

H.E. NO. 2011-12

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

In the Matter of

PASSAIC COUNTY SUPERINTENDENT  
OF ELECTIONS,

Respondent,

-and-

Docket No. CO-2009-493

COMMUNICATION WORKERS OF AMERICA  
AFL-CIO LOCAL 1032,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends that the Commission find that the Passaic County Superintendent of Elections violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-5.4a(1) and (3) by eliminating warehouse technician positions and terminating four employees in retaliation for the technicians' pursuit of grievances. The Hearing Examiner also finds and recommends that the Superintendent's proffered business justification was pretext. The Hearing Examiner recommends that the Superintendent be ordered to offer reinstatement and back pay to the technicians.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which 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,  
Genova Burns and Gantomasi, PA attorneys  
(Brian Kronick, of counsel)

For the Charging Party,  
Weissman and Mintz, PA, attorneys  
(Ann Marie Pinarski, of counsel)

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

On June 30, 2009, Communications Workers of America, AFL-CIO, Local 1032 (CWA) filed an unfair practice charge with the Public Employment Relations Commission (Commission) alleging that the Passaic County Superintendent of Elections (Superintendent) violated 5.4a(1) and (3) of the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.<sup>1/</sup> CWA alleges

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the  
(continued...)"

that the Superintendent illegally terminated four voting machine technicians in June, 2009 in retaliation for their protected activities by the filing of grievances and pressing a claim for overtime pay. The Charge seeks as a remedy that the four employees be reinstated to their former positions with full back pay and that the Commission issue a cease and desist order.

On October 7, 2009, the Director of Unfair Practices issued a Complaint and Notice of Hearing and hearings were scheduled. The Employer filed an Answer to the Charge on October 16, 2009, admitting that the Union filed certain grievances but denying all other factual allegations. Thereafter, the parties mutually agreed to hold the Charge in abeyance and instead proceeded with the same issue in arbitration. Arbitrator John Simmelkjaer issued his opinion and award on May 14, 2010 (CP-5). The Employer appealed the Award to the Superior Court and the court set the award aside and found that the Commission has primary jurisdiction over claims that employees were terminated in retaliation for activities protected by the Act.

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1/ (...continued)  
rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."

On January 19, January 20, February 4, March 3, March 4 and March 10, 2011 I conducted hearings.<sup>2/</sup> The parties presented testimony and documents during the hearings. Both parties filed post-hearing by May 16 and reply briefs by May 23, 2011.

Based on the record, I make the following:

#### FINDINGS OF FACT

The Superintendent of Elections is a statutory officer pursuant to N.J.S.A. 19:32-1 and is appointed by the Governor for a term of five years. In April 2005, Laura Freytes was appointed as Superintendent of Elections of Passaic County (4T28).<sup>3/</sup> Rudy Filko was her predecessor and Freytes served as his deputy superintendent for five years (4T17-4T18). The Office of the Superintendent of Elections conducts all primary and general elections in the County, as well as municipal elections and school board elections. There are six or seven elections a year (4T20).

Reporting to Freytes are 11 election clerks, three investigators, and, until 2009, four voting machine technicians (4T19). The four voting machine technicians were Elvin Sanchez,

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<sup>2/</sup> The transcripts of the hearing are referred to as "1T-through 6T," respectively; the Commission's exhibits are referred to as "C-"; CWA's exhibits are referred to as "CP-"; and the Superintendent's exhibits are referred to as "R-".

<sup>3/</sup> At the time of the hearing, Freytes' term had expired and she was in holdover status (4T128).

Robert Tomczyk, William Malave and George Dowd. All are represented by CWA (4T19). The Superintendent's main office is located in the County Administration Building. It also operates a warehouse located at 501 River Street in Paterson, which houses 650 voting machines (4T19). The warehouse technicians all worked in the warehouse (5T103). Freytes rarely visited the warehouse, but often communicated with the technicians by conference call (5T104).

The investigators are Celestino Malave, Orlando Yepes and William Depsee. Their responsibilities include investigating complaints from the public and voters, as well as filing reports. They also serve as field representatives on election days (4T20). The voting machine technicians were responsible for setting up the machines for elections, cleaning and maintaining the machines, maintaining records, and scheduling the transport of the machines by the transport vendor to the polling places (4T20). For each election, they prepared the machines, inputting information into the machine, inserting a printed "face ballot" into each machine, checking the spelling on the ballot, and ensuring that each machine went to the proper voting location (4T21-4T22).

#### **HISTORY OF VENDORS**

In addition to the employees, the Superintendent's Office has long relied on outside contractors to provide certain

services. From 2005 until 2010, Sequoia has been contracted to perform programming on the machines and provide training to the warehouse staff at an annual cost of approximately \$30,000 (2T46; 4T23-4T24). In 2010, Election Graphics replaced Sequoia as the programming contractor (4T23).

Freytes also contracts with a printing company to print the "poll books," - the log books containing the list of registered voters (4T24-25). It also prints the mass mailings that are sent to residents at least twice a year (4T24).

When Filko was superintendent, he contracted for per diem workers to assist in preparation for major elections. When Freytes became Superintendent, she reduced the Office's reliance on contracted help and assigned the investigators to assist in the elections (2T44-2T45).

Since at least 2003, Superintendent Filko had an arrangement to pay the warehouse technicians \$590 per day as vendors instead of their regular salary. They were required to take a vacation day on such occasions. When Freytes became Superintendent, this arrangement continued. Warehouse Technician Tomczyk estimated that the technicians were paid eight to ten times in this manner (2T47).

Prior to 2004, the Office's employees were not represented by any employee organization for collective negotiations (6T6). Sometime in 2004, CWA Representative Mario Rivera collected

authorization cards from the employees and presented them to then County Superintendent Filko (1T54). Filko voluntarily recognized CWA as the employees' majority representative. Thereafter, Rivera met with Filko and presented the Union's contract proposals (1T54-1T55). Filko agreed to most of the Union's proposals, and in one negotiations session, Rivera and Filko reached an agreement (1T55). On June 22, 2004 Filko and Rivera signed the contract (CP-1) which covered the period January 1, 2004 through December 31, 2008 (1T55).

Rivera had negotiated several agreements with Passaic County covering other bargaining units, including the Juvenile Shelter and Preakness Hospital (1T56). He was aware of the "pattern" of salary increases among the other County units (1T56). The contract Rivera negotiated with Filko included wage increases that were above the County average by as much as one percentage point (1T57).

Prior to the negotiation of CP-1, Rivera was unaware that there was a practice of paying certain employees on Election Day as vendors. The issue was not raised in negotiations (3T16-3T17). The parties did negotiate an overtime provision -- Article 18.2 -- that employees working on holidays, including Election Day, would receive double-time pay for all hours worked (1T56-1T58).

Freytes, who was the Deputy Superintendent of Elections, was not involved in the recognition of CWA or the negotiations leading to the 2004-2008 agreement (3T17). No one from the County administration participated in the negotiations leading to the signing of the 2004-2008 contract, and no County representative signed the contract (1T57, 6T5-6T6). Rivera learned from Filko that, as a statutory officer, Filko had the authority to sign the contract and did not need County approval (1T58-1T59).

Anthony DeNova has been the County Administrator since 2004 (6T4). His responsibilities include running the day-to-day operation of the County. He participates in negotiations for all of the County's 22 bargaining units (6T5). DeNova first learned that Filko had negotiated a contract with CWA when he received the contract together with a memo from Filko explaining that he had negotiated the contract with CWA (6T6-6T7). When DeNova examined the contract, he was "outraged" because the contract included a combination of raises and step increases of "between 8 and 18 percent" in a single year (6T7). DeNova considered the contract Filko's "parting gift" to Passaic County (6T7). The County took no action to challenge the contract because it did



not want it to appear that it was fighting the employees' decision to unionize (6T7-6T8).<sup>4/</sup>

### GRIEVANCES

Freytes testified that she had no problems or issues with CWA in 2005 or 2006 (4T28-4T29). Lisa Laguerra is an election clerk working in Freytes' office. Her duties include processing registration forms, address changes, death notices, and handling returned mail with bad addresses (1T107). Laguerra was voted shop steward in 2005 (1T107). She filed a grievance in 2006 and it was resolved (1T108).

Warehouse Technician Tomczyk testified that, after Freytes became superintendent, one of her earliest meetings was with the representatives of the printing vendor and the moving vendor, the latter having been hired to transport the machines on election days to their respective polling locations. The purpose of the meeting was to coordinate everyone's efforts under the new superintendent (2T10). Freytes asked Tomczyk to attend, to provide information on behalf of the warehouse's interests, and

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<sup>4/</sup> Laguerra testified that she believed the County challenged the contract in court because it was not approved by the County. Laguerra believed that the court ruled that the superintendent had the authority to negotiate a contract on behalf of his employees (1T104-1T105). I credit DeNova, who as the County Administrator, was more familiar with the County's negotiations contracts. By 2004, LaGuerra had not taken an active role in CWA or participated in negotiations (1T94). Therefore, DeNova was in a better position to know whether the contract was challenged in court.

to ensure that the required specifications were being met (2T10). Topics discussed at the meeting included how the machines were supposed to be moved, under what conditions, what apparatus was required to move them, the type of paper for the printer and the scheduling of materials deliveries during the election cycle (2T10-2T11). Freytes and Tomczyk could not come to an agreement with the moving company (2T11). Tomczyk testified that the movers' contract had expired and it had offered the County a fee-per-election contract. Tomczyk described the movers' contract price as "astronomical" and their past performance as "less than stellar." Freytes, at that point, suggested that the warehouse staff would transport the machines (2T11). Tomczyk reminded her that the employees had a union contract, that they were not hired as movers, and he did not think the Union would look favorably upon the warehouse staff serving as movers (2T11). Tomczyk testified that Freytes became agitated (2T11). According to Tomczyk, Freytes stated that "she did not sign the contract, it didn't apply to her, no one was going to tell her how to run her office, and that she didn't give two shits about the Union." She further stated that before she's done the Union will be gone (2T11-2T12). Tomczyk suggested that Freytes talk to CWA Representative Rivera, and see what could be worked out (2T12). Thereafter, the warehouse technicians were not assigned to move the machines, and the Superintendent continued to use an outside

contractor to transport them (2T32). I credit Tomczyk's testimony concerning the events at this meeting, including his testimony about Freytes' reaction to Tomczyk's reluctance to permit the technicians to assume the moving duties.

#### **EMPLOYEE UNIFORMS (2007)**

On April 18, 2007, the warehouse technicians filed a grievance complaining that they had been waiting for two years for uniforms as provided for in the CWA contract (R-1). Freytes answered the grievance that the uniform vendor had scheduled a fitting session for April 26. The uniforms were ordered on May 4, 2007, and the grievance was resolved (R-2).<sup>5/</sup>

#### **YEPES' PERSONAL DAY**

In September, 2008, Investigator Orlando Yepes filed a grievance over denial of payment for a personal day. The grievance was denied, and in January 2009, CWA moved the grievance to arbitration (CP-4; 1T40).

#### **VENDOR PAY GRIEVANCE**

Sometime in 2004, Tomczyk met with Filko and asked why the warehouse technicians were being paid \$590 per diem as vendors rather than being paid as employees on Election Day. Filko did not seem to be interested in dealing with the issue because it

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<sup>5/</sup> Tomczyk testified that he thought the uniform grievance was resolved through arbitration (2T37). Given the timing of the grievance and the quick resolution, I believe he was mistaken.

was the end of his term and one of his last elections (2T9). Freytes told Tomczyk, outside of the meeting, that when she became superintendent she would look into the issue (2T9). By 2006 the warehouse technicians as well as the investigators were still being paid as vendors on Election Day. Tomczyk again approached Freytes about the issue (2T36, 2T123). Tomczyk testified that Freytes told him, "he did not have a leg to stand on" (2T102, 2T104).

Investigator Harry Martinez decided that he did not want to be paid as a vendor; rather he wanted compensatory time for working on Election Day (1T111). Laguerra and Martinez spoke to the superintendent and Martinez's pay issue was resolved by the end of 2007 (1T111-1T112). Just prior to the 2008 presidential election, Freytes conducted a conference call with the warehouse technicians. They again raised concerns over being paid as vendors rather than at the overtime rate in accordance with their contract (2T104, 2T106). Freytes responded that by past practice they accepted vouchers and "there was never a problem so why would it be a problem now?" (2T106). She told the technicians that "it was too close to the election, that they would have to accept the vendor issue and if they failed to do so she [Freytes] would bring her own people in and either do it her way or she could replace them" (2T13, 2T23). Freytes stated that "the Union can't tell her what to do or how to run her election, the

election would go on no matter what and she was the boss of the office" (1T86, 2T108, 2T109). She further stated that she did not sign the contract and "didn't give two shits about the Union" (2T23, 2T114).

Immediately after the November 2008 election, Yepes and Depsee filed a class-action grievance with their immediate supervisor, Gary Olsen, over the vendor pay issue (4T40, 5T100; CP-3). The grievance was denied, and the Union moved it through the grievance process (1T40, 4T41, 5T97).

For the April and May 2009 elections, Freytes sent the warehouse technicians and the investigators a letter asking them if they were willing to work as vendors for the elections (CP-8; 5T101-5T103). The workers responded both times with letters stating that they wished to work, but under the terms of the contract, not as vendors (CP-9; 2T12, 2T18, 2T19, 2T115).

#### CHANGE IN WORK HOURS GRIEVANCE

A special election was conducted in December 2008 (4T45). Just prior to that election, Freytes notified the warehouse technicians that she was placing them on staggered shifts (2T14-2T15, 2T76, 4T46). Freytes stated that since they did not want to work as vendors she was going to have them work seven hours as employees (2T76). The technicians' normal work hours were from 8:30 a.m. to 3:30 p.m.. Freytes scheduled two warehouse technicians to work the early hours and the other two

technicians to work an evening shift to cover the election (2T15-2T16, 2T109, 4T46). Tomczyk testified that if he had chosen to work as a vendor he would have worked from 5:30 a.m. until 10:00 p.m. (2T24).

The shop stewards talked to Freytes regarding the change in work hours. She responded she had a right to change their hours in an effort to save overtime costs; Rivera was advised of the situation (1T39). CWA filed a formal grievance over the change in work hours (1T39-1T40, 2T15). The CWA was unable to resolve the grievance with Freytes, and on January 21, 2009, Rivera sent Freytes a letter informing her that the CWA was filing for arbitration over the issue (CP4). Rivera received no response from Freytes.

In April 2009, the technicians collectively spoke to Freytes on a conference call regarding their change of work hours for the April election (2T80). Technician Elvin Sanchez testified that Freytes was very adamant and very angry towards them and did not want to hear anything about the Union (2T79). Freytes told the technicians that "she would run the office the way she wanted, she had no ties to the Union, the Union did not tell her how to run her office, she did as she pleased" (2T81). Further, Technician Sanchez testified that Freytes continued, "if they wanted to grieve, she would fight them on it, and if they did not wish to work the election, she could replace them." (2T81-2T82).

With regard to her decision to change the employees' work hours, Freytes testified:

As a Superintendent of Elections, as an administrator, I do have the right to a schedule or scheduling a staff working hours in order to conduct any elections and to make sure that the elections - that this election was covered from the beginning to the end (4T46).

On January 21, 2009, CWA sent a letter to Freytes (CP-4) informing her that three grievances were being submitted to arbitration: Yepes' Personal Day, the Vendor Pay Issue, and the Change in Working Hours (1T40, 5T98). The change in work hours grievance, filed as a class action on behalf of the entire group of affected employees, was the first to reach arbitration. In May 2009, at the arbitration hearing before Arbitrator Frank Mason, the parties entered into a memorandum of agreement (CP-6; 1T40, 1T41-1T45, 1T69-1T70, 4T48). The vendor pay grievance, which involved the payment of employees as vendors, was settled at the arbitration hearing on July 1, 2009 (CP-7; 1T40, 1T66-1T67). This occurred after the four warehouse technicians were terminated. The Employer agreed to pay the employees pursuant to the contract, and not as vendors, on election days (CP-7; 1T40, 4T31, 4T44).

The Yepes' personal day grievance was heard on July 25, 2009 and an award was issued by Arbitrator Thomas Hartigan (CP-5; 1T40, 1T68). Yepes was paid for his personal day (1T-69).

After the four technicians were terminated, CWA staged a public protest of the terminations (1T91). During their lunch break, half of the office staff whose lunch was from 12:00 noon to 1:00 p.m., went outside and protested until 1:00 p.m. and returned to their office (1T91). After their lunch break was over, the staff that went to lunch at 1:00 p.m. went outside and also protested (1T91). Both groups carried signs and handed out fliers protesting the terminations. They conducted the protest outside of the Administration Building on the public sidewalk on Pennsylvania Avenue (1T91, 1T92). The employees were not on strike and there was no work stoppage (1T92).

Laguerra testified that while she was at her desk, which is not too far from the Freytes' secretary's office, she heard Freytes say "They better watch it, because they'll be next." (1T92).

#### **FREYTES' ATTITUDE**

Lisa Laguerra started working for the Passaic Superintendent of Elections Office in April, 2000 as an administrative secretary. She held that title until 2005, when she was given a position as election clerk. She believed she became a CWA shop steward in 2005 or 2006 (1T76-1T77).

When Freytes became superintendent in May 2005, Laguerra tried to be the liaison between the employees and the Superintendent (1T80). Laguerra went to the superintendent with



employees' issues about working conditions (1T83). If an employee had any problems, she tried to talk to the superintendent and resolve it before it became a formal grievance (1T80-1T81, 1T83). Laguerra often witnessed the Superintendent making comments about the Union (1T82). Laguerra testified that whenever Freytes received a grievance, especially the vendor pay grievance, she made comments that she never had a part in signing the contract, that she did not have to follow it, and she did not care about the Union (1T82). There had been plenty of times when Freytes got very upset and stated that she could do what she wanted; she was the boss of the office (1T122); and "She doesn't give two shits about the Union; she's the boss; and things have been done this way for years" (1T82-1T84). Laguerra testified that Freytes stated if it was up to her and there was no Union, she would get rid of everybody in the office (1T91).

On more than one occasion Laguerra repeated Freytes' comments to Rivera because she was unsure if it was considered intimidation or if a grievance was required. Rivera told her to write Freytes' comments down (1T139). When Freytes was asked at the hearing whether she ever said "I don't give two shits about the union," she responded,

Well, in the past probably perhaps in the course of my frustration with the County, the running of the election, . . . maybe at one time, the County was asking me to cut costs, to cut my budget, my-my investigators, my staff was asking to - to get better pay for

their-for their working hours. And they didn't want to work as vendors. And I was put in like in the middle - like a pickle in the middle of a sandwich. So, I was frustrated, maybe, I said 'I don't give two shits.' But I don't give two shits - and I have said many times, that I don't give two shits about Mr. DeNova demanding me to cut my budget. . . So maybe I did say that, out of frustration. And when I get this, and then my staff getting grievances at the same time, and its - no, you have to use this us. She's going to hear from my union. . . I tried to do everything possible. I responded to their grievances. I tried to respond to Mr. DeNova and everybody. So maybe I did say that. . . out of frustration." (4T125-4T127)

On October 24, Freytes visited the warehouse at 7:45 a.m., the day of a required public test of the voting equipment, scheduled for 9:00 a.m. She found three employees sleeping, another playing on a cell phone, another reading a newspaper, and another out getting coffee. Three of the machines were open and not certified and ready for the public test. She was assured that the 16 sample machines would be ready.

On October 27, a training session was scheduled to be held in Hawthorne. Six machines had been requested for the training. Only one machine was delivered, preventing a hands-on training class from taking place.

The November 2008 general election, which included the selection of the presidential candidate, was the largest the Superintendent's Office had ever run. According to Freytes, the

November election went "very well" with a minimum of machine errors (4T45, 5T60).

On December 8, 2008, four days after the general election, Freytes sent a memo to the four warehouse technicians entitled "Written Warning" (R-8). It pointed to three different occasions where there were job performance issues among them including: sleeping on duty, not making sure all of the voting machines were inspected thoroughly and working properly, and not following up with Liberty Transportation to ensure voting machines were delivered to Hawthorne for training. She advised the technicians that other counties, with fewer warehouse staff, typically complete pre-election certification at least eight days before an election. She also criticized the technicians because too many voting machines malfunctioned on the November election day, indicated that they had not been inspected properly. She directed that the errors be reduced and threatened that if performance did not improve, she would have "no choice but to take alternative measures" (R-8; 4T58).

The warning letter was hand-delivered by Freytes' secretary Yanira Martinez (4T67). Martinez reported to Freytes that R-8 was hand delivered to each of the named employees and that each of the employees had refused to sign it. Martinez signed R-8 as a witness (R-8; 4T68). At the time, Freytes believed Martinez to be trustworthy and believed that she delivered it (4T73-4T75).

**2009 NEGOTIATIONS**

As a CWA senior staff representative, Mario Rivera's job duties included negotiating and administering contracts. Rivera has been the CWA representative representing Passaic County employees for many years (1T28-1T29).

CWA initiated negotiations for a successor agreement in the Spring of 2009. The CWA's negotiations committee consisted of Rivera, Shop Steward Lisa Laguerra, employee George Dowd, and employee Orlando Yepes (1T30, 6T8). The Employer's negotiations committee consisted of County Administrator Tony DeNova, Freytes and Assistant County Counsel Mike Glovin (6T8, 6T46). DeNova served as the Employer's chief negotiator (1T126, 1T32, 5T4, 5T109)<sup>6/</sup>, but his main concerns were the economic components of the contract, while Freytes' focused mainly on operational issues (6T6, 5T9, 5T164, 6T41).

DeNova typically obtains recommendations from the department head or constitutional officer as it pertained to the operational aspects of contract provisions, while DeNova would present the economic components (5T108-5T110, 6T13-6T14). DeNova met with Freytes at least twice in preparation for negotiations to obtain her input into the Employer's proposals (5T162). Together, they drafted the employer's written proposal (5T5).

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<sup>6/</sup> DeNova participates in negotiations with all 22 County bargaining units (5T165, 6T34).

At the parties' first negotiations session on March 24, CWA presented its initial proposal (R-15; 6T11-6T12), while the County made its initial proposal written proposal, R-16. In the initial phase of negotiations, Rivera went through CWA's proposal one by one, and they were discussed individually. Some items were agreed to, others had been flatly rejected, and other issues were left open (6T8, 6T12).

One of CWA's demands was a layoff and recall provision. Laguerra felt the clause was important because Freytes had previously laid off two employees, and other County employees had recently been laid off. The County had just closed the Juvenile Detention Center and 150 CWA members had been laid off (1T127-1T128, 6T11). DeNova initially rejected the provision (6T28). But he understood how important the layoff language was to CWA, especially in light of their recent mass layoff in the Juvenile Detention Center in April, 2009 (6T13, 6T49-6T50). The County had recently negotiated a layoff provision with the Prosecutor's Office PBA (6T49). However, DeNova believed CWA's proposed layoff clause, as written, would not be in the Employer's best interests as it was much more restrictive than the agreed upon language in the Prosecutor's group (6T29, 6T49).<sup>2/</sup> However, DeNova felt that eventually he would agree to

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<sup>2/</sup> DeNova testified that most of the County units consist of classified civil service employees, and their protections  
(continued...)

some modified version of a layoff and recall provision, if all other issues were agreed upon (6T29-6T30).

Freytes never communicated to DeNova that she had concerns about employee sabotage or damage to equipment if the advance notice provision in the layoff clause was agreed upon (6T30).

The Employer offered CWA its written proposal (R-14) at the first session on March 24, 2009 (5T15, 6T32). DeNova had prepared R-14 with input from Freytes (6T31). The Employer proposed to eliminate the titles "administrative clerk" and "part-time clerk" from the recognition clause (R-14; 6T31-6T32). Freytes did not tell DeNova that she was seeking to eliminate any other titles (6T32).

The Employer's proposal also sought concessions from the Union in the areas of health care contributions, the elimination of summer hours, and reduced holidays, as well as reductions in vacation allotment and longevity for new hires (6T14, 6T15). The County and CWA had agreed upon some of these give-backs in other County bargaining units (6T15). The County was developing a pattern of salary increases, and DeNova had communicated that to Rivera (6T15).

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7/ (...continued)  
are derived from that source, making a layoff clause unnecessary. However he agreed that some units of unclassified employees, such as the Prosecutor's office, do have layoff provisions.

The Employer also made a proposal at the second or third meeting regarding employees working as vendors on Election Day. (CP-13; 3T4-3T6). That proposal stated,

An employee of the Supt. of Elections, Investigator and Elections Warehouse employees will become vendors on Election Day and work as Election Day field technicians at the discretion and when requested by the Supt. of Elections. These employees are charged with a personal day or vacation day and are provided with a voucher and a payment method for working on Election Day. (CP-13)

CWA rejected this proposal. Rivera testified that the employees were not going to give up their contractual right to work overtime and get paid for it (3T7). Moreover, the issue was being addressed in arbitration over its grievance. The Employer also proposed a new section 18.1 which was intended to address the hours of work issue as presented in the grievance. Freytes was seeking to have discretion to schedule the employees as needed (5T123-5T124).

It was Freytes who had suggested including the proposal on vendor pay. She testified that she intended the proposal to apply to warehouse technicians and investigators working the election (5T18, 5T21). Freytes testified that she was "very concerned" about this proposal because of her budget; it would eliminate the double time payments on election days (5T16, 5T17). Freytes was asked on cross examination if, when she made this

proposal to the Union, she had then intended to eliminate the warehouse technicians' positions (T18). Freytes replied:

Well, yes, according to the--because I was doing some investigations before when in 2008 and 2007 Mr. DeNova - - I received these letters and phone calls and meetings from Mr. DeNova and then I started doing my research and investigating how can I cut costs. So then I was getting all this information and that - - and maybe at the time when we met I was still looking in reference to this - - before, at that time and before, I started to do in my research in 2008. And then in 2000-2008 and then - I mean, uhmmm - year 2008. And then in February of 2009 is because when - - after I did all my research I met with these other superintendents for other counties, I got - - I got the information about their operation and their cost cutting and then on February - - after I got all my figures done, not all my figures, because I started to do the - - getting information from the - - from the finance department about salaries, about comp time, health benefit. I didn't finish all you know, I didn't have a complete figures there because I was waiting to see what the vendor figures would have been in order for me to complete my cost analysis (5T18-5T19).

Freytes was again asked if, when she made the proposal across the table to CWA, she then intended to eliminate the warehouse positions. She replied, "At that time, I was looking for ways."  
(5T20)

Freytes was asked on cross-examination, "If the Union had agreed to the technicians working as vendors on Election Days, is it fair to say you wouldn't have eliminated their positions?" Freytes replied, "No, I can't say that." (5T20)



The parties held five or six negotiations sessions between March and June (1T70-1T71, 3T15, 6T8).<sup>8/</sup> The final session occurred on June 15 - - just one working day after the warehouse technicians were terminated.

The negotiations teams had not yet exchanged specific economic proposals. But, by that point, Rivera had finished negotiations with other Passaic County bargaining units, and a pattern of cost-of-living increases was emerging. He and DeNova had talked separately about increases, and Rivera believed that this unit's increases, coupled with the health care contribution, would mimic the settlement in other County units (1T33-1T34, 3T21, 6T33). Although there were a number of issues not finalized, DeNova believed that the parties would conclude negotiations that day (6T27, 6T28). The health care contribution issue was technically still on the table as part of the total economic package, but DeNova believed CWA would agree to it (6T34). Rivera also believed that the County would make some movement on the layoff and recall provision, and therefore the parties might finalize the agreement of June 15 (3T20-3T21).

With respect to the Superintendent's proposal to eliminate section 18.1 and 18.3 and add section 18.2, Rivera believed that the proposal was made only because of the pending vendor pay

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<sup>8/</sup> The County never refused to meet and provided information in preparation for negotiations as CWA requested (1T71, 6T15)

grievance, and may have been withdrawn (3T21). Because he believed that the contract would likely be finalized on June 15, Rivera was "surprised and livid" to learn on Friday June 12 about the warehouse technicians' termination.

DeNova believed that both the County and the Superintendent would be co-signers to the contract (6T26). However, Freytes expected that only she would sign the contract with CWA, not the County (5T4-5T5).

**BUDGET CONCERNS NOT RAISED**

At the June 15 negotiations meeting, Freytes did not offer CWA her cost analysis for privatizing the warehouse, nor did she explain why she had terminated the warehouse technicians (6T47). During negotiations, Freytes did not prepare any cost-out documents to determine the impact of potential salary increases or health care contributions to her budget (6T34-6T35). Freytes had not suggested to DeNova that freezing salaries should be proposed, nor did she inform the Union that she needed to trim \$100,000 from her budget (5T10-5T11, 6T33, 6T35). Freytes testified that she felt there was "no need" to discuss possible budget trimming measures with the Union during negotiations (5T6-5T7). She testified that the Employer's committee did not propose a wage freeze because "she felt there was no need for that." (5T8)

Freytes testified that she explored the possibility of eliminating some of the positions in her main office (5T10). She later stated that she made no attempt to cut the central office staff (5T13). She decided that she needed all of the central office staff positions, and in fact, during the 2008 election, she needed additional temporary help to process the large influx of new voters (5T13-5T14).

### **BUDGET PROCESS**

DeNova explained the budgeting process. The County's budget year is based upon a calendar year (5T68). Sometime in September or October, the County Finance Office annually sends a letter to the department heads and constitutional officers to assemble their budget requests for the following year (6T21, 6T36). Once the Finance Office receives each department's proposed budget, it is all put into the system and that document becomes the starting point for budget discussions (4T91, 6T21). DeNova and the finance director then meet with each department head/constitutional officer near the end of the year. At that meeting, the department head must justify each line item in that department's budget request (6T21, 6T36, 6T39). In the case of the constitutional officers, the Freeholders appropriate an overall budget for that department, but have no oversight on how the money is spent (6T22).

In the beginning of the year, the County sets up a temporary budget of 25% of the previous year's appropriations which covers the first quarter of the year. If a budget is not adopted by the end of the quarter, then the County will do an emergency appropriation so that the department can continue to operate while the budget is pending (5T71, 5T129, 6T37). The budget is typically introduced in March and is approved in a matter of a few weeks, but some years it has been delayed as late as May. DeNova stated that the County budget has basically remained flat for most departments for the past five years (6T24).

The Superintendent's Office has its own budget. The Superintendent's budget request is prepared by a team comprised of Freytes, her election supervisor and her secretary (1T78). Laguerra's duties including invoicing the municipalities or school boards for election expenses (1T77-1T78, 5T57-5T59). Laguerra explained the process of reimbursements to the Superintendent's accounts. Expenses associated with each election, other than the primary and the general election, are reimbursed by the municipality or the school board for whom the election is conducted (1T78). Reimbursable expenses include food, employee overtime, transporting the voting machines, postage, printing, programming expenses and vendor fees (1T78-1T79, 1T103). Once reimbursement is received, it is credited to the appropriate account in the budget to which the

reimbursement applies (1T80, 6T59). In 2008, the County also received reimbursement from the State Board of Elections for expenses associated with the primary election (6T65-6T66). The Superintendent's Office receives the reimbursements whether employees run the operation or the job is outsourced (5T148-149). Freytes testified that the reimbursements are slow to be paid (5T22).

The County's 2008 budget was not adopted until June or July, 2008 (5T128, 6T22). The 2008 Superintendent's budget included amounts for open positions. In addition, three employees retired or resigned in 2008 - Election Clerk Mary Card, Sandra Maselli and Caroline Beotticher (4T94-4T95, 4T110). These positions were not filled because the County would not approve hiring new employees (4T95).

The Superintendent's budget request for 2009 was submitted to the County Finance Office in December, 2008 (5T68). Although the 2009 budget request had to be revised several times, apparently R-10 is the final budget request (5T69-5T70).

In 2008, Freytes' office exceeded its budget for overtime (4T110). A total of \$230,058 was paid in overtime payments in 2008, largely because of the 2008 presidential election (R-11; 4T110). For 2009, the Superintendent' Office spent \$56,828 in overtime, which again exceeded the budgeted amount for overtime (4T111). Freytes testified that DeNova questioning her about the

overtime payments, but that she did not pay much attention to what was being paid in overtime; if she needed the employees to work, they did (4T112).

In 2007, the County had planned to sell the County golf course to an Improvement Authority and use part of the revenue as anticipated revenue in the 2008 budget (6T44). However, in August 2007, the Appellate Division disallowed the use of revenue from the sale in 2008, creating a budget shortfall of now \$14.5 million.<sup>9/</sup>

In November, County Administrator DeNova met with each of the department heads and constitutional officers to explain the ramifications of the budget shortfall and to solicit cuts in their budgets. On December 6, 2007, DeNova sent Freytes a follow-up memo (R-5). This memo explained that the County would be required to reduce appropriations for all constitutional and statutory agencies by \$14.5 million. More specifically, DeNova stated,

Under the circumstances it is necessary to reduce your 2008 budget request for your department by a total of \$231,199. Since you are your own appointing authority, it is respectfully requested that you begin the process of your anticipated layoff plan or cost-reduction plan (R-5).

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<sup>9/</sup> DeNova testified that the shortfall was about \$10M, (6T19, 6T45) but R-5 pins the shortfall at \$14.5M.

Following receipt of R-5, DeNova met with Freytes about the 2008 budget at least twice, and there were many telephone conversations between them about her budget (6T23). DeNova wanted Freytes to reduce staff and/or reduce costs (4T31). Freytes testified that DeNova was "hounding her" about the budget for most of 2008.

When asked how she reacted to DeNova's request for cuts, Freytes testified:

After this letter (R-5) - I did nothing. He wanted me to cut staff. He wanted to reduce my budget. I ignored his request (4T31).

Each of the constitutional/statutory officers (Prosecutor, Sheriff, Surrogate, and County Clerk) received a memo similar to the one DeNova sent Freytes (R-5) advising that they needed to cut their 2008 budgets because of the County's financial constraints (6T18-6T19). The Sheriff complied with the County's request and laid off sheriff's officers, correction officers, and civilian personnel (6T20). The County had requested that the Prosecutor's Office cut \$2.7M from its budget (6T20). The Prosecutor filed a Bigley application with the Assignment Judge; with the assistance of a court-appointed mediator, the County and the Prosecutor reached an agreement to cut \$2.2M from the budget and employees were laid off (6T20).

Freytes did not cut her 2008 budget as DeNova had requested (5T41, 6T20). The County fully funded her budget only after she

sought intervention of the Attorney General's office (5T41-5T42). By the end of 2008, the County had to transfer money into the Superintendents budget to cover expenses (6T23).

Although no such significant event occurred which would impact the budget in 2008, the County once again found itself looking to make budget cut for 2009 (6T45-6T46). DeNova testified that in the Fall of 2008 going into 2009, the County's economic picture was difficult. Passaic County got into an economic slump a little earlier than most, and the County was facing challenging times (6T51). There was a budget gap that needed to be closed in 2009 as well (6T52). The County's biggest step to close that gap was the consolidation of the Juvenile Shelter with Essex County's (6T52).

In late 2008, the departments and constitutional officers met with DeNova, who again told them to reduce their budget requests because the County budget was facing a shortfall (5T130-5T131). In 2009, the process was the same as was used for 2008. DeNova stated that he had many and frequent discussions with Freytes about her budget (6T24-6T25).<sup>10/</sup>

Freytes testified that she was receiving many phone calls from DeNova "bugging her" to cut the budget (4T32). DeNova testified that in 2008, his relationship with Freytes became

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<sup>10/</sup> Freytes testified that she could not recall whether DeNova's demand that she cut her 2009 budget was made by letter, by phone or in meetings (5T40-5T41).



"very adversarial" (6T20). DeNova asked Freytes "at every opportunity" to make the needed cuts. Other County departments were laying off personnel and the County was closing the Juvenile Detention Center (4T34). DeNova felt everyone should share in the pain, and that Freytes seemed reluctant to make any cuts (6T21).

In late 2008, Freytes received what she described as "a nasty phone call" in which DeNova was shouting that it was "her duty to help the taxpayers of the County" by reducing her budget for 2009 (4T34, 4T48-4T49). Freytes testified that DeNova's continued insistence on budget cuts was making her very upset because she did not want to lay off staff (4T34, 4T36). Freytes testified that it was at that point that she began to look at outside vendors and ways to save money (4T49).

#### **SUBCONTRACTING CONSIDERATIONS**

In 2006, Freytes retained Sequoia Voting Machines Company as a consultant to review the warehouse operations and make suggestions to improve efficiency (4T56). On December 7, 2006 Sequoia President, Peter Balcon sent Freytes an email suggesting that having the voting machines serviced by a private vendor would be more efficient and cost saving (R-7; 4T53-4T54).

Freytes testified that in March 2008, she began to look into ways to cut costs by contacting other county superintendents of elections (4T32). In the Spring of 2008, Freytes attended the

annual conference of the New Jersey Association of Election Officials where cost savings measures were discussed (5T150).

Freytes spoke with Morris County Deputy Election Superintendent, Dale Kramer in June and again in August, 2008.<sup>11/</sup> In August, Freytes toured the Morris County facility. She and Kramer discussed the use of outside vendors, and specifically Election Graphics to provide certain election services (R-6; 4T33, 5T150).<sup>12/</sup> Freytes learned that Morris County contracts with Election Graphics to certify its voting machines, but that it employs three voting machine technicians to maintain its voting machines (5T80).

In December 2008 or January 2009, Freytes also spoke with Hudson County Superintendent Maria Barace about its operations (5T81, 5T151). She learned that Hudson County also contracts for certain election services through Election Graphics but has not fully privatized its warehouse operations (4T33, 5T80, 5T152). Freytes also believed that Camden County uses a vendor to certify the voting machines (5T83). She was not aware of any other

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<sup>11/</sup> Morris County Deputy Superintendent, Dale Kramer testified before Arbitrator Robert Simmelkjaer on January 25, 2010. The parties jointly agreed to place a transcript of that testimony (R-6) in evidence in this record.

<sup>12/</sup> Freytes first testified that she discussed the use of vendors as well as cost savings measures with Kramer. She later testified that she discussed the use of vendors.

County that has fully contracted out its warehouse operations (5T80).

**BACKGROUND ON SEQUOIA AND ELECTION GRAPHICS**

In 2006, Passaic County upgraded all of their voting equipment to voting machines purchased from Sequoia (3T-26). Part of the purchase agreement included training to the voting technicians and assistance with two elections. Sequoia subcontracted with Election Graphics for assistance in getting the County's new equipment up and running and programming the machines (3T26). The printing vendor also subcontracted with Election Graphics to print the specialized ballots used by the new machines (3T26-3T27). Sequoia also subcontracted with Election Graphics to provide crisis management for the night of the election (3T27).

In February 2009, Freytes contacted Election Graphics and spoke with its President Adam Perna (5T122-5T123). Freytes told Perna that she was looking for a vendor to take over her warehouse operations and Perna scheduled their first meeting. Perna provided Freytes with a letter (R-3) stating that Election Graphics was happy to meet with her and discuss what they could do for her (3T30). Perna testified that the letter was hand - delivered to Freytes because Freytes was very concerned that she did not want anyone to know that she was considering privatizing the warehouse operations (3T31, 3T34). However, Perna could not

recall if he or someone else personally hand delivered R-3 (3T34-3T35).

Freytes testified that the first meeting took place in February or March 2009. At their first meeting, Perna told Freytes that Election Graphics could provide a range of services - - anything from certifying the voting machines or repairing equipment to actually running her entire warehouse (3T28). Perna told her that the more services she contracted for, the more she was going to save. Perna testified that "really got her going." (3T28). Freytes provided Perna with a list of 40 to 50 functions currently being performed by the warehouse staff (3T32, 3T48). Perna reviewed the list and responded that Election Graphics could handle all of the things on her list. He also suggested some additional functions such as computerized tracking of replacement parts (3T32). Perna suggested that if Election Graphics obtained the contract, he could make the whole operation run more efficiently (3T33).

Although Freytes told Perna that she employed four full-time warehouse technicians, she did not provide him with any documents setting out her current costs of operation with the existing staff or any projected cost savings from outsourcing the operation (3T48-3T49, 5T47). Perna testified that, while Freytes had not given him any information on her current costs, he was able to approximate the employees' wages and benefits, plus a

little for overtime and come up with a guesstimate about the County's current expenses to run the warehouse (3T51). Perna prepared a proposal based upon the scope of operations that Election Graphics would be doing (5T20).

On March 9, Freytes and Perna met again. Perna hand-delivered his first proposal to Freytes for Election Graphics to take over the warehouse operations. The proposed annual cost was \$300,000 (R-4; 5T20, 5T47).

Upon receipt of Perna's first proposal of \$300,000, Freytes told Perna that she thought the price was a little steep. He promised to review the estimate and get back to her (5T141). Perna prepared a revised proposal (4T51, 4T118-4T120).

Exactly when Freytes decided to outsource the warehouse operations is disputed. Freytes recollected that she made the decision in March, 2009. Part of the dispute concerns when Freytes received Election Graphics' revised proposal, which is the subject of conflicting proofs.

Freytes testified that Perna called her back sometime in March and offered a revised contract for \$280,000, and she accepted Perna's proposal (4T64, 4T120, 5T141). Freytes was sure that she first received a revised quote of \$280,000 from Perna in March (5T55-5T56). However, the second proposal was date stamped as received by the Superintendent's office on June 16, 2009. Freytes' explanation for the June date stamp was that she had

misplaced the original copy and had to ask Perna for a duplicate. Freytes opined that the copy date stamped June 16 was the duplicate (5T49-5T50, 5T56, 5T58).<sup>13/</sup>

Perna stated that the March 9 proposal was prepared by his staff, that he signed it, and that he personally delivered the proposal to Freytes (3T37-3T38). Freytes was surprised and disappointed by the cost of the proposed contract (3T38-3T39).

Perna's testimony about the timing of the second proposal at the hearing conflicts with his testimony at the January 19, 2010 arbitration. In that proceeding, Perna testified:

The discussions went on and on until we came to basically a final proposal. There was little negotiation on the price and I guess we reached that in June. I don't remember exactly. Think it was June because we - no, it was a little earlier than June because we initially wanted to start this for the primary election which I believe was June 2 or 4 but we just couldn't get it done in time so it was right after - the primary we came to an agreement (3T62-3T63).

I find that, notwithstanding the date stamp on Election Graphics' second proposal of June 16, 2010, it is likely that Perna hand-delivered the first copy much earlier. Both Freytes and Perna testified that Freytes had emphasized the need to keep the possibility of contracting the warehouse operations confidential.

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<sup>13/</sup> Freytes had not testified in the earlier arbitration hearing that there could have been an earlier copy received before June 16 (CP-15; 5T59).

Perna obviously wanted to obtain the contract, and would not have risked making Freytes angry by allowing it to come in the regular mail to be opened by her staff. Further, it makes sense that shortly after Freytes fired her technicians, she would need to get the proposal in hand to get it to the Freeholders quickly for approval. Further, it would not have made sense for Perna to delay more than three months after their March 9 initial meeting in getting Freytes a revised price.

Even if Freytes did not receive the written proposal from Perna until June, I credit her testimony that Perna had told her in March that Election Graphics could contract for the warehouse operations for \$280,000. At that point, she had all of the information she needed to know about whether she could outsource the operation.

Sometime in June, 2009, after Freytes decided to accept the revised proposal from Election Graphics, she met with Assistant County Counsel Mike Glovin to have a Resolution prepared for the Freeholders' approval. Freytes gave Glovin a copy of the revised proposal from Election Graphics (5T66). The Freeholders did approve the first contract, and it became effective July 14, 2009. The contract for \$280,000 is billed annually but is invoiced in 12 monthly installments of \$23,333.33 (3T42). Election Graphics took over the warehouse operation on August 1,

2009 (3T42). On March 1, 2010, Freytes signed a successor contract with Election Graphics (5T44).

### SECURITY

The possibility of outsourcing the voting technician operations was not raised in negotiations (4T64). Freytes testified that the reason she did not discuss the issue with the Union was for "security reasons and the integrity of the election" (4T64). Freytes testified that she was concerned that if this information got out, disgruntled workers might retaliate and tamper with or damage the voting equipment (4T65).

Freytes also did not discuss the possible elimination of the warehouse positions with anyone in her office (5T66). R-4 was hand-delivered directly to Freytes and no one saw it but her (5T137-5T138). She did not discuss hiring a vendor or eliminating the warehouse technician positions with DeNova before June 12, nor did she provide DeNova with a copy of her cost savings analysis, R-12 (5T67).

Elvin Sanchez testified that in his position as a warehouse technician, he had access to the keys, codes and ballots for the machines (2T99), which he acknowledged is sensitive information (2T120).

### COST BENEFIT ANALYSIS

The Cost Benefit Analysis (R-12) prepared by Freytes provides the following:



Privatization Savings  
Superintendent of Elections Warehouse

Current Costs:

Salaries:	\$205,700	(based on 2008 salaries - 4 warehouse employees)
Benefits:	100,280	(approx., possibly more)
Overtime:	59,000	(based on present salary for 4 warehouse employees plus 3 investigators)
Programming:	30,000	(approximately)
Total Cost:	\$394,980	

Privatization Cost: \$280,000

County Savings: \$114,980 (this figure can go up depending on employee salary, benefits and overtime)

County 5-Year Savings: \$574,900 (this figure can go up depending on employee salary, benefits and overtime)

The proofs concerning the preparation and timing of Freytes' cost benefit analysis (R-12) are inconsistent and conflicting. Freytes initially testified that she personally prepared and typed R-12 (5T142)<sup>14/</sup>, and that she began preparing it in 2008. She then testified that R-12 was prepared by a "team effort" of herself, her secretary, Martinez, and the election supervisor (5T86). She then testified that only she and Martinez were involved in preparing R-12 (5T87). Martinez did not know what

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<sup>14/</sup> Unlike R-9, which contains a footer at the bottom typed by the secretary, R-12 does not contain a footer (5T143)

the data was being collected for (5T87). Freytes later testified that R-12 was never shared with CWA (5T87, 5T90).

Freytes testified that she obtained the information concerning the cost of employees' wages from the finance office, or from personnel or from payroll, but that she personally spoke to other County offices (5T61, 5T144). She testified that her secretary had no involvement in collecting the data (5T145). At another point, Freytes testified that Martinez made calls to obtain the information. Freytes stated that she obtained the cost of employee benefits from the finance department (5T145). The benefit costs included all health benefits (5T145). She stated that she obtained the overtime costs either from finance or from payroll (5T145). Freytes testified that although R-12 shows \$59,000 in overtime costs, the actual overtime cost in 2008 was \$239,541 (5T146). Overtime costs had fluctuated from year to year (5T59).

Freytes stated that, based upon information she received from the finance department, she added the 2008 base salaries plus the benefits, overtime expenses and programming expenses for the warehouse operation (4T115). Freytes made no attempt to compare the cost figures she was given to any data in her own office (5T63-5T64).

Freytes testified that she "probably" prepared R-12 in late 2008. She later testified that she started gathering the

information sometime in 2008 (4T116). She claimed that she only finished R-12 after she received the final contract figures from Election Graphics (4T114-4T115, 5T67-5T68). Freytes' stated that her purpose was to determine whether she would actually save the County money by privatizing the warehouse operations (4T116-4T117).

Freytes testified that after she received the \$280,000 proposed contract from Perna, she then put all the figures together and compared Election Graphic's proposal to the existing cost figures (4T114, 4T121). She realized that the Election Graphics proposal would save money over the costs of keeping the existing warehouse employees (4T124). She testified that "at least I will be able to get Mr. DeNova out of my back." (4T121) Nevertheless, Freytes did not share her cost benefit analysis with DeNova or even advise him that she had a proposal from Election Graphics (5T95).

On July 14, 2009, the County Freeholder Board approved the contract between the Superintendent of Elections and Election Graphics (R-13).

#### **LACK OF BUDGET INFORMATION TO UNION**

Prior to the June 12 termination of the warehouse technicians, Freytes never raised the possibility of contracting out the warehouse operations and never expressed concerns to CWA about cutting her budget (1T34-1T35, 1T62-1T63). This was unlike

the County's handling of the closing of the Juvenile Detention Center, where the County gave CWA advance notice, they met several times to discuss other possibilities in terms of layoffs (1T63-1T65).

Rivera pointed out that, beginning in June, there were no elections coming up until November, so there was nothing the technicians could sabotage at the particular time (1T72). Rivera also pointed out that if the Employer had given CWA union a heads up, the Union might have been able to address Freytes' budget concerns and work out a resolution (1T72-1T73). Prior to June 12, 2009, Laguerra also testified that she never heard Freytes say anything to her about having budget problems (1T88-1T89).

#### **TERMINATION NOTICES**

On June 12, Freytes went to the warehouse accompanied by her deputy and a few sheriff's officers (2T65).<sup>15/</sup> She gathered the technicians in the warehouse office<sup>16/</sup> and handed each of them a letter signed by her that advised them that the warehouse operations "would be done differently" and that they were being terminated immediately (CP-10; 4T77-4T78). She gave them 30 minutes to clean out their desks and they were then escorted from

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<sup>15/</sup> Witnesses had varying accounts of the number of sheriff's officers that accompanied Freytes to the warehouse for the termination. The number of officers is not particularly relevant.

<sup>16/</sup> Malave was off that day and learned later from Tomczyk that the technicians had been dismissed (2T117-2T118).

the building. Freytes did not offer the technicians any explanation for their dismissal (2T65, 2T83-2T84, 4T78-4T79). Freytes testified that she selected this time of the year because no elections were coming up until September (4T79).

On June 12, 2009, just after receiving their termination notices, the warehouse technicians called Rivera to tell him they had been terminated and that Freytes had come to the warehouse escorted by armed sheriff's officers (1T47). They explained that they had been given a half hour to clean out their desks and were escorted off the property. They read the termination letter to Rivera (1T47).

Rivera testified that, in his experience, the manner in which the terminations occurred was atypical (1T52). He explained ordinarily, if a layoff was imminent, he would be contacted by the County to discuss it first (1T53). In this instance there was no warning whatsoever (1T53). Rivera was livid especially because, until then, he believed the contract would be finalized the following Monday, June 15, 2009 (1T47).

Rivera immediately called DeNova, explained that his members were being terminated, and asked why he had not been given a heads up that there were problems (1T48). DeNova responded that he knew nothing about the termination but would look into it (1T48).

The County and the CWA negotiations committees met face to face on June 15(1T49). The CWA team was upset and Rivera was angry (6T16). Rivera told the County committee that CWA believed it had engaged in bad-faith bargaining by not ever intimating budget problems or issues at the warehouse, and then abruptly terminating the warehouse technicians (1T49, 1T74). Rivera announced that the Union committee would not negotiate and the committee walked out of negotiations (1T50, 6T16). The parties have not returned to the negotiations table since June 15, 2009 because CWA believes that the County's actions in terminating the warehouse technicians amounted to bad faith (1T45, 6T16).

Freytes did not offer the Union any explanation for the terminations at the June 15 session. She testified that she did not provide the CWA committee R-12 on June 15 because of "security reasons." (5T89) She later testified that she did not know why she never shared her basis for terminating the warehouse technicians with CWA (5T92). In fact, she never provided the Union with an explanation about the terminations until her testimony at the arbitration hearing (5T92, 5T94). Freytes testified that the "main reason" the warehouse technicians were fired was for cost savings (5T94).

**TERMINATION ARBITRATION**

The CWA filed a grievance over the termination of the four warehouse technicians and advanced the grievance to arbitration (5T105). Arbitrator Robert Simmelkjaer issued an opinion and award on May 14, 2010 (C-3). Simmelkjaer found that the Superintendent of Elections violated Article 16.3 of the contract by terminating the four technicians and sustained the grievance. He ordered the four employees be reinstated with full back pay. (C-3). Freytes reviewed the award and disagreed with it. Specifically, she disagreed with Simmelkjaer's finding that R-12, the Privatization Savings Analysis, was unreliable. The County appealed the award to the Appellate Division. The court set the award aside, finding that the Commission has primary jurisdiction over allegations of retaliation for activities protected by the New Jersey Employer-Employee Relations Act.

**ANALYSIS**

The CWA contends that the Superintendent terminated the voting machine technicians in retaliation for their protected activities in violation of N.J.S.A. 34:13A-5.4a(1) and (3) of the Act. It seeks an order reinstating the four employees with full back pay.

The Employer contends that its motive in contracting out the warehouse operations was purely to save money. It denies any violation of the Act.

In re Op. of Bridgewater, 95 N.J. 235 (1984), articulates the standards for determining whether personnel actions are motivated by discrimination against the exercise of protected activities in violation of subsections 5.4a(3) and, derivatively, (1) of the Act. A Charging Party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse personnel action. This may be done by direct or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile towards the exercise of 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 need not be considered, however, 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 Commission to resolve.

I find that CWA has proven by a preponderance of the evidence on the record, that employees' protected conduct was a substantial and motivating factor in the Superintendent's decision to contract out the warehouse operation and eliminate the technicians' positions.

It is undisputed that the warehouse technicians engaged in protected activities and that Freytes was well aware of those actions. Soon after Freytes became Superintendent, she and Technician Tomczyk met with outside vendors to coordinate logistics. When Freytes proposed to sidestep the transportation vendor's contract and instead use the technicians to move the voting machines, Tomczyk was resistant and pointed out that the Union would not likely permit voting machine technicians to serve as movers. Freytes became agitated and expressed her resentment that the employees had a Union contract that she had not had a part in negotiating. She told Tomczyk that "no one was going to tell her how to run her office, and that she didn't give two shits about the Union." This declaration proved to be prophetic of the way Freytes would deal with Union issues for the next several years.

In 2007, the warehouse technicians filed a grievance complaining that they had been waiting for two years for uniforms

as provided for in the CWA contract (R-1). The uniforms were finally provided.

In 2006, Tomczyk again approach the Superintendent about getting paid as employees on Election Day, just as he had with Filko in 2004. Freytes told Tomczyk that the vendor pay would continue.

In 2007, Investigator Yepes filed a grievance over denial of pay for a personal day. This grievance went to arbitration, and Yepes was awarded the day's pay.

By November, 2008, the vendor pay issue came to a head. Just days before the November general election, the warehouse technicians addressed the issue with Freytes on a conference call from the warehouse. The technicians told Freytes that they wanted to be paid for the day as employees, not as vendors. Freytes was upset that the issue was being raised just a few days before the election and told them that the schedule was already in place for Election Day and that it was too late to make changes. She also expressed her frustration that the employees were attempting to get her to change a long-standing practice. It is evident from Freytes' reaction that she saw this demand from the unionized employees as an intrusion into her authority to manage the operation at a critical time in the election process.

Just after the November 2008 election, the Union initiated a formal grievance over the vendor pay issue. Shortly thereafter, and in direct response to the technicians' insistence upon being paid for elections as employees, Freytes announced that she was changing the technicians' work hours for the December election day. CWA then filed a grievance over the change in hours.

By letter of January 21, 2009, CWA apprised Freytes of its intent to move all three grievances - Yepes' personal day, the vendor pay issue, and the change in work hours issue -- to arbitration.

#### **HOSTILITY**

The record is replete with proofs that Freytes exhibited hostility to the Union generally and to employees pressing their contractual rights. As noted above, Freytes first displayed her attitude about the Union to Tomczyk in an early meeting with the transportation vendor. When Tomczyk showed resistance to Freytes suggestion that she could use the warehouse technicians to move the voting machines, she told him that "no one was going to tell her how to run her office, and that she didn't give two shits about the Union." She also told Tomczyk that "before she's done the Union will be gone."

When the employees pressed Freytes for contractual compensation instead of vendor pay for the November 2008 election, she told the employees that if they failed to accept

payment as vendors, then she "would bring her own people in" to replace them. Freytes stated that "the Union can't tell her what to do or how to run her election, the election would go on no matter what, and that she was the boss of the office." She again repeated that she "didn't give two shits about the Union."

Laguerra confirmed that Freytes frequently repeated this phrase around the office, especially when confronted with an issue being raised by the unionized employees. Moreover, Laguerra repeated that Freytes had said, "if it was up to me, and there was no Union and I would get rid of everybody in the office." (1T91) Finally, when the Union employees staged a public rally in front of the Administration Building to show their opposition to the terminations, Freytes threatened, "They better watch it, or they will be next."

I have credited the testimony of Tomczyk, Sanchez and Laguerra concerning Freytes' comments. Their testimony was clear, convincing and unrebutted. Moreover, Freytes did not deny making any of these comments, and she admitted that she was known to say that she did not "give two shits about the Union." I find that the Union has proven beyond a doubt that Freytes was hostile toward the Union and the employees attempts to enforce their contract and their other protected activities.

The timing of events also leads to an inference of hostility as well as an inference that the terminations were made in

retaliation for protected activities. Almost immediately after CWA initiated a formal grievance over the vendor pay issue in November 2008, Freytes retaliated by changing the employees' work hours. More importantly, within just a few weeks after CWA notified Freytes on January 21, 2009, that it intended to arbitrate all three grievances, Freytes called Election Graphics to arrange a meeting to talk about contracting out the warehouse operations. Interestingly, Freytes had already prepared a full list of the warehouse technicians' duties and had it ready to present to Perna at their first meeting. I infer that, at this point, Freytes had already made up her mind that she would find a way to eliminate the warehouse technicians' positions and rid herself of the problems they were causing for her.

Freytes contends that her "main reason" for eliminating the warehouse technicians' positions was to cut costs by contracting the operations to a private vendor. This rationale must be rejected as pretextual.

If Freytes were truly motivated to save money, she would have to know with some degree of certainty that the contract costs from Election Graphics would be less than the costs of maintaining the existing staff. The "cost benefit analysis" was the cornerstone of her plan. This analysis would be the deciding factor in whether she would benefit financially by contracting out the warehouse operations. Yet, everything about the process

Freytes used in preparing her "cost benefit analysis", R-12, was the subject of confusing and internally conflicting testimony.

She testified that she began to prepare R-12 in the Fall of 2008. She could not say with certainty when or how she acquired the information on employee salaries and benefits, or whether she obtained the information on her own or her secretary helped her. The overtime calculations appearing on R-12 do not square with the budgeted overtime or the actual overtime expenditures for 2008. She made no attempt to verify any of the information with records in her own office. Further, one of the components of "existing costs" was the \$30,000 annual fee for programming the voting machines, a cost which the records shows continued even after warehouse was contracted out.

I find that the Cost Benefit Analysis document does not support the conclusion that Freytes had an objective belief that contracting out the warehouse operations would save money. I find it more likely that this document was prepared after the decision to subcontract was made, not in preparation for that decision.

Second, the record makes clear that DeNova was, in Freytes' words, "hounding her" to cut her budget, beginning in 2007 and continuing through 2008. Freytes claimed that the contract with Election Graphics would "at least get [DeNova] off her back." This seems disingenuous: First, Freytes had ignored DeNova's

pleas for all of 2007 about cutting her 2008 budget request. Freytes and DeNova both testified that he was on her about cutting the budget at every opportunity. Freytes stated that DeNova's "bugging her" about the budget was making her upset. If Freytes really saw the contracting out of warehouse operations as a significant cost savings measure, she would have been anxious to share her decision to subcontract the warehouse with DeNova as soon as possible. Yet, she did not tell DeNova about the contract, and never shared her cost analysis with him. This further supports the conclusion that the analysis was only done as an after-the-fact justification for what had already been decided.

Freytes' lack of demands for budget cost controls in negotiations further undermines the Employer's contention that the decision to eliminate the warehouse employees was made for cost savings. No other cost savings proposals were made, and in fact, she never told the Union that she had any need to cut the budget. Freytes offered no plausible explanation for this. Further, after the terminations occurred, Freytes did not share her rationale for terminating the employees until the arbitration hearing in January, 2010.

Finally, the way in which the employees were terminated with no notice and no reason given is more like a "gotcha" than a good faith effort to eliminate Union positions based upon a financial

rationale. While Freytes expressed concerns that any advance notice of the layoffs to the employees would put the warehouse machinery at risk of tampering or sabotage, there was little objective basis for that fear that the employees would have engaged in such an illegal activity.

Based upon the above, I conclude that the Employer has not proven that the decision to contract out the warehouse operation was motivated by Freytes' desire to save money.

#### CONCLUSIONS

I conclude that CWA has proven that the Passaic County Superintendent of Elections terminated the warehouse technicians in June, 2009 in retaliation for their activities protected by the Act. I conclude that such retaliation was a substantial and motivating factor in that decision, and that the Employer's rationale must be rejected as pre-textual.

#### RECOMMENDED ORDER

I recommend the Commission **ORDER**:

A. That the Passaic County Superintendent of Elections cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating the warehouse technician positions and terminating their employment.



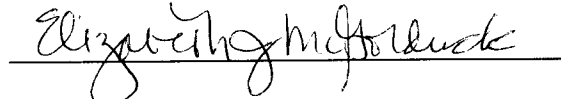
2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating the warehouse technician positions and terminating their employment in retaliation for their protected activities.

B. That the Board take the following affirmative action:

1. Offer to reinstate the warehouse technicians who were terminated on June 12, 2009, with back pay and with substantially the same hours of work and employment responsibilities as they had immediately prior to their termination.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A". Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and 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.

3. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.



Elizabeth J. McGoldrick  
Hearing Examiner

DATED: May 31, 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 June 10, 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:**

I recommend the Commission **ORDER**:

A. That the Passaic County Superintendent of Elections cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating the warehouse technician positions and terminating their employment.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by eliminating the warehouse technician positions and terminating their employment in retaliation for their protected activities.

B. That the Board take the following affirmative action:

1. Offer to reinstate the warehouse technicians who were terminated on June 12, 2009, with back pay and with substantially the same hours of work and employment responsibilities as they had immediately prior to their termination.

Docket No. CO-2009-493

Passaic County Supt. Of Elections  
(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