

H.E. NO. 2007-8

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

In the Matter of

EAST ORANGE BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CI-2004-057

JULIA ANN FULLER,

Charging Party.

SYNOPSIS

The Charging Party alleged that she was harassed and ultimately terminated as a result of protected activity. The Hearing Examiner found that the Respondent was neither hostile toward Fuller's protected activity nor did it retaliate against her for engaging in such activity. The Hearing Examiner recommended that the Commission dismiss the unfair practice charge.

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 which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law. If no exceptions are filed, the recommended decision shall become a final decision unless the Chair or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent, Schwartz, Simon, Edelstein, Celso & Kessler, LLP, attorneys  
(Nicholas Celso III, of counsel and John Geppert, Jr. of counsel)

For the Charging Party, Childress & Jackson, LLC, attorneys  
(Louis Childress, Jr. of counsel)

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

On June 1, 2004 and November 4, 2004, Julia Ann Fuller (Fuller) filed an unfair practice charge and amended charge, respectively, against the East Orange Board of Education (Board). The 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 (4),<sup>1/</sup> when it continually berated

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of rights guaranteed to them by this act. (3) Discriminating in  
(continued...)

and harassed Fuller after she requested overtime pay and that it did not renew Fuller's employment contract in retaliation for her union activity.

On May 25, 2005, a Complaint and Notice of Hearing issued on 5.4a(1) and (3); 5.4a(4) was dismissed (C-1)<sup>2/</sup>. On June 13, 2005, the Board filed an Answer denying the allegations and asserted, among other defenses, that Fuller did not participate in protected activity, that the Board's actions were managerial prerogatives, and that any damage to Fuller was as a result of her own misconduct (C-2B). An amended answer was filed on August 31, 2005, asserting that the Board had a legitimate business reason for terminating Fuller (C-2A).

A hearing was held in this matter on September 27, October 7, November 1, November 3, November 21, and November 29, 2005. The parties submitted post-hearing briefs by April 3, 2006. Based upon the record in this case, I make the following:

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1/ (...continued)  
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. and (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act."

2/ "C" refers to Commission exhibits received into evidence at the hearing. "CP" and "R" refer to Charging Party's and Respondent's exhibits, respectively, received into evidence. Transcripts of the successive days of hearing are "1T" through "6T".

**FINDINGS OF FACT**

1. Julia Ann Fuller commenced employment with the East Orange Board of Education in June of 2002 as a "Whole School Reform Social Worker" (1T20). Fuller's duties involved obtaining services for students and their families, such as, medical, counseling, or legal services (1T21). Fuller was the only Whole School Reform Social Worker employed by the Board at the Cochran Academy and Fourth Avenue School and her duties were different from the other school social workers (1T21; 2T106-2T107).

2. Fuller was initially assigned to work for Sharon Vincent, the principal of the Fourth Avenue School for the past seven years (1T21; 5T8). Vincent interviewed and recommended Fuller be hired as the Whole School Reform Social Worker (5T11-5T12). During the interview and hiring process Vincent explained to Fuller the difference between a Child Study Team Social Worker and a Whole School Reform Social Worker, including the differences in their schedules and supervision (5T12-5T13). From June 3, 2002, the date she began working with Vincent, through June 30, 2002, the last day of the 2001-2002 school year, Fuller had an amicable relationship with Vincent (1T23). Fuller received a new contract for 2002-2003 school year (J-3). Fuller also received a salary adjustment in the fall of 2002 which increased her pay based upon her years of teaching experience (1T25-1T27).

3. In September of 2002, due to budget cuts, Fuller's duties were split between the Fourth Avenue School and the Cochran Academy; she worked two and one half days a week at each school (1T22; 5T14). Fuller reported to Deborah Harvest, principal of the Cochran Academy and reported to Vincent at the Fourth Avenue School (4T50). Harvest has been with the East Orange School District twenty (20) years (4T49). The Cochran Academy was Fuller's transmittal school where she attended staff meetings, was on the Family Support Team, and attended Family Support Team meetings. Harvest was responsible for Fuller's evaluations, observations, and other tasks, in an effort to avoid duplication of services (1T22, 1T142-1T143, 1T145; 4T69-4T70). However, Vincent also had input into all of Fuller's evaluations (4T147, 4T150-4T153, 4T166; 5T138-5T139, 5T185-5T187).

4. At the Fourth Avenue School, Vincent assigned Fuller to observe, meet with students, do group sessions, and organize or contact social service agencies (5T20). The assignments were based upon information or referrals from teachers of students having problems or causing disruptions (5T19-5T20). Initially, Vincent gave Fuller a broad schedule which included "school service periods" to be used to meet with various people, and a lunch period (5T21). Then, Vincent prioritized students and people for Fuller to meet (5T21).

Often Fuller did not develop a report as requested or failed to meet with students. This became an ongoing problem for Vincent (5T22). Reports that came from Fuller were on torn pieces of paper, often stained or greasy. Vincent found this documentation to be inappropriate for placement in student files or to be shared with other professionals (5T22-5T23).

Thereafter, Vincent provided forms to Fuller to help her record and organize information. Fuller did not use a computer and indicated that she had the service of secretaries in the past. However, secretaries were not available. There was a constant struggle to get Fuller to present documentation in an appropriate and professional manner acceptable to Vincent (5T23-5T25).

Because tasks and assignments were not completed, Vincent determined that although all staff were on a schedule, Fuller needed a more definitive structure rather than an open-ended schedule (5T25, 5T21; 3T4, 3T13, 3T15, 3T77-3T78, 3T81-3T82, 3T106). Vincent began to more specifically schedule blocks of time for Fuller (5T25-5T26). Fuller's schedule included a planning period which was designed to allow her time to organize records or materials, to make copies, or to perform other tasks (5T36-5T38). This more definitive schedule was designed to keep her organized, focused and ensured that assignments were completed (5T47).

Harvest also scheduled all staff members at the Cochran Academy, including Fuller (4T54-4T55, 4T68, 4T170; R-20).<sup>3/</sup> There were periods of time Harvest would not schedule Fuller but would assign her to a specified room, if needed (4T55). From the beginning, Harvest had difficulty with Fuller following her schedule (4T144).

Fuller was supposed to provide monthly logs to Harvest indicating the work Fuller had performed the previous month (4T56). Fuller did not follow through or continually failed to submit the logs (4T56).

5. Fuller spoke with Vincent and Harvest about self-scheduling and being a Type II employee (1T41, 1T51, 1T53, 1T57; 4T67-4T68). A Type II employee is defined under the parties collective bargaining agreement as including "guidance counselors, learning disability teachers, consultants, psychologists and social workers" (J-5, p. 72). Pursuant to the parties' collective negotiations agreement, Type II personnel "shall be responsible for self scheduling with non-preparation periods" (J-5, p. 73; 1T51-1T52, 1T72). Vincent's response was that . . . "as long as you are in this building you will be on a schedule" (1T58).

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<sup>3/</sup> Although Fuller testified that she was not on a schedule at the Cochran Academy, I do not credit that testimony. Rather, I credit the testimony of Harvest, as she is the principal of the Cochran Academy, she would have accurate knowledge of employees' schedules.

Harvest explained that since Fuller wasn't a teacher assigned to a classroom all day, that when there is unscheduled time Fuller should fill it appropriately (4T67-4T68). Fuller also spoke to the Association about Vincent scheduling her days and eventually, in September 2003, a grievance was filed seeking that Fuller be permitted to self-schedule (R-2; 1T53-1T54, 1T57).

6. Beginning in September of 2002, there were numerous occasions where it was difficult for Vincent to find Fuller. This was an ongoing problem throughout Fuller's tenure. When Vincent began creating a more specific schedule for Fuller it helped to narrow the search for her (5T25-5T28). When Vincent was looking for Fuller, she would frequently find her in the staff lounge, the child study team office or in other people's offices, such as the school nurse (5T29). On more than ten occasions, Vincent observed Fuller in the staff lounge over all four lunch periods, when she was only assigned to one lunch period (5T31-5T33).

Harvest also had difficulty finding Fuller at times and had to remind Fuller to follow her schedule (4T56-4T57).

Several witnesses corroborated that they had been unable to find Fuller according to her schedule or that they observed her somewhere other than her scheduled location (3T83, 3T104-3T105; 4T27-4T28, 4T29-4T34).



7. On October 2, 2002, Fuller failed to attend the open house at the Cochran Academy despite expectations and a verbal reminder from Harvest to attend (R-9; 4T71-4T72).

8. Fuller received her first formal, written observation,<sup>4/</sup> dated October 29, 2002, which was completed by Harvest (CP-1; 1T27-1T29; 4T76). The evaluation is marked "S" for satisfactory, except for under "Teaching strategies or techniques", line 7, "provide opportunities for pupils to express and apply learnings" is marked "NI" for needs improvement (CP-1). The observation also included hand-written comments expressing the need for Fuller to plan and record lessons, give students a purpose for the lesson, allow student conversation to dominate, assist students with positive choices, abide by scheduled times, and submit a monthly plan (CP-1). Harvest went over the form with Fuller and both signed it (CP-1; 4T76).

The last page of the observation includes a "professional improvement plan" which reiterated Fuller's need to plan lessons in advance, abide by her schedule and turn in her monthly calendar (CP-1; 4T77-4T79). Although the observation was marked satisfactory, Harvest believed Fuller's performance was not

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<sup>4/</sup> A form, entitled "Teacher Evaluation/Observation" is used, for both evaluations and observations. A box on the top left side of the form is checked to distinguish between an observation and an evaluation. However, at times the parties refer to the document as an evaluation although the "observation" box is checked (4T80).

(4T131-4T132). Harvest indicated she did not want to "knock her down," but rather to identify expectations and provide resources for her to meet them (4T132-4T133). Harvest did so in an effort to retain teachers in an urban area (4T143). Vincent echoed this sentiment and also testified that scheduling was a problem even at this time (5T49-5T51).

9. An evaluation of Fuller was completed by Harvest on November 1, 2002, covering the time period of September 20, 2002 through October 29, 2002 (1T31; CP-2). The evaluation states in pertinent part,

On 10/30/02, I observed Julia presenting a lesson on following the code of conduct. The following suggestions were given pertaining to that observation:

1. Plan your lesson prior to instruction. Use a plan book to record the objective you wish to cover. Include activities to reinforce the objective. Let student conversation dominate the lesson.
2. Abide by the scheduled times.
3. Turn in monthly calendar at the end of each month.

Presently Julia is functioning at a satisfactory level, I hope the intervention strategies that are utilized contribute to a change in behavior. I look forward to her putting forth an above average performance to accomplish the task (CP-2).

10. On November 4, 2002, Harvest documented Fuller's late arrival at 8:10 a.m. (R-12). Harvest also spoke to Fuller about the need to arrive on time and sign in at 8:00 a.m. (4T83). A

couple of times Fuller would pull up at the front of the school, sign in and then return outside to park her car and get to work (4T57, 4T83).

11. A second formal, written observation of Fuller was conducted by Harvest on December 16, 2002 (CP-3). Despite performance problems, Fuller received a satisfactory rating in all areas of observations (CP-3). However, first-year staff are becoming acclimated to the district and in order to retain staff Harvest tries to be very supportive by identifying problems, while giving strategies and techniques to resolve them (4T84-4T85). The observation indicates that lesson plans must be prepared in advance, logs must be kept up-to-date and attention paid to timely submission of reports (CP-3).

12. Fuller received another evaluation in January 2003 (CP-4). This was also a satisfactory evaluation but reflected the difficulties Vincent and Harvest had with Fuller, namely comments advising that lesson plans be prepared in advance, requiring logs to be professional, up-to-date, and provided to each principal (CP-4; 1T36; 4T86-4T88; 5T51-5T52). In addition to the observations and evaluations, Harvest also had ongoing conversations with Fuller on her need for improvement (4T88).

13. During the 2002/2003 school year, Fuller had a discussion with Vincent and Harvest regarding Fuller's split schedule, wherein she worked two and one half days at each

school. This schedule, Fuller felt, resulted in an additional one half hour of work and entitled her to additional pay (1T41). Fuller also wanted compensation for lunch duty as well as a.m. duty and p.m. duty. Staff would rotate a.m. and p.m. duty, which entails monitoring the students arrival and departure fifteen minutes before the start and at the end of the students day (1T159-1T160, 1T163; 4T53-4T54). At the Cochran Academy, Fuller was assigned a.m. and p.m. duty and lunch duty (4T54, 4T92). When Fuller inquired about getting paid, Harvest explained that no one is paid for the a.m. or p.m. duty and only a staff member who gives up their own lunch period is paid for lunch duty (4T62-4T63). Fuller was not paid for lunch duty because she had a lunch period (1T163, 1T165; 4T63-4T64, 4T67).

There was also extensive testimony about conversations between Fuller and Vincent on these issues of extra pay (1T42, 1T49, 1T50, 1T57-1T58, 1T166). The two disagree about whether discussions were about "overtime" as well as whether Vincent was "hostile" to Fuller's demands (5T45, 5T56-5T57).

I credit Fuller's testimony that she inquired of both Harvest and Vincent about receiving additional pay for lunch duty and a.m. and p.m. duty. Whether Fuller used the term "overtime" is immaterial. She asked both principals for additional pay. Both Vincent and Harvest explained that no one is paid for a.m. and p.m. duty and that only a teacher who gives up their personal

lunch is entitled to additional pay for lunch duty (4T62-4T63; 5T45). The testimony of Vincent and Harvest is consistent with one another, consistent with the schools' policies and with the other witnesses.

Fuller disagreed with the explanations given by Vincent and Harvest. She believed that other Type II employees, specifically Diane Evans, Kevin Salminen, Ms. Chavez and Mr. Tomiskin were paid overtime for working extra time, such as, covering classes or lunch duty (1T43). I find Fuller was mistaken in her beliefs. Kevin Salminen, a social worker, was never paid overtime for a.m., p.m. or lunch duties and never told Fuller that he was (3T8-3T10). Further, Diane Evans, a guidance counselor, only received additional compensation for lunch duty when she gave up her own lunch period (3T4-3T5). Alice Natelson worked in the East Orange school district for 16 years on the child study team as a learning consultant (5T259-5T262, 5T272). Natelson worked with Fuller at the Fourth Avenue School (5T461). Natelson was never paid overtime for any duties and never told Fuller she was paid overtime (5T270-5T271). Finally, Hester-Lambert had p.m. duty and was not paid additional compensation (3T89, 3T96).

14. On January 21, 2003, Harvest provided a memorandum to Fuller reminding her that she had a.m./p.m. duty that week (R-13). The memorandum was the result of her failure to appear for a.m. duty (4T88-4T90).

15. On February 6, 2003, Harvest provided Fuller a memorandum highlighting her absence on three occasions and indicating the need for regular attendance (R-15; 4T92-4T93). Such memoranda were given to staff to remind them of their absences and the need for attendance (4T93).

16. On April 2, 2003, Harvest observed Fuller leaving the school at 10:40 a.m. even though she was not scheduled to leave until 11:00 a.m. (4T94). Harvest also noted in a memorandum that Fuller had inaccurately signed out that she left at 11:00 (4T94). Harvest documented her observations and requested Fuller adhere to her schedule and sign out at actual time of departure (R-16; 4T94-4T95).

17. Fuller received a third, satisfactory evaluation from Harvest in March of 2003 (CP-5; 4T95-4T96). Again the evaluation indicated a need for lesson plans to be prepared in advance, logs to be up-to-date, professional and timely submitted to each principal, reach out and update parents on student progress, and seek to improve overall behavior of students (CP-5). This evaluation also reflected Vincent's experience with Fuller (5T53).

18. Fuller testified that between January and June 2003, Vincent became very hostile and aggressive toward Fuller (1T57-1T58). Fuller alleged that Vincent began to publicly reprimand Fuller in front of staff members, parents and students (1T58).

On the first such occasion, Fuller had cafeteria duty and was talking with a student when Vincent approached. Fuller contends that Vincent began yelling that she (Fuller) should be monitoring students, not sitting down. When Fuller tried to explain that she was talking to a student, Vincent insisted Fuller should be standing up and moving around (1T74).

19. On June 4, 2003, a second incident occurred in the cafeteria, wherein Vincent was looking for Fuller. Vincent entered the cafeteria, where Fuller was, and told Fuller that she was not following her schedule (1T75-1T76; 2T10-2T12). Fuller maintains that Vincent then chased her around the cafeteria and that Fuller ran around a table yelling "can I get a witness" (1T78; 2T21-2T25).

Vincent denied at any time ever chasing Fuller around the cafeteria or yelling at her (5T63-5T67). Instead, Vincent states there were numerous times where she entered the cafeteria and observed Fuller there when she was not supposed to be and questioned why she was in the cafeteria. On one occasion Vincent recalls Fuller waiving her arms and stating "look, look, I need a witness" (5T66-5T67).

I do not find that Vincent chased or screamed at Fuller. Rather, I find that Vincent was both firm and loud in her remarks to Fuller during the cafeteria incidents. This is the first time that Fuller asserts that she spoke to union representatives

Greadington and Burke to start the process of a grievance. No grievance, however, was filed relating to these incidents (1T79).

The union president Jacqueline Greadington had a meeting with Vincent in the presence of and at the request of Fuller to discuss yelling, screaming and chasing. Greadington did not recall when that meeting occurred (1T83-1T84; 2T122-2T126, 2T133). Greadington attempted to get Vincent and Fuller to talk in an effort to work things out (2T113). Greadington testified that Vincent did not admit nor deny whether she yelled at or chased Fuller but Vincent inferred that Fuller was "making a mountain over a mole hill" (2T113). Greadington recalls that Vincent repeatedly stated throughout the meeting that Fuller just needs to be worried about doing her work (2T113).

Vincent recalls the meeting but states Greadington wanted to discuss Vincent's scheduling of Fuller differently from other staff members (5T84). Vincent told Greadington she scheduled Fuller because she was off task, not providing the services to students and not completing her assignments (5T84). Vincent stated that when Greadington raised the issue of Vincent yelling and screaming at Fuller, Vincent denied any such behavior (5T84-5T85). I credit that Vincent denied the "yelling," as it is consistent with her testimony during the hearing.

20. Vincent had a "intense" conference with Fuller in June 2003. Vincent advised Fuller that she needed to start getting



organized and follow the suggestions that had been given to her. Vincent advised Fuller that she would begin carefully documenting all of the issues and problems, that she had up to that time been giving Fuller the benefit of the doubt and opportunity to improve (5T68-5T71).

21. Fuller received an annual contract of employment for the 2003-2004 school year (J-4). Harvest recommended Fuller's contract be renewed and that Fuller receive an increase in pay (4T145-4T146).

22. On September 4 and September 11, 2003, Vincent had conferences with Fuller. The conferences were to review and discuss the need to follow schedules and to provide suggestions for Fuller to best stay organized and focused (5T74-5T76). Fuller was late for the September 4, 2003 conference and Vincent followed up the conferences with a memorandum, again, reiterating the need to follow a schedule and effectively use her time (CP-17). The memorandum also addressed the need to develop and present professional notes and reports (CP-17). The memorandum states, in pertinent part:

This memorandum serves as follow up to the conferences held with you on 9/4/03 and 9/11/03. As reviewed and discussed with you, I expect you to follow and adhere to the schedules for Fourth Avenue School and Cochran Academy that are developed by me and Mrs. Harvest. You cannot randomly change or alter your schedule without our approval. If there is a need to monitor or adjust the schedule due to emergencies or unforeseen

events that may occur, you must make contact with us ASAP!

You must work on becoming more conscious of the effective use of your time. You stated to me on 9/4/03, when you were late reporting to my office for a follow-up meeting that you did not have a watch. I suggested you obtain a watch in order to assist you with your time management. In the meantime, you should monitor and utilize the clocks available for your viewing throughout the school building. This is in an area of your work performance that will be carefully monitored during the school year.

There is a need for you to develop and present when necessary professional notes and reports. Of course, these reports and notes should adhere to all legal and professional guidelines that are required.

Miss Harvest and I will continue to provide suggestions and feedback to you on how to best serve the needs of our schools.

You may arrange to meet with me if there is a need to clarify any of the contents of this memorandum. [CP-17]

23. On September 12, 2003, Harvest also met with Fuller to discuss expectations for the year and address problem areas (R-18; 4T97-4T101). Harvest advised Fuller that she would again be her evaluator of record for the 2003-2004 school year (R-17; 4T97).

24. By memorandum dated September 16, 2003, Vincent advised Fuller that she must follow all school procedures, specifically the need to sign in and out of the building. The memorandum also addressed her specific failure to sign out on September 16, 2003,

and her failure to timely sign in to the Fourth Avenue School on the same date (CP-15; 5T69-5T70). Furthermore, when Vincent's secretary requested Fuller sign for receipt of the memorandum, Fuller refused (5T72-5T73). As a result, Vincent sent Fuller another memorandum indicating that the procedure was to have teachers sign for confidential memoranda and their failure to do so would result in the memorandum simply being included in her personnel file (CP-16; 5T73).

25. On September 17, 2003, Vincent singled Fuller out and told her to stop talking in the presence of students, parents and teachers during morning exercises (1T99). Fuller admitted she was talking and, thereafter, stopped (2T44). Vincent did not recall this incident but a September 17, 2006 memorandum from Vincent to Fuller noted that Fuller was late to dismissal of students at the end of that day and that she was engaged in conversation during the dismissal (CP-18; 5T81).

26. In the afternoon on the same day Fuller testified Vincent again began yelling at her while she was in the office on the telephone holding for a DYFS worker (1T100). Fuller testified that Vincent continuously screamed at her to get off the telephone and follow the schedule provided by Vincent (1T100-1T102). Thereafter, Fuller alleged that Vincent brushed past her causing their shoulders to touch and Fuller to lose her balance

(1T103; 2T47-2T51). Fuller testified that Natelson was present during this incident (1T102).

Vincent's version of the incident was that Fuller was supposed to be at cafeteria duty at 12:20 p.m. on September 17, 2003. When she failed to appear, Vincent went looking for Fuller and found her on the telephone. Vincent told her to get off the phone and go to the cafeteria, but that Fuller continued to speak on the telephone and did not arrive in the cafeteria until the period was half over (5T78-5T79). Vincent denies yelling and screaming at Fuller but admits using a very stern voice and that she constantly told Fuller that she needed to go to her assignment (5T82-5T83). I find that whether Vincent "yelled" or "spoke firmly" is immaterial. Vincent was upset with Fuller for not being in her assigned location.

Vincent testified that when she left the Child Study Team office while Fuller was on the phone, Fuller swayed into her and that their shoulders briefly touched (5T85-5T86). However, Vincent denies pushing, shoving, touching or assaulting Fuller at any time (5T86-5T88). Vincent memorialized the events, via a memorandum, indicating that Fuller is continuously late for assignments and that her behavior is unacceptable (CP-18). The memorandum also relayed the incident earlier in the day regarding Fuller's use of the telephone (CP-18).

I credit Vincent's version of events, particularly since her testimony was consistent with her memorandum written the same day. I find Vincent was a credible witness while Fuller tended to exaggerate her testimony. Fuller went to the union office and reported this incident to Greadington, and to discuss filing a grievance (2T53-2T57). No grievance was filed regarding the incidents of September 17, 2003 (2T63). Further, Greadington did not recall Fuller ever telling her that Vincent pushed or assaulted her (2T127-2T130). Lastly, Natelson denied ever observing an incident wherein Vincent bumped or pushed Fuller (5T271).

27. On September 19, 2003, a grievance was filed on behalf of Fuller (R-2). The grievance, states:

By refusing to allow Ms. Julia Fuller, a social worker, to schedule herself as is the practice with all Type II personnel, Mrs. Vincent is in violation of Article XXV-2-C and Article V-D of the agreement between the EOEA and the EOBOE.

The remedy sought in the grievance stated:

Mrs. Sharon Vincent should cease the violation of the agreement between the EOEA and the EOBOE and the disparate treatment of Ms. Fuller immediately. Ms. Fuller's scheduling should follow the "self scheduling" practice and contract language of the district immediately. [R-2]

28. On September 18, 2003, Harvest sent a memorandum to Fuller and other staff to mark October 15, 2003 on their

calendars to meet with parents (R-19; 4T102). Fuller failed to attend the meeting (R-25; 4T110-4T111). Fuller responded that she understood she was no longer involved with the Family Support Team because she was assigned to Fourth Avenue School on Thursdays (4T26). Harvest responded that the October 15, 2003 event was to meet with parents, it was not a Family Support Team meeting (R-26; 4T111-4T112). Further, Fuller had received verbal reminders from Harvest that she was expected to attend the meeting (4T154-4T157).

29. On September 18, 2003, Harvest provided Fuller and other staff a schedule and lessons/issues to be discussed (R-20; 4T104-4T106). The schedule also listed a.m./p.m. duty and lunch duty (4T20; 4T104-4T106). Despite the schedule, Fuller failed to execute her a.m. duty on October 20, 2003 (4T27, 4T112).

30. On September 18, 2003, Fuller was scheduled to observe two students during the fourth period. Vincent was in a nearby classroom conducting a formal observation when Fuller walked by the classroom through the cafeteria (5T91). Vincent thereafter found Fuller in the Child Study Team office sitting down at the desk. When Vincent questioned why she was not observing students, Fuller replied "I'll go back if you want me to" (5T91-5T92). Vincent memorialized this incident in a memorandum to Fuller (CP-19). She also used the memorandum to reiterate the need for Fuller to use her time effectively, and remind her that

the daily schedules were developed for Fuller to keep her "organized, focused and delivering services to our students and parents." The memo further stated:

When you should be engaged with either students or parents, you have been observed by me as socializing or eating in the staff lounge (when you weren't at lunch or planning) and/or office. You also have interrupted staff members on numerous occasions while they're trying to do their work. These observations have been discussed with you during numerous conferences.

You simply waste a whole lot of time doing nothing. At the end of the 2002-2003 school year, I met with you to lay out my expectations for the 2003-2004 school year. I told you that this type of behavior must be improved. You assured me you would make improvements and agreed that following the prepared schedules would help keep you better focused. [CP-19]

31. On September 22, 2003, Harvest requested Fuller turn in her professional development plan which Harvest provided her in March 2003, but still had not received from Fuller (R-21; 4T106-4T107). On October 8, 2003, Harvest again requested that Fuller submit the plan or Fuller would not receive staff development hours (R-23; 4T108-4T109). On October 14, 2003, Harvest documented that she had not yet received Fuller's plan (R-24; 4T109-4T110).

32. Priscilla Burke was the grievance chairperson for the East Orange Education Association in 2002 and 2003 (3T18). In late September or early October 2003, a meeting was held with

Fuller, Burke and Vincent (3T20). Vincent recalls that her meeting with Burke regarding the grievance was at the end of October of 2003 (5T95). The only issue discussed was scheduling; there was no discussion of overtime, pushing, shoving, chasing, yelling or screaming (5T95-5T97). Fuller did provide information to Burke about Vincent following her around a room and brushing up against Fuller. Burke filed no grievances regarded these alleged incidents (3T44-3T45).

At the meeting Vincent advised that a time had come when she felt she needed to have more input with Fuller's schedule due to concerns over Fuller's performance (3T21; 5T96). The meeting ended with Burke indicating that she was going to conduct further investigation. No level 3 grievance was ever filed (5T97).

Burke did not pursue the grievance further because:

Basically the information that I received was that, initially my impression was that Ms. Fuller was being treated differently than other Type 2 employees.

After I did my research I found that not necessarily to be the case, that there were many, that there was a great deal of input into what a Type 2 employee did during the day and that it wasn't -- this was not an extreme case that she was being treated so differently, it was just different people did different things and there may have been -- her belief was that this contract language which said that Type 2 employees were self-scheduled, was very cut and dry.

When I did the research I found that not necessarily to be the case, that there were



many different forms of Type 2 scheduling around the district. [3T23-3T24]

33. On October 16, 2003, Yvonne Hester-Lambert, a "Whole School reform design coach", observed Fuller coming up the stairs and entering a classroom with a "hot cup with a lid on it." Some of the liquid spilled on the floor as a child was coming out of the classroom. Teachers are not supposed to eat or drink in classrooms or hallways. This incident was memorialized in a memorandum from Vincent to Fuller on October 23, 2003 (3T77, 3T86-3T88; R-4).

34. On October 27, 2003, Harvest reminded Fuller that food is not permitted in the child study team office. Harvest had received complaints about food odor and crumbs from Fuller's colleagues (4T113-4T115). She also reminded Fuller of the need to pay attention to her scheduled time for meeting with students (R-28). The memorandum was a follow-up to verbal reminders (4T113).

35. On October 30, 2003, Fuller was in the Child Study Team office hanging a picture on the wall when she was scheduled to be observing students in the classroom (5T123-5T124). Vincent gave her a memorandum reminding her of her need to follow her schedule and the need for her to immediately improve her performance (CP-20).

36. Again, on October 30, 2003, at 1:50 p.m., Fuller was in the staff lounge eating and talking instead of observing a class

(5T125). Vincent memorialized this in a memorandum and also recommended adverse personnel action due to the fact that Fuller's work performance was unsatisfactory (CP-21).

37. Fuller received her final evaluation dated October 31, 2003, indicating that her overall performance was unsatisfactory and recommending non-renewal of her contact (R-30). The evaluation was prepared by Harvest with the input of Vincent (5T139-5T140). The evaluation covers the period from September 2, 2003 to October 31, 2003, it references all dates where Fuller had observations, discussions and meetings with Harvest and Vincent, and a list of memoranda given to Fuller regarding areas of concern (R-30; 4T119-4T122). Lastly, the evaluation sets forth:

Your performance in the area of planning and preparation is unsatisfactory. You failed to plan and organize the materials and resources needed in your observation of students. Unnecessary time is wasted in servicing students and parents because of your poor organization.

You have failed to follow through on assignments given to you to develop and increase outreach to community organizations and agencies in order to assist our parents/guardians.

You are added to the staff to provide additional services to assist students with barriers that inhibit them from reaching their fullest potential. However, you have consistently failed to use your time effectively. Daily schedules have been developed for you to help keep you organized, focused and deliver your services to our

students and parents. In spite of this assistance, you still managed to stray away from your scheduled responsibilities. [R-30]

38. Fuller was terminated by the Board in December of 2003 subsequent to a Sunshine hearing (2T70-2T72; R-3).

#### ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the New Jersey Supreme Court set forth the standard for determining whether an employer's action violates subsection 5.4a(3) of the Act. Under Bridgewater, no violation will be found unless the Charging Party has proven, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will

not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, 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. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

Here, Charging Party satisfied the first two Bridgewater elements, that Fuller engaged in protected activity and the employer knew of her activity, since Fuller sought the Union's involvement and meetings were held with Fuller, Vincent and the union representatives, Greetington and Burke. However, Fuller has not shown that the Board was hostile toward her protected activity.

Fuller claims that in January 2003 Vincent was hostile and aggressive toward her after she requested overtime pay and questioned Vincent's scheduling of Fuller's day. Fuller asserts that the hostility and harassment became progressively worse, particularly after Fuller filed a grievance in September 2003 complaining about the scheduling. Fuller asserts the series of corrective memoranda received from Vincent and Harvest subsequent to the grievance and ultimately her termination were motivated by union animus.

I disagree. Despite Fuller's claims to the contrary, the problems regarding her performance are well documented in evaluations and observations from the beginning of her employment, notwithstanding the fact that she received overall satisfactory ratings. Both Vincent and Harvest had difficulties obtaining professional documentation from Fuller, having her follow her schedule, and locating her throughout the day. The difficulty in finding Fuller was corroborated by several witnesses.

Furthermore, Fuller indicates that it was in January 2003, that Vincent became hostile and aggressive towards her after she began asking for additional pay for lunch time duty, a.m./p.m. duty, etc. However, it was not until September 2003 when Fuller filed a grievance, and this grievance was related to scheduling, not to pay issues. Nevertheless, beginning in January 2003, Harvest and Vincent had significant concerns related to Fuller's performance at work. On January 21, 2003, Harvest provided a memorandum to Fuller as a result of her failure to report to a.m. duty. Again on February 6, 2003, Harvest provided Fuller a memorandum highlighting her absence on three occasions. Then on April 2, 2003, Harvest noted in a memorandum to Fuller that she left the building prior to her scheduled leave time. Fuller does not deny these incidents, nor does she maintain they are the result of or related to her protected activity.

Moreover, two incidents involving Fuller and Vincent in the spring of 2003 appear to be confrontations related to work performance. Vincent observed Fuller talking with students rather than monitoring them in the cafeteria. In another incident, Fuller was not in her scheduled location but rather in the cafeteria. While Fuller maintains these incidents were hostile, there is no relationship between them and any alleged protected activity. Furthermore, despite the problems with Fuller's performance she received a renewed contract for employment for the 2003-2004 school year. This belies hostility by the employer toward union activity.

In September 2003, prior to Fuller's filing of the grievance, Vincent and Harvest had separate conferences with Fuller indicating the need for her to follow schedules, stay organized and focused. These conferences were memorialized in a memorandum reiterating the issues of scheduling, timeliness and need for proper documentation of work by Fuller, all performance-related criticism. The same criticism Fuller received from the beginning of her employment with the Board.

The corrective memoranda issued to Fuller subsequent to the filing of the grievance were from both Vincent and Harvest, not just from Vincent who Fuller claimed was hostile to her union activity. Furthermore, none of the incidents as set forth in the memoranda were denied by Fuller.

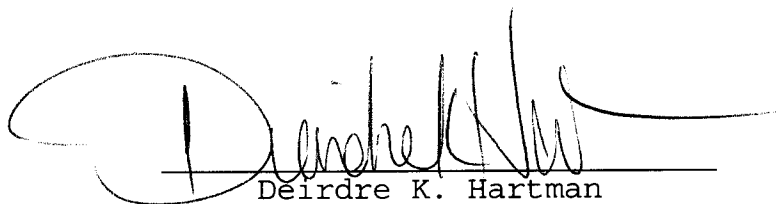
Based on the above, I do not find that the Board violated the Act under Bridgewater. The termination of Fuller was based on legitimate business reasons. There is no evidence that either Vincent or Harvest unlawfully denied Fuller overtime, unlawfully scheduled her, or were hostile toward her because of her protected activity. Even assuming, arguendo, that Vincent was hostile to Fuller's requests for additional compensation, Vincent and Harvest had legitimate and well documented concerns with Fuller's work performance which support the non-renewal of her contract. Accordingly, I find that the Board did not violate 5.4a(3) and, derivatively, 5.4a(1) of the Act with regard to Fuller.

#### CONCLUSIONS OF LAW

The East Orange Board of Education did not violate 5.4a(1) and (3) of the Act.

#### RECOMMENDATION

I recommend the Commission ORDER that the Complaint be dismissed.



Deirdre K. Hartman  
Hearing Examiner

DATED: April 5, 2007  
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 April 16, 2007.