

H.E. NO. 2017-1

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

In the Matter of

BURLINGTON COUNTY COLLEGE,  
Respondent,

-and-

Docket No. CO-2015-010

BURLINGTON COUNTY COLLEGE  
SUPPORT STAFF ASSOCIATION,  
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a substantial portion of a Complaint alleging that Burlington County College discriminated against unit employee and Burlington County College Support Staff Association President Regina Algado in retaliation for conduct protected by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically section 5.4a(3) and (1), when it terminated her employment on June 27, 2014. The Hearing Examiner recommends that the Association did not demonstrate a prima facie case that the College violated the standard for such discrimination cases set forth in In re Bridgewater Tp., 95 N.J. 235 (1984).

The Hearing Examiner recommends that the College violated section 5.4a(1) of the Act when it refused to provide drafts of proposed memoranda of agreement for a successor collective negotiations agreement to Association President Algado after her termination and deleted her name from proposed signature lines in the draft memoranda from July 1, 2014 through December 16, 2014. The facts show that after Algado's termination, the Association informed the College that she continued to be the duly elected Association President.

The Hearing Examiner recommends that the remainder of the Complaint be dismissed.

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

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Appearances:

For the Respondent  
Capehart Scatchard, attorneys  
(Carmen Saginario, of counsel)  
(Katheryn Eisenmann, of counsel)

For the Charging Party  
Selikoff Cohen, PA, attorneys  
(Keith Waldman, of counsel)  
(Steven R. Cohen, of counsel)

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

On July 23, 2014, August 8, 2014 and October 27, 2014, Burlington County College Support Staff Association (BCCSSA or Association) filed an unfair practice charge and amended charges against Burlington County College (College). The charge alleges that on June 27, 2014, the College terminated the employment of unit employee and Association President Regina Algado in retaliation for engaging in union activities, including collective negotiations, and filing and advancing grievances

(including her own). The charge alleges that in the six months preceding the filing of the charge, Algado's supervisor, ". . . on many occasions," told her to "get out of [her] union positions" and remarked that her activities on behalf of BCCSSA was "taking up too much time." Another College representative allegedly told Algado that a College vice president was ". . . out to get her."

The first amended charge alleges that on July 1, 2014, College "administrator" Stacy Jankiewicz advised Association Vice President Donna Podolski that since Algado was no longer employed by the College, the College refuses to recognize her standing to represent unit employees, denying Podolski's request to send all Association-related business communications to Algado's personal email address. The amended charge alleges that on July 23, 2014, Association Counsel wrote to Jankiewicz, demanding that the College communicate with Association President Algado through her personal email address and to no reply was received.

The second amended charge alleges that on September 30, 2014, the College transmitted a memorandum of agreement setting forth terms and conditions of employment of a successor agreement that failed to include a signature line designated for Association President Algado. This amended charge also alleges that following Association's transmission of a revised memorandum setting forth such a signature line, the College, on October 16,

2014 again transmitted a memorandum of agreement to the Association that eliminated a signature line for Association President Algado. The College's conduct allegedly violates 5.4a(1), (2), (3) and (5)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

On November 21, 2014, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing conference. On December 15, 2014, the College filed an Answer admitting some facts and denying violating the Act. It contends that Algado was terminated from employment for "chronic absenteeism." On January 13, 2015, this case was reassigned to me.

On May 11 and 12, 2015, June 8 and 9, 2015, October 7, 2015 and December 2, 2015, I conducted a Hearing at which the parties examined witnesses and exhibits. Post-hearing briefs were filed by March 14, 2016 and replies were filed by March 29, 2016.

Upon the record, I make the following:

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the 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. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

**FINDINGS OF FACT**

1. The Association and College signed a collective negotiations agreement extending from July 1, 2009 through June 30, 2013 (J-1). The recognition provision (Article Three) of the agreement references an attached appendix identifying numerous "full-time permanent" and "part-time permanent" "secretarial/ clerical," "technical," and "maintenance/custodial" titles in enumerated pay grades within the unit. About 100 employees are included in the unit (1T28).

Article Seven (Association Rights and Responsibilities) permits Association representatives to conduct "Association business" on College property at "reasonable times," provided that that activity does not interfere with College "normal operations."

Another provision entitles:

- a. The duly-elected President, Vice President, Secretary and Treasurer of the Association [ ] to a maximum of three (3) hours per week of release time from their regular assigned College job duties to conduct official Association business;
- b. Such time shall be taken at times mutually agreeable between the Association officers and her/his College supervisor

Article Eight (Employee Rights and Responsibilities) requires unit employees , ". . .to notify her/his supervisor if she/he is going to be tardy or absent."

Article Twenty-One (Leaves of Absence) requires five days advance written notice of vacation leave (section four) and five days advance written notice of personal leaves, possibly excepting emergencies (section seven).

Article Twenty-Three (Resignation, Discharge, Suspension, Layoff) provides the College (Board of Trustees) the right, "to relieve employees from duties by layoff, suspension or termination because of: lack of work, unjustified and/or excessive lateness, unjustified and/or excessive absence, fiscal emergency and other just cause."

Under the "Notice" provision in this article, employees normally will be provided two weeks notice before the effective date of termination unless the employee ". . . is guilty of gross misconduct."

Article Twenty-Six (Procedure for Handling Employee Performance Requiring Corrective Action or Discharge) is intended, ". . . to provide an orderly and sequential process whereby employee performance requiring corrective action (which shall include but not be limited to employee suspension or discharge) may be handled."

Procedural steps include written notice from the "immediate supervisor;" a "conference" with the supervisor that includes a "recommended course of action;" "continuous monitoring of employee's performance, final written assessment of progress;

final conference and recommendation; and a supervisor's recommendation to the College or designee. The final "step" provides "advisory arbitration."

Article Twenty-Seven (Grievance Procedure) provides a five-step "procedure"; "informal discussion with immediate supervisor;" "written statement to immediate supervisor;" written statement to President or designee; written statement of Board of Trustees and "advisory arbitration."

2. The College hired Regina Algado in 1999 as a "payroll specialist." In 2003, she was promoted to "accountant general," a unit title responsible for remitting employee quarterly pension contributions and certifications; and overseeing loan applications and accounts receivable for the print shop and "external rentals" (1T17-18). Such payments need to be made "relatively quickly," as they are "time-sensitive"(1T17, 1T18, 1T122, 5T8). In the periods during and after Algado's employment by the College, the College was never penalized for failing to timely submit veteran or other pension remittances (5T95).

In Algado's absence her varied tasks were not performed (1T122). More specifically, the four employees (including Algado) in the accounting department under supervisor and Assistant Director of Finance Julie Ritter were not "cross-trained" to perform another's job. In Algado's case, no other accounting employee performed pension payments, worked on "fixed

asset" accounts or performed third-party billing (5T7, 5T8, 5T11). She scheduled her vacations ". . . around due dates" (1T19).

3. In fall 2005, Algado availed herself of the then-current and contractual "sick pool" provision offering up to 60 days of paid sick leave benefits. Algado was also provided unpaid family leave (not pursuant to FMLA provisions) from January 18, 2006 until April 1, 2006, upon her written request (R-1, R-20, R-21; 2T103, 2T108-111).

4. In 2010, Algado was elected President of the BCCSSA (1T27, 1T93). Algado has "overseen" about 50 disciplinary proceedings initiated by the College, representing about 85-90% of such cases brought against unit employees (1T28, 1T47, 1T94). She did not participate in negotiations for the 2009-2013 collective negotiations agreement (1T238).

5. Ritter became Algado's supervisor in 2005 and wrote annual performance evaluations of Algado (1T22, 5T7; CP-1). Ritter's 2009, 2011, 2012 and 2013 evaluations of Algado praise her performance, competency and affability, while denoting escalating concerns about her attendance (CP-1). Ritter's practice was to call Algado to her office, present the evaluation for her immediate review, discussion and signature. Algado would then photocopy the signed evaluation for herself and Ritter (2T43).



In 2009, Ritter, responding to a scaled, multiple-choice question (one of sixteen in the evaluation) about Algado's "attendance," checked, "good attendance record, rarely late." In July, 2011, Ritter checked, "usually at work and on time," which she again checked on the April 2012 evaluation form and added in the "comments" section (among complimentary remarks):

My only concern is the number of unscheduled absences Gina has had within the past year, which we have discussed so she realizes the importance of attendance. [CP-1]

On cross-examination, Algado was asked if Ritter said to her (in the meeting that accompanied Ritter's April, 2012 presentation of this evaluation) "Gina, you are spending too much time on union stuff; you have to get out," to which the witness answered: "She may have" (2T44). When pressed, Algado testified that she did not remember the conversation at all, and denied that she mentioned any such remark by Ritter to any other union representative (2T44). Nor did Algado avail herself of the opportunity to submit a written reply to the evaluation (2T45). Ritter denied that she ever told Algado to quit her union position or suggested or implied that she should limit her union activities (5T12-13, 5T65, 5T126-5T127). I find that Ritter did not so remark to Algado in their April, 2012 evaluation meeting. Both signed the evaluation (CP-1; 2T42).

In the March, 2013 evaluation, Ritter checked a box designating, "remiss in getting to work everyday and/or on time"

in response to the "attendance" question. For the question eliciting the "quantity of work produced," Ritter checked, "maintains average production (only her absences hinder the quantity of work produced; when at work, she exceeds production)." Ritter wrote in the "comments" section of this evaluation:

Gina is proficient in all aspects of her job. She adjusts well to new and/or stressful situations. My only concern is the number of unscheduled absences Gina has had within the past year, which we have discussed as needing improvement on an ongoing basis. Other than this, Gina is very capable of her job responsibilities and I can count on her to take on additional responsibilities as necessary. [CP-1]

6. On August 1, 2011, Ritter issued a memorandum to the College "Human Resources" department memorializing her meeting with Algado that day, ". . .regarding excessive absenteeism."

She wrote:

I spoke to [Algado] and explained that she has too many unscheduled absences and latenesses which are unacceptable. I just explained this is a Monday-Friday full-time job and I need to be able to count on her being here on a more consistent basis. She apologized and said she understands and will try to improve in this area. [R-22]

Ritter had chided Algado about excessive absences before August 2011, saying, for example, "You're calling out again? You have to be here." Algado replied that ". . . she knew, understood" (5T15). None of Algado's unscheduled absences were

attributed or attributable to union activities (5T16). On cross-examination, Algado admitted Ritter's remarks to her, adding ". . . but there were also circumstances I can't prevent; my father getting sick and being hospitalized" (1T134). The document was not placed in Algado's personnel file (3T223).

7. On August 21, 2012, Ritter issued a memorandum to Algado with a copy designated for placement in her personnel file, recounting a meeting held that day about her "excessive absences" and "the [adverse] effect it has on the accounting department" (CP-11(1)). Among the attendees were Stacy Jankiewicz, then-Assistant Director of Human Resources for the College and Belinda Long, a College employee and Association representative (3T227, 5T19). Jankiewicz admitted her participation in drafting the memorandum (3T225).

The memorandum provides:

A review of your attendance from August 2011 to present indicates that you have had 28 unscheduled absences (177 hours total, 23 full days, 5 partial days), nine (9) of which fell on a Monday or Friday. This is considered excessive and patterned absenteeism.

Effective immediately, your attendance at work needs to improve. You will be required to provide medical documentation for all use of sick leave for the next six (6) months. This documentation must be provided on the day of your return in accordance with the [2009-2013] support staff collective [negotiations] agreement.

Please be aware that these are serious concerns. Such improvement is expected on an on-going basis or further disciplining action may be taken. [CP-11(1)]

Algado, Ritter and Long signed and dated the document.

Algado considered the August 21, 2012 memorandum to be the first disciplinary warning and did not recollect challenging the accuracy of the reported number of unscheduled absences (1T145, 1T147, 1T152). I infer that she did not challenge the number. Algado admitted knowing at that time that excessive absenteeism could result in discipline, pursuant to the terms of the collective negotiations agreement. She did not file a grievance contesting the memorandum or the discipline (1T148, 1T150).

Algado testified:

I knew I needed to improve my attendance, but as I stated earlier, when there are personal issues that come up -- court dates, family illnesses, things you can't always schedule, your child being sick or your father being hospitalized. I did what I had to do.  
[1T150]

8. A "scheduled absence" requires at least five days of advanced notice to the appropriate employer representative for vacation leave and scheduled medical procedures, pursuant to Article twenty-one of the agreement (finding no 1; 3T230). Algado's understanding of the term does not differ (1T96-1T97). Algado had attended personal court appearances that were approved as "scheduled absences" (1T97).

An "unscheduled absence" provides the College little or no advanced notice of a (frequently unanticipated) absence, such as an employee illness or that of the employee's family member, hospitalization, etc. (1T101, 3T230). The College does not distinguish "excused" or excusable unscheduled absences from "unexcused" or inexcusable unscheduled absences (3T231). Algado admitted that "valid excuse" absences - such as sudden illness, hospitalization or auto breakdown - even resulting in a prompt, explanatory phone call to an employee's supervisor - are considered "unscheduled absences" (1T102). Algado also admitted that the collective negotiations agreement does not include any dispensation for an "excused" or "legitimate" unscheduled absence (1T102, 1T151).

9. On October 1, 2012, Ritter issued a memorandum to Algado regarding "excessive unscheduled absences," with a copy designated for placement in her personnel file (CP-11(2); 1T82). Jankiewicz participated in drafting the memorandum and in a meeting that day with Algado, Ritter and unit employee and Association Vice President Donna Podolski (1T152, 5T24). In the meeting, Ritter stated that Algado had too many unscheduled absences that they were "unacceptable" and that her absences "impacted" other employees in the department (5T24). Algado's recollection of the meeting comports with the substance of the memorandum (1T152-1T153).

The memorandum provides:

This memo is to address further concerns related to your continued unscheduled absences and the impact it has on Accounting and College-wide operations, It should be noted that we last met on August 21, 2012 to discuss similar concerns related to your excessive and patterned absenteeism.

In our previous meeting you were told that your attendance at work needed to improve. Since this time you have been absent an additional 38.5 hours, of which 24.5 hours were unscheduled, and you are currently in the negative for both your vacation and sick balances.

You are being given this second written warning with a one(1) day suspension without pay. Your attendance is unacceptable and is negatively effecting College operations. Without immediate and sustained improvement, additional disciplinary actions may be taken up to termination of employment. [CP-11(2)]

Podolski explained that the College should be lenient in its disciplinary treatment of Algado because she was absent for legitimate personal reasons (3T239). The memorandum was signed and dated that day by Algado, Ritter and Podolski (CP-11(2)).

Algado did not contest the reported number of hours she was absent, nor the number of reported "unscheduled" hours (1T154). While admitting that the second warning was "serious," Algado explained in her testimony that the period of time referenced in the memorandum was, ". . . when I was having issues with getting my daughter enrolled in school and there were numerous absences"

(1T151). She admitted knowing at that time that if her "attendance issues" persisted, she might be fired (1T167).

10. On October 9, 2012, Algado filed a grievance with Dennis Haggerty, College Vice-President of Administration, contesting the "just cause" for the penalty imposed in the College's October 1 disciplinary memorandum (R-3; 1T157). Algado wrote that the College "pre-determined" the penalty, without providing her, ". . . the right to explain my circumstances." Specifically, Algado wrote that she had moved to Pennsylvania and that her daughter ". . . was kept for over two weeks from attending school." The grievance continued:

Having called my supervisor and explaining the issue, it was made clear to me that my supervisor, Julie Ritter, understood and stood behind me. Thus taking vacation time was not a problem. Nothing was ever said to me after my return to work.

The College's position was that it was unscheduled time and penalized me with a day off without pay. Stating that I had fallen in arrears in my vacation time. I deny that I fell into a negative total and requested a reassessment of the SoftTime computerized attendance recording system. As of this grievance it was confirmed that the system was incorrect and that I had the time to take. [R-3]

The grievance sought expungement of the memorandum from Algado's personnel file and a crediting for the one-day suspension.

Ritter admitted that the October 1, 2012 disciplinary memorandum mistakenly provided that Algado was ". . . in the

negative for both vacation and sick [leave] balances." She testified credibly that the mistake was "corrected" to the extent that Algado's pay was not docked for that infraction (5T27). She also admitted that the October 1 disciplinary memorandum placed in Algado's personnel file was not corrected to delete the mistaken allegation (5T104). I infer that the omission was unintentional.

Ritter testified that before the October 1 warning and suspension Algado had explained her circumstances, including the illnesses of her daughter and father and difficulties in enrolling her daughter in school (5T29-31). Algado admitted on cross-examination that she had told Ritter that a reason for her absences in September, 2012 was the struggle to enroll her daughter in school and, ". . . in that way," she was provided the opportunity to "explain [her] circumstances" (1T160-161).

Also on cross-examination, Algado conceded that Ritter did not advise or suggest to her that she could be absent as much as she wanted, provided that she had good excuses. Algado testified that Ritter told her that she "understood" and said ". . . you have to do what you have to do" (1T161-162). Algado admitted that the College's "position" was that she had taken "unscheduled time-off" and had penalized her with a suspension (1T162). Algado also admitted that in or around October, 2012 the College's actions were not related to her union activities



(1T164). I find that Algado's October 9, 2012 grievance mischaracterizes Ritter's response to her absences from work.

11. On October 18, 2012, Ritter issued an email to Algado, with copies to Brand, Haggerty and Jankiewicz, denying the October 1 grievance. Jankiewicz assisted Ritter in drafting the denial (3T244). Ritter wrote: "Although I understand your situation, I cannot support the number of days you have taken off. All relevant information was known by all parties and utilized to make the decision" (R-4; 5T33).

Algado did not pursue her grievance to the next contractual step. She understood that she might be fired if her unscheduled absences persisted (1T167).

12. On February 15, 2013, Ritter issued a memorandum to Algado regarding a "suspension and final warning" (CP-11(3)). Ritter had earlier called Jankiewicz, advising that Algado continued taking unscheduled days off and expressing her frustration with, ". . . making things go in a positive direction, to see an improvement." She asked Jankiewicz to generate a report on Algado's attendance since October, 2012 (3T246-247). Jankiewicz generated Algado's attendance report and participated in drafting the memorandum (3T244, 248, 5T117). This memorandum, like the August and October memoranda preceding it, was printed on College "Office of Human Resources" letterhead, a standard practice (5T35).

The memorandum provides:

This is to confirm our prior meetings for excessive and unscheduled absenteeism on August 21, 2012 and October 1, 2012. You were advised in writing and in conference with College management and your union representative, that immediate improvement was expected in an ongoing basis or further disciplinary action could follow.

Since our last meeting you have been absent an additional 63 hours of which [ ] were unscheduled. Your attendance has not improved and your excessive absenteeism has had a continued negative impact on departmental operations.

The medical documentation submitted for your most recent absence did not meet the guidelines of the support staff [collective negotiations agreement] and required further inquiry by the College to meet the requirements.

Effective immediately, your employment is suspended for three (3) days without pay from Monday, February 18 through Wednesday, February 20. This is to be considered a final warning and continued excessive and unscheduled absenteeism will result in additional disciplinary [action] up to and including termination of employment. [CP-11(3)]

The memorandum was given to Algado on the ascribed date in a meeting she attended with Jankiewicz, Ritter and Podolski (1T169-170, 2T251, 3T248-249). Ritter and Podolski acknowledged receipt of the memorandum by signing and dating it, the latter representative writing, "employee not signing" (CP-11(3)). On cross-examination, Algado testified that she did not "agree" with the memorandum, initially referring to her father's medical

condition and then to the "medical documentation" she purportedly provided to the College (1T170-174). Algado admitted that the collective agreement does not provide that a "medical" excuse absence changes an unscheduled absence to some other type of absence (1T172).

Algado admitted that her attendance did not improve between October, 2012 and February, 2013 (1T168). She and Podolski also admitted that in the meeting she did not claim that she was being "targeted" for her union activities and did not believe she was being singled-out or harassed (1T175-176, 2T252). Algado also admitted that if her unscheduled absences continued for a time after the final warning, she might be fired (1T175-176). She was concerned about losing her job (1T184). None of the enumerated unscheduled number of hours Algado was reportedly absent were spent on union activities (5T36). She did not contest the number of unscheduled hours she was reportedly absent (1T191). Neither Algado nor Podolski demanded that Ritter, Jankiewicz or any College representative stop harassing her or asking her to leave the Association (5T40).

13. On February 26, 2013, Algado filed a grievance with Haggerty, College Vice-President of Administration, contesting the College's "just cause" for the discipline imposed on February 15 (R-5). Algado wrote that she was not provided the "right" to "explain her circumstances" before the penalty was imposed.

Algado wrote that her recent unscheduled absences identified in the February 15 meeting, ". . . were due to circumstances beyond my control. I am the sole caregiver to my daughter. Within the past month my daughter had a virus, which was documented and I became ill with the flu, which was also documented." The grievance sought expungement of the disciplinary notice from Algado's personnel file and rescission of the three day suspension (R-5; 1T193).

Ritter testified credibly that she knew of Algado's illness and that of her daughter and of Algado's status as her daughter's only caregiver at the time the final warning was issued (5T42-43). Ritter testified: "Even though I understood, I sympathized, you still can't support them as a supervisor. You can't support employees taking off as many days as Gina had taken off" (5T43). I credit that testimony.

14. Algado testified that around the time of her February 26, 2013 grievance, she, ". . . was just getting verbal warnings [from Ritter] to reduce [her] union activity" (1T193-194). Admitting that such warnings to her as Association President were a "huge" concern, Algado also conceded that she did not advise Association Vice-President Donna Podolski of the warnings, despite Podolski's participation in the February 15, 2013 meeting at which she (Algado) was served a final disciplinary warning and a three-day suspension, and despite her admission that she spoke

with Podolski "everyday" (1T194, 2T22). Nor did Algado file or seek to file a "harassment" complaint of any type with the College (1T196). She admitted having a working knowledge of the College's "harassment" policies and procedures (1T142).

Algado's only testimony of having told anyone of Ritter's warning or threat to "get out out of the union" was in her appearance in rebuttal on the final hearing date. Association Counsel engaged her in this colloquy:

Q: Lastly, Julie Ritter denies having made any comments to the effect that you should not be involved in the union or that you should step down as union leader. She said she never said these things; is this accurate?

A: No, its not.

Q: Why not?

A: Like I stated previously, Julie and I would have conversations in the morning. We were the first two there every morning. We would just chat about what's going on and have conversations. And there were numerous times she would say, 'you know, you really need to get [out] of the union. You need to step down as president. You know they are watching you. You know you need to get out of the union.'

Q: Did you tell anybody this at the time?

A: I mentioned it to [Podolski] but nobody else. [6T27-28]

The colloquy does not identify when Algado informed Podolski; ". . .at the time" does not query any specific or approximate date or time, nor does Algado's reply suggest one. Considering the significance of the alleged warnings (which was admittedly apparent to Algado), I draw a negative inference from her failure

to offer direct examination testimony that more circumstantially identified and corroborated those threats.

Podolski was Association president for most years since 1997 and vice president for the last few years (2T196). On direct examination, Podolski testified that Algado told her: "[Ritter] told [Algado] on several occasions that she needed to get out of her role as President of the union and stop taking on as many cases as she was taking on" (2T199). In her own cross-examination testimony, Algado denied that any College representative, specifically including Ritter, directed, advised or intimated that she should stop filing grievances<sup>2/</sup> (2T71). I find that Algado's denial undercuts the veracity of Podolski's testimony. When pressed for a date when Algado reported Ritter's statement(s) to her, Podolski testified: "I can only ballpark it

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2/ Podolski testified that ". . . employees are supposed to take it upon themselves to write the grievances;" that she and Algado did not write "a lot" of grievances; and that "[Algado] did the majority of the 'representations' because most of the employees are on the Pemberton campus" (2T204-205). Algado testified that Podolski "would handle" the filing of a "grievance" and that she (Algado) would administer "'a representation' at a meeting for [unit employee] discipline or investigat[ion]," which she "does not really call a grievance" (2T94). I infer that Algado's denial does not delineate a "grievance" from a "representation;" if Algado was drawing that distinction at the time of her answer on cross-examination, she would have likely said so in order to state her belief in the College's discriminatory treatment of her in retaliation for performing her "representation" duties. (1T47; finding no. 4). Her attested belief in such discrimination did not occur until the spring or early summer of 2014, around the time of her termination (1T50-51).

- 2012, 2013" (2T199). On cross-examination, Podolski was not more specific about the date(s) of Algado's reportage (2T229). She admitted that at the time of Algado's February 15, 2013 suspension and final warning, she did not know if Ritter was "still talking" to Algado about leaving the Association (2T252). Acknowledging the College's harassment and civility policies, Podolski was asked why she didn't file "any type of complaint or action" on behalf of Algado contesting Ritter's purported remark(s). She answered: "Because we thought at the time it was a passing thought, an 'in the heat of the moment' kind of thing, much as what my supervisors would say to me"<sup>3/</sup> (2T232). Podolski was then pressed to answer the question of "how many times did [Algado] tell you that [Ritter was harassing her about getting out of the union?]" This colloquy ensued:

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<sup>3/</sup> Podolski testified that in or around 2000, her supervisor at that time, Doug Deval, told her that she, ". . . shouldn't run for [Association] President again; it would be in my best interest if I didn't run for President again" (2T200). She testified that in September or October, 2014 her supervisor, Rob Arioso, ". . . repeatedly asked [her] if there is any way that [she] could get out of the union" (2T200). In her cross-examination, Podolski testified that Arioso asked her if she was willing to leave "the unit" (to promote her and reorganize "the area") (2T258-260). I infer that the latter example was an inquiry of Podolski's willingness to be promoted or transferred to a title not included in the support staff unit. Since 2011, Podolski has worked at the College's Mt. Laurel campus (2T195). In 2000, she worked at the College's main campus in Pemberton (2T196). She has never been warned about or disciplined for unscheduled absences or any other identified workplace infraction (2T210).

A: I can't remember.  
Q: More than one?  
A: Yes.  
Q: More than two?  
A: Yes.  
Q: More than three?  
A: Possibly.  
Q: So, she [Ritter] said it to her (Algado) more than three times and nothing was ever done until 2014 when she was under threat of termination, right?  
A: I don't believe she was under threat of termination at that point.<sup>4/</sup> [2T233]

On re-direct examination, Association Counsel asked Podolski, "What did [Algado] tell you was her understanding as to why Ms. Ritter was asking her to step down as president?"

Podolski answered:

She just wanted her out of the unit and you know, she was involved heavily with the -- with negotiations, she was out of the office,

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4/ This reply is not credible; it contradicts the record and Podolski's testimony from the previous transcript page, where she testified that shortly before Algado was fired in June 2014 she wrote a "memo" complaining that she, ". . ." was being harassed about her union activities" (2T232). The "memo" was Algado's June 11, 2014 grievance in part contesting a recent unscheduled absence, filed while she was "under threat" of termination (*i.e.*, long after the February 15, 2013 final warning and suspension for unscheduled absences issued). NJEA Consultant Nahom admitted the Association's "fear" of Algado's termination in May, 2014 because of the "final warning" (3T102). I infer that Algado had developed an increasing awareness of the "threat" of termination, as her unscheduled absences accrued between February, 2013 and June, 2014. I also find that on June 10, 2014, the day before Algado wrote the referenced grievance, she was essentially warned by a supervisor (a non-unit College employee) of her impending termination. Podolski actually assisted Algado in drafting her June 11 grievance, written soon after the warning to Algado to "watch her ass" (see finding no. 28).



even though her work was getting done. There wasn't an issue with that. She was just heavily involved in the union. [2T284]

Counsel followed up:

Q: Was it getting out of the unit or getting out of the office?

A: What do you mean?

Q: Did [Algado] relate to you that Ritter had asked her to get out of the bargaining unit or out of the office of president?

A: Out of the office of president. [2T284]

The latter colloquy reveals Association Counsel's adroit effort at redirecting Podolski's testimony from her express and intended definition of "office," i.e., the place where Algado was "getting her work done" to the "office" of Association President. I infer that Podolski instinctively referenced in her testimony about Algado what she claimed to have personally heard from her own supervisor later in 2014 (see footnote no. 3).

Oron Nahom has been a NJEA consultant since 2012 and assisted the Association in its most recent collective negotiations with the College, where he is not employed (3T6-7). Nahom is a professor employed by "Rowan College of Gloucester" and has been President and chief negotiator of his local majority representative for 10 and 15 years, respectively (3T6). On cross-examination, Nahom testified that "on several occasions," Algado called him in "the 2013-2014 time frame" and said that her supervisor told her to get out of the union (3T91-92, 183). Agreeing on cross-examination that such statements violate a law

governing "protected activities," Nahom added, "it's coercion" (3T92). Asked what he did when told of Ritter's purported threat, Nahom testified: "I said [to Algado] if this leads to any type of action against you, this would be an unfair practice" (3T92). Again admitting that Ritter's purported threat was "coercion" and prodded on cross-examination about why he didn't file any type of action at that time, Nahom testified:

Because there was a threat, but no action was taken against her at the time and I said to her - 'if a specific adverse action is taken against you, then this is something we should take to the Public Employment Relations Commission.' [3T93]

Nahom next admitted that on the unspecified date of his advice to Algado, he was unaware that she had been served a final warning notice with a three-day suspension and that if her unscheduled absences continued, she could be fired (3T93). Nahom admitted that, "[Algado] told me at some point she had some write-ups in relation to her use of leave" (3T93). He added that he probably became aware of Algado's attendance record in May, 2014 (3T100). He testified:

I don't recall exactly when she shared the fact that her supervisor was telling her to leave her union activities, but she mentioned it on several occasions. It was sometime during the 2013-2014 time frame. [3T93-94]

Asked if he did not think to memorialize Algado's confidences or report them in any venue, Nahom testified: "I had it in the back of my mind" (3T95).

Ritter repeatedly and strenuously denied in direct and cross-examination that she ever told Algado that she should quit or otherwise leave her position as Association President (5T12-13, 16, 40, 59, 65-66, 126-127). She denied ever discussing with any College representative terminating Algado's employment as a consequence of her participation in Association activities (5T12). She also denied that anyone asked her to stop harassing Algado for participating in union activities or stop telling Algado that she should leave the Association or its presidency (5T40).

I do not credit Association witness(es') testimony that before June, 2014, Ritter advised or threatened Algado to quit or leave her position as Association President. Only Algado approximated that Ritter first remarked her purported threat in February, 2013, after she (Algado) received notice of the three-day suspension and final warning. I do not find reasonable or credible that Algado elected not to identify the threat in her February 26, 2013 grievance contesting the discipline; or report the threat in another grievance; or file an unfair practice charge; or file a separate complaint under the College's "harassment" policy. I would have minimally expected Algado to have immediately and verbally objected in Ritter's presence; or to have contemporaneously memorialized the alleged threat (an admittedly "huge" concern) or timely confided to Vice-President

Podolski -- with whom she spoke "everyday" -- a matter likely to have been perceived as a threat (or heightened the extant threat) of dismissal, falling as it (purportedly) did, on the heels of her suspension and final warning. Also undermining Algado's credibility on the question of Ritter's alleged threats or warnings is her equivocation when asked if her supervisor had so warned her in April, 2012, followed by her admission that she did not recall a conversation at all (see finding no. 5).

Podolski's inability to approximate the month(s), time(s) of year or even year that Algado purportedly told her of Ritter's threats or "advice" is suspicious. Podolski received two arguable warnings or "threats" from two different supervisors on two separate campuses over a 14-year period and had no apparent difficulty recalling the specific calendar years of their occurrence, a feat of memory she could not duplicate on Algado's behalf, despite the admitted (and purported) multiple occasions that Algado reported such threats to her (Podolski) over a relatively brief and recent period of time. Podolski's memory is also questionable because she erroneously believed that Algado was first elected Association president in 2012, not 2010 (2T244-245; finding no. 4).

Also suspicious is Podolski's rationale for not contesting the threat in any forum or memorializing it in any way. Repeated warnings would not likely be perceived merely as a "passing

thought" to such an experienced union representative, especially one who attended the aggrieved employee's "final warning" meeting and knew that that employee was already under a threat of termination. Contrary to Podolski's attested characterization of her and Algado's view of Ritter's repeated threat as a "passing thought," Algado admitted that Ritter's warnings were a "huge" concern. I also do not find credible that Algado's desisting from "taking on as many [unit employee discipline] cases as she was taking on" was a goal or motive of the College in this case. There's simply no evidence to support that purported interest.

I also do not credit Podolski's quoted re-direct examination testimony. The question asked of Podolski elicits a multiple hearsay reply. (Algado was never asked what she told Podolski, specifically). To the extent Algado purportedly told Podolski anything about Ritter's purported threat, she did not testify that Ritter said that her participation in negotiations was drawing her [unnecessarily] ". . . out of the office." Podolski's re-direct examination testimony also shifts from her earlier direct examination testimony that Ritter told Algado that she needed to ". . . stop taking on as many [discipline] cases as she was taking on." Finally, Podolski's reply seems non-responsive; that is, not reportage of what (if anything) Algado told her but merely a subjective projection of a possible reason. I do not credit Podolski's testimony.

Nahom's testimony is not credible for similar reasons. I find it suspicious that Nahom, like Podolski, could not recollect any approximate month(s) or time(s) of year that Algado informed him of Ritter's repeated threats or "advice" to leave the presidency of the Association. Nor did the experienced local union and NJEA Uni-Serv representative ever memorialize such conversations or pursue any litigation on behalf of Algado, despite his admission that Ritter's purported threats were "coercion" and a violation of the Act. I don't accept as truthful Nahom's testimony that such a repeated and admittedly discriminatory threat would merely ". . . [be held] in the back of [his] mind." These omissions are superficially and conveniently consistent with Nahom's attested "wait and see" rationale for doing nothing but inconsistent with his admitted knowledge of ". . . some write-ups in relation to [Algado's] use of leave" (3T93). This specific testimony strikes me as intentionally vague. If Algado had apprised Nahom "on several occasions" of Ritter's purported threats in 2013 or 2014, why would she have withheld from him the (likely unforgettable) fact that she had been served a three-day suspension and final warning on February 15, 2013? Wouldn't that disclosure have provided a desirable or necessary sense of urgency? I do not believe that such an omission was likely or credible. Algado did not inform Nahom of Ritter's alleged threat(s) anytime before June, 2014;

she admitted telling Podolski, ". . . but nobody else"<sup>5/</sup> (6T28).

I also do not credit Nahom's testimony that he offered any advice to Algado about the alleged threats.

I credit Ritter's denial.

15. In response to Ritter's March 14, 2013 written evaluation of her job performance (see finding no. 5), Algado neither contested it nor filed any writing alleging that its adverse comments were pretextual, i.e., that the real reason for them was retaliation for her actions as Association president (2T47). Nor did Algado recall telling Podolski about a retaliatory evaluation (2T48). These omissions tend to circumstantially corroborate my finding in no. 14 that Ritter did not threaten or tell Algado to "reduce" her union activity or "get out of the union."

16. On April 23, 2013, Ritter issued a memorandum to Algado denying the employee's February 26, 2013 grievance. Jankiewicz, who had recently been promoted to Director, assisted in writing the memorandum (3T219). Ritter wrote that she was aware of "all circumstances" and "all relevant information," including Algado's attendance records before the February 15, 2013 meeting (R-6;

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<sup>5/</sup> If Algado "told" Podolski of Ritter's purported warnings or threats, I find that she told her on June 10 or 11, 2014, in conjunction with their drafting of Algado's June 11 grievance and after Schmidt had warned Algado that she had a "target" on her back (see finding nos. 28 and 29).

5T45). Algado reviewed the memorandum with Podolski and did not appeal it to the next contractual step (1T195-196).

17. Algado's attendance record and the attendance records of all College employees are maintained in an "electronic" or computerized program (known as "SoftTime") for requesting and recording time off. If the absence is "scheduled," the employee enters the anticipated date(s) into the program, subject to supervisory approval. If an absence (including a partial-day absence) is "unscheduled," the supervisor usually enters the data, following notice from the employee. Sometimes, a designee in the Office of Human Resources enters data on the system (1T101, 3T260, 5T53-54 finding no. 8).

Algado has not contested the accuracy of her recorded absences from 2010 through the date of her termination, June 27, 2014 (R-19; finding nos. 7, 9, 12; 1T191, 2T10). Her unscheduled absences following her February 18-20, 2013 suspension occurred on these dates in 2013: May 23, August 5 and 14, September 25, October 10, November 18, December 10 and 11. In 2014, she took unscheduled absences on these dates: January 23, February 5 and 20, March 3, 17, 20 and 21, April 9, 11, 15, 16 and 25, May 12 and 13, June 3 and 6. Algado had 24 unscheduled absences between February 21, 2013 and June 6, 2014 and 11 unscheduled absences between March 3 and June 6, 2014 (R-19; 2T77-84). She specifically admitted not contesting those absences (6T37).



Algado's printed attendance record reveals Ritter's explanatory "notes" for almost all unscheduled absences and several scheduled absences (R-19). For example, one unscheduled absence "note" provides: "[Algado] called in this morning to say she would not be in. Her [parent] is in the hospital." Another provides: "[Algado] called at 6:46 am this morning saying she will be late because she [is ill]" (R-19). Algado testified that she has not seen "notes like [hers]" in attendance records of other unit employees she has represented in disciplinary matters before the College (2T95). She later conceded the possibility that other College employees' "SoftTime" records have notations similar to hers for "unscheduled absences" (2T114).

Ritter testified that she writes similar "notes" for all employees in her charge on their "SoftTime" programs (5T52-53). In the absence of any evidence indicating that the "notes" written in Algado's "SoftTime" record vary from Ritter's methodology and practice for recording absences of other accounting department employees, I credit Ritter's testimony.

Algado's illnesses and those of her immediate family after February, 2013 accounted for the vast majority of her unscheduled absences (1T83, 2T11-12). Algado was neither warned nor disciplined for not performing her job duties (2T96-97).

18. Ritter is generally familiar with FMLA rights, though

is admittedly unfamiliar with specific provisions of both State and federal statutes (5T64, 120, N.J.S.A. 34:11B-1, et seq., 29 USC §2612 (a)(1), et seq.). If any employee under her supervision asks about leaves of absence under FMLA, she directs the employee to the College Human Resources department (5T91). Algado never inquired of Ritter about FMLA rights (5T63, 64).

Jankiewicz has not provided training to managers in contract administration, grievance processing and FMLA rights of employees (4T133). She admittedly received some training in administering FMLA provisions in 2011 or 2012 (4T134). Leaves under FMLA are generally available to employees who have or whose immediate family members have serious or chronic medical conditions. Jankiewicz acknowledged that FMLA regulations set forth a burden on an employer to timely notify employees of their FMLA eligibility for leave(s) (4T140; CP-17; 29 C.F.R. 825.300). Jankiewicz also admitted that she did not inform Algado of several instances of unscheduled absences that were eligible for leave of absence under FMLA (4T143-148). An employer's obligation to inquire further about FMLA eligibility will not be triggered merely by an employee calling in "sick." 29 C.F.R. 825.303(b).

19. The parties' negotiations teams met for about a dozen sessions between March 20, 2013 and December 17, 2014, without the assistance of a mediator, before reaching a successor

agreement to the 2009-2013 collective negotiations agreement (1T242, 246). On reaching the predecessor agreement, the parties met for 5 sessions before jointly filing a Notice of Impasse, seeking the assistance of a mediator (Docket No. I-2010-076).

The Association team included Nahom, Podolski, Algado and one or two others. Nahom was the lead negotiator, despite Podolski's admission that she was "the head of the negotiations committee" (2T215-216). The College team initially included College Counsel, Jankiewicz and Haggerty, the first two leaving for unspecified periods and replaced or sporadically substituted by a non-permanent employee in the Human Resources department, Willy Kelly, for an unspecified period of time during Jankiewicz's maternity leave. Kelly left and Jankiewicz and College Counsel eventually re-joined the team (1T29, 4T264).

Algado did not attend every negotiations session; Nahom and Podolski did (1T130). Former College President David Hespe and NJEA representative Chris Berzinski appeared at an initial session, expressing their desire for a smooth process and prompt resolution (1T251, 4T37).

Sometime during one of the earlier sessions, the College team announced its willingness to provide a 1.75% salary increase each year of a successor three-year agreement. The College's offer did not change throughout negotiations (4T40-41, 218). Algado testified that the College wished to agree on "economic"

terms first, but the Association team resisted, prioritizing "language" items (1T31-33). Asked on direct examination if the Association's insistence on negotiating "non-economic" matters first created "friction," Algado testified:

I think it did - yes, we got the feeling that [the College] wasn't willing to even negotiate with us or even let us have any option. It was, 'this is your offer and take it or leave it. That is all you are getting.' [1T32]

I do not infer from Algado's characterization of the College's response that any College team member stated that the offer of 1.75% in each year was, "take it or leave it, that's all you're getting."

I infer that the teams agreed upon salary relatively late in negotiations. A memorandum of understanding was circulated on or about September 30, 2014, about two months after Algado was terminated (4T224).

Algado and Nahom testified that in or around November, 2013, College negotiations team member Kelly, during a negotiations session with both teams present, rhetorically asked, in an effort to modify a specific contract provision, "If an employee were to say, 'Fuck you, Dr. Hespe,' shouldn't that employee immediately be subject to discipline?" or words to that effect (1T30, 3T8-9). Algado testified that Kelly's remark was ". . . highly offensive to one of our [unnamed] members" (1T30). Nahom testified that

Kelly's remark was "quite shocking" (3T9). College team member Jankiewicz testified that Kelly did not curse but the teams, ". . . were going back and forth, but that is part of the process" (4T37). For purposes of this decision, I assume the veracity of Algado's and Nahom's testimonies.

20. On November 20, 2013, the two teams met for a negotiations session at the College's Mt. Holly campus (1T34, 4T60). Among the attendees were Algado and Jankiewicz (1T305-306, 4T60-61). Algado had advised her supervisor - Ritter - that she would be attending the session at that campus until 3:30 p.m. (1T34, 306). The meeting started at about 9:30 a.m. and ended between 12:45 p.m. and 1:00 p.m. (1T311, 313, 4T64, 67). No agreement was reached on the discussed issue of "sick pool" eligibility (R-15; 1T307, 4T60-61).

After a brief discussion among the teams about a pending grievance, College team members Jankiewicz and Kelly departed, purchased their lunches "to go" from a nearby restaurant and returned to the Pemberton campus (1T34-35, 4T67). The Association's team, including Algado, remained for about one hour to discuss the pending grievance, adjourned to another nearby restaurant for lunch and returned to the Pemberton campus ". . . well after 4:00 p.m. that day," beyond the end of Algado's regular workday (1T35).

Sometime during the early to mid-afternoon that day, Jankiewicz called Algado's office phone extension and left a voice-mail request for Algado to return the call (4T69). Jankiewicz phoned again sometime later that afternoon to the same effect. Jankiewicz promptly called Ritter, who said that Algado was away from the office all day in negotiations and hadn't returned (4T69-72, 5T114). Jankiewicz then called the supervisors of other attending Association team members and learned that Podolski had also advised her supervisor of her all-day participation in negotiations (4T73). Jankiewicz learned that another Association team member had returned to his office (4T72).

On November 22, 2013, Jankiewicz issued an email to Algado, Podolski, their supervisors, two other Association representatives, College Counsel, Kelly, and Haggerty "confirming" that "some members" of the Association's team did not return to work ". . . or notify their supervisors at the conclusion of [November 20th's] bargaining session that ended at 1:15 p.m." The email admonishes: "There was no request or pre-approval of any time away from regularly scheduled work duties after the bargaining session concluded" (CP-2). The email concluded:

It is the College's desire to continue to engage in productive and meaningful negotiations however, it is expected that going forward, all participants approved for

meetings scheduled for this purpose will adhere to the provisions of the [Association] collective bargaining agreement. [CP-2]

Jankiewicz testified that her communication was not a disciplinary notice, which typically sets forth a penalty. She added that of the 50 or so disciplinary notices she has drafted, none have been sent by email. Nor was the email a "warning" because it was not printed and placed in any employee's personnel file (4T79-80). In the absence of any rebuttal evidence, I credit Jankiewicz's testimony.

21. The changing membership of the College negotiations team sometimes required the Association team to repeat discussions or arguments on issues in a subsequent session it had or believed to have resolved in a previous session (1T29, 2T265, 3T7, 66-67). College team members sometimes claimed that it (the team) did not have "authority" to agree to unspecified contractual items (1T33, 3T7, 69). In the testimonies of all three Association witnesses (and team members), College team member Kelly was derided for inappropriate perspectives he espoused in the sessions he attended (2T267). In the absence of rebuttal evidence, I find that the College team sometimes claimed it was without authority to "agree" to unspecified items at the table and that Kelly was sometimes disruptive to the negotiations process.

Nahom testified that "tension" in the negotiations concerned, "Ms. Algado [being] particularly strong in her representation and the College was just not very satisfied, very pleased with her stance at the table" (3T67). Asked on cross-examination to explain his testimony, Nahom gave the example of Algado remaining "very very adamant" that the Association retain a contractual requirement of a finding of "guilt" before disciplinary action be taken against a unit employee (3T67-68). Responding to a follow-up question, Nahom admitted that the provision was retained in the successor agreement without the parties resorting to mediation or fact-finding (3T68). I find that Nahom's admission fails to explain or corroborate the College's purported displeasure with Algado's "stance." I do not credit his testimony that "tension" in negotiations was attributable to Algado's "stance" on a negotiations dispute.

Over the course of negotiations, neither team "walked out" of any session, nor threatened to declare "impasse" and proceed to mediation, nor filed an unfair practice charge (alleging bad faith or a refusal to negotiate in good faith) (2T268, 4T35).

22. By the end of February, 2014, the negotiations teams reached "agreements in principle" on many items (1T254, 2T269, 4T43; R-8). They included changes in "sick pool;" computer access; bereavement leave; educational benefits; personnel files (prior disciplinary records not usable under specified



conditions); Association release time; removal of specified language from Article Fifteen; medical certifications to be provided to Office of Human Resources and not employee's immediate supervisor (R-8). The parties had not (by that date) agreed upon salary, health benefits and other items, including: position vacancy announcements; disciplinary procedure; work periods and overtime; healthcare "enrollment" standards; donation of unused sick leave time off; dental coverage; extending probationary period; proposed changes to bereavement leave; defining "gross misconduct;" requests for additional bereavement leave and uniforms (R-8; 4T220).

On March 20, 2014, College team member Jankiewicz prepared a collective negotiations proposal and gave it to the Association team that day (4T51-52). The teams discussed at least 14 unresolved items. The College withdrew a proposal regarding part-time employees; agreed to release time of up to three days per year for a maximum of 6 members; agreed to a provision regarding (no) payment for accrued, unused compensatory time off; agreed to add "stepparents" to the bereavement provision; agreed to application procedures for promotional positions (R-9; 4T52-57, 1T269). Podolski admitted that before Algado was terminated, the parties engaged in a negotiations process through which items were agreed upon (2T266). She attributed "contentiousness" in negotiations to College team member Kelly (2T267).

23. Ritter maintains a wall calendar about 18" x 16" near her office desk for her convenience (5T60, 61, 6T22). Each forward turn of a page reveals the next calendar month (1T73). I infer that each day of any calendar month was represented by a numbered date set within a configured line box. Ritter testified:

It's just my work calendar. I put everything on it. If my employees are out for the day, I write on there where they are just so I can keep track of where everyone is at certain times. And also when I have things scheduled on the calendar, also. [5T60]

She admitted writing notes on the calendar of meetings Algado attended. Asked on direct examination if the notes were of "union meetings," Ritter testified:

Not necessarily union meetings. If she or any of the other employees were going to be out of the office or in a meeting one day, I might write: '[Algado] in Mt. Laurel' or 'Laura meeting one o'clock in Willingboro.' Sometimes I would, sometimes I wouldn't write what it's for. [5T61]

On cross-examination, Ritter elaborated:

This is my personal calendar. There was not only union -- and I just want to make this clear -- there was not only union activity on that calendar. For all my employees, I keep a calendar, if they're going to be out today, I'll just write on my calendar, 'Laura out' or '[Algado] in meeting.' I might say what the meeting is for and I might not. [5T112]

Ritter made no effort to "hide" the wall calendar [5T113]. She testified that no entry on her calendar was related to her recommendation to terminate Algado's employment (5T147).

Algado testified in rebuttal that she looked at Ritter's wall calendar only when it was turned to the months of April and May, 2014 and she never flipped through its pages (6T37, 38). The calendar was visible from outside of Ritter's windowed office (6T20). She testified that the only writings she saw were, ". . . deadlines that [Ritter] had on it for herself, things that were due and my union meetings" (6T19). She testified that her scheduled meetings unrelated to Association business weren't represented on Ritter's calendar (6T21). Algado admitted that she informed Ritter of all her scheduled Association activities away from her office (6T39).

Algado viewed Ritter's wall calendar for details over a relatively brief time period. By crediting her testimony I also credit Ritter's testimony about her writings on her wall calendar for all other previous months. I infer that each time Algado informed Ritter of an upcoming Association meeting or "representation" during her regular work hours, Ritter noted the anticipated absence on her wall calendar. (Ritter did not participate in the parties' collective negotiations and did not "keep track" of Algado's Association activities unless the Association President informed her of them) (1T137, 5T37).

24. On the morning of Friday, June 6, 2014, Algado was driving her car to work when its brakes failed, forcing her to veer from the highway and stop, fortuitously, in a roadside diner parking lot (1T52-53, 198-199). She promptly phoned Ritter's office extension, leaving a voicemail message for her supervisor (1T53, 5T48). A transcription of the message provides:

Jul[ie], it's Gina. I'm broke down. Umm, I broke down on my way to work this morning and I don't have a ride, so I'm waiting for a tow truck now. I'll give you a call later on or I'll see you Monday. Alright. Bye.  
[R-28]

After leaving the message, Algado saw a "Meineke" auto repair shop sign in the distance and drove her car slowly to the shop. Upon inspecting Algado's car, the attendant advised that it would have to remain for repair. Algado called for a taxi that took her home (1T53). She did not call anyone at the College to advise that her car was not towed (1T204). The car was repaired by 5:00 p.m. that day when Algado paid the bill and drove it away (1T209).

Ritter did not speak with Algado that day (5T48). She listened to Algado's voicemail message and forwarded it to Jankiewicz, together with her prefatory message, "Here you go, Stacy, this is for you," or words to that effect (4T48-49, 5T5, 163). Ritter testified that she called Jankiewicz, ". . . because we have so many instances where [Algado] was out. And it was at this point where I needed to consult Human Resources to

see what we needed to do" (5T49). Ritter's testimony is credible. In the absence of any peaked and contemporaneous advocacy by Algado on behalf of the Association, I credit her testimony.

Jankiewicz listened to Algado's voicemail message and later that day, spoke with Ritter about the absence (4T49, 4T215, 5T8-9). Ritter expressed her concern to Jankiewicz about this latest of Algado's unscheduled absences and asked about the next appropriate step (4T9). In response, Jankiewicz generated Algado's "SoftTime" attendance record that showed 24 unscheduled absences dating from February 21, 2013 (the date of her return to work after serving the three-day suspension), including 11 unscheduled absences since March 2014 (4T13-14; R-19, finding no 17). Jankiewicz credibly denied knowing Algado's unscheduled absences since March, 2013 until her June 6 discussion with Ritter that prompted the "SoftTime" review (4T203).

Ritter testified that she also spoke with Haggerty on June 6 (5T49). I infer that Ritter spoke with Haggerty about terminating Algado's employment. Sometime on or between June 6 and 10, 2014 (likely excluding the weekend of June 7 and 8), Ritter discussed with "Human Resources" the College's response to Algado's June 6 unscheduled absence. I infer that Ritter spoke with Jankiewicz. Ritter's recommendation, in "consultation" with Jankiewicz, was to terminate Algado's employment (5T55-56).

25. On June 10,<sup>6/</sup> 2014, Algado deposited in Ritter's office "bin," a "Meineke" bill for the brake repairs to her car (CP-6; 1T60-61, 66, 205). No College representative had asked Algado for the bill and Algado admitted that no one at the College had reason to believe that her car had not been towed (1T205, 207). Ritter brought the bill to the attention of "Human Resources" and ". . . there was a question whether she was towed or not that day" (5T49). Ritter testified credibly that she was not concerned about whether Algado's car was towed but was concerned that, "[Algado] had called out another day of work" (5T50, 130-131, 133, 134). Jankiewicz testified that the bill created "suspicion", i.e., "did the reasoning [gleaned from the voicemail message] for the unscheduled absence actually match the documentation that was provided to support it?" (4T16, 154). Jankiewicz testified that if Algado had "misrepresented" the

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<sup>6/</sup> Both Ritter and Jankiewicz testified that Algado produced the Meineke bill on Monday, June 9, 2014 (3T254, 5T49). Algado's June 6 voicemail message for Ritter advises that she will "see" Ritter on "Monday" (June 9) (finding no. 24). Algado testified without contradiction that she attended unit employee "PM's" grievance arbitration proceeding away from the Pemberton campus on June 9, where, as a sequestered witness, she waited in vain to be called to testify that day. (She did not testify until July, 2014) (1T49-50, 61, 87). She testified (again, without contradiction) that in the afternoon of June 9, she asked Jankiewicz if she could ". . . remain on the Mt. Laurel campus to finish out her day," to which Jankiewicz referred her to Ritter, who assented (1T49-50). She testified that she gave Ritter the Meineke bill upon her return to the Pemberton campus the next day (1T61, 205, 214-215). I credit Algado's testimony, despite her June 6 falsely predictive voicemail message.

circumstances of her absence, she could have become ineligible for "the two-week [severance] payment" in the event of her termination (4T16; finding no. 1, Article twenty-three). I credit her testimony.

Also on June 10, Jankiewicz met with College interim-President Spang and Vice-President Haggerty in advance of a College personnel committee meeting scheduled for later that day<sup>7/</sup> (3T278, 4T196-197, 5T165). The purpose of the meeting was to apprise Spang of agenda items before the committee meeting (4T196).

Spang became College interim-President in March, 2014 (5T185). In an unspecified year, the College Board of Trustees

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<sup>7/</sup> Spang testified on cross-examination that he spoke with Haggerty and Jankiewicz about Algado ". . . most likely several days before" June 9, 2014 (5T204). No other testimony and no document indicates that Jankiewicz and/or Haggerty spoke with Spang about Algado's unscheduled absences or possible termination before June 6, 2014. Although Ritter testified that she spoke with Haggerty about Algado on June 6, her testimony was neither corroborated nor challenged; I do not infer that that conversation led to a discussion that day among Haggerty, Jankiewicz and Spang. Jankiewicz's and Ritter's testimonies and Algado's recorded message corroborate that Algado's June 6 unscheduled absence triggered their review of Algado's "SoftTime" attendance record that in turn presaged Jankiewicz's and Haggerty's meeting with Spang. In the absence of any corroboration, I do not credit Spang's testimony that he "most likely" spoke with Haggerty and Jankiewicz about Algado's absences or termination, ". . . several days before June 9, 2014." Stated another way, and in the context of record evidence and Spang's equivocation, I find that Spang did not confer with Haggerty and Jankiewicz about Algado anytime before June 9, 2014.

established a personnel committee comprised of several Board members, the College President (Spang), Solicitor, Vice-President of Administration (Haggerty) and Director of Human Resources (Jankiewicz). The committee meets monthly regarding "all employee-related matters," including hirings, promotions and terminations (3T273, 5T169). Jankiewicz normally presents matters for the committee's consideration and decisions.

In the earlier meeting that day, Jankiewicz discussed and reviewed Algado's attendance record with Spang and Haggerty (4T14). Spang requested and received a "quick synopsis" of circumstances leading to their discussion that focused on Algado's unscheduled absences and the "final warning" (5T165-166). There was no mention of Algado's participation in the "PM" grievance arbitration proceeding or in collective negotiations (4T83, 85). Admitting that the "towing" issue remained an "open item," Jankiewicz credibly denied that it motivated her to include Algado's employment circumstances in the personnel committee's June 10 agenda (4T198, 203).

Spang was informed of the history of Algado's disciplines for unscheduled absences (5T216-217). They talked about appropriate discipline. Spang opined that , ". . . a final warning was exactly that, a final warning" (5T162). Haggerty and Jankiewicz recommended Algado's termination to Spang (5T198).



Spang agreed that the next logical step would be termination (3T279, 4T14, 5T166).

Spang admitted knowing at that time that Algado was Association President (5T167). He testified that in the meeting with Haggerty and Jankiewicz, Algado's Association presidency was not discussed and her position in the Association had no effect on his decision to recommend termination (5T167). He also testified that at that time he was unaware of how the College's collective negotiations with the Association were proceeding and of Algado's appearance or participation in the "PM" arbitration proceeding (5T168). Spang intended to raise the subjects of Algado's absences and termination in the June 10 personnel committee meeting (5T171). Spang's testimony is credible; in the absence of any conflicting evidence about the earlier June 10th meeting among Jankiewicz, Haggerty and Spang, I credit his testimony.

26. Jankiewicz regularly prepares the agendas for the monthly College personnel committee meetings (3T273-276, 5T170). On June 10, 2014, Jankiewicz prepared and distributed a printed meeting agenda to the personnel committee members, including Spang (3T275-276, 4T191, 5T170, 203). The meeting began at 3 pm or 4 pm (4T192). A copy of the June 10 College personnel committee meeting agenda was proffered by the College and admitted in evidence (R-24). The first page of the two-page

document reveals the typed or printed meeting date of June 10; nine typed and "bulleted" single word or briefly phrased items, specifying mostly job titles and one named person; several redactions (performed by College Counsel in preparation for hearing, none of which concern Algado); and Jankiewicz's handwritten notes, including "approved" written 5 times, each alongside one bulleted item and the names of six personnel committee members "in attendance" and one attending "by phone." I infer that Algado's handwritten notations on this document record the results of the personnel committee's determinations that day. The last printed item of this agenda page is "Misc. HR," representing a "catch-all," categorizing discussion of "open items" not specifically referenced on the agenda page (3T277). Copies of this page without handwritten notations were distributed to the personnel committee members on June 10, 2014 (R-24; 3T281).

The second page of the exhibit (R-24) sets forth two typed job titles, two typed names, Jankiewicz's handwritten notes and numerous redactions (again, performed by College Counsel in preparation for hearing, none of which concern Algado). The final and handwritten entry on this page provides: "Regina [the name appearing within a sketched one-dimensional rectangular box] final warning discussion." Jankiewicz did not recall any significance to the "box" flourish (4T201). Jankiewicz testified

that this page was "[her] copy of notes to write down discussion items similar to that of the agenda that was not handed out to the rest of the committee" (3T281). I credit that testimony.

During the personnel committee meeting, Jankiewicz reviewed aloud Algado's "discipline leading up to the present" (3T280). She admitted that discussion of Algado's circumstances was an "add-on" to the committee meeting agenda (4T202). Spang recommended that Algado's ". . . numerous unscheduled absences have continued. And based on the final warning, the end result should be termination" (5T171). Jankiewicz informed the committee that Algado was Association President (3T280, 4T200, 202, 5T172). Spang testified that mention of Algado's presidency ". . . had no bearing whatsoever on the decision" (5T172). The personnel committee concurred with the recommendation (4T14-15, 86, 5T173). In the absence of any conflicting evidence about the discussion before the personnel committee of Algado's unscheduled absences, disciplines, and position with the Association, I credit Spang's testimony.

Jankiewicz was asked on direct examination if, at the end of the June 10 personnel committee meeting, a decision, ". . . had been made as to what [Algado's] final discipline would be?" (4T15). She testified:

No . . . Ms. Algado still hadn't been given the opportunity to dispute the 'SoftTime' records, to view the same "SoftTime" report that we had reviewed and there was still the

open issue of 'tow versus Meineke.' That was open and hadn't been discussed. [4T15]

I infer from Jankiewicz's testimony and from the absence of any fact(s) indicating that the College personnel committee was again presented with or asked to again consider the circumstances of Algado's termination or employment status, that by the end of the June 10, 2014 personnel committee meeting, the College's decision was essentially final, unless Algado's "SoftTime" attendance record proved to be inaccurate, to her detriment. I have credited Jankiewicz's testimony that the "tow versus Meineke" matter concerned only a two-week "severance payment" to Algado, in the event of her termination (see finding no. 23). On cross-examination, Algado admitted that she was not disciplined for not providing a tow bill (1T200). No facts indicate that the "tow versus Meineke" matter was placed on the personnel committee agenda or presented to the personnel committee on June 10, 2014. Spang was not directly involved in that matter, recalling only that Haggerty or Jankiewicz told him "something" about it in June, 2014. He credibly denied that his recommendation to the personnel committee was related to the "towing bill" matter (5T174, 205).

27. Algado testified that on June 10, 2014, ". . . when [she] turned in the document, the receipt from Meineke," she and Ritter engaged in one of "numerous discussions" about the "tow bill" (1T64-66). She testified that Ritter asked her:

. . . '[W]as indeed this an emergency repair and did I have a tow bill?' which I replied, 'No, I did not have a tow bill,' and it was persistent non--just constantly at me about my car breaking down, at which time she had made a comment about, 'You know you really need to get out of your union position and you need to step down. It's just taking too much time. They are watching. You just need to back out of your union position.' [1T65]

Asked of her reply to Ritter, Algado testified:

. . . I had told her that I'm [in] an elected position, that I wasn't going to just step down, that I chose to do this. I'm not getting paid for this. It was completely voluntary and I was going to stay in my union position and it shouldn't have anything--relevance on my job at the College. [1T65]

On cross-examination, Algado was asked when, before June 11, 2014, Ritter last told her to "get out of her union position," to which she replied, "I don't remember exact dates." The follow-up question reminded Algado that she had earlier testified that it was on the same date as the tow bill discussion with Ritter [June 10, 2014], to which Algado replied: "She may have said it that day, yes" (1T227).

Ritter admitted that before June 17, 2014, she questioned Algado several times about her "car problems" (5T125). I infer that Ritter asked questions (some indirect, perhaps) intended to elicit confirmation (or denial) that on June 6, Algado's car was towed. Ritter testified that she never said anything to Algado about the amount of time she spent on union activities and never harassed her about union issues (5T59). She testified that

Algado never complained to her about harassment or threats regarding her union activities (5T59, 66). She testified that she never told Algado to get out of her union or that her Association duties consumed too much time or that "they are watching" (5T126-127).

I do not credit Algado's testimony. I first find that Ritter did not demand a "tow bill" upon Algado's presentation of the Meineke receipt to her on June 10, contrary to the implied chronology in Algado's testimony. I have found that Jankiewicz - not Ritter - initially pushed the question of whether Algado had "misrepresented" facts about her June 6 unscheduled absence after Ritter provided her Algado's Meineke bill on June 10, 2014 (see finding no. 25).

I have not credited Algado's testimony that Ritter told her in 2012 and 2013 to quit the Association and warned her of spending too much time on Association matters (see finding nos. 5, 14 and 15). I also have not credited the hearsay testimonies of Podolski and Nahom that Algado had told each of them of Ritter's alleged warnings or threats (see finding no. 14). These findings weigh heavily against crediting Algado's testimony that Ritter (again) threatened her on June 10, 2014. I am disinclined to credit that testimony, based in part on Algado's equivocations on cross-examination and their inconsistency with her direct examination testimony about the last date of Ritter's alleged

warning and on a finding that Ritter would have neither a justification nor a purpose for so threatening Algado.

By omission or intention, Ritter had tolerated Algado's numerous unscheduled absences for a relatively lengthy period after the February 15, 2013 final warning. No facts indicate that Algado's Association duties accounted for any of those absences; none were so noted in Algado's "SoftTime" attendance record and she never contended that any "SoftTime" entry was falsely or inaccurately recorded or denoted. Nor was Algado ever warned or faced with possible discipline for exceeding the contractual allotment of time for conducting Association business, including collective negotiations. Ritter knew that Algado's unscheduled absences after the "final warning" were largely due to personal and family health issues (see finding no. 17). I cannot conceive of Ritter's motive on June 10, 2014 for allegedly telling Algado that her union duties were "taking too much time," as though her quitting might somehow redress any or all of her unscheduled absences or reduce them, prospectively. Nor can I conceive of an advantage to be gained by the College from Algado's quitting the Association presidency. On June 10, 2014, Ritter (more than likely) knew that Jankiewicz was recommending to College interim-President Spang and then to the personnel committee that same day Algado's termination for excessive unscheduled absences after receiving a "final warning"

(5T57-58). Of what immediate or short-term use to Ritter or the College would have been Algado's resignation from the Association presidency on that date? No use, I believe. Of course, I also do not credit Algado's testimony that she replied to Ritter's alleged warnings because Ritter didn't warn her. I credit Ritter's testimony.

28. Algado testified on direct examination that "a couple [of] weeks before my termination," Linda Schmidt, College Director of Public Safety (who reported to Haggerty), ". . .told me to watch my ass, Dennis Haggerty has a target on your back" (1T74, 75). Algado was terminated on June 27, 2014 (1T86; CP-12, finding no. 33). On cross-examination, Algado explained that she didn't complain to or "go to" a supervisor about being "targeted" because Haggerty was responsible for both equal employment opportunity "harassment" complaints and the College Human Resources department (1T200, 221). She testified: "I had no choice. I felt I had to do something . . . to stop the harassment [of being questioned why I wasn't at work on June 6, 2014]" (1T223). The "something" was her filing of a grievance, written on June 11, 2014, with Podolski's assistance, and emailed to Ritter the following day (CP-7; 1T220-223, 228, 3T288-289). Copies were sent to Jankiewicz, Podolski, Nahom and Chris Berzinski, also of the NJEA (CP-7). In the absence of Schmidt's testimony and without any inquiry of Haggerty on this specific



matter, I infer that Schmidt warned Algado on or about June 10, 2014 and that her warning likely alluded to or tacitly referenced contemporaneous discussion(s) about Algado's employment status by or among Jankiewicz, Spang and Haggerty (see finding nos. 24 and 25). I credit Algado's testimony to mean that Schmidt's remark motivated her to file the grievance and find that her predominant motivation was a perceived, fast-approaching threat of termination (having accumulated numerous unscheduled absences after the three-day suspension and final warning), rather than a need "to stop the harassment." I infer that the threat was pointedly signaled to Algado by Ritter telling her of Jankiewicz's incredulity about the "tow bill" absence, which, like the College's previous skepticism of Algado's medical excuses for absences, had no effect whatsoever on its determination that all such absences were "unexcused," regardless of their nature or authenticity (finding no. 12, 4T151). Algado likely understood that Jankiewicz's attention to the circumstances of her June 6th unscheduled absence, over and above Ritter's, did not bode well for her continued employment.

29. Algado's June 11 "grievance-harassment" provides at the outset that she, ". . . has been harassed repeatedly concerning my time whether it is for personal reasons (emergencies) or for union issues. The latter being an attempt to interrupt union activities per my position as President of the BCCSSA" (CP-7).

Algado wrote that the "latest incident" of harassment followed her June 6 absence from work, when she was told that the bill for car repairs was "not enough proof" and that a "tow bill" was demanded.

She next wrote of having taken other days off, ". . . due to family issues and an FMLA form will be filed shortly, as my father has had major medical issues, as does my daughter." She wrote of "court ordered" appearances (i.e., days off from work), the documentation for which is referred to the College Human Resources department.

Algado next wrote:

My supervisor on many occasions has told me that I have to 'get out of my union position. It is taking up too much time.' This is union busting and illegal and it is meant as threatening. This issue has been addressed in the past with the College. [CP-7]

Her requested relief was, "to be able to take FMLA when needed" and not be, ". . . threatened about my union activity in the future" (CP-7).

I don't credit a substantive allegation in Algado's grievance. Adding to the lack of specificity previously cited for not crediting Algado's testimony that Ritter told her repeatedly to "get out of her union position" is another instance; if Ritter had so threatened Algado on June 10, 2014 (see finding no. 27), why wouldn't she have written in her June 11th grievance that she was threatened "yesterday" and/or

elaborated on the specific circumstances of that threat, rather than writing (imprecisely and generally) that she had been threatened on "many occasions" and ". . . this issue has been addressed in the past with the College?" The record in this case does not indicate that the "issue" had ever been "addressed" for the reason that Ritter did not threaten Algado.

I credit Algado's written characterization of having been, ". . . harassed repeatedly concerning [her] time . . . for personal reasons (emergencies)," as it concerns only her June 6, 2014 unscheduled absence. I find that "harassed repeatedly" means that Ritter asked Algado for a tow bill several times (so that the two-week "severance pay" would not be jeopardized, in the likelihood of her termination). Previous unscheduled absences for "personal emergencies" were recorded in the "SoftTime" program and were reviewable anytime and reviewed without objection on the occasions that Algado was disciplined.

Jankiewicz testified that upon receiving Algado's grievance, she asked Ritter if the allegation that she had told Algado many times to "get out of her union position" was true and Ritter replied: "Absolutely not" (3T299, 4T258, 5T129). Ritter specifically denied ever telling Algado that she should "get out of her union position" (5T65). I credit their testimonies.

30. On June 11, 2014, Jankiewicz emailed College Counsel exclusively, writing in pertinent part as a "follow-up" on "open items" [all of which were redacted, except]:

Gina Algado, union pres, attendance:  
continued excessive absences (at least 11  
full days in the last 3 months); on a final  
warning; we also believe she was deceitful  
about the reasoning for her absence on June  
6. [R-25]

On cross-examination, Jankiewicz admitted that Algado's Association presidency, ". . . was a point of reference, but it was not a factor [in deciding her termination]" (4T182). I find that Jankiewicz's email essentially confirmed to College Counsel the June 10 personnel committee's decision to terminate Algado's employment, (provided that the "SoftTime" attendance record was accurate and unchallenged by Algado in the near future), while also expressing uncertainty (" . . . we also believe (emphasis added) she was deceitful about the reasoning for her absence on June 6") about the two-week "severance pay" upon her actual termination. I infer that on June 11, Algado's termination was an "open item," to the extent that the College had not yet formally issued her notice of termination (see finding no. 33). I credit Jankiewicz's testimony.

31. On June 13, 2014, Jankiewicz emailed a memorandum to Algado (with a copy issued to Ritter), acknowledging her receipt the previous day of the "grievance-harassment" (CP-9).

Jankiewicz wrote that the grievance did not meet referenced

requirements of Article twenty-seven (Grievance Procedure) of the collective negotiation agreement and, ". . . will not be processed." Jankiewicz also wrote that Algado's request, ". . . to take FMLA [leave] as needed" will not be "considered" because ". . . the College has no record of your requesting and/or applying for leave under the Family and Medical Leave Act."

Jankiewicz also wrote:

Finally, your requested relief that you 'not be threatened about your union activity in the future' is not grievable. As I am sure your NJEA consultant is aware, such alleged activity, if it occurs, is appropriately addressed through the filing of an unfair practice charge with the Public Employment Relations Commission. [CP-9]

Ritter did not participate in drafting Jankiewicz's June 13 response to Algado (5T66). On or about that date, Ritter spoke with Jankiewicz and Haggerty, agreeing that Algado should be provided an opportunity to discuss any concerns she had (5T68). I infer that Ritter's understanding of the procedure the College intended to follow after the June 10, 2014 personnel committee decision was the same as Jankiewicz's (see finding no. 26).

32. On June 17, 2014, Ritter (with Jankiewicz's assistance) wrote and issued a "memo" to Algado regarding a "request for a meeting to discuss absenteeism" (1T76, 4T17, CP-10). Noting that Algado had been suspended and issued a "final warning" on February 15, 2013, subjecting her to termination if such absences

continued, Ritter wrote that Algado's June 6, 2014 absence prompted a review of her attendance record. It showed that, ". . . over a significant period of time your excessive, unscheduled absences have continued, as contemplated under Article twenty-three, section 2 of the collective negotiations agreement" (CP-10, J-1, 3T51). Ritter wrote that the College, ". . . currently has reason to believe that your statement [on June 6 that she was waiting for a tow truck] was a misrepresentation . . . [and if it is], the College reserves the right to pursue additional disciplinary action." Jankiewicz testified that "additional disciplinary action" does not connote "termination," a term specifically used in the document regarding unscheduled absences (4T208-209). I credit that testimony. Finally, Ritter wrote that while the College acknowledges its receipt of her June 11 grievance, the College's actions regarding her excessive absenteeism are unrelated to it (CP-10). The meeting was scheduled for 3 pm that day and Algado was invited to be accompanied by an Association representative.

Algado, Nahom, Ritter, Jankiewicz and Angermeier attended the June 17 meeting (3T114, 5T70). Jankiewicz testified credibly that the purpose of the meeting was to review with Algado her unscheduled absences since receiving the final warning and all of her disciplines (4T17). She and Ritter in fact reviewed the applicable documents and Nahom and Algado admitted that they

didn't express any objections to the accounting of Algado's unscheduled absences and disciplines (2T9-10, 3T117, 3T148, 4T18, 5T70).

Nahom testified that he attempted to challenge "issues" raised by the concept of "unscheduled absences" but his efforts were rebuffed by the College representatives (3T115, CP-12). Specifically, Nahom said that Algado's absences largely resulted from her father's and daughter's medical conditions, and exacerbated by her being a single mother. He also asked if Algado should have been entitled to accrued leave (3T119-120). Jankiewicz testified that Nahom tried to shift "scheduled versus unscheduled" absences to a discussion of "excused versus unexcused" absences (4T23). I infer that Jankiewicz rebuffed Nahom's effort. Neither Nahom nor Algado asserted that any impending discipline was in retaliation for Algado's Association activities or that Ritter had repeatedly told Algado to "get out of the union" (4T25). The attendees discussed at length Algado's June 6, 2014 unscheduled absence (3T136-139). At the end of the meeting, Jankiewicz advised Nahom and Algado that the College would review "the information" and provide a final response (4T24).

33. On June 27, 2014, Jankiewicz wrote a memorandum to Algado, terminating her employment (CP-12, 4T28). The one-page document summarizes Algado's unscheduled absences from work and

disciplines incurred through February 15, 2013 and beyond, culminating in an attendance review following her June 6, 2014 unscheduled absence. The memorandum continued:

As a result of your excessive and unscheduled absences and notwithstanding your supervisor's repeated attempts to address such deficiencies, which subsequently led to the issuance of a final warning, your position as General Accountant with the College is being terminated effective immediately, June 27, 2014, per Article 23, section 2 of the collective negotiations agreement. As per the [collective negotiations agreement], you will receive two (2) weeks' pay in lieu of notice. [CP-12]

Copies were issued to Algado's personnel file, Ritter and Angermeier.

Algado was given the memorandum that afternoon in a meeting she attended with Jankiewicz, Ritter, Angermeier and Nahom (2T30). Jankiewicz read or reviewed aloud the memorandum (2T30, 4T29-30). Nahom and Algado did not challenge the memorandum's accounting of unscheduled absences. Algado was offered and declined the opportunity to resign her employment (2T32, 4T147). Algado said that her resignation could preclude her from eligibility for needed unemployment compensation benefits. Jankiewicz replied that such benefits would not be jeopardized because she was not being fired for "gross misconduct"<sup>8/</sup> (2T94-

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<sup>8/</sup> On an undisclosed date(s) after August 8, 2014, the College contested Algado's application for unemployment compensation (2T95).



95). By writing of Algado's imminent receipt of "two weeks' pay," the College had retracted any "misrepresentation" claim regarding her June 6 absence from work (4T31).

34. On or about June 24, 2014, Algado was reelected as Association President in a general meeting and balloting of Association members (1T77).

On July 23, 2014, Association Counsel sent a letter to Jankiewicz, contesting her ascribed July 1 email to Podolski, advising that since Algado was no longer employed by the College, it ". . . does not recognize her as having standing to represent College employees." Podolski had reportedly asked Jankiewicz to send all official correspondence concerning the Association to Algado. Association Counsel wrote that the College's refusal to send such correspondence to Algado is "patently illegal," reiterating that earlier in the day on July 1, the Association had emailed the College, providing a list of all executive officers, including President Algado, together with a request that all correspondence be forwarded to her, ". . . at her personal email address" (R-14). Counsel warned that continued failure to honor the request will result in the Association's filing of an amendment to its (extant) unfair practice charge. Copies of the letter were sent to College Counsel and others.

On August 8, 2014, the Association filed an amended charge alleging that the College's conduct violated the Act (C-1).

On September 2, 2014, College Counsel wrote a reply, expressing a willingness to allow Algado's participation in union activities, provided that it receive assurances that NJEA by-laws do not require a "successor election of local presidents who have been 'terminated' from employment." I infer that the Association did not reply to College Counsel's letter (R-14).

On September 26, 2014, College Counsel emailed several Association representatives, excluding Algado, reiterating that the College's ". . . final offer of settlement of the contract is a three-year contract at 1.75% increase per year" (R-12).

On September 30, 2014, Jankiewicz emailed a "draft MOA [memorandum of agreement]" to Nahom (with copies to College Counsel, Haggerty and Podolski) for the support staff successor agreement extending from July 1, 2013 through June 30, 2015. The attached four-page draft ends with signature lines for Association representatives Nahom and Podolski only and named College representatives, including College Counsel (R-10).

On October 14, 2014, Nahom emailed the Association's "revisions" of the draft MOA to Jankiewicz, (with copies to Berzinski, Podolski, Hutchins and Algado). The attached five-page draft ends with a signature line for Algado, in addition to those for Nahom, Podolski and named College representatives. (R-11).

On October 16, 2014, Jankiewicz emailed a reply to Nahom (with copies to Berzinski, Podolski and Hutchins) together with a five-page draft memorandum of agreement ending with signature lines for Association representatives Nahom and Podolski only and named College representatives (R-13). Jankiewicz's reply, her September 30 draft MOA email and College Counsel's September 26 "final offer" email were forwarded to Algado by Association representatives Nahom and Podolski (2T91, 92).

On December 17, 2014, Jankiewicz emailed ". . .an updated MOA with revisions we discussed" to Nahom, Podolski and McCullough on behalf of the Association, with copies to Haggerty and College Counsel, on behalf of the College. Attached is a five-page draft memorandum of agreement with a signature line for Algado, in addition to those for Nahom, Podolski and named College representatives (CP-16).

35. On the date of his testimony in this case, Dennis Haggerty had been employed as College Vice President of Administration for about four and one-half years. He oversees or "manages the managers" of several departments, including Human Resources, Public Safety, Registrar and Information Technology. He has successfully recommended the terminations of about eight to ten College employees (2T132-133). Though not specifically asked for his professional background, Haggerty credibly testified that he had been employed in similar capacities at two

named area hospitals and by the "labor board for nearly ten years" (2T182, 183). I infer that "labor board" refers to the National Labor Relations Board. He has participated in an estimated 150 grievance arbitration cases (2T183).

On or about August 8, 2014, Haggerty conducted a training session for managers at the College (2T134). A transcription of some of Haggerty's remarks was received in evidence (CP-13; 2T165). Haggerty in part told his audience:

There was another employee whose managers were following excessive absences with counseling, warning, a suspension and termination and that employee happened to be the union president. Then we found out a month or two later that another employee had 20-plus unscheduled absences a year and got zero. What do you think is going to happen in the arbitration? I'll bet, I fear the precedent's not uniform, not uniform in terms of managers being on top of things and when I say 'I fear,' I mean, OK, because when we go to arbitration there is a very strong possibility that an arbitrator will say that this College does not consistently manage employees equally and fairly and there may have been some discrimination here -- not discrimination in the sense of traditional but more in the sense of union leadership and therefore, reinstatement, there's reinstatement in an arbitration with the College. Besides 'egg in your face,' it means back pay. And so, it sets a precedent if we're not consistent and the impact, of course, if somebody's out. [CP-13]

Haggerty admitted that he said the transcribed remarks (2T165).

He testified that the College Board of Trustees at that time rigorously reviewed College personnel expenses and required that

position vacancies not be filled unless budgeted. It was also concerned about ". . . managing time and attendance." Haggerty was directed to strictly account for Human Resource department expenditures (2T175).

Haggerty testified that on August 8, 2014, he also advised the managers that, ". . . consistency in terms of managing performance and attendance was the key to success" (2T177). He believed that the managers,

did not know that they should start being responsible for attendance as well as performance and not just do annual performance evaluations . . . They were to review . . . to effectively manage a workforce for reasons of diminishing enrollment, diminishing revenues and diminishing support from the County government. We needed to be on top of managing our staff. [2T178]

Haggerty denied that anything he said in the meeting suggested he knew that Algado was fired because she was involved with union activities (2T182). He testified that inconsistency in discipline is problematic for employers in arbitration proceedings, citing his experiences at two named nearby hospitals (2T184). Haggerty knew that the College and Association had negotiated an advisory arbitration provision in their collective negotiations agreement; he testified that he was referencing, ". . . any arbitration" and distinguished such proceedings from "an unfair labor practice" (2T186-188). Haggerty agreed that

tracking Algado's attendance for three years and then terminating "the union president" was "troublesome" (2T192).

36. On December 23, 2013, College non-unit employee and "supervisor" Richard Brown issued a written warning to unit employee "E.K.," regarding "excessive absenteeism," confirming that over the calendar year he had accumulated 14 unscheduled absences (R-16, 1T328, 4T97-98).

On November 18, 2014, "E.K." was issued another warning with a one-day suspension for "continued unscheduled absences," totalling 24 days or 192 hours. The documents warns that if E.K. does not improve his attendance, additional disciplinary action, ". . . may be taken, up to termination of employment" (R-16, 4T100-101).

On February 10, 2015, "E.K." was issued a final warning and three-day suspension for 72 hours of unscheduled absences taken since his previous discipline (R-16). Between January and September, 2014, "E.K." exhausted 60 FMLA days off (CP-1).

On July 9, 2014, supervisors Michelle Martin and Martin Hoffman issued a memorandum to unit employee "S.A." regarding "excessive and patterned absenteeism," suspending the employee one day. The memorandum provides that "S.A.," over the previous year used ". . . 138 hours of unscheduled time on fifteen occasions," with some absences taken on a Monday, Friday or following a scheduled holiday. In addition to the suspension,

"S.A." was required to provide "medical documentation for all use of sick leave" (CP-15).

The supervisors had contacted Jankiewicz about "S.A.'s attendance and she produced the employee's "SoftTime" attendance record and assisted in drafting the memorandum (4T118).

On July 11, 2014, "S.A." filed a grievance, contesting that he or she was not provided written notice of any "concern" before the discipline was imposed, assertedly violating Article 26 of the collective negotiations agreement. The grievance also contests that no medical certifications had been requested before discipline was imposed (CP-15). On July 21, 2014, supervisor Martin issued a memorandum to "S.A.," denying the grievance.

On August 21, 2014, the Association filed an appeal, designated a "second endorsement to statement of grievance" addressed to College interim-President Spang. On August 28, 2014, supervisors Martin and Hoffman issued a revised disciplinary memorandum, rescinding the one-day suspension (CP-15).

#### ANALYSIS

In Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984), the New Jersey Supreme Court established a test to be applied in analyzing whether a charging party in a 5.4a(3) case has met its burden of proof. Under Bridgewater, no violation will be found unless the charging party has proved a

prima facie case by a preponderance of the evidence on the entire record, sufficient to support the inference 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, 1) the employee engaged in protected activities, 2) the employer knew of those activities, and 3) the employer was hostile toward the exercise of the protected activity. Id., at 242, 246.

If a charging party satisfied those tests, the burden shifts to the employer to prove that the adverse conduct would have occurred for lawful reasons, even absent the protected conduct. Id. at 242. If the employer did not present any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of 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 proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.



Conflicting proofs concerning the employer's motives are for the hearing examiner and/or the Commission to resolve.

In order to meet the "prima facie" standard, a charging party must prove all three Bridgewater elements, based on all of the evidence in the case. Whether a charging party has proved those elements is based on consideration of all evidence presented at the hearing, as well as credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987); State of New Jersey (Dept. of Human Svcs.), P.E.R.C. No. 96-20, 21 NJPER 352 (¶26218 1995), adopting H.E. No. 95-22, 21 NJPER 196 (¶26130 1995).

The Association has not demonstrated a prima facie Bridgewater case. College supervisor Ritter never "warned" or threatened Algado to "get out of the union" (finding nos. 14 and 27). Director of Public Safety Schmidt's warning to Algado to "watch her ass" because College Vice President of Administration Haggerty had "a target on [Algado's] back" was unrelated to her activities on behalf of the Association. The warning referenced only the College's decision to fire Algado because of her excessive unscheduled absences from work (finding no. 28). I disagree that Ritter's noting of Algado's Association meetings on her wall calendar at work in April and May, 2014 is direct evidence of anti-union hostility (finding no. 23).

The Association did not prove by a preponderance of circumstantial evidence that the College was hostile to Algado's activities as Association President. Contrary to an allegation in the Complaint and argument in the Association's brief, the essential decision to terminate Algado's employment was made before she filed a grievance dated June 11, 2014 that contested alleged harassment and warnings in retaliation for protected conduct (finding nos. 25-28).

The College's reason for that decision didn't "shift," as the Association contends. Algado's June 6, 2014 unscheduled absence prompted her supervisors' review that day of all such absences accumulated since her February 15, 2013 three-day suspension and final warning for the same infraction (finding no. 24). College Office of Human Resources Director Jankiewicz's suspicion about the truthfulness of Algado's reported "tow" of her disabled car wasn't aroused until June 10, after Algado submitted to Ritter the Meineke car repair bill. No facts suggest that Jankiewicz would have otherwise been deterred from recommending to and confirming with College Vice President of Administration Haggerty and interim President Spang that the next logical response to Algado's accumulated unscheduled absences should be her termination. I find that these circumstances fortuitously permitted the matter to be placed on the College personnel committee's agenda for approval that same day (finding

nos. 25 and 26). The record shows that the "tow" issue, if decided to Algado's detriment, would merely have resulted in denying her two weeks' severance pay upon her termination.

The Association also contends that Algado was punished disparately, citing comparisons to unit employees "E.K.," "S.A.," and "M.D." For purposes of discussion, I assume that none of the referenced and disciplined others were fired.

Under the facts of this case, I am not persuaded that disparate punishment indicates anti-union animus. College Vice President Haggerty's remarks to assembled College managers in August, 2014, recorded unbeknownst to him, demonstrate the College's concern that employee attendance was unevenly overseen and reported to the Office of Human Resources. Inasmuch as the three referenced unit employees reported to supervisors other than Algado's supervisor (Ritter), I infer a reasonable probability of disparate oversight of absenteeism and consequently, punishment.

Haggerty's candid remarks shows an employer's understanding of undesirable outcomes in grievance arbitrations contesting discipline for absences when the employer's absenteeism policy is inconsistently applied and enforced. He articulated Algado's specific circumstances from a hypothetical arbitrator's perspective, that is, even the progressive discipline afforded Algado might not be sustained in an overall context of an

inconsistently applied absenteeism policy, permitting "union leadership" to be posited or deduced as motive for the termination, thereby demonstrating (or at least, contributing to) an absence of "just cause" (finding no. 35). I do not find that Haggerty's remarks are an admission of anti-union animus or of a "guilty mind" (Association brief at 65).

The Association also adduces disparate treatment of Algado regarding FMLA-eligible leaves of absence. In 2005, Algado requested and was awarded about 50 days of unpaid family leave (finding no. 3). She never again requested family or FMLA leave until June 11, 2014. It is true that Jankiewicz did not periodically (i.e., whenever Ritter formally sought discipline of Algado's unscheduled absences) advise Algado of her possible eligibility for such unpaid leaves. But the record does not show whether the unit employees receiving (unpaid) FMLA leave initially requested it or were first advised of their eligibility for it. I disagree that disparateness of treatment has been shown. Nor does the record support a determination that Jankiewicz withheld advice to Algado regarding possible FMLA eligibility for anti-union reasons.

The Association elicited much testimony from its witnesses depicting "contentiousness" in the parties' collective negotiations for a successor agreement (finding nos. 19-22). I

do not find that those negotiations were contentious or in any way signaled College anti-union animus towards Algado.

Association Counsel contend that Jankiewicz's and/or Haggerty's anti-union animus "infected" Spang's recommendation to fire Algado (brief at 69-71). The concept is that an employer should not be permitted to launder the bad motives of certain supervisors by forwarding a dispassionate report to a neutral superior. Boston Mutual Life Ins. Co. v. NLRB, 692 F.2d 169, 111 LRRM 2983 (1st Cir. 1982); Irvington Bd. of Ed., H.E.. No. 2015-7, 41 NJPER 302, 309 (¶99 2015).

The record does not show that Jankiewicz, Haggerty or both pretextually recommended Algado's termination to Spang for excessive unscheduled absences in order to disguise anti-union animus allegedly rooted in Algado's "deception" about the towing bill. For this scenario to be true, one would have to ignore or discount Ritter's and Jankiewicz's June 6, 2014 review of Algado's "SoftTime" attendance record of continuing and substantial unscheduled absences after the February 15, 2013 final warning for that infraction (finding no. 24). That review easily provided a non-discriminatory justification for dismissal. One would then necessarily find that on June 10, when Jankiewicz was first presented the Meineke bill, the Human Resources Director immediately decided, without knowing all of the attendant circumstances, that Algado was deceitful and should be

fired for that infraction, instead. She would have promptly convinced Haggerty of the same "justification" and they both "pulled the wool" over Spang's eyes that same day with the "excessive unscheduled absences" pretext. This scenario is simply incredible and undermined by the College's continuing inquiry of the towing bill episode (finding nos. 30, 32).

\* \* \*

The Association has a right to choose its own negotiations representative(s). Bogota Bd. of Ed., P.E.R.C. No. 91-105, 17 NJPER 304, 306 (¶22134 1991); Salem Cty., I.R. No. 86-23, 12 NJPER 546 (¶17206 1986; Bor. of Bradley Beach, P.E.R.C. No. 81-74, 7 NJPER 25 (¶12010 1980); No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980); see also N.J.S.A. 34:13A-5.3. A contrary holding would allow an employer to control or prevent the use of non-employee representatives. See Colfer, Inc. and UAW, 282 NLRB 1173, 124 LRRM 1204 (1987), enf'd. 838 F.2d 164, 127 LRRM 2447 (6th Cir. 1988).

Uncontested facts show that from July to December, 2014, the College knowingly refused to issue modified and proposed memoranda of agreement for a successor collective negotiations agreement to Algado, the duly elected President of Association and member of its negotiations team. The College also twice deleted a signature line for Algado on proposed memoranda issued to Association negotiations team members. The College apparently

believed that Algado's dismissal in June, 2014 disqualified her from participating in the Association's negotiations for a successor agreement. In the absence of any facts indicating that Algado's participation in collective negotiations (or contract administration, for that matter) jeopardized campus safety or security, I find that the Association retained its right to designate its own representative. The College's conduct violated 5.4a(1) of the Act.

#### RECOMMENDATION

I recommend that the Commission find that Burlington County College violated section 5.4a(1) of the Act when it refused to provide drafts of proposed memoranda of agreement for a successor collective negotiations agreement to Burlington County College Support Staff Association President Regina Algado and deleted her name from proposed signature lines in those draft memoranda from July 1, 2014 through December 16, 2014.

I also recommend that the Commission find that Burlington County College did not violate section 5.4a(3) and derivatively or independently a(1) of the Act when it terminated Regina Algado's employment on June 27, 2014.

I recommend that the remainder of the Complaint be dismissed.

#### RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That Burlington County 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 issue proposed memoranda of agreement for a successor collective negotiations agreement to Burlington County College Support Staff Association President and negotiations team member Regina Algado and deleting her name from signature lines in the proposed memoranda from July 1, 2014 to December 16, 2014.

B. Respondent, Burlington County College, take the following affirmative action:

1. 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.



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

/w/Jonathan Roth  
Jonathan Roth  
Hearing Examiner

DATED: December 12, 2016  
Trenton, New Jersey

Pursuant to N.J.A.C. 19:14-7.1, this case is deemed transferred to the Commission. Exceptions to this report and recommended decision may be filed with the Commission in accordance with N.J.A.C. 19:14-7.3. If no exceptions are filed, this recommended decision will become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by December 22, 2016.



RECOMMENDED



# NOTICE TO EMPLOYEES

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

**We hereby notify our employees that:**

**WE WILL** cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to issue proposed memoranda of agreement for a successor collective negotiations agreement to Burlington County College Support Staff Association President and negotiations team member Regina Algado and deleting her name from signature lines in the proposed memoranda from July 1, 2014 to December 16, 2014.

Docket No. \_\_\_\_\_

\_\_\_\_\_  
(Public Employer)

Date: \_\_\_\_\_

By: \_\_\_\_\_

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372