

H.E. No. 2022-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2014-028

TRENTON EDUCATIONAL SECRETARIES
ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner finds that the Trenton Board of Education violated N.J.S.A. 34:13A-5.4a(1) and (3) when it abolished the Administrative II secretary position in the Superintendent's office in retaliation for Trenton Educational Secretaries Association's (TESA) exercise of protected activity when TESA asserted its contractual recall rights and prevented the Superintendent from selecting his secretary from a list of recalled TESA members.

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

H.E. No. 2022-1

STATE OF NEW JERSEY
PUBLIC EMPLOYMENT RELATIONS COMMISSION
BEFORE THE DIRECTOR OF UNFAIR PRACTICES

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2014-028

TRENTON EDUCATIONAL SECRETARIES
ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Adams Gutierrez and Lattiboudere, LLC, attorneys
(Derly Gutierrez, of counsel)

For the Charging Party,
Selikoff and Cohen, attorneys
(Keith Waldman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 23, 2013, October 15, 2013, and March 20, 2014, Trenton Educational Secretaries Association (TESA) filed an unfair practice charge, an amended charge, and a second amended charge, respectively, against Trenton Board of Education (Board). The second amended charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5),^{1/} when Superintendent

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)"

Francisco Duran abolished an Administrative II secretary position, and created a second confidential secretary position in the Superintendent's office in retaliation for TESA's exercise of protected activity when it asserted its recall rights under the parties' collective negotiations agreement (CNA) and prevented the Superintendent from selecting his secretary from a list of recalled TESA members. TESA further alleges in the second amended charge that the Board's former Executive Director of Human Resources told TESA representatives that if the Superintendent was not allowed to select a secretary to fill the vacancy in his office from the TESA recall list, "the Board would just abolish the position and make it a second confidential position."

On July 23, 2013, concurrent with the filing of its original charge, TESA filed a related clarification of unit petition, Docket No. CU-2014-002, regarding the Board's abolishment of the Administrative II secretary position and creation of a second confidential secretary position in the Superintendent's office.

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

On March 25, 2015, the Director of Unfair Practice and Representation issued a decision dismissing both the clarification of unit petition and the charge. See D.R. No. 2015-7, 41 NJPER 515 (¶161 2015). In that decision, the Director held that the clarification of unit petition should be dismissed because the Board's newly created position was a confidential secretary within the meaning of the Act who was ineligible for inclusion in any collective negotiations unit. Id. With regard to the unfair practice charge, the Director found that it "essentially challenges the Board's decision to designate Williams as a confidential employee under the Act," and that the Director had "advised of [the Director's] intention to dismiss the charge if Williams was determined to be a confidential employee whose duties may be determined by the public employer." Id. Thus, "[i]n the absence of any additional facts comprising an amendment to the charge," the Director found that the further processing of the charge was not warranted and dismissed it. Id.

On April 3, 2015, TESA filed a request for review of the Director's March 25, 2014 decision dismissing the charge and the clarification of unit petition with the Commission.

On June 25, 2015, the Commission denied TESA's request for review of the Director's dismissal of the clarification of unit petition, but remanded the unfair practice charge to the Director for further processing. P.E.R.C. No. 2015-78, 42 NJPER 39 (¶11

2015). The Commission found that the Director's finding that TESA's newly created position is a confidential secretary who is ineligible for inclusion in the unit was supported by undisputed material facts and a thorough investigation, and that an evidentiary hearing was unnecessary. Id. However, the Commission held that a finding that the new secretary position is confidential does not preclude a finding of an unfair practice if the new position was created in retaliation for TESA asserting its recall rights. Id.

Specifically, the Commission found as follows:

We disagree with the characterization of TESA's unfair practice charge in the Director's decision. A review of the unfair practice charge in its entirety reveals that essentially, TESA asserts that the Board threatened to abolish the administrative II secretary position if it asserted its recall rights under the collective negotiations agreement and did not allow the Superintendent to pick his own secretary. This allegation, if true, may constitute an unfair practice. N.J.A.C. 19:14-2.1(a). The Director's finding that the position that was created was in fact a confidential position does not preclude a finding that the Act's unfair practice provisions may have been violated if the position was created in retaliation for TESA asserting its rights under the agreement. See Local 195, IFPTE v. State, 88 N.J. 393, 424 (1982) (Handler, J. concurring and dissenting). Therefore, we remand the unfair practice charge to the Director for further processing.

Id.

On December 2, 2016, a Complaint and Notice of Hearing was issued (C-1).^{2/} On February 10, 2017, the Board filed an Answer (C-2). A hearing was held in this matter on May 10 and 29, 2018.^{3/} The parties submitted post-hearing briefs by October 1, 2018.

Based upon the record, I find the following facts:

FINDINGS OF FACT

1. TESA is a public employee organization within the meaning of N.J.S.A. 34:13A-1 et seq. It is the duly authorized representative for all personnel regularly employed under contract or on leave from the Board, but excluding Trenton Administrators and Superintendents, Trenton Education Association, Attendance Officers, Security Officers, Executive Secretarial Unit, Business and Technical Unit, Cafeteria, Para-professional Unit, and Mechanics and Laborers and Custodian Unit. (J-1; 1T11-22 to 1T12-5).

2. The Board is a public employer within the meaning of N.J.S.A. 34:13A-1 et seq., and the rules and regulations of the Public Employment Relations Commission promulgated in accordance therewith (1T11-14 to 1T-21).

^{2/} Commission exhibits are marked "C-", while Joint, Charging Party and Respondent exhibits are marked "J-", "CP-", and "R-", respectively.

^{3/} "T" represents the transcript, preceded by a "1" or "2" signifying the first or second day of hearing, followed by the page and line number(s).

3. TESA and the Board are parties to a CNA dated July 1, 2009 to June 30, 2012 (J-1).

4. Article 8, paragraph A of the parties' CNA regarding reductions in force and seniority provides as follows:

In the event of any Reduction in Force (RIF), district-wide seniority (the Board appointment date of employment on a permanent basis) shall apply. The Board shall retain the right to reduce the number of secretarial and clerical positions when done for just cause.

(J-1).

5. Article 8, paragraph D of the parties' CNA regarding the recall rights after a layoff due to a RIF provides as follows:

An employee who is laid off due to a RIF shall only have a right to be recalled if additional secretarial and clerical positions become available due to vacancies or creation of new positions within 3-1/2 years (forty two months) from the date of lay off. Notification to be rehired shall be sent to the employee at the last known address by Registered Mail-Return Receipt Requested and regular mail. A copy of such notification will be sent by regular mail or hand delivered to the Association. The employee shall be given five (5) work days to notify the Board in writing that he/she is available to be rehired. Any employee who does not respond or indicates that he/she is not available shall waive all future rights to be recalled.

(J-1).

6. TESA was organized in 1976, and since 1976, the Superintendent's office has employed one confidential secretary,

and one or two secretaries who were TESA unit members. (1T23-24 to 1T24-25).

7. However, when the confidential secretary in the Superintendent's offices was out on sick leave, the Board would replace the confidential secretary with a TESA unit member, who was paid a \$25 per day stipend in addition to the employee's regular salary. (1T64-1 to -16).

8. During the 2012-2013 school year, Duran had two secretaries employed in the Superintendent's office (1T56-7 to -16).

9. One secretary, Lenore Armstrong, was an Administrative II secretary and TESA unit member, and the second, Phyllis Boyer-Wood, was a confidential secretary who was not included in the TESA unit. (1T56-7 to -16).

10. During that time, a third employee, Maria Smith, also worked in the Superintendent's office as a confidential employee but not as a secretary. (1T56-20 to -23, 1T57-16 to -20, 1T83-15 to -17).

11. Armstrong, the Administrative II secretary and TESA unit member, announced in May 2013 that she also was retiring, effective July 1, 2013. (1T62-1 to -18).

12. TESA's expectation with regard to Armstrong's retirement was that the vacancy would be filled with a TESA unit

member who would be laid off as part of the Board's regular year-end RIF and then eligible for recall. (1T62-19 to -24).

13. On May 20, 2013, the Board's Executive Director of Human Resources, Kathleen Smallwood-Johnson, met with TESA President Patricia Vogt and TESA Secretary Elizabeth Gill to discuss TESA recall rights. (1T25-1 to 1T26-9, 1T85-23 to 1T86-12).

14. At that meeting, Smallwood-Johnson told Vogt and Gill that Duran would like to choose Armstrong's replacement for the Administrative II secretary position in the Superintendent's office from the TESA recall list of eligible Administrative II secretaries. (1T26-3 to 1T27-1, 1T86-9 to -24).

15. Vogt then stated to Smallwood-Johnson that Duran could not choose a replacement from the TESA recall list because TESA secretaries choose their own positions based on seniority. (1T27-1 to -3).

16. Smallwood-Johnson then stated that she was surprised that TESA would not let Duran choose a replacement secretary. (1T27-3 to -4).

17. Vogt then responded that Duran already had a confidential secretary of his choosing, and TESA wanted to keep the position in its unit. (1T27-5 to -7, 1T86-21 to -24).

18. Smallwood-Johnson then told Vogt and Gill that if TESA did not allow Duran to choose his own secretary from TESA's

recall list, he had indicated that he might abolish the Administrative II secretary position and replace it with a second confidential secretary position. (1T28-3 to -11, 1T86-25 to 1T87-9).

19. Although she felt threatened, Vogt responded that the Superintendent could do what he wanted to do, but TESA would challenge that action if necessary, as TESA had successfully challenged similar actions before. (1T28-3 to -11, 1T28-14 to -16, 1T87-9 to -12).

20. On May 21, 2013, TESA Vice President Ann Sciarotta called Smallwood-Johnson to schedule a date on which TESA Administrative II secretaries would choose their positions for the 2013-2014 school year, and the two selected May 31, 2013. (1T70-8 to -18).

21. During that conversation with Sciarotta, Smallwood-Johnson said three times that she could not believe that TESA would not allow Duran to choose his new Administrative II secretary. (1T70-18 to 1T71-1).

22. After both the second and third time that Smallwood-Johnson made that statement, Sciarotta responded that it is TESA's right to have its recalled members choose their positions. (1T71-2 to -7).

23. Smallwood-Johnson then told Sciarotta that Duran could abolish the Administrative II position in his office and make the position confidential. (1T71-8 to -10).

24. Sciarotta responded that this situation had occurred before to TESA, TESA had challenged it, and TESA had won. (1T71-10 to -13).

25. On May 22, 2013, Smallwood-Johnson called Sciarotta and told her that she had spoken with Duran. Smallwood-Johnson told Sciarotta that Duran had a "soft spot" in his heart for Vogt and Sciarotta, and Duran was going to allow the Administrative II secretary position in the Superintendent's office to be on the list of positions from which recalled TESA members could choose. (1T33-5 to -15, 1T71-22 to 1T72-6).

26. On May 31, 2013, Vogt, Sciarotta, and Smallwood-Johnson all attended the scheduled meeting for recalled TESA members to select their positions for the 2013-2014 school year. (1T32-12 to -15, 1T72-7 to 1T73-9).

27. At that meeting, recalled TESA Administrative II secretaries came in, in order of seniority, to choose their positions, and the third most senior recalled Administrative II secretary, Lisa Flowers, chose the Administrative II secretary position in the Superintendent's office. (1T32-12 to 1T33-23, 1T73-6 to -15).

28. On June 4, 2013, Vogt and Sciarotta met with Duran to discuss labor relations concerns other than the Administrative II secretary position issue. (1T36-1 to 16, 1T73-23 to 1T74-5).

29. At the end of the meeting, Duran raised the issue of the Administrative II secretary position in his office, and told Vogt and Sciarotta that it was very important that he had a secretary who was fluent in Spanish. (1T36-18 to 1T37-20, 1T74-6 to -12).

30. Sciarotta assured Duran that Lisa Flowers was fluent in Spanish. (1T38-4 to -10, 1T74-12 to -14).

31. Duran then said that fluency in Spanish was important because many calls come in to the Superintendent's office from Spanish-speaking people, and if the secretary cannot take the call, he has to take the call himself, or Maria Smith, the confidential employee in the office, has to take the call, but that is not her job responsibility. (1T37-13 to 1T38-3, 1T74-15 to -20).

32. The May 10, 2013 job posting for the Administrative II secretary position in the Superintendent's office lists "[a]bility to speak and write utilizing appropriate English language, spelling, grammar and sentence structure while speaking and completing correspondence" as a job qualification, but there is no mention of Spanish or any other language on the job posting. (CP-1).

33. On June 5, 2012, Vogt and Sciarotta again met with Smallwood-Johnson, who brought Duran to the meeting as well, although he was not scheduled to attend. (1T40-16 to 1T41-5, 1T74-25 to 1T75-12).

34. At this meeting, Duran announced that he was abolishing the Administrative II secretary position in his office and creating a confidential secretary position because the State monitor^{4/} told him that he could do so. (1T41-7 to -18, 1T75-14 to -17).

35. Vogt responded by stating that the TESA Administrative II secretary position had been in the Superintendent's office for many years, Duran's abolishment of it was a problem, TESA had this issue before, TESA challenged the issue, and TESA had won. (1T41-14 to -22, 1T75-18 to -22).

36. Vogt then asked Duran for the State monitor's name, and reiterated that TESA had this issue before, and TESA challenged it before. (1T41-14 to -22, 1T76-4 to -7).

37. Duran then asked Vogt the date of the TESA cases, and told her that she could not speak to the State monitor without Duran being present. (1T41-23 to 1T42-5, 1T76-7 to -20).

^{4/} Pursuant to N.J.S.A. 18A:7A-55, the Commissioner of Education may appoint a State monitor to school districts with specific fiscal characteristics "to provide direct oversight of a board of education's business operations and personnel matters," and the State monitor has the authority to "oversee all district staffing, including the ability to hire, promote, and terminate employees."

38. Although she felt threatened, Vogt responded that she could speak to anyone she wanted, and asked for the State monitor's contact information. (1T41-23 to 1T42-17, 1T76-24 to 1T77-2).

39. Duran responded that the State monitor, Lester Richens, was not in the district. (1T77-3 to -5).

40. Sciarotta telephoned Lisa Flowers later that evening to advise Flowers that she would not be able to take the Administrative II secretary position in the Superintendent's office because it was being abolished. Flowers was reportedly very upset by the news. (1T42-18 to 1T43-1, 1T77-17 to -24).

41. Flowers was subsequently placed in a position at Trenton Central High School West. (1T78-8 to -10).

42. On June 10, 2013, the Board voted unanimously to abolish the Administrative II secretary position and create a confidential secretary position in the Superintendent's office, and the minutes of the meeting provide that "[t]he abolishment of the Administrative II position in the Superintendent's office is Mr. Duran's recommendation." (CP-2, p. 5).

43. Vogt spoke at the Board meeting, stating that the Board's action violated its CNA with TESA, that TESA had challenged similar cases previously, and that taxpayers would end up bearing the cost of more litigation. (1T43-13 to -19).

44. Duran later hired Celeste Williams, who speaks Spanish, to be his second confidential secretary. (1T56-17 to -19, 1T58-12 to -25).

45. Duran left the district in October 2015. (1T92-16 to -23).

46. Smallwood-Johnson retired in 2015. (1T110-17 to -24). Lissa Johnson has performed Smallwood-Johnson's former duties since July 2015 under the title of Assistant Superintendent for Talent Acquisition and Development. (1T110-17 to 1T112-12).

47. Richens resigned as State monitor in April 2018. (1T96-6 to -10).

48. Laura Nemeth is a TESA member who was RIFed from July 1, 2016 to June 30, 2017, when she was recalled. (2T26-11 to -21). During her RIF, Nemeth was replaced with a confidential employee, and Nemeth lost a year's salary, a stipend for opting out of the Board's medical insurance coverage, and reimbursement for coursework that would have been covered under the parties' CNA. (2T27-9 to 2T30-5).^{5/}

^{5/} Although TESA had sought compensatory relief for Laura Nemeth in this matter, TESA recently advised that Nemeth and four other TESA members were granted compensatory relief in a related grievance arbitration award by Gerard G. Restaino, dated December 1, 2018. That award was confirmed by the Superior Court on June 7, 2019, in Trenton Bd. of Ed. v. TESA, Docket No. MER-L-429-19, and the Appellate Division dismissed the Board's appeal of the Superior Court's order on January 7, 2020 (App. Div. Docket No. A-005051-18T1). Thus, as Nemeth's compensatory claim has already been

(continued...)

ANALYSIS

N.J.S.A. 34:13A-5.3 guarantees to all public employees the right to engage in union activities, including the right to form or join a union, negotiate collectively and make their concerns known to their employer. Specifically, it provides that:

[a] majority representative of public employees in an appropriate unit shall be entitled to act for and to negotiate agreements covering all employees in the unit and shall be responsible for representing the interest of all such employees without discrimination and without regard to employee organization membership.

[N.J.S.A. 34:13A-5.3.]

Section 5.4a(3) of the Act prohibits an employer from retaliating against an employee or majority representative for exercising these rights. The legal standards set forth in Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984), determine whether an employer's actions violate section 5.4a(3) of the Act. There, the Court determined that if the charging party proves by a preponderance of evidence on the record that protected conduct was a substantial or motivating factor in the adverse action, a violation will be found. Id. at 246. Such a violation can be proven by direct evidence or by circumstantial evidence establishing that the employee was engaged in protected activity, the employer knew of this activity and was hostile toward the exercise of protected rights. Id.

5/ (...continued)
addressed, I will not consider it here.

If the employer does not present any evidence of a motive not illegal under our Act or if its explanation is rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Id. at 242. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. Id. 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 the conduct. Id.

The Commission has held that an employer's abolishment of a unit position in retaliation for an employee's exercise of protected activity violates section 5.4a(3) of the Act, and may also derivatively violate section 5.4a(1) of the Act. See Bd. of Fire Commr's Fire Dist. No. 1 and Monroe Tp., P.E.R.C. No. 2015-14, 41 NJPER 156 (¶54 2014), aff'd 42 NJPER 281 (¶81 App. Div. 2015), cert. den. 226 N.J. 213 (2016). In Monroe Tp., the Commission adopted a hearing examiner's recommended decision that the employer violated section 5.4a(3) of the Act when it terminated paid firefighters in retaliation for filing an unfair practice charge regarding the transfer of unit work. Id. The Commission further adopted the hearing examiner's recommended decision that the employer derivatively violated section 5.4a(1) of the Act when it employed non-unit, per diem firefighters to

perform firefighter duties that had historically been performed by unit firefighters. Id.

The issue in this matter is whether the Board abolished the Administrative II secretary position and created the confidential secretary position in retaliation for TESA asserting its recall rights under the CNA that would disallow the Superintendent to pick his own secretary, and if so, whether that constitutes a violation of section 5.4a(1), (3) and (5) of the Act.

First, it is clear that the parties' CNA grants TESA recall rights. Article 8 of the CNA provides that employees who are laid off due to a RIF have recall rights "if additional secretarial and clerical positions become available due to vacancies or creation of new positions within 3-1/2 years (forty two months) from the date of lay off." Thus, after Armstrong, the Administrative II secretary in the Superintendent's office, announced in May 2013 that she was retiring, effective July 1, 2013, it was TESA's expectation based on the CNA, as well as past practice, that the position would be filled with a TESA unit member who would, in order of seniority, select to fill that vacancy and then be laid off as part of the Board's regular year-end RIF.

But on May 20, 2013, Smallwood-Johnson told Vogt and Gill for the first time that Duran would like to choose Armstrong's replacement from the TESA recall list. Vogt immediately asserted

TESA's recall rights, but Smallwood-Johnson responded that she was surprised that TESA would not let Duran choose a replacement. Vogt then responded that Duran already had a confidential secretary of his choosing, and TESA wanted to keep the position in its unit. Smallwood-Johnson then told Vogt and Gill for the first time that if TESA did not allow Duran to choose his own secretary from TESA's recall list, i.e., relinquish its contractual recall rights, Duran had indicated that he might abolish the Administrative II secretary position and replace it with a second confidential secretary position. In the face of this clear threat, Vogt responded that Duran could do what he wanted, but TESA would assert its recall rights and challenge that action if necessary, as it had successfully done before.

A similar dynamic played out between TESA and the Board at the parties' second meeting on May 21, 2013, when Sciarotta called Smallwood-Johnson to schedule a date for TESA to exercise its recall rights for the 2013-2014 school year, and the two selected May 31, 2013. During that conversation, Smallwood-Johnson said three times that she could not believe that TESA would not allow Duran to choose his new Administrative II secretary, and after both the second and third time, Sciarotta asserted TESA's contractual recall rights. And then for the second time, in response to Sciarotta's assertion of TESA's recall rights, Smallwood-Johnson threatened that Duran could

abolish the Administrative II position and make the position confidential. And again, Sciarotta asserted TESA's recall rights and TESA's intention to challenge this threatened action.

Then, on May 22, 2013, Smallwood-Johnson told Sciarotta that Smallwood-Johnson had spoken to Duran, that Duran had a "soft spot" in his heart for Vogt and Sciarotta, and that Duran was going to allow TESA to exercise its recall rights, and the Administrative II secretary position would be on the list of positions from which recalled TESA members could choose, as if TESA's exercise of its contractual recall rights was subject to Duran's discretion. And on May 31, 2013, Vogt, Sciarotta, and Smallwood-Johnson all attended the meeting for recalled TESA members to select positions for the 2013-2014 school year in order of seniority, and third-most senior Lisa Flowers chose the Administrative II secretary position in the Superintendent's office.

However, on June 4, 2013, Vogt and Sciarotta met with Duran to discuss labor relations unrelated to the Administrative II secretary position, and Duran, sua sponte, raised the issue and stated for the first time that it was very important that he had a secretary who was fluent in Spanish, because of the many Spanish calls to the office. Notably, despite Duran's focus on Spanish language skills on June 4, the May 10, 2013 job posting for the position lists only English language skills as a job

qualification, with no mention of Spanish. Nevertheless, Sciarotta assured Duran that Lisa Flowers was fluent in Spanish.

Then, on June 5, 2013, Vogt and Sciarotta again met with Smallwood-Johnson, who brought Duran to the meeting, and Duran announced that he was indeed abolishing the Administrative II secretary position and creating a confidential secretary position because the State monitor told him that he could do so. This June 5 meeting - the sixth meeting between the parties on this issue -- was the first time the State monitor was mentioned. But again, Vogt asserted TESA's recall rights, and vowed to challenge any abolishment of the Administrative II secretary position. Then Vogt asked Duran for the State monitor's name, but Duran asked Vogt the date of the TESA cases, and told her that she could not speak to the State monitor without Duran being present. Although she felt threatened, Vogt responded that she could speak to anyone she wanted, and again asked for the State monitor's contact information. Duran responded that the State monitor, Lester Richens, was not in the district.

Finally, on June 10, 2013, the Board voted unanimously to abolish the Administrative II secretary position and create a confidential secretary position in the Superintendent's office, with the minutes providing that "[t]he abolishment of the Administrative II position in the Superintendent's office is Mr.

Duran's recommendation." Duran later hired Celeste Williams, who speaks Spanish, to be his second confidential secretary.

Applying the Bridgewater standard, I find that TESA engaged in protected activity by asserting its contractual recall rights to fill the Administrative II secretary position in six different meetings and phone calls with Smallwood-Johnson and Duran on May 20, 21, 22, and 31, 2013, and June 4 and 5, 2013. And, just as evidently, Smallwood-Johnson and Duran, on behalf of the Board, knowing of TESA's assertion of its recall rights from those meetings, variously displayed hostility toward TESA's assertion of its rights at five of the six meetings. Smallwood-Johnson twice expressed surprise that TESA was asserting its recall rights, and she and Duran both threatened to abolish the position if TESA asserted its recall rights. Then finally, on June 10, 2013, at Duran's recommendation and despite TESA's protests, the Board unanimously abolished the Administrative II secretary position and created a confidential secretary position, which Duran filled with his choice of secretary.

Although the Board presented evidence of alternate legitimate business justifications for its actions, those appear to be pretextual. See Bridgewater, supra, 95 N.J. at 242. The first was Duran's stated need for a secretary with Spanish language skills, raised for the first time at the fifth meeting between the Board and TESA on June 4, despite the omission of

that skill in the job posting. Then, once Duran learned from Sciarotta that Flowers was fluent in Spanish, he advised Vogt and Sciarotta the very next day, June 5, 2013, of the second: that the State monitor told him that he could abolish the Administrative II secretary position. This sixth meeting between the parties was the first time that the State monitor was mentioned, and when Vogt asked to speak with the monitor, Duran was hostile to her request. Thus, these two alternate business justifications appear to be pretextual.

The Board further argues that Smallwood-Johnson "retracted" her statement about abolishing the Administrative II secretary position in her May 22, 2013 conversation with Sciarotta, when she told Sciarotta that Duran had a "soft spot" for Vogt and Sciarotta, and would allow TESA to assert its recall rights. However, this subsequent statement was not an actual retraction, but simply notification to TESA that Duran had changed his mind and no longer wished to select his own secretary. But, Duran later changed his mind again, thereby retracting his previously alleged retraction, when he announced on June 5, 2012 that he was indeed abolishing the Administrative II secretary position. And then, acting at Duran's recommendation, on June 10, 2013, the Board abolished the Administrative II secretary position and created the confidential secretary position.

Under all these circumstances, I find that the Board violated section 5.4a(3) of the Act when it abolished the Administrative II secretary position and replaced it with a confidential secretary position in the Superintendent's office in retaliation for TESA's assertion of its contractual recall rights and prevented Duran from selecting his secretary from a list of recalled TESA members.

With regard to the a(1) allegation, i.e., whether the Board's actions "[i]nterfer[ed] with, restrain[ed] or coerc[ed] employees in the exercise of the rights guaranteed to them by this act," I find that the Board's abolishment of the Administrative II secretary position interfered with TESA's ability to exercise its contractual recall rights. TESA attempted to exercise its contractual recall rights on May 31 when Flowers chose the Administrative II secretary position, but once Duran announced on June 5 that he was abolishing that position, and once the Board voted to abolish the position on June 10 upon Duran's recommendation, TESA's ability to exercise its recall rights was restrained. Thus, Sciarotta had to notify Flowers that she could not take the position, and Duran filled the newly-created confidential secretary position with a secretary of his choosing. See Monroe Tp., supra, 41 NJPER at 156.

Thus, I find that the Board violated section 5.4a(1) of the Act when it abolished the Administrative II secretary position and replaced it with a confidential secretary position in the Superintendent's office in retaliation for TESA's assertion of its contractual recall rights and prevented Duran from selecting his secretary from a list of recalled TESA members.

Finally, TESA also alleges that the Board violated section 5.4a(5) of the Act. However, TESA did not present any evidence that it requested or attempted to negotiate with the Board regarding the abolishment of the Administrative II secretary position or the creation of the confidential secretary position. Thus, I do not find that the Board violated section 5.4a(5) of the Act.

CONCLUSIONS OF LAW

Based upon the above findings of fact and legal analysis, I make the following conclusions of law:

The Trenton Board of Education violated section 5.4a(1) of the Act when it abolished the Administrative II secretary position and replaced it with a confidential secretary position in the Superintendent's office in retaliation for TESA's exercise of protected activity when it asserted its recall rights under the parties' CNA and prevented the Superintendent from selecting his secretary from a list of recalled TESA members.

The Trenton Board of Education violated section 5.4a(3) of the Act when it abolished the Administrative II secretary

position and replaced it with a confidential secretary position in the Superintendent's office in retaliation for TESA's exercise of protected activity when it asserted its recall rights under the parties' CNA and prevented the Superintendent from selecting his secretary from a list of recalled TESA members.

RECOMMENDED ORDER

I recommend that the Commission order that the Trenton Board of Education:

A. Cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by abolishing the Administrative II secretary position and replacing it with a confidential secretary position in the Superintendent's office in retaliation for TESA's exercise of protected activity when it asserted its recall rights under the parties' CNA and prevented the Superintendent from selecting his secretary from a list of recalled TESA members.

B. Take the following affirmative action:

1. Restore the status quo ante by converting the confidential secretary position in the Superintendent's office back to an Administrative II secretary position, allow TESA to exercise its contractual recall rights to fill the reinstated Administrative II secretary position, and grant Lisa Flowers the right of first refusal to the position.

2. If Flowers accepts the reinstated Administrative II secretary position in the Superintendent's

office, allow TESA to exercise its contractual recall rights to fill the TESA unit position left vacant by Flowers.

3. 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.

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

/s/ Lisa Ruch
Lisa Ruch
Hearing Examiner

DATED: August 19, 2021
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 August 30, 2021.



RECOMMENDED



NOTICE TO EMPLOYEES

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

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., particularly by abolishing the Administrative II secretary position and replacing it with a confidential secretary position in the Superintendent's office in retaliation for TESA's exercise of protected activity when it asserted its recall rights under the parties' CNA and prevented the Superintendent from selecting his secretary from a list of recalled TESA members.

WE WILL restore the status quo ante by converting the confidential secretary position in the Superintendent's office back to an Administrative II secretary position, allow TESA to exercise its contractual recall rights to fill the reinstated Administrative II secretary position, and grant Lisa Flowers the right of first refusal to the position.

WE WILL, if Flowers accepts the reinstated Administrative II secretary position in the Superintendent's office, allow TESA to exercise its contractual recall rights to fill the TESA unit position left vacant by Flowers.

WE WILL 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.

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

Docket No. CO-2014-028

Trenton Board of Education
(Public Employer)

Date: _____

By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 292-9830