

H.E. NO. 2009-8

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

In the Matter of

STATE OF NEW JERSEY,
DEPARTMENT OF TREASURY,

Respondent,

-and-

Docket No. CO-2006-216

COMMUNICATIONS WORKERS OF AMERICA, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that the State of New Jersey (Department of Treasury) refused to promote Robert DePeola, a unit employee and CWA shop steward to the title, investigator I, taxation, at the Fair Lawn office in retaliation for his protected activities. The Hearing Examiner found that the charging party failed to prove that the State was hostile to his protected conduct, pursuant to the standards set forth in In re Bridgewater Tp., 95 N.J. 235 (1984).

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
George N. Cohen, Deputy Attorney General

For the Charging Party
Weissman & Mintz
(Rosemarie Cipparulo, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On February 27, 2006, the Communications Workers of America, AFL-CIO (CWA) filed an unfair practice charge against the State of New Jersey, Department of Treasury (State). The charge alleges that in and after August, 2005, the State failed to appoint CWA shop steward and professional unit employee Robert DePeola to the title, investigator I, division of taxation, at the Fair Lawn office in retaliation for his protected union activity.

The charge alleges that since 2002 DePeola filed grievances on behalf of unit employees, including Deborah Morgan, and represented them at grievance meetings and hearings. It specifically alleges that in September, 2002, DePeola represented Morgan at a step one grievance hearing, the outcome of which was in favor of CWA and resulted in the reassignment of a supervisor from the Fair Lawn office to the Newark office. It alleges that in November, 2002, DePeola filed another grievance on behalf of Morgan, contesting discipline, and that in December, CWA prevailed at the step one hearing. It alleges that in February, 2003, DePeola filed grievances on behalf of Morgan and another employee, which were resolved to CWA's satisfaction. The charge alleges that in September, 2003, DePeola filed grievances contesting harassment and an unsatisfactory PAR evaluation on behalf of Morgan, the outcome of which was in favor of CWA and resulted in a change of a supervisor for Morgan. The charge alleges that in October, 2003, DePeola assisted Morgan in filing a complaint with the Department of Treasury equal opportunity office. The charge also alleges that in March, 2004, DePeola filed a grievance on behalf of another unit employee, the outcome of which (about three months later) resulted in the reassignment of the grievant to another department supervisor. The charge alleges that in or about December, 2004, employer representative

Cheryl Fulmer told DePeola that efforts to promote him were "being blocked by managers above her."

The charge alleges that in August, 2005, unit employee Morgan asked employer representative Cheryl Fulmer about promotions to the title, investigator I in the northern region. Fulmer allegedly advised: "DePeola is a veteran and cannot [be] bypassed on the list and management won't budge on promoting him" and that he is a "poor performer." The employer's conduct allegedly violates 5.4a(3) and (7)^{1/} of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act).

On June 7, 2006, a Complaint and Notice of Hearing issued only upon allegations that the employer's conduct violated 5.4a(3) of the Act. On or about July 17, 2006, the State filed an Answer, denying that it violated the Act and asserting that it acted ". . . with legitimate governmental and business justification. . ."

On October 11 and 29, 2007, I conducted a hearing at which the parties examined witnesses and presented exhibits. The parties filed briefs.

^{1/} These provisions prohibit public employers, their representatives or agents from: "(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; (7) Violating any of the rules and regulations established by the commission."

Based upon the record, I make the following:

FINDINGS OF FACT

1. Robert DePeola has been employed in the taxation division of the Department of Treasury at the Fair Lawn regional office since April, 1993 (1T51).^{2/} He was hired as a trainee and a year later was promoted to the title, investigator III. In 1999 or 2000, he was promoted to investigator II (1T52). Investigator IIs elicit payments from deficient taxpayers or take necessary enforcement measures, including issuing "warrants of execution" authorizing the seizure of assets, such as bank accounts and personal property (2T6).

In March, 2003, DePeola took a Department of Personnel promotional examination for the title, investigator I, taxation (1T52). The job duties for the position are similar to those for investigator II and add the administrative task of assisting a group supervisor. For example, an investigator I may be directed to train other investigators and substitute for a supervisor in his or her absence (2T7; 2T38). In completing the application form for the examination, DePeola wrote "all locations" in the space seeking his choice of which of the 21 counties he would

^{2/} "C" represents Commission exhibits; "CP" and "CWA" represent charging party exhibits; "R" represents respondent exhibits; and "J" represents joint exhibits. "T" represents the transcript, preceded by a "1" or "2," signifying the first or second day of the hearing, followed by the page number(s).

accept employment (J-1). On March 31, 2003, DePeola received a "notification of certification" from the Department of Personnel, essentially advising of his success on the examination. It also asked him to provide the numerical order of his preference for the five specified work locations printed on the form. DePeola wrote "1" through "5" in this order; Asbury Park, Newark, Trenton, Somerville and Camden (J-2). The Fair Lawn work location was not among the options but DePeola returned the completed form anyway because he feared that he might otherwise be disqualified from the list of eligible candidates (J-2; 1T69).

2. The northern region of the taxation division is comprised of offices at Fair Lawn, Newark and Somerville (2T19). On or around the date DePeola examined for the title, investigator I, the Fair Lawn office employed 3 supervisors and 22 investigators. The Newark office employed 4 supervisors and 32 investigators. The Somerville office employed 2 supervisors and 14 investigators (R-14; 2T19). In the Fair Lawn office, John Sheehan was serving as an investigator I provisionally, awaiting permanent appointment (1T102; CP-2). Sheehan and DePeola have veterans' preference status under Department of Personnel guidelines (1T75; 1T120).

3. DePeola has served as a CWA shop steward for about eight years and has represented employees in grievance matters (1T58-1T59). DePeola has represented Deborah Morgan, an

investigator II in the Fair Lawn office, in several grievances. In August, 2002, DePeola represented Morgan in a grievance contesting the conduct of supervisor Joseph Latka. The grievance was resolved informally. The supervisor was transferred from the Fair Lawn office to the Newark office (CWA-1; 1T46-1T47).

On February 3, 2003, Morgan filed a grievance contesting discipline. On March 10, 2003, Morgan was represented by DePeola at a step 1 grievance meeting, and the grievance was resolved informally (1T60; CP-1(a)). The principal employer representative was Cheryl Fulmer, chief of field investigators in the division (CP-1(a); 2T4).

Also on February 3, unit employee and investigator III Peter Eisenstadter, assigned to the Fair Lawn office, filed a grievance contesting discipline. On March 10, 2003, DePeola represented the grievant at a step one meeting. Again, the principal employer representative was Cheryl Fulmer. The grievance was resolved informally (CP-1(b)).

On September 29, 2003, Morgan filed two grievances, one contesting her supervisor's conduct as "demeaning, degrading and harassing . . ." and the other contesting an evaluation of her performance. DePeola was Morgan's union representative (CP-2; 1T24). In February, 2004, a "settlement agreement" resolving the grievances was signed by Morgan and Fulmer, among others (1T40; CP-3). DePeola testimonially acknowledged that he worked well

with employer representative Fulmer on most grievances and almost all of them were resolved before arbitration (1T95).

4. On April 7, 2003, the Department of Personnel issued a "certification of eligibles for appointment" for the title, investigator I, taxation in the Camden, Asbury Park, Trenton, Newark and Somerville offices (CP-2). DePeola ranked third on the Camden office list; fifth on the Asbury Park office list; fifth on the Newark office list; seventh on the Trenton office list; and fifth on the Somerville office list (CP-2). On the Camden office list, John Sheehan was ranked second and was to receive a permanent appointment on May 17, 2003 at the Fair Lawn office (CP-2).

An office location would not be listed on a "certification of eligibles for appointment" if no vacancy existed or if no provisionally appointed employee worked there. As a veteran serving provisionally as an investigator I in the Fair Lawn office in early 2003, Sheehan was ranked higher than DePeola on all promotional lists (1T126; 1T128).

5. On May 13, 2003, DePeola wrote a memorandum to a departmental human resources representative, Wendy Banka (1T72; J-4). The letter advises:

On May 12, 2003, I was informed verbally by my supervisor E. Latka that I was appointed to an investigator I position in Asbury Park taxation . . .

I am not interested in an appointment to Asbury Park at this time. However, I may be interested in the future and wish my name be retained for consideration on all future lists.

Fair Lawn would be my preferred choice but that option was not offered on the 3/31/03 certification . . . [J-3]

6. On or about August 27, 2003, DePeola filed a "response to promotional certification" form, advising the Department of Personnel that he was "not interested" in being appointed to the title, investigator I, taxation, at the Trenton office (J-4; 1T72). DePeola testimonially conceded that Trenton was "too far [away]" and would not fall within his jurisdiction as shop steward (1T73).

7. DePeola's interim and final job performance evaluations from September, 1999 through August, 2007 consistently depict competent performance (CP-7; 1T56-1T58). He usually agreed with the evaluations he received and occasionally disagreed with certain "job expectations." Final evaluation forms included the tallies of DePeola's "closings," "successful levies," "seizures," "auctions," and "collections" (CP-7).

On March 16, 2004, unit employee and investigator I Luis Lingan filed grievances contesting discipline and his regional supervisor's "intimidation" and "harassment." DePeola was the grievant's union representative (CP-14). On or about June 17,

employer representatives and union representatives, including DePeola, informally resolved the matters (CP-4; 1T63).

8. In or around late December, 2004, Fulmer recommended to her superiors at the division that DePeola be promoted to a supervisor position in the "taxpayer services section" in Trenton. Fulmer recommended DePeola because he was a "very strong advocate for taxpayers" (2T28-2T29). She based her opinion upon his advocacy on behalf of unit employees in grievance meetings (2T28). The title was several pay grades above his title, investigator II (2T27-2T28). The title and its two positions became available following a reorganization which created a "new chain of command within the field taxpayer services operation" (2T28).

On January 7, 2005, DePeola wrote a memorandum to two employer representatives, withdrawing his candidacy for the title. DePeola wrote that his decision was "difficult," conceding that his ". . . enthusiasm for this new challenge is lacking" (J-5).

9. DePeola complained to Fulmer about not being promoted (to investigator I, taxation, in the Fair Lawn office). In a letter dated September 30, 2005, DePeola wrote that he spoke with Fulmer in December, 2004 (CP-5). In the absence of testimony setting the date, I credit the date set forth on the document. He told Fulmer that he was being "victimized" for employment

matters that were "brought to a head" in Fair Lawn, specifically, that grievances had to be processed, resulting in the "removal" [i.e., transfer] of supervisors from the Fair Lawn office (1T82). He testified that "[his] thinking was that 'somebody pays for this'" (1T83). I infer that DePeola meant that management retaliated against him for proving in grievance matters that supervisors were harassers, requiring their involuntary transfers to other work locations.

DePeola was then asked about Fulmer's reply. He testified:

The first time we spoke, she said -- she approached me, she told me that she is trying to make an appointment to the investigator I position in the northern region [Fair Lawn, Newark, Somerville]. That was really understood, they needed positions filled, but you're preventing me from doing so, you keep shooting yourself in the foot. When I asked her what she meant by that, she said that I make comments on my PAR evaluations that discouraged high level management from considering me or those behind me for promotion . . . [1T83-1T84]

Fulmer testified that she did not recall mentioning to DePeola that the northern region had a critical need for investigators (2T10). Her monthly reports in mid-February and mid-March, 2004 to the assistant director of compliance activity do not refer to a shortage of investigators (R-9; R-10). She testified:

There's always a critical need for additional staffing in all of our field offices, including Fair Lawn. Being a tax collector is a stressful job and we have constant

attrition . . . for various reasons. It's difficult to replace them . . . [It] tends to be more difficult to retain staff in the northern half of New Jersey because housing costs are higher. . . [2T13]

Staffing levels tallied and documented each January from 2003 through January 2006 show that the Fair Lawn office consistently employed 22 investigators and 3 supervisors (R-4; R-5; R-6; R-7). In December, 2006, the number of investigators assigned to the Fair Lawn office dropped to 20 (R-8). The number of investigators assigned to Newark and Somerville each declined by one in December, 2006 (R-7; R-8).

Fulmer denied that she told DePeola that efforts to promote him were being blocked by managers (2T20). She denied trying to block his promotion (2T30). She testimonially acknowledged:

. . . [T]here was a concern about promoting him to the investigator I title because of its responsibilities as an assistant to the supervisor of the group. [2T21]

She testified that his performance as an investigator II created a concern that he would not fulfill those responsibilities (2T21; 2T45). She cited and explained statistical records from January through March, 2004, showing that DePeola ranked in collections [of delinquent tax payments] among the lowest one-quarter to one-third of all 27 investigator II's in the State (R-1; R-2; R-3; 2T25). She testified that some investigators are "very reluctant to take the necessary post-judgment steps required to protect the State's 'interests'" (2T26). I infer that Fulmer meant that they

did not enforce judgments against delinquent taxpayers. I credit her unrebutted testimony.

Fulmer conceded that revenue collection is not intended to be a component of investigator II evaluations (2T35). She also testified:

. . . One of the statistics we do look at as managers to try to determine whether somebody is working up to their potential and how they are doing relative to their coworkers; one of the statistics is going to be revenue.
[2T27]

I credit Fulmer's quoted testimony; I infer that despite a professed aversion to consider collections in evaluating investigator performance, Fulmer and other employer representatives use them as a measure of performance. I also credit those documents corroborating Fulmer's testimony that DePeola had a relatively poor to mediocre record in "collections."

10. On September 22, 2004, DePeola signed a "performance evaluation system" document, disagreeing with certain goals and responsibilities set forth in it (CP-7(m)). He testified that it is the sole document on which he wrote "comments" and about which Fulmer characterized his conduct as "shooting himself in the foot" (1T104; see finding no. 9). DePeola wrote four enumerated objections to the prescribed goals:

1. PAR standard not mutually formulated.
Does not take into account my individual strengths and weaknesses;

2. No mention of caseload. Caseload can impact either positively or negatively on aged-case performance;
3. Computer competency standards -- I don't have internet capability on my computer. I'm 55+ and do not have keyboarding skills . . . ;
4. I've been here 11 years and do not have my own investigator's manual . . .
[CP-7(m)]

11. On or about April 14, 2005, DePeola completed a Department of Personnel "response to promotional certification" form (1T77; J-6). DePeola declined an offer of promotion to the title, investigator I, taxation, in the Asbury Park office. He wrote: "not interested in Asbury Park at this time" (J-6).

12. On September 30, 2005, DePeola sent a letter to David Gavin, assistant director of compliance for the division (CP-5; 1T89). DePeola wrote about ". . . [his] concerns about the division not making needed promotions to the investigator I title in the northern region." DePeola set forth a chart listing all six offices, the total number of investigators at each office and the number of investigator I positions at each office. According to the chart, the Newark office employed 24 investigators, including 5 investigator I's; the Somerville office employed 13 investigators, including 1 investigator I; and the Fair Lawn office employed 21 investigators, including 3 investigator I's. The Camden, Trenton and Asbury Park offices each employed fewer investigators than Fair Lawn and two and one-half to four times

as many investigator I's. The State did not specifically rebut DePeola's chart. I credit it.

DePeola more specifically complained in his letter:

. . . [T]he division refuses, despite that critical need, to promote me to an [investigator] I title. Since I'm a veteran and ranked #1 on the list, those investigators ranked behind me on the list are also being denied promotion. [CP-5]

DePeola wrote that his discussions with Chief Fulmer ". . . are always cordial, often enlightening and sometimes productive. . .

[W]e disagree on this promotion issue." DePeola wrote:

There is no justification to deny me a promotion based on performance. Ours is not a meritocracy. It is a collective, the same as a judge, teacher, fireman, whatever. One meets an agreed-upon competency standard and advances upon a competitive test score. [CP-5]

DePeola warned: "You're not demonizing me by denying promotions; you're alienating those people who attained a position on a 36-month promotional list. . ." (CP-5). He enclosed a copy of his written objections to prescribed standards of performance (see finding no. 10). A copy was sent to Fulmer.

13. On October 3, 2005, Gavin issued an e-mail to DePeola, acknowledging that they never met. Advising that he was "not impressed," Gavin wrote:

If you are worthy of promotion, I would have seen a recommendation from your immediate supervisor, a recommendation from your regional manager, and a recommendation from

your branch chief. I have never received any such recommendations . . .

In addition, I would expect that . . . you would have used the opportunity to make me aware of all the legitimate reasons why you are in fact deserving of promotion and how your performance as an investigator I would benefit the Fair Lawn office . . . You certainly did not accomplish that . . .

I feel no urgency whatsoever to promote you.
[CP-5]

14. In October, 2005, investigator Deborah Morgan complained to a State senator that she had not been promoted because the employer was retaliating against the person [i.e., DePeola] immediately preceding her on the certified list (1T29). On October 11 and 12, 2005, Morgan and the senator exchanged e-mails about the matter (CP-6; 1T31).

15. On February 9, 2006, Morgan sent an e-mail to an administrative assistant in the legislative affairs unit of the State Treasurer's office. Morgan wrote about the "gross injustice" of her department's refusal to promote. She wrote that the veteran ahead of her on the list "has filed an unfair practice charge as a result of being denied an appointment" (CP-6).

On March 2, 2006, Doug Ianni, a human resources officer of the NJ Department of Treasury sent an e-mail to Morgan, advising that her e-mail had been referred to him for a reply. Ianni wrote:

. . . [Y]ou are indeed ranked number two on an investigator I taxation promotional list that is set to expire on March 12, 2006. A veteran occupies the number one ranking. Veterans' preference in New Jersey prohibits an appointing authority (Treasury) from bypassing a veteran on a promotional list. The Division of Taxation does not intend on promoting the veteran, but for other reasons that I will not divulge, than you cite in your e-mail. In accordance with the rules, Taxation can make no other appointments from this list and will let it expire. [CP-6]

16. Ianni has overseen all human resource actions for the Treasury Department since January, 2003 (2T68). He testified that the phrase, "does not intend on promoting the veteran" in his March 2, 2006 e-mail to Morgan was a "poor choice of words" (2T72). He testified: "[T]he fact is, there was no ability to promote and there was no need to promote because the driving factor is there were no vacancies" (2T72). Asked about the meaning of the sentence, "The division of taxation does not intend on promoting the veteran but for other reasons that I will not divulge than you cite in your e-mail," Ianni testified:

Well, let's assume, if they had the ability or need to promote, the issue would have been did Mr. DePeola's performance warrant promotion and I was advised that his performance did not predict well on a promotion to a supervisory position. [2T72]

Ianni was then asked about the State's offers of promotion to DePeola in locations other than Fair Lawn. He testified:

Those promotions [to investigator I] were offered based upon the rules because he was one of the top persons on that list for that

region, for the Trenton region. I'm not sure what the other region was but the rules require that we ask if he's interested in that promotion. [2T73]

Ianni testified that he did not try to block any promotion of DePeola and did not make any determination on the availability of investigator I positions in the northern region (2T74; 2T75).

Ianni's testimony was unrebutted; I credit it.

ANALYSIS

Public employees and their organizations have a statutory right to avail themselves of negotiated grievance procedures. N.J.S.A. 34:13A-5.3. Retaliation for engaging in protected activity violates 5.4a(1) and (3) of the Act. In re Bridgewater Tp., 95 N.J. 235, 244 (1984), sets forth the elements a charging party must prove to establish a violation of 5.4a(3).

Under Bridgewater, no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of protected rights. Id. at 246.

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 unlawful motive under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place in the absence of protected conduct. Id. at 242. The 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.

No direct evidence shows that the State refused to promote DePeola to the title, investigator I, taxation, in the Fair Lawn office, in retaliation for his activities as shop steward. I must next assess the circumstantial evidence to determine if the Act was violated.

CWA has proved the first two Bridgewater elements; DePeola engaged in protected activity and the State knew it. Specifically, DePeola filed grievances on behalf of unit employees and acted as their representative in grievance meetings and hearings, which were attended by employer representatives. DePeola often resolved grievances with Cheryl Fulmer, chief of field investigators and signed agreements with her disposing of them.

The decision on whether the charging party has proved hostility in retaliation cases is based upon consideration of all the evidence, including that offered by the public employer and the 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). I find that the evidence does not show that the State was hostile to DePeola's protected conduct by not offering to promote him to the title, investigator I, taxation, in the Fair Lawn office.

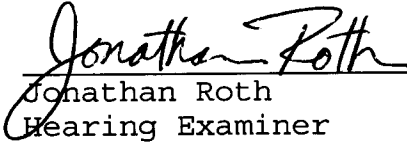
DePeola did not prove that the State was hostile to his conduct as shop steward. Most or all grievance matters in which he represented unit employees from 2003 through 2005 were resolved informally. DePeola even noted his cooperative and professional relationship with Cheryl Fulmer, the principal employer representative in most of the asserted grievance matters. Assuming that Fulmer remarked to DePeola that he was "shooting himself in the foot" by having written his objections to proposed job expectations on an evaluation form, I find that DePeola's writing was not protected conduct. See North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451, 454 n. 16 (¶4205 1978), aff'd NJPER Supp.2d 63 (¶45 1979). Assuming that DePeola's September 30, 2005 letter to the assistant director of compliance in a small part regards protected conduct (i.e., it expresses a concern for the promotion of others), I find that

Gavin's October 3, 2005 reply does not show animus to that conduct. His effrontery was targeted at DePeola's worthiness for promotion as an employee. Nothing in the record indicates that Gavin knew of DePeola's role or efforts as a shop steward. Finally, employer representative Ianni's March 2, 2006 e-mail reply to Morgan does not show animus to DePeola's protected activity. Ianni credibly testified that at the time of Morgan's complaint, the division had no investigator I, taxation, vacancies in Fair Lawn and DePeola's performance as an investigator II did not "warrant promotion," a conclusion credibly corroborated by his mediocre accomplishments (relative to others') in "collections."

The State demonstrated that DePeola was offered promotions to investigator I, taxation, three times during the contested period and was offered another promotion at several pay grades higher than investigator I. He declined all of them. Nothing suggests that the promotions were offered to draw DePeola away from his role as shop steward in the Fair Lawn office. See, e.g., Irvington Bd. of Ed., P.E.R.C. No. 2003-83, 29 NJPER 218 (¶65 2003); NLRB v. Exchange Parts Co., 37 U.S. 405, 409 (1964).

RECOMMENDATION

I recommend that the Complaint be dismissed.


Jonathan Roth
Hearing Examiner

DATED: March 9, 2009
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 March 19, 2009.