

P.E.R.C. NO. 87-99

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BERGEN COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CO-86-132-104

LOCAL 804, INTERNATIONAL BROTHER-
HOOD OF TEAMSTERS and JUNE SELDERS,

Charging Parties.

SYNOPSIS

The Public Employment Relations Commission finds that Bergen Community College violated the New Jersey Employer-Employee Relations Act when it did not appoint June Selders to the College's Affirmative Action Committee. The Commission finds that she was not appointed in retaliation for her union activity on behalf of Local 804, International Brotherhood of Teamsters.

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HOOD OF TEAMSTERS and JUNE SELDERS,

Charging Parties.

Appearances:

For the Respondent, Andora, Palmisano, Harris & Romano,
Esqs. (Robert J. Romano, Jr., of counsel)

For the Charging Parties, Cohen, Weiss & Simon, Esqs.
(Franklin Moss, of counsel)

DECISION AND ORDER

On November 27, 1985, Local 804, International Brotherhood of Teamsters and June Selders ("charging parties") filed an unfair practice charge against Bergen Community College ("College"). The charge alleges that the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3), (4), and (7),^{1/} when

^{1/} These subsections 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the

it removed Selders from the College's Affirmative Action Committee because of an affirmative action class grievance she filed on November 6, 1985.

On January 30, 1986, a Complaint and Notice of Hearing issued. On February 10, the College filed its Answer. It denied that Selders had ever been appointed to the committee and claimed the decision not to appoint her was made in October, before the filing of the November 6 grievance, because the committee "already had two members of the supportive staff of which she is one."

On March 18, April 8 and May 9, 1986, Hearing Examiner Mark A. Rosenbaum conducted hearings. At the hearing, the charging parties alleged, also, that the removal was motivated "because of Miss Selders' militance on behalf of the union, and particularly her militance with respect to Affirmative Action issues."^{2/} The

1/ Footnote Continued From Previous Page

exercise of the rights guaranteed to them by this act; (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; and (7) Violating any of the rules and regulations established by the commission."

2/ Although the charge was never amended to include these broader allegations, the parties fairly and fully litigated them. The College has not excepted to their consideration; it merely submits that the broader allegations were first raised at hearing. We have therefore considered them. Cf. New Jersey Department of Higher Ed., P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985); Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982) aff'd App. Div. Dkt. No. A-1642-82T2 (12/8/83).

parties examined witnesses and introduced exhibits. The charging parties argued orally on May 9. The College waived oral argument but filed a post-hearing letter memorandum on July 22.

On September 4, 1986, the Hearing Examiner issued his report and recommended decision, H.E. No. 87-19, 12 NJPER ____ (¶ ____ 1986). He found that the College violated subsections 5.4(a)(3) and, derivatively, (a)(1) when it refused to appoint Selders to the committee. He found, also, that the charging parties neither argued nor litigated independent violations of subsections 5.4(a)(1), (2), (4) and (7) and recommended those allegations be dismissed.

On October 8, 1986, after an extension of time, the College filed exceptions. It excepts: (1) to the Hearing Examiner's crediting of Selders, Helff and Johnson and not Lopez-Isa and Hayes; (2) to his finding that Hayes admitted that she "may" have told Selders that there was an official reason; (3) to his characterization of Lopez-Isa's actions as "atypical"; (4) to his finding of anti-union animus; (5) to his finding that the testimony of Hayes and Lopez-Isa is inconsistent; (6) to his finding that the basis for the President's decision was illogical, and (7) to his conclusion that the College failed to prove that Selders would not have been appointed absent her protected activities.

On October 27, 1986, the charging parties filed a letter agreeing with the Hearing Examiner's credibility findings and relying on his decision.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-11) are accurate, but incomplete. We adopt and incorporate them here with the following additions.

We add to finding no. 6 that Hayes testified that she understood Lopez-Isa's response to mean that he would not accept a recommendation that Selders be placed on the committee. Yet, she subsequently sent Lopez-Isa a memorandum recommending Selders for the position. She further testified that she assumed Selders would be permitted to join the committee and that this assumption was presumptuous.

We modify finding no. 12 to add that Hayes testified that any discussion at the November Affirmative Action Committee meeting about the union and any problems had to do with a conflict between Selders and Barbara Mickolajczyk, the other shop steward, over Selders' private meetings with the president and Mickolajczyk's feeling threatened by Selders' greater visibility. Hayes knew of the conflict through Selders. Hayes further testified that when Lopez-Isa told her he wanted broader representation on the committee, she assumed he was alluding to that conflict although he never said so. Lopez-Isa concurred that they never discussed Mickolajczyk. Selders testified that when Hayes came to tell her about her meeting with Lopez-Isa, she asked whether Selders knew of any reason why the president would say that he would prefer that she appoint Mickolajczyk. Also, Johnson testified that someone at the November meeting, probably Hayes, mentioned that Mickolajczyk wanted to be on some committees because Selders had been active in many.

We add to finding no. 15 that all persons appointed to the Affirmative Action Committee received letters confirming their appointments from the president. Selders did not receive such a letter. Also, Selders testified that she was never on a committee organizing a staff conference as testified to by Lopez-Isa.

We modify finding no. 16 to reflect that Helff testified that on January 14, 1986 Lopez-Isa asked him: "What am I [Helff] doing with June Selders, creating another Peter Helff? I believe that was the exact quote."

In re Bridgewater Tp., 95 N.J. 235 (1984) establishes a two-part test for considering allegations of discriminatory conduct. The charging party must prove by a preponderance of the evidence that the employee's protected conduct was a substantial or motivating factor in the employer's adverse action. In the absence of any direct evidence of illegal motivation for the employer's action, circumstantial evidence may create a reasonable inference that an adverse action was impermissibly motivated. In such a case, to establish unlawful motivation, the charging party must show that the employee engaged in protected activity, that the employer knew of this activity and that the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer presented no evidence to rebut the showing of an illegal motive or if the reasons an employer proffered to explain the adverse action are rejected as pretextual, there is sufficient basis for finding a violation without further inquiry.

Sometimes, however, the record demonstrates that both motives are 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 even absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The Hearing Examiner found that Selders' exercise of protected activity was a substantial or motivating factor in her non-appointment or removal from the committee and exclusion from attendance at the off-campus conference. We agree.

It is undisputed that Selders was engaged in protected activity and that the College knew it. Selders was an active shop steward who filed affirmative action grievances. In May 1985, she processed a "hotly contested" grievance to arbitration and testified on behalf of the grievant. It was her interest in issues of equity for women in employment that prompted Dean Hayes to recommend her appointment to the committee. The dispute here, therefore, revolves around the issue of hostility.

The College contends that Selders was never appointed to the committee and claims it had legitimate reasons for its decision.

The charging parties contend that the College's asserted reasons are a pretext and that Selder's removal/non-appointment decision was unlawfully based on Lopez-Isa's dislike of Selder's actions on behalf of the union and affirmative action. After an examination of all the evidence, we conclude that hostility toward protected activity motivated Selder's non-appointment.

It is undisputed that Hayes recommended Selders' appointment to Lopez-Isa and that he rejected that recommendation before Selders filed her November 6 affirmative action grievance. Thus, we do not find that the filing of that grievance motivated Lopez-Isa's initial decision in October. However, we find, from the evidence as a whole, that Selders' protected activity motivated both Lopez-Isa's decision to direct Hayes to seek someone other than Selders to be on the committee and his subsequent decision to remove her after her participation in committee work.

The record reveals direct evidence of illegal motivation. Mary Johnson, a member of the Affirmative Action Committee, testified that Dean Hayes explained Lopez-Isa's decision not to appoint Selders at the beginning of the committee's November meeting. Johnson explained that Hayes made clear that one of the reasons included Selders' union activities on the job and her handling of a discrimination grievance for three secretaries. Johnson also indicated that Hayes sought to keep the explanation within the confidence of the Committee. Hayes denied that she gave that explanation. Instead, she maintained that all she stated was

that the President had not appointed Selders, he wanted broader representation and she was to ask other people who represented the support staff to serve on the committee.^{3/}

The College presented one witness to corroborate Hayes' version of the November meeting. That witness testified that to the best of his recollection, Hayes did not explain why Selders was not at the meeting. However, he also could not recall Selders attending the October meeting. The October minutes reflect that Selders was present; the November minutes, that a discussion took place regarding the absence of one of the Committee members. Given the witness' inability to recall even those facts which all parties agree happened, we cannot give substantial weight to his testimony.

The Hearing Examiner specifically credited Johnson's testimony concerning Hayes' explanation. He assessed witness demeanor and motivation to fabricate as well as corroborating

^{3/} Johnson testified that immediately after the November meeting, someone, probably Hayes, mentioned that the other shop steward, Barbara Mickolajczyk, wanted to be a part of some of the College committees because she felt Selders had been active on most all of them and she had not been asked to be on any of them. Hayes admitted that she indicated there was some problem between the stewards and that their conflict might be why Lopez-Isa wanted her to look elsewhere and get broader representation. In fact, immediately after her meeting with Lopez-Isa, Hayes had asked Selders why the president would prefer Mickolajczyk be appointed. Without deciding whether it motivated Lopez-Isa, we note that a preference for one steward over another because of one's protected activity would violate the Act.

evidence in resolving conflicting testimony. We accept his determination. Ocean Cty. College, P.E.R.C. No. 86-107, 12 NJPER 1341 (¶17130 1986).

Because we have found that protected conduct motivated the College's action, we must determine whether the College proved, by a preponderance of the evidence, that Selders would not have been appointed absent her protected conduct. The Hearing Examiner found that the College did not. We agree.

Two witnesses testified as to Lopez-Isa's reasons: Lopez-Isa and Hayes.^{4/} Their testimony was strikingly contradictory.

First, Hayes claimed Lopez-Isa specifically mentioned that Selders was on the President's Advisory Council while Lopez-Isa claimed he never mentioned the President's Advisory Council because he knew someone other than Selders was on that committee. He first testified that he mentioned two or three committees to Hayes, but then could only recall mentioning one. The only committee Selders did sit on was a Reaccreditation Study Project with about 120 members. When Lopez-Isa met with Selders, he told her she was already involved in high-level decision-making activities. Yet when he testified, he could only remember Selders being on a committee working on a full day staff conference. Selders denied she was ever appointed to such a committee.

^{4/} Dean Smith testified that Lopez-Isa told her that Selders was not a member of the Committee, but did not give her any reasons.

Next, Lopez-Isa emphasized that he specifically told Hayes he wanted her to seek out representation from the maintenance area because it had a large number of minority employees. Hayes claimed that Lopez-Isa never specified any areas; he merely directed her to reach out to allow others to have some involvement.

Thus, the College's attempt to prove that it would have taken the same action absent its hostility to Selder's protected conduct is marked by the conflicting testimony of its own witnesses. In addition, Lopez-Isa asserted that Selders was involved in high-level decision making when in fact she was on only one committee, fewer than the College's own witness.

Also, after Hayes met with Lopez-Isa, Selders explained to Hayes that Lopez-Isa was mistaken; she was not on the President's Advisory Council or active on any other committee. Hayes agreed to correct the president's perception, which would have removed the basis for his objections. She never did. Instead, Hayes merely sent a written recommendation of Selders' appointment with no explanation, despite her understanding that Lopez-Isa would not accept that recommendation. We find that explanation to be illogical and therefore questionable. Hayes' actions indicate that something other than the council motivated Lopez-Isa's decision.

All these factors, viewed together, do not persuade us that Lopez-Isa would have rejected Hayes' recommendation had Selders not been a vocal advocate for affirmative action and union rights. To the contrary, the inconsistencies of the College's defense lend

support to our initial finding of illegal motivation. See, e.g., NLRB v. Health Care Logistics, ___ F.2d ___, 121 LRRM 2872 (6th Cir. 1986) (employer's inconsistent and inadequate reasons support finding of illegal motivation)

Accordingly, under all the circumstances of this case, we find that the College violated subsections 5.4(a)(3) and, derivatively, (a)(1).^{5/}

ORDER

The Bergen Community College is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of rights guaranteed them by the Act, particularly by failing to appoint June Selders to the College's Affirmative Action Committee.

2. Discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage and discourage employees in the exercise of rights guaranteed to them by the Act, particularly by failing to appoint June Selders to the College's Affirmative Action Committee.

B. Take the following affirmative action:

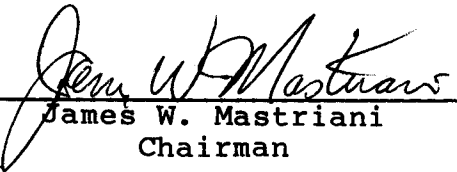
1. Forthwith appoint June Selders as a full member of the College's Affirmative Action Committee.

^{5/} The charging parties presented no evidence of independent violations of subsections 5.4(a)(1),(2),(4) and (7). We dismiss these allegations.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Bertolino, Reid, Smith and Wenzler voted in favor of this decision. None opposed. However, Commissioner Wenzler dissented from that part of the Order requiring the College to reinstate June Selders to the Affirmative Action Committee. Commissioner Johnson was not present.

DATED: Trenton, New Jersey
February 6, 1987
ISSUED: February 9, 1987

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of rights guaranteed them by the Act, particularly by failing to appoint June Selders to the College's Affirmative Action Committee.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage and discourage employees in the exercise of rights guaranteed to them by the Act, particularly by failing to appoint June Selders to the College's Affirmative Action Committee.

WE WILL forthwith appoint June Selders as a full member of the College's Affirmative Action Committee.

Docket No. CO-86-132-104

BERGEN COMMUNITY COLLEGE

(Public Employer)

Dated _____

By _____
(Title)

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 St., CN 429, Trenton, NJ 08625 (609) 984-7372.

H.E. NO. 87-19

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

In the Matter of

BERGEN COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CO-86-132-104

LOCAL 804, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS and JUNE SELDERS,

Charging Parties.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent College violated §5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when it refused to appoint Charging Party June Selders to the College's Affirmative Action Committee. The Hearing Examiner found that the Respondent was substantially motivated by anti-union animus and that the Respondent failed to prove that it would have taken the same action even in the absence of Selders' exercise of protected activity.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 87-19

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

In the Matter of

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-and-

Docket No. CO-86-132-104

LOCAL 804, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS and JUNE SELDERS,

Charging Parties.

Appearances:

For the Respondent

Andora, Palmisano, Harris & Romano, Esqs.
(Robert J. Romano, Jr., Esq.)

For the Charging Party

Cohen, Weiss & Simon, Esqs.
(Franklin Moss, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

On November 27, 1985, Local 804, International Brotherhood of Teamsters and June Selders ("Charging Parties") filed an Unfair Practice Charge with the Public Employment Relations Commission ("Commission") alleging that Bergen Community College ("College" or "Respondent") engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13a-1 et seq. ("Act"). The Charging Parties allege that the College was improperly motivated when it removed Selders from the College's

Affirmative Action Committee, in violation of N.J.S.A.

34:13A-5.4(a)(1), (2), (3), (4) and (7).^{1/} Specifically, the Charging Parties state that the "real reason" for Selders' removal from the Committee was "because of an Affirmative Action Class Grievance that [Selders] served the College on November 6th...." At the hearing, the Charging Parties also alleged that the action was motivated "because of Ms. Selders' militance on behalf of the union, and particularly her militance with respect to affirmative action issues." (Transcript of March 18, 1986 at p. 14).^{2/}

1/ These subsections 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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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; (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; and (7) Violating any of the rules and regulations established by the commission."

2/ The Charging Parties also allege that the College was motivated by sexual discrimination. With respect to that allegation, I note that Charging Party Selders filed a complaint with the New Jersey Division on Civil Rights on December 23, 1985. I reminded the parties on the record that, should a complaint issue on the Civil Rights matter, the parties should inform me and contemplate a predominant interest ruling pursuant to N.J.A.C. 1:1-14.4. To this date, neither party has advised me of any further action on the charge before the Division on Civil Rights. Accordingly, I make no legal findings as to the sexual discrimination claim.

On January 30, 1986, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On February 10, 1986, the College filed an Answer (Exhibit. A-3). The College denied the allegations of the Charge generally, specifically denied that Selders had ever been appointed to the Affirmative Action Committee and stated that "Ms. Selders was not appointed because the AAC [Affirmative Action Committee] already had two members of the supportive staff of which she is one. The President was seeking wider diversity on the Committee, in particular, members of the maintenance staff."

On March 18, April 8 and May 9, 1986, I conducted hearings in Newark, New Jersey, at which time the parties were given opportunities to examine witnesses, present relevant evidence and argue orally. The Charging Parties argued orally on May 9, 1986, and the Respondent waived oral argument and filed a post-hearing letter memorandum which I received on July 22, 1986. Upon the entire record, I make the following:

FINDINGS OF FACT

1. Bergen Community College is a public employer within the meaning of the Act and is subject to its provisions.
2. Charging Party Local 804, International Brotherhood of Teamsters is an employee representative within the meaning of the Act and is subject to its provisions.
3. Charging Party June Selders is a public employee within the meaning of the Act and is subject to its provisions.

4. Selders is a library secretary at the College and has worked for the College for eight years. Selders has been a Shop Steward for Local 804 for the past five years. As Shop Steward, Selders met frequently with College President Jose Lopez-Isa. She was active in the filing and processing of grievances; in the year preceding the events in question, Selders had filed two grievances in the Affirmative Action area, and in May 1985 processed a third grievance to arbitration on behalf of Affirmative Action Committee member Mary Johnson. The Johnson grievance was "hotly contested." Selders and Dean Margaret Hayes testified on Johnson's behalf, and Hayes discussed her testimony with Lopez-Isa. Subsequent to the arbitration, Johnson remained on the Committee, and was not discriminated against by Lopez-Isa. The most recent Affirmative Action grievance filed by Selders was dated October 28, 1985, and served on the College on November 6. (Exhibit A-1; T I pp. 19-24, 66-67 and 100-102; T II at pp. 84-85 and 88-89).^{3/}

5. Margaret Hayes is a Dean of the College, serves as Affirmative Action Officer, and chairs the College's Affirmative Action Committee. On October 7 or 8, 1985, Hayes approached Selders, informed her of a vacancy on the Affirmative Action Committee, and indicated to Selders that she would like to recommend to the President of the College that Selders be appointed to the

^{3/} T I refers to the transcript of March 18, 1986; T II refers to the transcript of April 8, 1986; and T III refers to the transcript of May 9, 1986.

Committee. Selders indicated that she was agreeable. Hayes gave Selders certain documents relevant to the Committee's work. (T I at pp. 25-26 and 132-134; Exhibit R-2).

6. Shortly after a meeting with Selders, Hayes met with College President Jose Lopez-Isa and discussed, among other things, the Selders' recommendation. Hayes testified that President Lopez-Isa "indicated to me that he would like to have more broader [sic] representation on the various committees of the College, and asked me if I could invite someone else because at the time he thought that June Selders was on the President's Advisory Council, and she had had a lot of visibility lately and that the Board of Trustees had an all day conference and June was the spokesperson at that conference, and she was also on the Accreditation Committee so, therefore, he would ask if I would reach out and allow some other people to have some involvement." When asked whether or not President Lopez-Isa provided any further explanation to her at that time, Hayes testified that he did not. (T I at pp. 135-136).

President Lopez-Isa testified about the same meeting. He testified that he took a minute or two to consider Hayes' recommendation of Selders for the vacancy on the Affirmative Action Committee and then told Hayes "Well I believe June Selders is already involved in other committees. Why don't you look for someone particularly in the area of maintenance." (T II at p. 60). Lopez-Isa further testified that when he said "maintenance" he meant the entire custodial area, and that he thought Hayes "knew that I

was referring to all that area." The Maintenance Department at the college has eight or nine employees, none of whom are women and one of whom is Hispanic. (T II at pp. 60, 80-82 and 105).

7. After meeting with President Lopez-Isa, Hayes discussed the meeting with Selders. Selders told Hayes that she was not on the President's Advisory Council, that she was not on any other committee, she wanted to be on the Affirmative Action Committee, and requested that Hayes report all this back to President Lopez-Isa. Hayes told Selders that she would communicate this information to President Lopez-Isa. However, Hayes never did communicate the information to President Lopez-Isa. (T I at pp. 41, 46-50, 137 and 159).

8. After she met with Selders, Hayes sent a memo to President Lopez-Isa, putting in writing her recommendation of Selders for the Affirmative Action Committee. Later that day (October 10, 1985), the Affirmative Action Committee met and Selders attended that meeting with Hayes' permission. The minutes of the meeting note Selders' attendance and do not distinguish her from the members of the Committee. (Exhibits. R-3 and CP-6; T I at pp. 26-27 and 139).

9. On November 6, 1985, Hayes sent a memorandum to Selders requesting that Selders represent the Affirmative Action Committee at an off-campus conference. Upon receipt of Hayes' memo, Selders filled out an off-campus participation form and submitted it for approval. In the week that followed, Selders and Hayes

discussed Selders' participation in the conference. (Exhibits CP-1, CP-2 and CP-3; T I at pp. 27-32 and 163-167).

10. Consistent with allowing Selders to attend the Committee meeting of October 10, and requesting Selders to attend the off-campus conference, Hayes testified that she "assumed that [Selders] would [be permitted to join the Committee by the President], like any other name that I put before him." Hayes further testified that the President had never overruled a previous committeeperson recommendation of hers, but she had once withdrawn a recommendation at the President's request. At no time did Hayes withdraw her recommendation of Selders. (T 1 at pp. 174-177).

11. On November 11, 1985, Hayes sent a memorandum to President Lopez-Isa "requesting permission for June Selders to represent the Affirmative Action Committee..." at the off-campus conference. On November 13, President Lopez-Isa sent a memorandum to Hayes indicating that he did not "recall ever appointing June Selders to the Committee." In addition to his November 13 memo, Lopez-Isa sought to contact Hayes personally, including a visit to her office early on a day when he was scheduled to be off campus. Since Hayes was out sick that day, Lopez-Isa later contacted Dean Mary Robertson-Smith and asked her to convey to Hayes that Selders could not attend the off-campus conference. Robertson-Smith contacted Hayes on November 14 and Hayes contacted Selders. Selders testified that Hayes told her that she was being removed from the Affirmative Action Committee and, thus, from representing the

Committee at the conference "because of your Affirmative Action grievance, because of your union activity." Selders further testified that Hayes told her that the "official reason" for the action would be that Lopez-Isa never appointed her to the committee. Hayes acknowledged that she may have made reference to an "official reason," but could not definitely recall using such language. Hayes denied making statements that the actions were related to Selders' union activities. Hayes attended the conference the next day, and Selders did not. (Exhibits R-4 and R-5; T I at pp. 32-33, 141-145 and 181-182; T II at pp. 10-12 and 67-69).

12. Later on the same day that Hayes informed Selders that she was not a member of the Affirmative Action Committee and could not represent the Committee at the off-campus conference, the Committee held its monthly meeting. Selders did not attend the meeting, and her absence was discussed at the outset of the meeting. Mary Johnson, a Committee member and member of Local 804, testified that Hayes closed the door of the Committee's meeting room and told those in attendance that Selders "was no longer going to be on the committee because it was stated by the president that she had not been appointed to the committee, and because of her union activities, and a grievance or something she had filed for three female employees was made reference to." Johnson further testified that Committee members immediately raised questions and concerns, that Hayes asked that all remarks be kept confidential, and that the committee secretary tore up notes which she had taken regarding

Selders' absence. Karl Prota, also a member of the Committee (as well as two other permanent committees), testified that he could not remember such statements or events. He also could not remember Selders ever having attended a meeting of the Committee. Hayes testified that she did not make reference to Selders' union activities, nor did she seek to keep any remarks confidential. Hayes testified that she told the Committee that there were "some bits of friction" between Selders and the other Local 804 shop steward, and "so that's why I was to look to other members of the college to come on the Committee." The minutes of the November 14 meeting state that "[a] brief discussion followed regarding the absence of one of the committee members." (Exhibit CP-7; T I at pp. 86-96 and 152-155; T II at pp. 5-6 and 8-9).

14. At the conclusion of the November 14 Affirmative Action Committee meeting, Selders entered the room to present a grievance concerning her status with the Affirmative Action Committee. Hayes read the grievance to the remaining Committee members. In the days that followed, Selders sought out Robertson-Smith, Lopez-Isa and Administration member David Braddish for explanations of the events of November 14. Selders testified that Robertson-Smith told her that "the real reason you aren't on that committee...is there are simply too many females on the committee." Smith testified that she indicated to Selders that the President balances a variety of factors, including gender, when making committee assignments. Selders' conversation with Lopez-Isa

lasted about forty-five minutes. Selders testified that Lopez-Isa told her she was not on the Committee because he wanted more diversification on the committee and that she was "too involved already in high level decision making activities in the college." Selders told Lopez-Isa that she was not involved in other committees. Lopez-Isa acknowledged that he told Selders she was "already involved in several other committees at the College, and that I wanted as many people from the College as possible involved in committee work." Selders remained off the Committee. (T I at pp. 37-40 and 90-91; T II at pp. 72-73 and 90).

15. President Lopez-Isa testified that the College has approximately one thousand employees and "hundreds of committees," all of which hold meetings during regular working hours. The President makes most College committee appointments. Selders had previously served on a Safety Committee, which was effectively disbanded prior to the events in question. During the events in question, she volunteered for and served on the College's Reaccreditation Committee, a temporary committee with 120 members. She also worked on a one-day staff conference in the spring of 1985. Selders was never a member of the President's Advisory Council, and Lopez-Isa knew that. (Exhibit R-2; T I at p. 40; T II at pp. 43-44, 86-87, 90-91 and 97).

16. Peter Helff is a Professor of Library Science at the College and is an executive officer of the Faculty Association, which represents College faculty for the purposes of collective

negotiations. Helff described himself as a "thorn in the side of the College." In January, 1986, Helff met with College President Jose Lopez-Isa concerning operations of the library. Helff testified that Lopez-Isa asked him: "What was I doing, creating another Peter Helff?" Pat Pagnanella, Local 804 Business Agent, testified that College Administration member David Braddish had referred to both Helff and Selders derogatorily (T I at pp. 105-107 and 122-125).

17. The Affirmative Action Committee members include Alice Peters, who is an executive officer of the Faculty Association, and Vera Lev, who is a secretary represented by Local 804. (Exhibits CP-6, CP-7 and A-1; T I at pp. 72 and 87-89).

ANALYSIS

In Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 233, 242-244 (1984), the New Jersey Supreme Court set forth the mode of analysis for alleged violations of subsection 5.4(a)(3) of the Act. First, the Charging Party must establish either direct evidence of anti-union motivation for disciplinary actions or a prima facie showing sufficient to support an inference that the employee's exercise of protected activity under the Act was a substantial or motivating factor in the employer's personnel action. If the Charging Party meets this burden, the onus "shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

I find that the Charging Party has established, both by direct and inferential evidence, that Selders' exercise of protected activity was a substantial or motivating factor in her non-appointment or removal from the Affirmative Action Committee and exclusion from attendance at an off-campus conference. It is undisputed that Selders was an active shop steward on behalf of Local 804, and that her protected activity was well known to President Lopez-Isa and Dean Hayes (Finding of Fact No. 4). While President Lopez-Isa and Dean Hayes denied that actions taken with respect to Selders were motivated by animus toward her protected activities, I credit the contrary testimony of Selders, Helff and Johnson (Finding of Fact Numbers 11, 12, and 16).

In this regard, I specifically credit Johnson's testimony that, at the Affirmative Action Committee meeting of November 14, 1985, Hayes told Committee members behind closed doors that Selders was removed from the Committee because of her union activities and a recent grievance. Johnson also recalled reactions of other Committee members to Hayes' comments. While Hayes denied the colloquy, her nervous and anxious demeanor on the stand at that point provided a stark contrast to Johnson's calm and forthright testimony. Moreover, Johnson, who testified that she had suffered no retaliation from President Lopez-Isa after a recent grievance arbitration, had no cause for fabrication. By contrast, Hayes who had recommended Selders for the Committee and then been rebuffed by the President under any construction of the events, was clearly

under significant pressure as events unfolded and throughout the hearing. Indeed, at one point in the testimony, Hayes admitted that she "may" have told Selders that there was an "official reason" (as opposed to an unofficial reason?) for her removal from the Committee (Finding of Fact Number 11). While the only other record witness to the November 14 meeting of the Affirmative Action Committee, Karl Prota, had no recollection of Hayes' remarks or any discussion about Selders' absence, I cannot give his testimony any weight. Prota could not recall that Selders ever attended a Committee meeting, even though Committee minutes indicate that he attended the meeting which she attended (Exhibit P-6). Indeed, even the minutes of the November 14 meeting indicate that a brief discussion took place concerning the absence of a Committee member (Exhibit CP-7).

In addition to the above evidence of anti-union animus as a substantial or motivating factor for actions taken against Selders, I find that the circumstances and timing of the actions amply support the inference of improper motivation. Notwithstanding Lopez-Isa's original negative reaction to her recommendation of Selders for the Committee, Hayes assumed that Selders would be appointed and treated her as if she were appointed (i.e. welcomed her to the next meeting of the Committee, and selected her to represent the Committee at an off-campus conference). In this regard, Hayes' actions reflected her prior experience; any previous committee recommendation which she made to Lopez-Isa and never withdrew from his consideration was implemented consistent with her

recommendations. Indeed, as late as November 13, 1985, and more than a month after Selders attended her first Committee meeting, Hayes, Selders and Committee members all acted as if Selders were a member of the Committee, and Hayes personally chose Selders to attend an off-campus conference as a representative of the Committee. However, contrary to prior experience, Lopez-Isa did not adopt Hayes' recommendation originally, nor after her failure to withdraw it. Instead, he reacted vigorously to Hayes' selection of Selders for an off-campus conference (Finding of Fact Number 11). This atypical conduct, together with Lopez-Isa's knowledge of Selders' protected activity, supports an inference of improper motivation.

While it is clear that Lopez-Isa had no responsibility to appoint any particular individual to any particular committee, the Charging Party has demonstrated that anti-union animus was a substantial motivating factor in Lopez-Isa's decision to not appoint, and later expressly remove Selders from the Affirmative Action Committee. Applying Bridgewater, supra, I now consider whether the College proved that, even in the absence of Selders' protected activity, Lopez-Isa would have taken the same actions.

The Respondent, through testimony of Lopez-Isa and Hayes, presented several reasons why Lopez-Isa did not appoint Selders to the Committee. The testimony focused on Lopez-Isa's belief that Selders was "already involved in several other committees at the College, and that I wanted as many people from the College as

possible involved in committee work." (Finding of Fact Number 14). He also testified that he told Hayes to find someone "in the area of maintenance." (Finding of Fact Number 6). Hayes testified that Lopez-Isa told her that Selders "had had a lot of visibility lately...", including her participation in the President's Advisory Council, the Reaccreditation Committee, and a recent all-day Board of Trustees conference. She further testified that Lopez-Isa asked her to "reach out and allow some other people to have some involvement," and that he gave her no further explanation (Finding of Fact Number 6). Lopez-Isa testified that he knew that Selders was not on the President's Advisory Council (Finding of Fact Number 15).

The testimony of Lopez-Isa and Hayes is contradictory on the issues of Selders' membership on the President's Advisory Council and the need to appoint someone from maintenance. The inconsistencies do not lend credit to the rationales offered. As for the points where the testimony of Hayes and Lopez-Isa is consistent, the testimony simply does not comport with other record evidence. Selders was not on several committees at the time of Hayes' recommendation; she was on only one committee, and that committee was temporary and staffed by 120 volunteers. By contrast, one of the Respondent's witnesses was a member of three permanent or standing committees of the College. In comparison, Selders did not have "a lot of visibility" in committee work, although she was certainly visible in her union functions. Moreover, in a college

with approximately one thousand employees and "hundreds of committees," the claim that an individual who is on one committee would be on too many committees if she served on a second committee is just not logical.

The need for representation of maintenance employees in the Committee also does not comport with the facts. The maintenance department has eight or nine employees none of whom are women and one of whom is Hispanic. Lopez-Isa testified that when he said "maintenance" he meant to include custodial employees, and testified that "I think she [Hayes] knew that I was referring to all that area." However, Hayes did not corroborate the testimony; instead, she testified that her only instructions were to "reach out and allow some other people to have some involvement." (Finding of Fact Number 6).

In view of the above, I conclude that the College failed to meet its burden to prove that Selders would not have been appointed to the Affirmative action Committee even in the absence of her protected activities. Accordingly, I recommend that the Commission find that the Respondent violated N.J.S.A. 34:13A-5.4(a)(3) and, derivatively, (a)(1),^{4/} and order the Respondent to take the actions recommended below.

^{4/} Since the Charging Parties have neither argued nor litigated independent violations of subsections (a)(1), (2), (4) and (7), no such violations are found.

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That Respondent Bergen Community College cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to appoint employees such as June Selders to College committees because of their exercise of protected activity.

2. 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 the Act, particularly, by refusing to appoint employees such as June Selders to College committees because of their exercise of protected activity.

B. That the Respondent Bergen Community College take the following affirmative action:

1. Forthwith appoint June Selders as a full member of the College's Affirmative Action Committee.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix A. Copies of such notice on forms to be provided by the Commission shall be posted immediately upon receipt thereof and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days.

Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

3. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

C. That the allegations of the Respondent Bergen Community College violated N.J.S.A. 34:13A-5.4(a)(2), (4) and (7) be dismissed in their entirety.



Mark A. Rosenbaum
Hearing Examiner

Dated: September 4, 1986
Trenton, New Jersey

NOTICE TO ALL 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 NOT interfere with, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to appoint employees such as June Selders to College committees because of their exercise of protected activity.

WE WILL NOT discriminate 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 the Act, particularly, by refusing to appoint employees such as June Selders to College committees because of their exercise of protected activity.

WE WILL forthwith appoint June Selders as a full member of the College's Affirmative Action Committee.

BERGEN COMMUNITY COLLEGE

(Public Employer)

Dated _____

By _____ (Title)

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 James Mastriani, Chairman, Public Employment Relations Commission, CN 429 495 W. State Street, Trenton, New Jersey 08625. Telephone (609) 292-9830