

H.E. NO. 2016-12

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

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2014-188

NORTHEAST REGIONAL COUNCIL OF  
CARPENTERS,

Charging Party.

**SYNOPSIS**

A Hearing Examiner recommends that the Commission dismiss the complaint. She determined as a threshold issue that the personnel decisions involving the non-renewal of LaBrutto's permanent carpenter position as well as the delay in putting his name on the approved temporary carpenter list were beyond the six month statute of limitations. She further determined that even if the allegations as to any delay in putting him on the Board's approved list were timely, the Charging Party failed to meet the Bridgewater standards. Specifically, the Hearing Examiner found that LaBrutto was not involved in protected activity, because his complaints about sub-contracting and/or no-bid contracts were in the nature of personal gripes. Also, no decision-maker as to LaBrutto's non-renewal or placement on the temporary carpenter approved list had knowledge of his complaints. Finally, she determined that even if there was protected conduct and knowledge of it, there was no irregularity in the Board's processing of LaBrutto's placement on the approval list for temporary carpenters such that she could infer hostility.

A Hearing Examiner's Report and Recommended Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission, which reviews the Report and Recommended Decision, any exceptions thereto filed by the parties, and the record, and issues a decision that may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent,  
Schwartz Simon Edelstein and Celso, attorneys  
(Joshua Savitz, of counsel)

For the Charging Party,  
Kroll Heineman Carton, attorneys  
(Raymond G Heineman. of counsel)

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

On February 20 and October 7, 2014, the Northeast Regional Council of Carpenters (Charging Party or Regional)<sup>1/</sup> filed a charge and amended charge, respectively (C-1),<sup>2/</sup> against the

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1/ The charge was originally filed by Northeast Regional Council of Carpenters Local 253. On the first hearing day, Charging Party requested that the Complaint be amended to reflect its name without Local 253 (1T10). I granted the request.

2/ References to exhibits marked into evidence are as follows: "C" for Commission exhibits, "CP" for Charging Party's exhibits, "R" for Respondent's exhibits, and "J" for joint exhibits.

Elizabeth Board of Education (Respondent or Board) alleging violations of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically 5.4a(1) and (3).<sup>3/</sup> Charging Party contends that on or about August 21, 2013, the Board informed Temporary Carpenter George LaBrutto that he would not be employed as a temporary carpenter for the 2013-2014 school year. The Board's action, Charging Party contends, was because LaBrutto raised grievances on behalf of the Regional and complained to supervisors and managers about sub-contracting the work of the carpenters without submitting it to the public bidding process. As a remedy, Charging Party seeks the reinstatement of LaBrutto as temporary carpenter together with any back pay or lost benefits.

On October 24, 2014, the Board filed its Answer denying that it terminated LaBrutto for protected activity and asserting that it had a legitimate business justification for its action. The Board contends that LaBrutto was required to undergo a new background check and be approved by the Board to continue his

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<sup>3/</sup> 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; and (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."

employment as a temporary carpenter, that he indicated he was not interested in temporary employment, and that the Board was unaware of any grievances filed by LaBrutto or any complaints to managers and supervisors about sub-contracting. The Board further explains that it complied with all relevant law regarding public bidding. The Board raises various affirmative defenses, including, but not limited to, managerial prerogative to hire, employ, non-renew and/or reduce its work force.

At the pre-hearing conference, I granted Charging Party's request to sequester witnesses. Respondent raised no objection. Each side was entitled to one resource person who could also be a witness. At the hearing, Charging Party designated George LaBrutto as its resource person and Respondent designated Luis Couto as its resource person. Both LaBrutto and Couto were present during the two days of hearing. All other witnesses were sequestered.

The hearing was conducted on April 14 and 15, 2015.<sup>4/</sup> The parties examined witnesses and produced exhibits. After several requests for extensions to file briefs were granted, briefs were filed by August 3, 2015. Based on the record, I make the following:

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<sup>4/</sup> Transcript references for the April 14 and 15, 2015 hearing are "1T" and "2T", respectively.

**FINDINGS OF FACT**

Facts Nos. 1 through 12 are stipulated by the parties (J-1):

1. George LaBrutto ("LaBrutto") is an employee within the meaning of the New Jersey Employer-Employee Relations Act ("the Act").

2. The Elizabeth Board of Education is an Employer within the meaning of the Act.

3. LaBrutto was first employed by the Elizabeth Board of Education ("Board") in January 1997 as a temporary carpenter.

4. The Board and the Northeast Regional Council of Carpenters ("Regional") are parties to a collective negotiations agreement effective July 1, 2012 through June 30, 2015 (see J-2).<sup>5/</sup>

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5/ There is a discrepancy between the parties stipulation and J-2, an exhibit attached to the stipulated facts. J-2 is a collective negotiations agreement between the Board and the United Brotherhood of Carpenters and Joiners of America, Local Union No. 715 ("United") effective from July 1, 2005 through June 30, 2008. Article I, entitled "Recognition" recognizes United as the exclusive negotiating representative for all full time permanent plumbers employed by the Board at its facilities. Two Memorandums of Agreement (MOA) are attached to J-2. The first MOA is between the Board and the New Jersey Regional Council of Carpenters, Local Union 155, Sheet Metal Workers' Int. Assoc. Local Union No. 22, Plumbers Local #24 and the International Union of Painters and Allied Trades AFL-CIO (Council). The MOA has an effective term from July 1, 2005 through June 30, 2008 and refers to the terms and conditions of the current CNA remaining in full force and effect except as changed by the MOA. The second MOA is between the Board and Council with an effective date of July 1, 2008 through June 30, 2011. It also refers to the terms of the parties' (continued...)

5. LaBrutto was a member of the Northeast Regional Council of Carpenters.

6. No employees belonging to the Northeast Regional Council of Carpenters are entitled to contractual tenure.

7. Luis Couto is the Board's Director of Plant, Property and Equipment Department.

8. Miguel Jimenez is an Assistant Director of Plant, Property and Equipment.

9. Luis Milanese is an Assistant Director of Plant, Property and Equipment.

10. LaBrutto had an employment contract with the Board covering the period July 1 2012 through June 30, 2013 (see J-3) and was employed as a permanent carpenter.

11. By correspondence dated May 6, 2013, LaBrutto was informed that his employment contract was not being renewed for the 2013-2014 school year (see J-4).

12. LaBrutto was originally brought back to work as a temporary carpenter for approximately two weeks before he was told that he was required to undergo a new background check and

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5/ (...continued)  
current agreement remaining in full force and effect. There is no testimony in the record to clarify the discrepancy between the stipulated fact that refers to J-2 as the current CNA between the Board and the Regional effective from July 1, 2012 through June 30, 2015. However, the discrepancy is not material as the parties agree as to any contractual terms effecting LaBrutto which are pertinent to this hearing.

be approved by the Board as a temporary carpenter in order to continue his temporary employment.

The following are facts adduced at the hearing from witness testimony and exhibits:

**Background**

13. As director of plant, property and equipment (1T108), Couto has the two assistant directors, Jimenez and Milanese, reporting to him (1T108-1T109). There are approximately 300 employees in the department holding many different trade positions, such as plumbers, carpenters, painters, electricians, custodians, truck drivers and warehousemen (1T109). Couto determines how many employees to use on the various department jobs at any point in time and, also, whether or not to hire outside contractors (1T114).

14. The job description for carpenter sets forth general job duties and states, in pertinent part, "[u]nder the leadership of Foreman and/or Supervisor, [a carpenter] builds and repairs structures and fixtures of wood, plywood and wallboard to conform to building codes..." (R-7; 1T110). Generally, carpenters work with wood and wood type of building materials. They do not usually perform tile work which is the work of masons, although they may do small patch jobs like replacing loose tiles in bathrooms (2T17-2T18). There are no masons employed by the department, so that work is sub-contracted (1T110-1T111).

15. The Board employs both permanent and temporary carpenters (1T111). Permanent carpenters are Board employees whose salary are part of the Board budget, whereas temporary carpenters are retained on an as-needed basis and their compensation derives from separate discretionary budget funds (1T111). Under the collective negotiations agreement covering carpenters, carpenters do not get tenure and have no recall or seniority rights (J-2; 1T115).

Unlike permanent carpenters, temporary carpenters do not work under a contract with the Board. When a temporary carpenter is needed, the foreman contacts the union hall. Sometimes, he requests a specific carpenter. At other times, any carpenter who is available will be sent over, but whoever is sent must first be on the Board-approved temporary carpenter list (1T112, 1T152-1T153). The need for temporary carpenters changes during the year. For instance, more are required during the summer months when students are not present, so that classroom routine will not be disrupted (1T113).

A foreman, such as Robert Donlan, does not necessarily need Couto's permission to use a temporary carpenter, although he must get Couto's approval for any decision to hire (1T112). However, foremen are not supervisors - e.g. they do not evaluate carpenters or hire or fire them (1T136). Also, foremen are

members of the carpenters' negotiations unit and covered by J-2 (1T81, 1T135).

16. LaBrutto held a temporary carpenter position from 1997 until February 21, 2011 when he was appointed by the Board as a full-time or permanent carpenter (CP-1, CP-2). Robert Delaney, LaBrutto's immediate supervisor in 2011, highly recommended him for the full-time position (CP-3 at page 17). There were no complaints about LaBrutto's work performance from the time he was hired in 1997 through May 2013 when he was informed that his contract as a permanent carpenter would not be renewed for the 2013-2014 school year. Couto confirms that LaBrutto did good work (1T115).<sup>6/</sup>

17. On May 3, 2013, Donlan instructed LaBrutto to report to the warehouse, the office housing all the trades, to pick up his 2013-2014 contract. However, when LaBrutto reported to the office, there was no contract. LaBrutto informed Donlan who told him to just "sit tight" (1T30-1T31). I infer that Donlan was not aware of the non-renewal decision at this point in time.

18. A few days later, on May 6, 2013, LaBrutto was called to the warehouse office and told to meet with Assistant Director

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6/ CP-3 is LaBrutto's personnel file and contains over a hundred pages. I admitted it over Respondent's objection that it is irrelevant because LaBrutto's work performance was not at issue. However, I cautioned counsel for Charging Party that I would only give weight to anything contained therein to the extent that there is witness testimony explaining the exhibit (1T28-1T30).

Jimenez. Jimenez gave LaBrutto (J-4), a letter from Superintendent Pablo Munoz, informing LaBrutto that, upon expiration of his employment contract effective June 30, 2013, he would not be offered a contract for the 2013-2014 school year "due to a reduction in force and budgetary constraints" (J-4; 1T32, 2T7-2T9).

According to LaBrutto, Jimenez explained that there was no money in the budget, and that he had to cut back (1T32). LaBrutto replied to Jimenez that, in his opinion, there was a lot of work and questioned, therefore, why the department was getting rid of people. By way of explanation, Jimenez repeated that there was no money in the budget (1T32).<sup>7/</sup>

#### **The Decision to Cut LaBrutto**

19. In the spring of 2013, Director Couto was instructed by the Board's Business Office and Human Resources Department to cut costs and/or positions in his department due to budget reductions (1T115-1T116). Human Resources decided that positions would be cut by "last in/first out" (1T116).

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<sup>7/</sup> Jimenez testified that he handed LaBrutto the letter and told him his contract was not being renewed but does not recall what, if anything, LaBrutto said to him about the non-renewal or any other specifics (2T7-2T9). Jimenez' recall as to the conversation was vague, whereas LaBrutto's recall was clear and specific. I credit LaBrutto's testimony as to the May 6, 2013 encounter with Jimenez, namely that LaBrutto questioned the decision to let him go when, in his (LaBrutto's) opinion, there was a lot of work to be performed.

Couto was also told by Human Resources to cut specific positions including one permanent carpenter, namely LaBrutto, because he was the last carpenter hired (1T116, 1T147). In addition to LaBrutto, seven other employees in Couto's department were notified of their non-renewal, including electricians and custodians as well as a supervisor. Some of these employees were later brought back while others were not (1T119-1T120, 1T148-1T150).

20. Additionally, there were other non-certified employees recommended by the superintendent for non-renewal (R-4; 1T117). Specifically, on May 3, 2013, then Superintendent Munoz issued a memorandum to members of the Board detailing 66 employees holding various positions who would be notified that contracts for their current positions would not be offered to them for the 2013-2014 school year due to budgetary reasons (R-4).

21. The staff cuts continued into the succeeding year. On June 10, 2014, a memorandum of non-renewal was issued by the new Superintendent, Olga Hugelmeyer, to 67 individuals, including Permanent Carpenter Steven Fedorochko (R-1, R-2; 1T120). Subsequently, Fedorochko was appointed to a temporary carpenter position and put on the Board's approved list, but only after he went through a new criminal history background check and was re-fingerprinted (R-3; 1T121-1T122).

**The Summer of 2013**

22. After LaBrutto was notified in May 2013 of his non-renewal as a permanent carpenter effective June 30, 2013 and during the summer of that year, particularly in June, LaBrutto observed Vito Gianetta, owner of VG Construction, doing ceramic tile and cement work at various district schools (CP-4, CP-5; 1T37-1T38). Most of the jobs sub-contracted to VG were small. LaBrutto had done ceramic tile work before, especially in the school bathrooms where he would be required to patch holes in the wall (2T17-2T18). The cement work being performed by VG involved patching concrete sidewalks which required building wood frames into which to pour the concrete.

LaBrutto concluded from his observations that VG was performing carpentry work (1T38). Couto's testimony refuted LaBrutto's conclusions that VG was performing carpentry work. He explained that the VG work involved brick and block work, work performed by masons, not carpenters (CP-5; 1T133). Whether LaBrutto was correct or not in his opinion of VG's work is irrelevant, since any carpentry being performed by VG was apparently incidental to the masonry work being performed. The Board does not employ masons (1T134). Also, Couto determines based on the needs of the department whether or not to hire outside contractors to perform work whether masonry or carpentry (1T114).

23. During the summer of 2013, LaBrutto also observed Stonehouse Construction putting Hardie Board siding on portable trailers (1T37). He observed approximately six workers from Stonehouse performing this task, which he also considered carpentry work (1T35, 1T39). According to Couto, however, Stonehouse was doing mostly demolition at the trailers prior to the carpenters doing the finishing work (1T138). The Board solicited competitive quotes for the Stonehouse work, but because of the size of the project was not required to put it out to bid (1T137).

24. Between May 6, 2013 and July 18, 2013, LaBrutto did have several discussions each week with Donlan asking him why this so-called carpentry work was being sub-contracted to VG and Stonehouse (1T40). Donlan explained to him that "we don't have the time" (1T40). Presumably, Donlan meant that his work crew did not have the manpower or the time to complete the work sub-contracted to VG and Stonehouse while performing other required duties for the district (1T81-1T82).

25. LaBrutto also testified that sometime between May and July 2013, he asked Donlan about no-bid contracts for the small jobs given to VG and Stonehouse. No-bid contracts can be awarded for jobs under a certain amount of money. LaBrutto does not recall what Donlan's response was to his question (1T46). In fact, LaBrutto's testimony was devoid of any specifics as to what

he asked Donlan regarding no-bid contracts. Therefore, I draw no inference from LaBrutto's testimony as to his conversation with Donlan about no-bid contracts. There is no evidence that LaBrutto made more than a general inquiry in this instance. Certainly, there is nothing in LaBrutto's testimony to support that LaBrutto was raising concerns about improprieties in the Board's bidding process.

There is also no evidence that LaBrutto questioned anyone else generally or specifically about no-bid contracts. Nor did he ask the union to file a grievance on behalf of himself or others as to this issue or any other issue (1T76-1T77). LaBrutto did speak to the union's business agent in July 2013 about sub-contracting but the record is devoid of testimony as to the specifics of that conversation or what, if anything, was done by the union in response to LaBrutto's complaint (1T100-1T101). The union's business agent did not testify.

26. Jimenez testified that LaBrutto never complained to him about VG Construction or Stonehouse nor did Donlan ever tell him about LaBrutto's concerns (2T6). I credit this testimony since LaBrutto testified that he spoke to Jimenez generally when he was handed his non-renewal letter on May 6, 2013 questioning why he was being non-renewed when there was so much work to do (1T33, 1T41, 1T78). There is no other testimony that LaBrutto asked Jimenez specifically about VG or Stonehouse or about

sub-contracting to any other contractor. The only other testimony relating to LaBrutto's complaints about work being sub-contracted to VG construction and Stonehouse were LaBrutto's conversations with his foreman, Donlan, and co-worker Steven Fedorochko (1T34, 1T40). There is no evidence that either man communicated LaBrutto's concerns to Jimenez, Couto, Superintendent Munoz or anyone else in management (1T35).

**LaBrutto's Two-Week Stint as Temporary Carpenter in July 2013**

27. On June 27, 2013, a Friday, Jimenez spoke to LaBrutto and told him to report the next week for work as a temporary carpenter (1T41, 1T49-1T50, 2T12).<sup>8/</sup> LaBrutto's employment as a permanent carpenter ended effective June 30, 2013 (1T136). Couto authorized bringing LaBrutto back, because the summer months were busy with carpentry work to be completed before September (1T123-1T124). Also, Jimenez had spoken to Couto and the Human Resources Department about bringing LaBrutto back because he considered him to be a good worker (2T12).

28. LaBrutto reported for work the next Monday and worked as a temporary carpenter until July 18, 2013 (1T50). There were other temporary carpenters hired during this period, namely Joe Papparatto and a Mr. Judeorsi who had previously worked as temporary carpenters during the summer of 2012 (1T52). LaBrutto

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<sup>8/</sup> Jimenez did not recall this conversation with LaBrutto, but since LaBrutto did report for work the next Monday, I credit LaBrutto's testimony in this regard (2T13).

had no discussions about sub-contracting during this period with Jimenez (1T51).

29. On July 18, 2013, Jimenez came to the school where LaBrutto was working and told him to report to Human Resources Representative Maria Malina at the Board's North Broad Street office (1T52-1T53).<sup>9/</sup> Malina told LaBrutto that his fingerprints were invalid and gave LaBrutto a form to get them reprinted (CP-7; 1T53). She advised him that the sooner he got them done, the sooner he could come back to work (1T54). Both permanent and temporary carpenters are required to have background checks and to be fingerprinted before working for the Board (1T112).

Specifically, Malina informed LaBrutto that he could not go back to work until he got re-fingerprinted and had a new background check. Although LaBrutto had worked as a temporary carpenter for 17 years and was on the approved list during that time, he was required to go through the process again, because he had been terminated from his permanent carpenter position as of June 30, 2013, and there was, therefore, a break in service (1T143-1T144, 1T146).<sup>10/</sup>

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9/ Jimenez did not recall this conversation on July 18, 2013, but since LaBrutto did report to Malina and Couto confirmed this, I credit LaBrutto that Jimenez told him to report to Malina (2T13).

10/ LaBrutto did not have to be re-fingerprinted and get a new background check when he moved from temporary carpenter to permanent carpenter, because there was no break in service (continued...)

30. Couto admits that he mistakenly brought LaBrutto back as a temporary carpenter. He thought that since LaBrutto had been on the approved list in the past, he would be on the list again. However, when someone from the payroll department alerted Couto that LaBrutto was not on the approved list for temporary carpenters, he realized his mistake. He learned that LaBrutto was not on the approved list, because he had not gone through the required state procedures of a new background check and fingerprinting (1T123). Couto spoke to Malina who confirmed what he learned from the payroll department (1T124).

31. After speaking to Malina, LaBrutto went to Couto to verify what she had told him. Couto confirmed that State regulations required fingerprinting and offered to set him up on an office computer so that he could get an appointment (1T54). LaBrutto declined to do so and opted to go home to get it done (1T54). He went home and filled out an application to be fingerprinted and got an appointment for July 24, 2013 (CP-6, CP-7, CP-8; 1T55). There was a ten-day waiting period between

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10/ (...continued)  
(1T143-1T144). He was required to get a physical (CP-3; 2T18). On the other hand, Vinnie Slaven, a school teacher during the year who traditionally worked as a temporary carpenter in the summer months, was not required to be re-fingerprinted or have a new background check because he was already on the approved temporary carpenter list (1T140).

getting fingerprinted and receiving the report in early August (1T55-1T56).

LaBrutto did not believe that the Board was discriminating against him by requiring him to go through a new background check or being re-fingerprinted in order to be put on the temporary carpenter list or being approved by the Board thereafter (1T87-1T88).

32. During this period after July 18, 2013 while LaBrutto was waiting for the report on his fingerprints and because the summer months were so busy, the Board hired new temporary carpenters including Vito Gianetta of VG Construction (R-5; 1T55, 1T125-1T126).

33. Once LaBrutto got back the results from his background check and fingerprinting in early August, he brought the forms (CP-7, CP-8) to Couto and asked when he could return to work (1T57-1T58). Couto explained that LaBrutto needed to be approved by the Board at its regular meeting to be put on the temporary carpenter list (1T58). Everyone who is put on the approved list has to first be approved by the Board (1T141).

LaBrutto's name was not on the August agenda. However, his name was on the September agenda, but was removed by someone in Human Resources (1T144).

**The Fall and Winter of 2013/2014**

34. In September 2013, LaBrutto first learned that his name was not in the Board minutes for approval at the August or September Board meeting (1T59). LaBrutto spoke to Couto who told him without explanation that his application was denied by the Board (1T59, 2T19). LaBrutto, however, learned from Donlan that he was denied because he did not live in the City of Elizabeth (CP-12; 1T59).<sup>11/</sup> During a later conversation on January 21, 2014, Jimenez, also, confirmed that the Superintendent had removed LaBrutto from the approved list because he did not live in the City of Elizabeth (CP-12).

35. LaBrutto was puzzled by Donlan's explanation regarding the residency requirement since several of the temporary and permanent carpenters he knew lived outside the City, including Fedorochko, Eddie Dipilito, Mike Levina, Blaise LaPolla and Robert Donlan himself (1T60). Couto corroborated LaBrutto's testimony in this regard confirming that there is no prohibition against temporary carpenters living outside the City.

Based on this testimony, I find that residency is not a bar to working as a temporary carpenter for the City. However, I

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<sup>11/</sup> According to LaBrutto, Donlan explained to him that he was a substitute carpenter, and no subs could work for the Board unless they lived in the City (1T60). I do not find that there is a distinction between temporary and substitute carpenters since the terms are used interchangeably by the Board (CP-9; R5; 1T60, 1T63-1T64, 1T98, 1T153-1T154).

also find that the Board and/or Superintendent removed LaBrutto from the list because of the residency issue (CP-12). Whether they were mistaken in removing LaBrutto because of his residency status or they did so for another reason, is not established by testimony or documentary evidence. Nor can I draw a negative inference from the Boards and/or Superintendent's decision to remove LaBrutto from the list for this reason, since no fact supports that they were aware of LaBrutto's concerns or statements regarding sub-contracting and/or no-bid contracts or any other protected activity.

36. Despite the residency issue that apparently caused LaBrutto to be initially denied approval in August and/or September, the Board approved LaBrutto's temporary carpenter status in October 2013 (1T126-1T127). Couto was notified of the approval by the Human Resources Department, although he never saw a Board resolution to that effect (1T129). LaBrutto, however, was unaware that he was approved and put on the temporary list (1T98, 1T127). Nevertheless, by the time that LaBrutto was approved in October, the busy summer season had ended, and there was no work for him at that point in time (1T127). Between July 18, 2013 and December 31, 2013, LaBrutto was not offered work as a temporary carpenter (1T64).

37. Then, in January 2014, Jimenez called LaBrutto into his office because Carpenter Michael Vena needed surgery and Jimenez

thought of LaBrutto as a replacement (1T132-1T133). On January 21, 2014, LaBrutto reported to Jimenez. LaBrutto taped the conversation that day (CP-12; 1T69-1T72).<sup>12/</sup> The transcript (CP-12) of that conversation reveals that Jimenez first asked after LaBrutto's welfare and then told him that he (Jimenez) had the impression that LaBrutto thought that they did not try to help him (CP-12).

In the transcript, Jimenez denied not trying to help LaBrutto and explained that he spoke to everyone including those in Human Resources as well as to Couto. Jimenez explained that LaBrutto had been put on the temporary carpenter list, but that the superintendent removed him because LaBrutto lived outside the City. LaBrutto countered that there was a plumber working for the Board who lived in Bradley Beach. Jimenez explained that LaBrutto was not a plumber, but that the plumber was brought in because they needed his services.

Jimenez continued that he was 60 days behind in his work orders and one of his carpenters was not working due to a medical problem. Jimenez told LaBrutto he needed his services for approximately two months (1T65). LaBrutto told Jimenez that he

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<sup>12/</sup> Jimenez did not recall this conversation and offer of work. Most of his testimony was vague and his recollection faulty regarding what, if any, conversation he had with LaBrutto on January 21. Accordingly, I credit LaBrutto's testimony as to the offer of employment in January 2014, because CP-12 is a taped transcript of the conversation which corroborates his testimony.

would get back to him on the offer of work, but that he was not currently working.<sup>13/</sup> LaBrutto then left the office (CP-12).

38. In actuality, before accepting Jimenez' offer, LaBrutto wanted to speak to his attorneys, because he had already filed a tort claim against the City (R-8; 1T65). According to LaBrutto, a few days later, on January 25 or 26, he contacted Jimenez and told him the attorneys agreed that he could come back to work, but Jimenez told him to forget it, that LaBrutto had refused (1T66). Jimenez hired Giuseppe Paparatto to do the work sometime after the January 21 meeting (1T66). The timing of Paparatto's hiring is not established in the record - e.g. whether Paparatto was hired before or after LaBrutto contacted Jimenez on the 25<sup>th</sup> or 26<sup>th</sup>. However, Paparatto was hired as a temporary carpenter and worked until June 2014 (1T66).

39. On February 4, 2014, LaBrutto's attorney wrote to the Board's attorney in response to Jimenez' January 21 offer of work (R-8). The attorney wrote confirming that a law suit was filed

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<sup>13/</sup> On direct examination, in describing the January 21, 2014 conversation, LaBrutto testified that he told Jimenez that he could not accept the offer of work until he spoke to his attorneys (1T65). However, the taped transcript supports that he never told Jimenez during the conversation that he had to first speak to his attorneys before he could give Jimenez an answer (1T90-1T91). On the 21<sup>st</sup>, LaBrutto simply told Jimenez that he would get back to him on the offer (CP-12). I credit the transcript, not LaBrutto's testimony, in this regard.

on behalf of LaBrutto against the Board and continued in pertinent part:

I had contacted you directly and advised you that Mr. Labrutto [sic] would be willing to return for the purpose of mitigating his damages but that this was not [an] appropriate solution to the problem since Mr. Labrutto [sic] should be immediately reappointed and reinstated as a full time carpenter. [R-8]

The attorney also denied Jimenez' claim that LaBrutto had refused to come back to work and demanded that the Board immediately reinstate LaBrutto to his permanent carpenter position with back pay, overtime and reimbursement for medical benefits (R-8).

In characterizing the letter on cross examination, LaBrutto admitted that the letter does not state that he was accepting the temporary position offered by Jimenez, because LaBrutto wanted a permanent position (1T94). However, on redirect LaBrutto testified that, in the letter, his attorney was accepting the offer of temporary employment on his behalf (1T101-1T102).

The language in the letter appears to suggest that LaBrutto would come back as a temporary carpenter only to mitigate his damages, but that he was actually entitled to be reinstated to a permanent carpenter position. The Board's attorney, however, did not interpret the letter in this manner, and LaBrutto was not given the temporary carpenter position originally offered by Jiminez.

40. There have been no permanent carpenters hired since LaBrutto was non-renewed effective June 30, 2013. Furthermore, a year later, one more permanent carpenter - Steven Fedorochko - was non-renewed. Like LaBrutto, Fedorochko was required to undergo a new criminal background check, be re-fingerprinted and approved by the Board in order to be placed on the approved-temporary-carpenter list (R-2, R-3; 1T120-1T121, 1T156-1T157). Although LaBrutto was not aware of Fedorochko's situation, when shown the exhibits on cross examination, he was not surprised that Fedorochko was also required to undergo the same process as him in order to be put on the approved list (1T85-1T86).

41. LaBrutto has never held union office or been a shop steward (1T76). He has never filed a grievance against the Board or had one filed on his behalf (1T76).

#### **ANALYSIS**

Charging Party contends that on or about August 21, 2013, the Board informed Temporary Carpenter George LaBrutto that he would not be employed for the 2013-2014 school year. The Board's action, Charging Party contends, violated 5.4a(1) and (3) of the Act. Specifically, Charging Party asserts that both LaBrutto's non-renewal as a permanent carpenter and the Board's subsequent delay in placing him on an approved list for temporary carpenters and/or failing to give him work thereafter once he was approved

as a temporary carpenter was in retaliation for the exercise of protected activities, namely grievances LaBrutto filed on behalf of the union and complaints he made to supervisors and managers about sub-contracting the work of the carpenters without submitting it to the public bidding process. Based on the record before me, I recommend that the Complaint be dismissed.

**The Statute of Limitations Argument**

N.J.S.A. 34:13A-5.49(c) states in pertinent part:

. . . no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was no longer prevented.

See also, Kaczmarek v. N.J. Turnpike Auth., 77 N.J. 329, 341 (1978).

The charge and amended charges only allege that on August 21, 2013 the Board terminated LaBrutto because of and in retaliation for protected activity, namely his complaints to managers and supervisors about sub-contracting in non-compliance with public bidding laws. Respondent contends that as a threshold issue, the charge and amended charge, filed respectively on February 20, 2014 and October 7, 2014, are beyond the six-month statutory period, because LaBrutto's permanent employment ended June 30, 2013 and his temporary employment ended July 18, 2013. I agree.

No testimony or documentary evidence supports, as alleged, that LaBrutto's employment as either a permanent or temporary carpenter ended on August 21, 2013.<sup>14/</sup> In fact, the significance of that date is nowhere in the record before me. LaBrutto was informed of his non-renewal effective June 30, 2013 at the end of June. Although he was mistakenly brought back the next week as a temporary carpenter, he was removed on July 18, 2013 after Human Resources determined that he was not on the temporary-carpenter-approved list because he had not gone through a new background check, fingerprinting and Board approval process. Accordingly, July 18, 2013 was the latest operative event regarding his permanent or temporary employment with the Board.

Charging Party now argues that the process utilized to place LaBrutto on the approved list after his June 30 non-renewal was irregular. It asserts that I should draw an inference of hostility to protected conduct from this irregularity which, it alleges, LaBrutto only learned about on August 21, 2013, namely when he learned he would not be on the approved list. This date, it contends, was the triggering event. However, as stated above, no testimony establishes that anything occurred on August 21. Basically, none of the events complained of in the charge - LaBrutto's termination as a permanent or temporary carpenter -

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<sup>14/</sup> The only significance of the date August 21, 2013 is that it is the last date that a charge would be timely based on the February 20, 2014 filing date of the charge.

occurred within six months of the filing of the charge and are time barred. Nevertheless, for the reasons set forth below, I find that even if the charge were timely as to the Board's failure to approve LaBrutto for placement on the temporary-carpenter approved list in August, Charging Party has not met its burden of establishing a 5.4a(3) violation of our Act.<sup>15/</sup>

### **The Bridgewater Test**

In re Bridgewater Tp., 95 N.J. 235 (1994) set out the standards for determining whether personnel actions were 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 evidence on the entire record, that protected conduct was a substantial and motivating factor in the adverse personnel action(s). This may be done by direct or circumstantial evidence showing that the employee engaged in protected activity, the

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<sup>15/</sup> Respondent correctly argues that even assuming that in August LaBrutto learned he was not on the approved list, being on the list did not guarantee him employment as under the parties' collective negotiations agreement management employs temporary carpenters on an as-needed basis. The busy summer season was coming to the close by the end of August. Moreover, there is no seniority or rotational system under the collective agreement to guarantee him work even if there was a need for carpentry services at that time. Therefore, the only remedy if a violation were found, would be to order the Board to put him on the list which it did, in any event, in October 2013.

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

If the employer does not present any evidence of a motive not illegal under the 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 unlawful motives under the Act and other motives contributed to a personnel action. In these dual motive cases, the employer has not violated the Act if it can prove by a preponderance of the evidence on the entire record, that adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proven, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action.

First, as to the initial non-renewal of LaBrutto as a permanent carpenter, the evidence supports that he was one of many non-certified Board employees (66 in all) notified that their contracts would not be renewed for the 2013-2014 school year for budgetary reasons. Specifically, in LaBrutto's department, eight employees were non-renewed. LaBrutto, as the least senior permanent carpenter, was cut. There is no evidence that the "last in, first out" procedure imposed by Human Resources on department managers was applied inappropriately in

the decision to lay off LaBrutto who was the last permanent carpenter hired. Nor is there evidence that the method selected to layoff the 66 employees across all departments was selected to target LaBrutto in particular. Finally, no evidence supports that LaBrutto was engaged in protected activity before the decision to non-renew him was made. He filed no grievances nor was he involved in the union as an officer or representing himself or co-workers in concerted activities. Accordingly, I cannot find that the Board violated the Act by non-renewing LaBrutto.

Next, when LaBrutto was notified by Assistant Director Jimenez that he was being non-renewed, LaBrutto remarked generally to Jimenez that there was a lot of work and questioned why the Board was reducing the workforce. Jimenez responded that there was no money in the budget. LaBrutto's observations to Jimenez amounted to nothing more than a personal gripe, namely his disagreement with management over its operational decision to reduce its workforce - an exercise of managerial prerogative.

In this context, Respondent correctly cites State of New Jersey (Office of the Public Defender) and Rau, P.E.R.C. No. 86-67, 12 NJPER 12 (¶17003 1985), recon. den. P.E.R.C. No. 86-93, 12 NJPER 199 (¶17076 1986), aff'd NJPER Supp.2d 169 (¶148 App. Div. 1987). There, the charge alleged that Rau was discharged in retaliation for voicing complaints concerning the operation of

her office. The Commission determined that Rau's individual protests, complaints and grievances "simply did not involve terms and conditions of employment within the meaning of the Act and amounted at most to her personal opinions about how her section should be organized and the practice of law conducted." Id. at 12. Relying on North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), aff'd NJPER Supp. 2d 63 (¶45 App. Div. 1979), the Hearing Examiner also wrote:

Note carefully the limitation placed by the Commission on protected individual conduct, namely, it must occur in the context of enforcing an agreement or existing working conditions in a recognized or certified unit. H.E. No. 85-48, 11 NJPER 425, 428 (¶16147 1985)

See also, Capitol Ornamental Concrete Specialties, Inc., 248 NLRB 851 (1980)<sup>16/</sup> (employee's complaint about condition of road leading to parking area not protected where no evidence he acted in concert with any other employees.) Contrast, State of New Jersey (Office of the Public Defender), P.E.R.C. No. 2006-11, 31 NJPER 276 (¶109 2005) (employee's complaints together with other attorney assistants in meeting with supervisor about screening abusive, harassing client calls and safety concerns related to unscheduled family visits was protected concerted activity);

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<sup>16/</sup> The NLRB's interpretation of the NLRA may serve as a guide for interpreting our Act, and the Commission may rely on federal precedent in unfair practice litigation. Lullo v. International Assn. of Firefighters, 55 N.J. 409 (1970).

Atlantic Cty. Judiciary and Derek Hall, P.E.R.C. No. 93-52, 19 NJPER 55 (¶24025 1992), aff'd 21 NJPER 321 (¶26206 App. Div. 1994) (employee engaged in protected conduct when, during group meeting called by management to discuss new evaluation system, he questioned proposed changes).

Here, upon learning of his non-renewal, LaBrutto questioned the decision to layoff himself as a full-time carpenter when he felt that there was plenty of carpentry work which was being sub-contracted. Assuming arguendo that LaBrutto was correct in concluding that the work he observed being performed by sub-contractors VG and Stonehouse was carpentry work,<sup>17/</sup> LaBrutto's comments in this regard whether to Assistant Director Jimenez or to LaBrutto's co-worker Federochko or Foreman Donlan were nothing more than personal opinion. He was not speaking on behalf of anyone but himself since he was the only permanent carpenter non-renewed for 2013-2014 for budgetary reasons.

Moreover, whether or not the Board's decision to sub-contract the work previously done by carpenters was fiscally prudent in light of its budget constraints is part and parcel of its operational decision making process. LaBrutto's disagreement does not rise to the level of a protected activity in this

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<sup>17/</sup> Couto refuted this assumption explaining credibly that if any of the work was actually carpentry it was only tangential to the work project, most of which was masonry or other work not within the carpenters job description. However, this fact is immaterial here.

context. Contrast, Central Reg. Bd. of Ed., P.E.R.C. No. 2015-77, 42 NJPER 36 (¶10 2015)(Assn. President's concerns about use of substitute drivers and rotational assignments of bus runs raised to supervisor was union-related protected conduct). In any event, no grievance was filed on LaBrutto's behalf or on behalf of the union nor did LaBrutto speak out at a public meeting about his concerns or ask that a grievance be filed. In fact, there is no evidence that any decision-maker, other than Jimenez was aware of LaBrutto's comments regarding sub-contracting and those comments were seemingly casual and randomly made.

Similarly, LaBrutto testified that he questioned Donlan about no-bid contracts given to VG and Stonehouse, but the record before me lacks specifics as to what LaBrutto said to Donlan, namely, whether LaBrutto was questioning that the awarding of the no-bid contracts violated any public bidding laws. This testimony is insufficient to establish a nexus between any alleged protected activity and management's decision to non-renew his permanent carpenter position as well as to any subsequent action in allegedly delaying LaBrutto's appointment to the approved-temporary-carpenter list. There is no evidence that any statement made by LaBrutto regarding no-bid contracts was communicated by him or anyone else to management such that I

could infer hostility and retaliatory motive on the part of the Board.

Next, even if I were to find that LaBrutto was engaged in protected conduct in regard to his comments about sub-contracting and awarding of no-bid contracts, I do not find hostility to the exercise of any protected conduct. Charging Party asserts that the manner in which management handled LaBrutto's subsequent placement on the approved temporary carpenter list was irregular, and that I should, therefore, infer hostility. In particular, Charging Party urges that I infer hostility from Respondent's failure to call a witness - Human Resources Representative Maria Malina - who was sitting in the hearing room. It contends that Malina might have testified that the manner in which LaBrutto was placed on the temporary-carpenter-approved list was irregular. I decline to draw such an inference.

This argument ignores the burden placed on the Charging Party in the first instance to prove its case by a preponderance of the evidence. N.J.A.C. 19:14-6.8. In other words, if Charging Party had established initially that LaBrutto was treated differently from other permanent carpenters after his non-renewal in regard to placing him on the approved list for temporary carpenters, then Respondent's failure to call a witness within its control to rebut this evidence would have warranted a negative inference. State v. Clawans, 38 N.J. 162, 171 (1962).

Here, however, Director Couto credibly testified that he followed the instructions given him by Malina, namely that LaBrutto had to have a new background check, be re-fingerprinted and approved by the Board before he could be placed on the approved-temporary-carpenter list, because his non-renewal caused a break in service.<sup>18/</sup> LaBrutto himself confirmed that he did not consider the procedure imposed on him in this regard discriminatory. Couto further explained that a year later another carpenter similarly situated to LaBrutto - Steven Fedorochko - was required to undergo the same procedure as LaBrutto in order to be placed on the approved list. LaBrutto's treatment, therefore, was not irregular.

Charging Party also asserts that the Superintendent's initial refusal to approve LaBrutto for the list of temporary carpenters due to his lack of residency is proof that the Board's treatment of LaBrutto was irregular. However, nothing in the record supports that the Superintendent's actions, although mistaken as to the residency requirement, were taken as a result of hostility to a protected activity. There was no evidence that the Superintendent was even aware of LaBrutto's personal gripes or complaints about his non-renewal or of LaBrutto's view that

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<sup>18/</sup> Whether there was actually a break in service is irrelevant, since Board policy required that in order to work as a temporary carpenter LaBrutto had to be on a Board-approved list. Once LaBrutto was hired as a permanent carpenter, he was no longer on the approved list.

there was plenty of carpentry work which was being sub-contracted or awarded as no-bid contracts from which I could draw an inference that the Superintendent's "mistake" about the residency requirement was a pretext for hostility.

Indeed, no decision-maker here was shown to have knowledge that LaBrutto disagreed with management's operational decision to non-renew him when there was, in LaBrutto's opinion, carpentry work being sub-contracted and/or awarded as no-bid contracts. Accordingly, without knowledge by a decision-maker of any union-related or protected activity which is the second prong of the Bridgewater test, there is no violation of our Act. UMDNJ, P.E.R.C. No. 98-127, 24 NJPER 227 (¶29107 1998) (Charging Party did not meet its burden of proof under Bridgewater where decision-maker had no knowledge of union activity.); Tp. of Teaneck, P.E.R.C. No. 2000-45, 26 NJPER 48 (¶31018 1999) (no violation where record contained no evidence supervisor/decision-maker acknowledged or cared in anyway about charging party's protected activity).

The only one in a supervisory position with any direct knowledge about LaBrutto's feelings was Assistant Director Jimenez who was not a decision-maker in regard to non-renewing LaBrutto as a permanent carpenter or placing LaBrutto on the temporary-carpenter-approved list thereafter. Jimenez's actions demonstrated no hostility to LaBrutto's general comments about

there being plenty of work and questioning why the Board was non-renewing him as a permanent carpenter and then sub-contracting carpentry work.

In actuality, Jimenez did everything he could to give LaBrutto work after his non-renewal despite any comments about sub-contracting. For instance, with Couto's approval, he brought LaBrutto back immediately as a temporary carpenter.

Unfortunately, shortly after employing LaBrutto, Couto was notified by human resources, that since LaBrutto was not on an approved-temporary-carpenter list, he could not work as a temporary carpenter until he had completed a process involving a background check, fingerprinting and Board approval.

Even after the Board finally put LaBrutto on the approved list in October 2013, Jimenez, presumably with Couto's approval, offered him a temporary-carpenter position in January 2014 to replace another carpenter who was on an extended medical leave. Whether that offer was refused as Jimenez believed or whether, as Charging Party contends, the job offer was accepted by LaBrutto pursuant to his attorney's letter to the Board, is immaterial to this proceeding because Charging Party has not met its burden under Bridgewater to prove that LaBrutto was engaged in protected

activity, that the employer was aware of that activity or that the employer was hostile to it.<sup>19/</sup>

Based on the above, I recommend that the complaint be dismissed.

**RECOMMENDED ORDER**

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

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

DATED: December 15, 2015  
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 December 28, 2015.

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<sup>19/</sup> In any event, after LaBrutto left Jimenez's office the day the employment offer was extended, Jimenez acted on his belief that LaBrutto had refused the offer and hired another temporary carpenter to fill the position.