retrieved a copy of the original doctor's note (1T23-1T24). It is unclear from the record when Saito got the second note or if she showed it to Mirabelli. Mirabelli testified that she only learned from Principal Sanchez about Saito's medical excuse and his approval of an accommodation for Saito to wear open-toed shoes in January 2009 (1T128, 1T130-1T131).

Saito's and Mirabelli's testimonies are not mutually exclusive. There is a difference between Saito showing Mirabelli proof of her medical condition, and Mirabelli confirming with the principal that she had an accommodation. Also, whether Mirabelli went into Saito's class to complain about her footwear on a daily basis or complained to her elsewhere is immaterial. Mirabelli admits challenging Saito about the footwear that violated the district's dress code. In Saito's opinion, Mirabelli's comments constituted harassment since Saito had a medical note, approval



of the principal to wear the open-toed shoes and Mirabelli continued to comment about the inappropriateness of Saito's shoes (1T24).

8. In any event, Saito got tired of what she viewed as Mirabelli's harassing behavior - e.g. her continuing to question Saito about her footwear. In the beginning of December 2008, sometime before December 15, Saito spoke to Association Building Representative Michael Cordasco and asked him to go the Board to register a complaint about Mirabelli's behavior toward her (1T22, 1T51-1T52). Saito doesn't know if Cordasco ever brought her complaint about Mirabelli to the Board, but was under the impression that he was intercepted before he could do so.<sup>4/</sup> She also doesn't know if Cordasco ever went to Mirabelli with her complaint, but does not believe he took her complaint anywhere (1T25, 1T52-1T53). Cordasco did not testify.

9. On December 15, 2008, Saito states that Mirabelli came to her and told her that if she ever went to the union again she would be sorry (1T25). Although Saito has been a member of the Association since 1992 and is familiar with her rights as a union member, including her right to file a grievance, she did not tell Association President Tarr at that time what Mirabelli said to her (1T32-1T33). Moreover, even though Saito is tenured and understands that the Board would have to go through a formal

---

<sup>4/</sup> I do not find as a fact that Cordasco was intercepted. This is speculation on the part of the witness.

process to terminate her, Saito was afraid of Mirabelli and, in particular, that she would be fired (1T31, 1T37-1T38).

10. At some point in December 2008, either before or after the December 15 incident with Mirabelli, Saito also complained to science supervisor Mary Anne Cinque about Mirabelli, namely, that she was tired of being harassed by her. Saito does not recall telling Cinque the details of the harassment, but she asked Cinque if she could transfer the following year into her department (1T27-1T28, 1T90). Cinque did not testify.

11. Saito states she also spoke to her principal regarding her concerns about Mirabelli and the harassment related to her wearing open-toed shoes. Saito does not recall if the conversation was in 2008 or when this conversation occurred (1T46). Principal Sanchez did not testify.

12. Saito never filed a grievance or written complaint about Mirabelli before December 15, 2008 regarding the issue of her footwear (1T47). Indeed, according to Saito, even though Mirabelli treated her severely in the past over other issues, Saito never filed a grievance or written complaint about what she considered to be harassing treatment (1T50).

13. Cinque spoke to Tarr at the end of March about Saito's concerns regarding Mirabelli. As a result, Tarr telephoned Saito at the beginning of April 2009 to discuss it (1T30, 1T90). This was the first time Tarr heard about any issue between Saito and

Mirabelli. Cordasco had never contacted her about the Saito/Mirabelli situation (1T97-1T98). This was also the first time Saito learned that Cinque reported her complaint about Mirabelli to Tarr (1T29).

14. When Tarr called Saito, Saito told Tarr that she didn't know if she wanted to pursue the issue regarding Mirabelli, because she (Saito) was afraid of what would happen (1T101). Saito felt that Mirabelli could make her life more miserable, and she could not take anymore harassment. In the end, however, Saito decided to speak to Tarr because she just had enough (1T31, 1T101-1T102).

15. Tarr listened to Saito who explained that Mirabelli was coming into her classroom daily to complain loudly in front of her students about Saito's open-toed shoes, stating that Saito should know better. Saito also related to Tarr that Mirabelli embarrassed her at a faculty meeting about where she was sitting and yelled at her generally about a variety of issues in Saito's classroom (1T91-1T92).

16. During the conversation, Saito testified that she told Tarr about Mirabelli's December 15 comment. Tarr testified that Saito did not inform her about the comment until a couple of days later in a written statement Tarr asked Saito to provide (1T30, 1T42, 1T92). After reading what Saito had written, in particular about the December 15 comment, Tarr called her a couple of days

later to discuss it (1T94-1T95). Once Tarr confirmed the December 15 Mirabelli comment with Saito, she then called the NJEA office and her attorney about filing an unfair practice charge (1T95).

I credit Tarr that she first learned about the specific allegation regarding the December 15 Mirabelli threat when she read the writing Saito provided. Saito's testimony was vague as to when her conversations with Tarr took place and what was said during each conversation (1T29-1T30).<sup>5/</sup>

17. Mirabelli denies threatening Saito about her making a complaint to the union and, specifically, denies that either Cordasco or Cinque told her about Saito's complaints to the Association (1T116-1T118). Mirabelli knows Cordasco is a building representative and works in the administrator's office on the 3<sup>rd</sup> floor of the high school (1T117). On direct, Mirabelli testified that Cordasco never advised her that Saito made complaints regarding Mirabelli either before or after December 2008 (1T117-1T118). On cross, however, Mirabelli

---

<sup>5/</sup> The charge (C-1) asserts that Saito contacted Tarr on or about May 15, 2009 telling her for the first time about Mirabelli's threat. These allegations do not conform to Tarr's testimony, namely that Cinque telephoned her about the Mirabelli/Saito situation at the end of March 2009 and that she (Tarr) then telephoned Saito about it at the beginning of April. The dispute as to the timing is not critical in that there is no disagreement that Saito did not involve Tarr until months after the alleged December 15 comment. Tarr and Saito both testified that Tarr telephoned Saito and then Saito told her about Mirabelli's harassment and then provided a written statement.

testified that she doesn't think she spoke to Cordasco about Saito wearing open-toed sandals or about Saito being concerned about Mirabelli speaking to her about the footwear, because she does not recall speaking to him (1T133-1T134). This is neither an admission nor a denial. Mirabelli's testimony is equivocal.

Charging Party did not call Cordasco to testify regarding whether or not he spoke to Mirabelli about Saito's complaints before December 15, namely that Mirabelli was harassing her. When a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. State v. Clawins, 38 N.J. 162, 170 (1962). For a negative inference to be drawn, the witness must be within the power of the party to produce and the proffered testimony must be superior to that already in evidence with respect to the fact to be proved. Id. at 171.

Here, Cordasoco, as Association building representative, is within Charging Party's ability to produce and may reasonably be assumed to be favorably disposed to the Association. His testimony is critical to establishing that Mirabelli was aware of Saito's complaints about her before December 15, 2008 when the alleged threat was made. Knowledge that Saito complained about her to the union is critical to establishing that the threat was made. Otherwise, Mirabelli's statement to Saito, warning her not

to go to the union "again" with complaints about her, is illogical. Without Cordasco's testimony establishing that he passed on Saito's complaints to Mirabelli, I do not find that he did.

Additionally, in determining whether or not to credit Saito or Mirabelli as to whether the December 15 threat was made, I draw a negative inference from Charging Party's failure to call Cinque to testify as to what Saito told Cinque about Mirabelli's harassment. Cinque could have been produced. Although Cinque is a supervisor like Mirabelli, Cinque was apparently disposed to sympathize with Saito's plight, because she eventually passed on Saito's concerns to the Association president at the end of March 2009.

Moreover, although Saito's testimony was vague concerning when in December 2008 she spoke to Cinque about Mirabelli, if Saito spoke to Cinque before December 15, Cinque could have testified as to whether or not she passed on Saito's complaints to Mirabelli, thus, lending credibility to Saito's testimony. Specifically, if Mirabelli had knowledge before December 15 that Saito complained to Cinque, then Mirabelli's alleged threat about Saito complaining "again" would be somewhat logical. In any event, the Saito/Cinque conversation was close enough in time to the December 15 conversation that Cinque's testimony would be

valuable to corroborate Saito's testimony generally as to what, if anything, Mirabelli stated to Saito.

Finally, the only other corroborating witness was Tarr who related what Saito told her in April 2009 about their December 15 conversation months after the incident. At that time, Tarr asked Saito to put her complaints about Mirabelli in writing which she did a few days later. When Tarr reviewed Saito's written statement, it was the first time she learned about what Mirabelli had threatened on December 15 (1T94-1T95). Tarr admitted that she retained the writing, but it was not produced at the hearing (1T100). I, therefore, draw a negative inference from Charging Party's failure to produce corroborating evidence by way of the written statement Saito provided to Tarr in April 2009. If the writing had conformed to Saito's testimony, it would have served as an additional corroborating piece of evidence and weighted the testimony about the December 15 threat in favor of Saito.

Tarr's testimony was too remote in time from the December 15 incident to overshadow Mirabelli's denial or the negative inferences drawn from the failure to produce two witnesses as well as Saito's written document. Accordingly, based on the failure to call Cordasco and Cinque and to produce Saito's written statement to Tarr, I cannot credit Saito's testimony about what, if anything, Mirabelli said to her on or about December 15, 2008 regarding Saito's complaints to the union.

Specifically, I do not find that on or about December 15, 2008, Mirabelli threatened Saito that if she complained to the union again about her, Saito would be sorry.

**October 21, 2009 Math Department Meeting**

18. Esta Heilberger was hired by the Board as a math teacher in September 1998 (1T59-1T60). Since then, she has been assigned to work in Mirabelli's math department under her supervision (1T60).

19. Constance Lacroce was hired by the Board in September 1993 as a math teacher (1T73). Mirabelli is also her direct supervisor (1T74). Lacroce has not had good relations with Mirabelli for at least 10 years (1T78, 1T82).

20. Heilberger and Lacroce attended the October 21, 2009 math department meeting. There were 14 math department teachers in attendance (1T60, 1T66, 1T74). Mirabelli conducted the meeting which lasted approximately one hour and took place during the school day (1T61).

21. At the meeting, Mirabelli discussed Kelly Jameson who had been hired as a master teacher. Mirabelli explained that Jameson would be coming to the math teachers' classes to observe them throughout the school year (1T61).

22. According to Heilberger, no one verbally responded to Mirabelli's comments about the master teacher, but the staff was looking at each other while Mirabelli was talking about the



master teacher's role (1T62). Heilberger then testified that Mirabelli stated "please let's not make this a union issue. Let's keep this amongst ourselves" (1T62).

Heilberger is not sure why Mirabelli thought that the staff would make the master teacher issue a union issue, but felt Mirabelli's statement was prompted by the staff looking at each other (1T62). According to Heilberger, nothing else was said during the meeting about the master teacher, although other topics were discussed (1T63).

At the end of the October 21 meeting Heilberger did not feel threatened by Mirabelli, she just wanted to get information about the master teacher (1T68, 1T70).

23. Lacroce confirms that Mirabelli spoke at the October 21 meeting about the master teacher who was going to be observing their classes. According to Lacroce, this was a new concept (1T74, 1T76). Lacroce doesn't remember if anyone questioned Mirabelli or asked for clarification about the information Mirabelli was conveying to them nor does Lacroce recall anyone mentioning the union in this regard (1T77). Lacroce, however, recalls Mirabelli telling the group that she didn't want the master teacher to be a union issue (1T75, 1T77).

After hearing this comment, Lacroce looked at Mirabelli "kind of weird," because she didn't think it was a union issue (1T77-1T78, 1T84). Although Lacroce agreed with Mirabelli that

the master teacher issue was not a union matter, Lacroce felt that Mirabelli should not be telling the staff when an issue is a union matter or not (1T84, 1T86).

On direct, Lacroce described Mirabelli's tone when making this comment as threatening (1T78). On cross, Lacroce modified her testimony describing Mirabelli's tone of voice as strong or forceful rather than threatening (1T85). Lacroce confirmed that Mirabelli never said that if the teachers went to the union they would be fired (1T85). I find that Mirabelli's tone was not threatening.

Lacroce did not speak up at the October 21 meeting because Mirabelli always brushes her off and has been doing so for the last ten years (1T78, 1T82). Because Lacroce is unhappy being brushed off, she has stopped making comments during department meetings (1T84).

24. Lacroce did not contact Tarr after the meeting, because she knew that Heilberger was going to speak to Tarr and would fill Lacroce in with any information (1T78). Likewise, Lacroce never filed a grievance regarding Mirabelli's October 21 statement because Lacroce tries not to make waves (1T79). Her feeling was that she often gets bad schedules, but her schedules could always get worse (1T79-1T80). Although Lacroce concedes that she doesn't know what in-put Mirabelli has in the type of student she gets, the type of student is dependent on the type of

class she is assigned - e.g. general math class (1T81).

Presumably, Mirabelli assigns the classes to the math teachers.

25. Two days after the October 21 meeting, Heilberger contacted Tarr for information about the master teacher, specifically what role the master teacher was to play and whether the observation by the master teacher would count as the 40-minute yearly observation (1T62-1T63, 1T68-1T69). Heilberger did not call Tarr to tell her that she felt threatened by Mirabelli. Heilberger just wanted information (1T68).

26. Tarr called Heilberger back and gave her the information she sought about the master teacher (1T69). Heilberger did not ask Tarr to file a grievance about what Mirabelli said at the meeting or pursue the matter further, because Heilberger decided that she got the information she needed and because she had never previously become involved with anything like this controversy (1T64-1T65).

27. Mirabelli denies the statement attributed to her at the October 21 meeting as testified to by Heilberger and Lacroce. Mirabelli states that she previously introduced master teacher Kelly Jameson at the September 2009 math department meeting and explained to the staff that the Board hired her as a master teacher and what her role would be. Master teachers are supposed to primarily assist non-tenured teachers, but can help tenured teachers, if necessary (1T121).

Mirabelli recalls explaining during the October 21 meeting that Jameson would be visiting the veteran teachers to steal any good ideas she observed. Those ideas would be shared with the non-tenured teachers who in 2008-2009 made up approximately one third of the math department staff (1T122-1T123). There had been master teachers in other subject areas but not in the math department (1T121). Mirabelli admits using the word "observe" when explaining what Jameson would be doing (1T122, 1T136).

28. The October 21, 2009 department meeting was one of two department meetings that month (1T121). Before the meeting, someone told Mirabelli that staff had contacted the union about the master teacher (1T132, 1T137).

Mirabelli states that many of the teachers present at the meeting raised concerns about the master teacher (1T123). Her testimony in this regard was confusing and vague. At first Mirabelli testified that two teachers at the October 21 meeting told her they had gone to Tarr to complain about the master teacher sitting in their classroom to observe (1T123). Then Mirabelli testified that one teacher came to her before the meeting to tell her privately that she had gone to the union about the master teacher issue, but that teacher was not at the October 21 meeting (1T124). Mirabelli testified, however, that a teacher at the meeting stated that they didn't like the master teacher observing them so they had gone to the union (1T125).

Mirabelli did not recall who made that statement (1T124-1T125). Mirabelli recalls responding "I don't see this as a union issue because she's one of your members. And she's visiting. She is not evaluating you as teachers" (1T125).

On cross, Mirabelli was asked whether she told the teachers at the meeting to keep the master teacher issue amongst themselves. She responded:

I have to tell you the truth, I do not remember saying 'keep it among ourselves.' I remember saying that I didn't see this as a - I don't see this as a union issue, strictly because she's one of your members. And she's not here to evaluate you. She's here to help the non-tenures [1T137].

29. This testimony is contrary to Lacroce's and Heilberger's who both testified that none of the staff commented when Mirabelli was discussing the master teacher, but were looking at each other, and that Mirabelli's comment - "please let's not make this a union issue. Let's keep this amongst ourselves" - was, therefore, gratuitous. Both witnesses testified credibly.<sup>6/</sup>

---

<sup>6/</sup> Although Heilberger's and Lacroce's testimony was not identical, their versions were substantially similar. For example, Heilberger testified that no teachers commented while Mirabelli was explaining the master teacher's role. Lacroce did not remember any teacher commenting. Both testified to staff looking at each other during Mirabelli's presentation. Lacroce confirmed that she looked at Mirabelli "kind of weird." Heilberger testified that Mirabelli's comment about the union was not in response to any teacher's comment. Lacroce did not recall any teacher commenting about the union.

30. Respondent called one other witness to testify as to the October 21 meeting. Louis DeNoia was hired by the Board 38 years ago as a math teacher assigned to the high school and has been a member of the Association for his entire tenure with the district. DeNoia held offices with the Association as a treasurer and president in the mid-1980s. As a former Association president, he is a lifetime member of the Association executive board and is a current building representative (2T6-2T7). As a building representative, he has the authority to bring to the attention of the Association president any situation that he feels should be grieved (2T8).

31. DeNoia attended the October 21 math department meeting (2T8-2T9). He recalls Mirabelli discussing the master teacher who, she explained, would be observing techniques of different teachers. DeNoia recalled that some teachers objected to Jameson sitting in their classrooms. DeNoia specifically did not recall any teacher saying that they were going to or had gone to the union to discuss the master teacher issue. He also did not recall Mirabelli discussing the union (2T11). After the meeting, DeNoia did not feel that Mirabelli had said or done anything threatening or that would prohibit him from going to the Association (2T12, 2T14-2T15).

DeNoia's testimony refutes Mirabelli's testimony that the teachers raised the union issue first to which Mirabelli

responded with her opinion that it wasn't a union matter. His testimony corroborates Heilberger and Lacroce to the extent DeNoia did not recall the teachers bringing up the union issue. However, DeNoia testified that he also did not recall Mirabelli discussing the union. Mirabelli admits that she did. His testimony was not reliable in this regard.

Accordingly, to the extent that DeNoia's testimony is inconsistent with Heilberger's and Lacroce's as to what, if anything, Mirabelli stated at the meeting about the union, I credit their testimony, namely that Mirabelli herself brought the union into the discussion, telling the teachers that the master teacher was not a union issue, not to make it a union issue and to keep it amongst themselves. On cross examination, Mirabelli did not deny stating that the teachers should keep the master teacher issue amongst themselves, she did not recall whether she did or not (1T137). Mirabelli's testimony is not sufficient to refute Heilberger and Lacroce in this regard.

The fact that Respondent's witness, DeNoia, did not feel that anything Mirabelli said at the meeting prohibited him from going to the Association is not dispositive. His testimony does not refute Heilberger's or Lacroce's as to what Mirabelli said nor does his testimony corroborate Mirabelli's.

**ANALYSIS**

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

Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998); Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exposition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). The Charging Party need not prove an illegal motive. Orange Bd. of Ed., citing Hardin, The Developing Labor Law, at 75-78 (3<sup>rd</sup> ed. 1992). However, an employer may express opinions about unions so long as the statements are not coercive. Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981). The cases must balance the employer's right to free speech with the employees' rights to be free from coercion, restraint or interference in the exercise of protected activities. County of Mercer and PBA Local #167, P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985). The Commission considers the total context of the situation and evaluates the issue from the standpoint of employees over whom the employer has a measure of economic power. Id. See also NLRB v. E.I. DuPont de Nemours, 926 F.2d 538, 118 LRRM 2014, 2016 (6<sup>th</sup> Cir. 1984).



Here, there are two statements allegedly made by Math Supervisor Donna Mirabelli that are at issue. The first is a statement Mirabelli allegedly made to Math Teacher Janet Saito on December 15, 2008. The conversation was between Mirabelli and Saito with no witnesses to the conversation. Saito testified that Mirabelli cautioned her that if she (Saito) ever complained to the union again about her, she would be sorry. Mirabelli denies making the December 15 threat. Basically, Saito's and Mirabelli's testimony is at equipoise regarding whether or not Mirabelli made the December 15 statement.

The threat attributed to Mirabelli presumes that she knew about Saito's complaints to the union. Mirabelli testified that Building Representative Cordasco did not tell her about Saito's complaints or, at least, that she does not recall his doing so. I found this testimony equivocal. Knowledge of Saito's complaint about Mirabelli is critical to determining whether or not Mirabelli made the threat, because she could not have warned Saito against going to the union again, if she had no knowledge of her going to the union in the first instance. Neither Saito or Association President Tarr knew if Cordasco related the complaint to Mirabelli. In fact, Saito does not think he took her complaint anywhere.

Charging Party did not call Cordasco to refute Mirabelli on this critical issue of knowledge of Saito's complaints. I drew a

negative inference from Charging Party's failure to do so. Cordasco's testimony could establish whether or not Mirabelli knew about Saito's complaint. Accordingly, I found that Mirabelli had no knowledge of Saito's complaint to the union making it highly unlikely that she made the December 15 threat as testified to by Saito.

I also drew a negative inference from the failure of Charging Party to call Supervisor Cinque to whom Saito complained about Mirabelli sometime in December 2008, either before or after December 15. The conversation with Cinque could have corroborated the nature of the alleged harassment by Mirabelli and, depending on when the conversation with Cinque took place, that the threat was made. If Saito spoke to her before December 15, Cinque might have been able to corroborate that Saito had made a complaint to Cordasco. If Saito spoke to Cinque after December 15, Cinque might have been able to corroborate that the threat by Mirabelli was made. In either event, Cinque's testimony about a conversation with Saito, contemporaneous in time to the alleged threat, could corroborate Saito's testimony that the December 15 threat was made.

Finally, I drew a negative inference from Charging Party's failure to produce a corroborating writing which Saito gave to Association President, Tarr in April 2009. Tarr first learned of the Saito's problems with Mirabelli at the end of March 2009 from

Cinque. Tarr spoke to Saito shortly thereafter and asked her to put her complaints about Mirabelli in writing which Saito did. The December 15 threat was supposedly related for the first time in that writing. Tarr testified that she has the written statement, but did not produce it at the hearing.

Charging Party has the burden of proving the allegations in its charge by a preponderance of the evidence on the record. A review of the evidence supports that Charging Party has not met its burden as to the Saito/Mirabelli threat. Where two witnesses' testimonies (Saito's and Mirabelli's) are at equipoise, the negative inferences drawn from Charging Party's failure to call corroborating witnesses - Cordasco and Cinque - and its failure to produce a corroborating written statement prepared by Saito that was in Tarr's possession prevents Charging Party from meeting its burden in this instance. Accordingly, I find no violation attached to the allegation regarding the December 15 threat, because Charging Party has not proven that the threat was made.

Next, Charging Party asserts that Mirabelli's statement to 14 teachers at the October 21, 2009 math department meeting independently violated 5.4a(1) of the Act. In this instance, Charging Party met its burden of proving that Mirabelli told the 14 teachers that they should not make the master teacher a union issue and to just keep it amongst themselves. Here, unlike the

Saito allegation, there were two credible witnesses to the conversation, namely teachers Heilberger and Lacroce who attended the meeting. They testified that Mirabelli stated that the master teacher issue was not a union issue, the teachers should not make it a union issue and that they (the teachers) should keep it amongst themselves. Mirabelli did not deny stating that the master teacher was not a union issue, but as to whether she also told the teachers to keep it amongst themselves, Mirabelli did not recall making this statement. Her testimony does not outweigh Heilberger's and Lacroce's recollections of the meeting.

Also, unlike the Saito allegation, Mirabelli had knowledge before the October 21 meeting that some of the teachers had complained to the Association about the master teacher, a new role in the department. This knowledge lends additional support to the teachers' testimony that Mirabelli was addressing what she viewed as unwarranted concerns regarding the master teacher issue and the parties' collective agreement and that Mirabelli suggested they keep the issue amongst themselves, not wanting unnecessary interference from the Association.

Based on the record, I found that Mirabelli gratuitously addressed the teachers' concerns about the master teacher, that her statements were not in response to questions raised first by a teacher or teachers at the meeting. Mirabelli volunteered that the master teacher was not a union issue, didn't want it to be a

union issue and suggested that the teachers keep it among themselves. However, whether or not Mirabelli made her remarks gratuitously or in response to questions, is immaterial, because Mirabelli's statement was not merely the expression of her opinion, but a suggestion not to pursue the matter with the union. Regardless of the earnestness of Mirabelli's belief that the master teacher was not a union issue, her statement - let's keep this amongst ourselves - referring to the master teacher issue, when objectively viewed, had a tendency to discourage her audience of subordinates from going to the Association about it.

Moreover, even though I found that her statement was not made in a threatening tone and that some teachers (Heilberger, Lacroce and DeNoia) may not have felt threatened, Mirabelli's statement could have been coercive to some, if not all, of the teachers present at the meeting over whom Mirabelli, as their supervisor, exercised a measure of economic power. Black Horse. This would be particularly true for the non-tenured teachers who made up approximately one-third of the math department staff. For instance, as a former Association president, Mirabelli's statement might not have the same subjective impact on Respondent's witness DeNoia as for other attendees at the meeting, such as non-tenured teachers. Basically, Mirabelli was speaking to a captive audience of subordinates. Mirabelli was not dealing with these teachers as equals. The tendency of the

employer's conduct to interfere with protected rights and not its result or motivation is the threshold issue. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983).

Accordingly, Mirabelli's statements at this meeting had a tendency to interfere with the teachers protected rights, namely the right to discuss any issue of concern with the Association. This interference was confirmed by Lacroce's testimony. Upon hearing Mirabelli's comments about the union, Lacroce felt Mirabelli had no right to tell teachers what is or is not a union issue or when teachers could go to the Association about any issue. Lacroce's conclusion in this regard was correct.

The fact that Mirabelli is currently and has been a long-time union member and officer and that she has attended training in union rights does not establish that she acted or spoke appropriately at the October 21, 2009 meeting. It only establishes that she should have known better.

#### **CONCLUSIONS OF LAW**

The West New York Board of Education did not violate 5.4a(1) of the Act regarding the December 15 threat allegedly made by math supervisor Donna Mirabelli to math teacher Janet Saito.

The Board violated 5.4a(1) of the Act when math supervisor Mirabelli stated to math teachers at a October 21, 2009 math

department meeting that they should not make the master teacher issue a union matter and told them to keep it amongst themselves.

**RECOMMENDED ORDER**

I recommend that the Commission dismiss the 5.4a(1) allegation regarding the December 15 threat allegedly made by math supervisor Donna Mirabelli to Math Teacher Janet Saito.

I recommend that the Commission ORDER that:

A. Respondent Board cease and desist from:

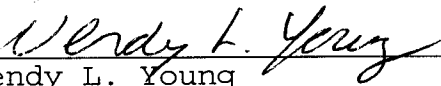
1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by the Act, particularly when math supervisor Mirabelli stated to math teachers at a October 21, 2009 math department meeting that they should not make the master teacher issue a union matter and told them to keep it amongst themselves.

B. Respondent Board take the following affirmative 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.

  
Wendy L. Young  
Hearing Examiner

DATED: April 29, 2011  
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 May 11, 2011.





# 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 math supervisor Mirabelli stated to math teachers at a October 21, 2009 math department meeting that they should not make the master teacher issue a union matter and told them to keep it amongst themselves.

Docket No. CO-2009-452

West New York Board of Education  
(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