

H.E. No. 2011-2

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

In the Matter of

CUMBERLAND COUNTY COLLEGE,
Respondent,

-and-

Docket No. CO-2009-204

CUMBERLAND COUNTY COLLEGE
STAFF ASSOCIATION,
Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss an unfair practice charge filed by the Cumberland County College Staff Association alleging that Cumberland County College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically 5.4a(1) and (3), when it transferred secretary and CCCSA President Sharon Lind between offices, changed her assignments, and advised her that she would be slated for termination "under the guise of a reorganization."

The Hearing Examiner finds that although Lind's protected activity was a motivating factor in the College's actions, the preponderance of the evidence on the entire record supports concluding that the College's reorganization of its academic divisions which resulted in the elimination of Lind's position would have taken place absent Lind's protected conduct. The Hearing Examiner also finds that although Lind's relinquishment of the CCCSA presidency upon her resignation from the College might have had the tendency to interfere with CCCSA members' rights, the College's reorganization of its academic divisions had legitimate and substantial business justifications.

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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Charging Party.

Appearances:

For the Respondent,
Basile & Testa P.A.
(Todd W. Heck, of counsel)

For the Charging Party,
Selikoff & Cohen, P.A.
(Keith Waldman, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On December 9, 2008 and February 24, 2010, the Cumberland County College Staff Association (CCCSA) filed an unfair practice charge and an amended charge against Cumberland County College (College). The charge, as amended, alleges the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically 5.4a(1) and (3)^{1/}, when it

^{1/} 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. (3) Discriminating in
(continued...)"

transferred secretary and CCCSA President Sharon Lind between offices, changed her assignments, and advised her that she would be slated for termination "under the guise of a reorganization." The CCCSA alleges that Lind's protected activity was a substantial, motivating factor in the College's actions.^{2/}

On June 5, 2009 a Complaint and Notice of Pre-Hearing was issued (C-1).^{3/} On June 12, 2009 the College filed an Answer denying the allegations and asserting that its actions were taken without regard to Lind's prior protected activity (C-2).

A pre-hearing conference was held on August 6, 2009. Hearings were on February 23, 24, and April 6, 2010.^{4/}

The parties submitted all post-hearing briefs by August 19, 2010. Based upon the record, I make the following:

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- 1/ (...continued)
regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act."
- 2/ The CCCSA moved to amend the charge on the second day of hearing. The amended charge changed a reference to a "reduction in force" in paragraph nine of the addendum to a "reorganization" (C-3; 2T9).
- 3/ "C" refers to Commission exhibits received into evidence at the hearing. "CP" and "R" refer to Charging Party's and Respondent's exhibits, respectively, received into evidence. "J" refers to exhibits received into evidence that were submitted jointly by the parties.
- 4/ Transcript References to hearing dates are "1T" through "3T", respectively.

FINDINGS OF FACTBackground

1. The College and the CCCSA are, respectively, a public employer and a public employee representative within the meaning of the Act (1T8-1T9). The CCCSA represents a unit of full-time support staff employees, including secretaries, maintenance and custodial employees, cafeteria employees, and switchboard operators (J-1; C-1, C-2).

2. Sharon Lind began her employment with the College in 1993 and was hired as a full-time Secretary I in 1995. She was elected President of the CCCSA in June 2002 and held that position until she resigned her employment with the College on December 12, 2008 (1T49-1T50; R-3, R-10). At the time of her resignation she was employed as a Secretary II (1T189).

3. Lind was one of the lead negotiators on behalf of the CCCSA for the 2006-2010 collective negotiations agreement (CP-7; 2T34-2T35).

4. Dr. Thomas Isekenegbe has been the President of the College since July 1, 2009. Before that he was the Vice President of Academic Affairs and Enrollment Services for seven years (2T66-2T67). In that position he was responsible for all issues involving faculty, curriculum, the library, professional and community education, and activities on campus. It was his job to look for better ways of delivering services to students (2T66-2T67).

5. Patricia Brining has been the College Executive Director of Human Resources since October 31, 2006 (3T104).

6. Maryann Westerfield is the Dean of the STEM/Health Division^{5/} at the College. Prior to the implementation of the 2007-2009 reorganization of the College's academic divisions she was the Chair of the Health and Science Division (R-11, R-12). Lind was Westerfield's secretary (1T27).

Collective Negotiations 2002-2003

7. During contract negotiations between the College and the CCCSA in 2002-2003, Lind contacted Assemblymen and addressed the Board of Freeholders at a televised meeting regarding an impasse in negotiations. Former College President Dr. Kenneth Ender told her afterward that he was "disappointed that everything couldn't stay on campus" (1T51-1T53).

Collective Negotiations 2006 and Related Events

8. In 2006, Lind organized a coalition of the CCCSA, the Technical Assistance Association, and the Faculty Association to engage in coalition negotiations with the College. Ender was very upset about the attempt to form the coalition (CP-3; 1T64-1T70).

^{5/} STEM is an acronym for "Science, Technology, Engineering, and Mathematics" (1T27).

9. During negotiations in 2006, Lind contested Brining's assertion that Lind had to file an OPRA^{6/} request for negotiations-related documents(1T61-1T62)^{7/}.

10. At the staff orientation on the first day of the 2006-2007 academic year, Ender identified Lind and Paul Swierczynski, a tenured faculty member who was the lead negotiator for the Faculty Association, as the reason the employees did not have new collective negotiations agreements (1T64-1T65, 1T112-1T115).

11. In September 2006 Westerfield told Lind that Isekenegbe came looking for Lind and when he could not find her commented that Lind was never in her office when he was looking for her. Lind testified that Isekenegbe also asked Westerfield where Lind was if Lind did not answer her phone when he called (CP-4; 1T29, 1T71). Westerfield asked Lind what she had done to get all of this attention from Isekenegbe (1T73). Westerfield told Lind that Isekenegbe wanted her to put a note on her desk if she was leaving her office indicating where she was going and what time she would be returning (1T76).

^{6/} The New Jersey Open Public Records Act, N.J.S.A. 47:1A-1 et seq.

^{7/} Lind testified that she had issues with former College Human Resources Director Marie Tiemann from the time she became CCCSA President. Although I credit Lind's testimony about Tiemann, I find it to be of little import in this case since Lind testified that all of her issues associated with Tiemann ended in 2006 (1T181).

Isekenegbe did not recall making these comments. He denied that he instructed Westerfield to require Lind to leave a note on her desk when she was leaving the office (1T22-1T23).

I credit Lind's testimony. It is consistent with an email Lind sent to New Jersey Education Association (NJEA) Field Representative Julie Giordano-Plotkin two days after the alleged incident.^{8/} I also find that these events would be memorable to Lind because they worried her (CP-4).

12. In September 2006, Nancy Ewan from human resources instructed Westerfield to make sure that Lind was not doing union business on work time (1T76; CP-5). From the close proximity of Ewan's instruction to Westerfield and Isekenegbe's frustration with not finding Lind at her office on September 7, 2006, I infer that Isekenegbe assumed Lind was away from her office doing union business.^{9/}

13. The CCCSA filed for impasse on December 1, 2006 (CP-6). Despite Ender's edict to the CCCSA that it keep everything related to the parties' negotiations confidential, Lind reached

^{8/} The email Lind wrote to Giordano-Plotkin about this incident was dated Saturday, September 9, 2006. The first line of the email references "Thursday" as the day that Isekenegbe came looking for Lind. I infer that this was September 7, 2006, the preceding Thursday (CP-4).

^{9/} In September 2006 the parties were operating under an expired predecessor collective negotiations agreement which is not part of the record. The 2006-2010 collective negotiations agreement between the CCCSA and the College does not provide for CCCSA release time (J-1). No testimony regarding what if any practice existed for union release time was introduced.

out to College alumna and NJEA President Edythe Fulton and Assemblyman Nelson Albano to advise them regarding the lack of progress in negotiations (1T82-1T83).

14. The CCCSA and the College reached a Memorandum of Agreement (MOA) on March 23, 2007 (CP-7). The CCCSA ratified the MOA in April 2007 (CP-9). However, Ender advised Lind that he would not recommend ratification to the Board of Trustees because he did not like the health insurance language (1T92; CP-8).

In response, Lind and other CCCSA members attended a Board of Trustees meeting shortly thereafter. Addressing the Board during the open public session, Lind stated that the CCCSA was very upset that the College had broken their deal, accused Ender of negotiating in bad faith, and implored the Board to honor the MOA. Ender was "staring her down" as she addressed the Board (1T92-1T94, 3T63; CP-10).

15. In addition to addressing the Board of Trustees, Lind contacted Assemblyman Douglas Fisher to discuss Ender's refusal to recommend ratification to the Board of Trustees on April 20, 2007 (1T103-1T104; CP-16).

16. To further publicize the stalled ratification, the CCCSA and the other Associations held an informational picket from 6:00 a.m. - 8:00 a.m. on April 24, 2007 (1T94-1T95).^{10/} Lind

^{10/} Isekenegbe gave inconsistent testimony regarding whether he was on campus on the day of the picket. He first testified that he could not recall whether he was on campus that day (1T23). Later, he testified that he drove to work that day and saw people on the picket line (2T133).

prepared a press release describing the events that precipitated the picket and circulated it to the media the day of the picket (1T100-1T101; CP-14). The *Daily Journal*, a local newspaper, published an article about the picket and quoted Lind (1T101-1T103; CP-15).^{11/}

17. Lind met with Ender some time after the newspaper article was published and they came to an agreement on the healthcare language. The College and the CCCSA executed the collective negotiations agreement on May 15, 2007 (1T106-107; J-1).

Formation of Reorganization Plan

18. Soon after executing the collective negotiations agreement, Lind became aware that there was a reorganization committee meeting convening in the fall of 2007. Lind had been through three or four reorganizations during her tenure at the College. They were not unusual (1T107).

10/ (...continued)

Lind's fiancée, Marc Chiappini, testified that Dr. Isekenegbe saw him at the picket and gave him "a stare like I had never seen before" and, "if looks could kill, I would probably be a dead man" (2T29). Chiappini, a former adjunct professor at the College, accuses the College of jeopardizing his retirement benefits. I do not credit his testimony regarding the statements he attributes to Isekenegbe, but find that Isekenegbe was on campus the day of the picket.

11/ On May 4, 2007 the President of the Faculty Association, Dr. Adrian M. Dewindt-King, wrote to William Milam, Chairperson of the Board of Trustees, to advise him that the Faculty Association gave Ender a vote of no-confidence on April 23, 2007 (CP-17; 1T105). I do not find this to be relevant because this action was not undertaken by the CCCSA or Lind.

19. Isekenegbe initiated the 2007-2008 reorganization of the academic divisions of the College (2T67, R-11). The prior academic structure had been in place since the College had 2,000 students enrolled. The College presently has 3,500 students enrolled (2T67, 2T93-2T94).

After the June 2007 resignation of Dr. Debra Kuhl, the Division Chair of the Division of Business, Computer Science, and Mathematics, Isekenegbe suggested to Ender that before they fill the position they should take a comprehensive look at the way services are delivered to students, including academic, advising, and freshman seminar. Ender agreed, and Isekenegbe created a reorganization committee (2T67-2T68; R11, R13).^{12/}

The reorganization tied into the College's strategic plan, which it launched in 2006. The strategic plan set forth the College's vision and plans for the future. It was developed by the College community, faculty, staff, local mayors, and partners from Rowan College and Stockton College. It had a theme of "access, alignment, and accountability." The plan consisted of four strategic directions and eight goals, the sixth of which called for a reexamination of the way the College does business and delivers services on campus (2T72-2T73; R-13).

^{12/} In the exhibits in evidence where the reorganization committee is referenced, it is called the "Ad-Hoc Committee on Academic Organizational Structure and Delivery of Academic Support Services." For simplicity, I will refer to it as the "reorganization committee" or the "committee."

20. The reorganization committee met in October and November 2007 (2T79). Westerfield chaired the 13-member committee. Neither Ender nor Isekenegbe were on it (2T80). The committee met five or six times for a total of 15-20 hours (R-14, R-15, R-16; 2T220-2T221, 2T80). It issued its report and recommendations on December 13, 2007 (2T79; R-16). The committee reviewed the College's academic structure and determined that three divisions and three division chairs were insufficient to meet the needs of the programs, the faculty, and the students.^{13/} It determined that because the division chairs were occupied with the day-to-day running of their respective divisions, they had little time to devote to new program development, curricular changes, student relations, and the assessment processes within classes and programs. Taking those issues into consideration, the committee developed several proposed models of a new academic organization (R-16). The committee formulated its recommendations without any input from Isekenegbe (2T80).

The committee's report and Isekenegbe's reaction to it were provided to Ender on January 17, 2008 (R-16). Ender then met

^{13/} Prior to the resignation of Kuhl in June 2007 there were four academic divisions at the College: 1) the Business, Computer Science, and Mathematics Division; 2) the Health and Science Division; 3) the Arts and Humanities Division; and 4) the Social Science/Education Division. Upon her resignation, the Business, Computer Science, and Mathematics Division was eliminated and the programs within were reassigned to the remaining three divisions on an interim basis (R-11, R-12).

with the committee to ask its members how they arrived at their recommendations. After that, Ender, Isekenegbe, and Vice President for Finance and Administrative Services John Pitcher met to discuss the financial implications of the committee's recommendations (2T87-2T89). They did not discuss the specific people who would be affected (2T98). The meeting resulted in the reorganized structure which is presently in place (2T91).

I credit Isekenegbe that the new structure would be more effective in accommodating the College's present enrollment and benefitted the College community because it enhanced student engagement and retention by bringing students closer to the faculty (2T91-2T94, 2T99-2T100).

21. The specifics of the reorganization, including the type of support staff that would be required to support the new structure, were finalized by Isekenegbe during the spring of 2008 (2T92). Isekenegbe, not the committee, decided to eliminate the secretary positions and replace them with administrative assistants as part of the reorganization (2T154). He based this decision on the need for an increased level of administrative support to the deans in light of the elimination of the division chairs. The administrative assistant position requires higher level skills, which is reflected by their placement on higher salary levels than the secretaries (1T34, 2T101-2T102, 2T117-2T118; R-5, R-28). Isekenegbe presently has administrative assistants who work for him (2T102-2T103, 2T165).

Implementation

22. The reorganization reduced the number of academic divisions at the College from four to three. The new divisions were the STEM/Health Division, the Humanities and Arts Division, and the Business, Education, and Social Science Division. A dean heads each division (R-22). Three dean positions replaced four division chair positions; three administrative assistant positions replaced four secretary positions. The reorganization affected seven employees^{14/} (R-22; 2T194-2T195). The four secretaries affected were Lind, Patricia Lafferty, Natasha Pitts, and Jacquelyn Whilden. Lind and Pitts resigned. Lafferty and Whilden remain employed by the College (1T154, 2T194-2T195). The three division chairs affected were Westerfield, Dr. Monica Heppel, and Caroline Wilson (3T130).

23. Brining prepared the job description for the new administrative assistant positions. Approximately 40% of the job description reflects Brining's input; the remaining 60% reflects the input of Isekenegbe and the three then-existing Division Chairs - Westerfield, Heppel, and Wilson (3T104, 3T114; R-28). Brining independently decided to include "advanced proficiency in Microsoft Office (Word, PowerPoint, Excel, Access)" as a job requirement for the administrative assistant position. She had received feedback from management and administrators that their

^{14/} After the Division Chair of Business Kuhl resigned in June 2007 the position remained vacant (2T194).

needs were not being met. She determined that those needs would be met by administrative assistants with advanced proficiency in the Microsoft Office applications (3T115-3T116; R-28). Brining has managed support staff throughout her career and proficiency in Access is a typical job requirement for an administrative assistant (3T117).

24. The Board of Trustees approved the new positions created by the reorganization on December 16, 2008 and the College began accepting applications in the spring of 2009 (R-19; 2T108-2T111).

25. There is a dispute regarding whether the College has a practice of requiring employees whose positions are being eliminated pursuant to a reorganization to apply for new positions if they wish to remain employed by the College.

Isekenegbe testified that the College's practice is to require the employees to apply for new positions (2T105-2T106).

Lind testified that in past reorganizations employees were automatically placed into "newer versions" of their former positions (2T22, 3T268-3T269). She testified that prior reorganizations that affected her involved "moving certain classes, the academic part into other divisions and just mixing up the academic area. The staffing for those areas just whatever the reorganization was you decided which secretary was going to go to that new named area [sic]" (2T22-2T23). Consistent with this, she later testified that "reorganizations that I've been

involved in previously, which again was the same shuffle of academic areas to other umbrellas, and there is constantly a new idea of where math should go and social sciences, and they just move the secretaries. I would just get moved on to the next whatever position and supervisor that they assigned to the new branch of that academic program [sic]" (3T268).

From Lind's testimony, I find that in prior reorganizations Lind was reassigned to new academic divisions and new supervisors because her position was not being eliminated. Lind's assertion that employees were automatically placed into "newer versions" of their former positions in prior reorganizations is therefore not inconsistent with Isekenegbe's testimony that employees whose positions are being eliminated must apply for new positions. I credit Isekenegbe's testimony. It is consistent with Brining's (3T134-3T135).

Additionally, the non-renewal notification sent to former employee Darlene Jones supports the College's assertion that employees whose positions are eliminated are not mechanically placed into new positions (R-6).

26. On August 25, 2008, Isekenegbe and Brining held a meeting to advise all of the affected employees that their positions were being eliminated on June 30, 2009 as a result of the reorganization. They were told they could apply for new positions that were being created (1T40, 2T56). Lind requested the job description for the new administrative assistant

position^{15/} but was told it was not yet available (1T145). At a September 2, 2008 meeting for all college staff, Ender reminded the affected employees that they could apply for the new positions. Lind again requested a job description for the new position, which she received that day (1T146-1T147).^{16/}

27. During her tenure at the College, Lind had seen job descriptions which included knowledge of Microsoft Excel, Word, and PowerPoint as requirements, but she had not seen a job description which included knowledge of Microsoft Access as a requirement until she received the job description for the new administrative assistant position on September 2, 2008 (2T11-2T12). Nevertheless, I find that Lind knew that knowledge of Microsoft Access was a skill that administrators might require of their clerical support staff because she had previously served on a committee to hire a part-time grant-funded secretary for the nursing department and the person who headed the grant wanted her secretary to know Microsoft Access (1T148-1T149).

^{15/} The administrative assistant title existed prior to the 2007-2008 reorganization (2T117). The new administrative assistant title created by the reorganization is called "Administrative Assistant - Academic Divisions" and has its own unique job description (R-19, R-28; 3T113).

^{16/} Lind had applied for other positions at the College, most recently in November 2007. She was not interviewed for any of the positions and never received letters thanking her for applying. She testified that the College has a practice of at least inviting internal applicants to interview (CP-18; 1T143-1T144). The CCCSA did not allege in its charge that the College's failure to interview Lind for these other positions was a violation of the Act.

28. No one ever told Lind that she was not permitted to apply for the new administrative assistant position (1T188-1T189). She acknowledged that nothing prevented her from improving her computer skills to meet the job requirements for the position (1T192).^{17/} She understood that as technology changed she would be expected to adapt to new technology requirements. The skills required of her former position evolved over the years to keep up with modern technology (1T172-1T173).

29. Westerfield, who served on the reorganization committee, saw her own position eliminated as part of the reorganization. She had to apply for a new position if she wished to remain employed by the College. Westerfield looked for jobs outside the College but also applied for one of the new dean positions. She was hired after completing an application process that entailed interviewing with a committee of nine people, followed by interviews with Isekenegbe and Ender (1T40-1T41, 1T27).

30. Lafferty is now employed as an Office Manager at the College. Prior to the reorganization she was a secretary II

^{17/} It is unclear from Lind's testimony why she decided not to apply for the new administrative assistant position. On direct examination, Lind testified that she did not apply because the job description had not yet been approved and the new position was not in a bargaining unit and she was terrified of not having union protection (1T153). On cross examination, Lind testified that it was her belief that notwithstanding her qualifications for the position, the College would not hire her for it (1T192).

included in the CCCSA bargaining unit. She had been a CCCSA member for at least two years, serving as CCCSA Secretary in one of them (2T42-2T46).

31. Whilden is employed by the College as an administrative assistant to the Dean of Arts and Humanities. She had been the secretary to former Division Chair Kuhl. After Kuhl resigned in June 2007, Whilden was secretary to an adjunct coordinator and also substituted in other areas after the resignations of Lind and Pitts (2T49-2T50). Whilden was one of the four secretaries whose positions were being eliminated by the reorganization (2T56). Before the reorganization, Whilden's position was included in the negotiations unit represented by the CCCSA. However, Whilden was not a full dues-paying member of the CCCSA (2T54-2T59).

Whilden started as an administrative assistant on July 1, 2009. She was hired after sending her information to the College human resources department in response to a job posting. She interviewed twice with a hiring committee (2T61). Whilden uses Access as an administrative assistant (2T58).

32. Faculty Association negotiator Swierczynski believed that the reorganization was done to "zap" the CCCSA and that it would have been a waste of Lind's time to apply for one of the new administrative assistant positions (1T127, 1T130). He believed the secretaries were targets of the College because they always took leadership positions in the CCCSA (1T127). Absent

evidence supporting Swierczynski's theories, I do not credit his testimony.

Swierczynski's testimony that the secretary jobs were "reclassified to something else, but the people who got the new jobs do the exact same thing that the secretaries used to do" (1T126-1T127), is not reliable evidence that the duties remained the same. I found nothing in the record to indicate that Swierczynski is or was ever in a position to know whether or how the responsibilities of the positions differ.

Transfer between offices and change of assignments

33. In September 2008, Lind was moved from the science building to the academic building and was given additional responsibilities. The move required her to travel between buildings because the faculty she worked for were in both locations. Her new office had no windows and it was smaller than her former one (1T140).

The parties presented conflicting testimony on the proximity of Lind's new office to Isekenegbe's office. Lind testified that it was close enough to Isekenegbe's office that he could monitor her (1T141). Brining testified that Isekenegbe would not be able to see Lind from his office (3T156).

Brining testified that Lind's relocation was a result of the reduction in division chairs which required Westerfield to take on additional responsibilities and necessitated Westerfield's

relocation. As Westerfield's secretary, Lind moved with her (3T154-3T155).

I credit Brining's testimony regarding the reason Lind was moved, and, therefore, find whether or not Isekenegbe could see Lind from his office immaterial.

ANALYSIS

The CCCSA contends that the College transferred Lind between offices, changed her assignments, and eliminated her position in retaliation for her union activity in violation of 5.4a(3) and 5.4a(1) of the Act.

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

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further

analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

The decision on whether a charging party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as 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).

The CCCSA argues that the aggregate of Lind's protected conduct since becoming CCCSA President in 2002 was a substantial, motivating factor in the College's actions. The CCCSA filed its unfair practice charge on December 9, 2008. The Act provides a six-month statute of limitations for unfair practice charges. N.J.S.A. 34:13A-5.4(c). Events occurring outside the statute of limitations period cannot be found to constitute unfair practices by themselves. But they can be considered as evidence of

possible discriminatory motivation and harassment leading to the separation from employment within the six month period. Township of West Orange, P.E.R.C. No. 99-13, 24 NJPER 429 (¶29197 1998); State of New Jersey, P.E.R.C. No. 93-116, 19 NJPER 347, 351 (¶24157 1993); Middletown Tp. Bd. of Ed., P.E.R.C. No. 96-45, 22 NJPER 31 (¶27016 1995), aff'd 23 NJPER 53 (¶28036 App. Div. 1996), certif. den. and notice of app. dismiss. 149 N.J. 35 (1997); Essex Cty. Sheriff's Dept. and Denver, P.E.R.C. No. 88-75, 14 NJPER 185 (¶19071 1988), recon. den. P.E.R.C. No. 88-112, 14 NJPER 345 (¶19132 1988); Bloomfield Tp., P.E.R.C. No. 88-34, 13 NJPER 807 (¶18309 1987), aff'd NJPER Supp.2d 217 (¶191 App. Div. 1989), certif. den. 121 N.J. 633 (1990); accord Lodge No. 1424, I.A.M. v. NLRB (Bryan Mfg. Co.), 362 U.S. 411, 45 LRRM 3212 (1960).

I have considered all evidence in the record of Lind's protected activity dating back to 2002 when she became CCCSA President. I find that the College was hostile toward Lind's protected activity on four occasions during her six-and-a-half years as CCCSA President, and that this hostility was a motivating factor in the College's 2007-2009 reorganization of its academic divisions which resulted in the elimination of Lind's position. However, I find that the preponderance of the evidence on the entire record supports concluding that the reorganization would have taken place absent Lind's protected conduct.

The College was hostile to Lind's protected activity on the following occasions:

1) When Ender identified Lind and Swierczynski as the reason the employees did not have new collective negotiations agreements at the staff orientation on the first day of the 2006-2007 academic year;

2) When Ender glared at Lind during a Board of Trustees meeting as Lind publicly accused him of negotiating in bad faith by refusing to recommend ratification of the MOA reached by the parties on March 23, 2007;

3) When Ender reacted angrily to the attempt at coalition negotiations in 2006; and,

4) When Isekenegbe commented to Westerfield on September 7, 2006 that Lind was never in her office and, assuming Lind was away from her office doing union business, told Westerfield that he wanted Lind to put a note on her desk before leaving to indicate where she was going and what time she would be returning.

I find no hostility in Ender's statement to Lind that he was "disappointed that everything couldn't stay on campus" after Lind contacted State Assemblymen and addressed the Board of Freeholders at a televised meeting regarding an impasse in negotiations in 2002-2003. I find that it was not an inappropriate statement to make within the context of negotiations. See Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No.

82-19, 7 NJPER 502, 503 (¶12223 1981). Moreover, the nexus between the statement and the elimination of Lind's position is too far attenuated to be reliable evidence of hostility.

Regarding Lind's criticizing the College's conduct in negotiations to elected officials, the CCCSA has not proven that the College knew of this and, thus, has not demonstrated that it was a substantial or motivating factor in its reorganization decision.

The 2007-2009 reorganization of the academic divisions of the College was an involved process that spanned two years from inception to implementation. Its impetus was the June 2007 resignation of Kuhl. Enrollment at the College had increased significantly since the last reorganization. In light of this, Isekenegbe suggested to Ender that before they fill Kuhl's position they should take a comprehensive look at the way services are delivered to students, including academic, advising, and freshman seminar. The reorganization also tied in to the College's strategic plan, in that one of the plan's goals called for a reexamination of the way the College does business and delivers services on campus.

Isekenegbe created a committee to look into the reorganization process. The committee met five or six times for a total of 15-20 hours. For the reasons cited in its detailed report, the committee determined that the existing structure was insufficient and it developed several proposed models of a new

academic organization. The committee's recommendations included the elimination of Westerfield's position. Westerfield chaired the committee.

The committee's report and Isekenegbe's reaction to it were provided to Ender, who then met with the committee to ask its members how they arrived at their recommendations. After that, Ender, Isekenegbe, and Pitcher met to discuss the financial implications of the committee's recommendations. The result of that meeting was the reorganized structure that is presently in place. Isekenegbe credibly testified that the new structure would be much more effective in accommodating the College's present enrollment and that it benefitted the College community because it enhanced student engagement and retention by bringing students closer to the faculty.

Isekenegbe decided to replace the secretary positions with administrative assistant positions as part of the reorganization because the elimination of the division chairs created a need to provide a higher level of administrative support to the deans. The administrative assistant position requires higher level skills.

It is not clear from the record what higher level skills are required of the administrative assistant title that distinguish it from the secretary II title.^{18/} However, the CCCSA did not

^{18/} The record does not contain a job description for the
(continued...)

prove that the change was made so that the College could supplant Lind's position with another for which it knew she was unqualified.

All drafts of the job description for the new administrative assistant positions included advanced proficiency in Microsoft Access as a required qualification. Critically, the CCCSA did not establish that the College knew Lind did not have this qualification at the time it created the job description. Even if the CCCSA had established that the College knew Lind lacked this qualification when it created the job description, no evidence suggests that the College's motivation for including the requirement was to disqualify Lind. To the contrary, the evidence demonstrates that the requirement was included because Brining determined that administrative assistants with advanced proficiency in the Microsoft Office applications would better meet the needs of management and administrators. Furthermore, Whilden, who obtained one of the new administrative assistant positions, uses Access in her position.

Lind was given more than ten months' notice of the impending elimination of her position. This provided her sufficient time to work on acquiring the skill.

18/ (...continued)
secretary II title that Lind held at the time of her resignation.

Lind ensured she would not be interviewed for the administrative assistant position by not applying for it. She believed she was unqualified because she did not have advanced proficiency in Microsoft Access. However, this was just one of many essential duties and responsibilities listed in the job description. In considering her for the position, Lind could not have known what emphasis the College would have placed on her deficiency in that area, or if the College would even have become aware of it.

The CCCSA suggests that Whilden, the only affected secretary who obtained one of the new administrative assistant positions, was hired because she was not a full dues-paying member of the CCCSA.^{19/} The record does not support this proposition. Whilden was hired after sending her information to human resources in response to a job posting and interviewing twice with a hiring committee. Moreover, Lafferty, one of the three other secretaries, was hired by the College into an office manager position. Prior to the reorganization she had been a CCCSA member for at least two years and served as CCCSA Secretary in one of them. The fact that Lafferty, who was active in the CCCSA, was hired belies the CCCSA's suggestion that the College

^{19/} The CCCSA argues that the reorganization was also motivated by Isekenegbe's desire to eliminate positions from the NJEA-affiliated CCCSA bargaining unit. As this was not alleged in the CCCSA's charge, it will not be considered.

hired Whilden because of Whilden's decision not to join the CCCSA.

Many factors give credence to the legitimacy of the reorganization:

- 1) the increased enrollment at the College which necessitated that it consider changing the way services are delivered to students;
- 2) the amount of time that elapsed between the inception and implementation of the reorganization;
- 3) the creation of the 13-member committee which met for a 15-20 hours and issued a detailed report containing several proposed models of a new academic organization; and,
- 4) the fact that the committee chair recommended the elimination of her own position for the betterment of the College.

These factors lead me to conclude that the preponderance of the evidence on the entire record supports finding that the College's 2007-2009 reorganization of its academic divisions which resulted in the elimination of Lind's position would have taken place absent her protected conduct.

The CCCSA argues that the elimination of Lind's position also independently violates 5.4a(1) of the Act.

An employer independently violates subsection 5.4a(1) if its action tends to interfere with an employee's statutory rights and lacks a legitimate and substantial business justification.

Orange Bd. of Ed., P.E.R.C. No. 94-124, 20 NJPER 287 (¶25146 1994); Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986); New Jersey Sports and Exhibition Auth., P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Proof of actual interference, intimidation, restraint or coercion is unnecessary. The tendency to interfere is sufficient to prove a violation. Mine Hill Tp. Thus, a party asserting an independent violation of 5.4a(1) must establish that the employer engaged in some action that would tend to interfere with, intimidate, coerce or restrain an employee in the exercise of statutory rights.

The CCCSA argues that the elimination of the position of an elected Association leader, like Lind, impairs the independent right of members protected under section 5.4a(1) to be protected from interference, restraint, or coercion in their exercise of rights guaranteed by the Act, citing Local 195, IFPTE v. State, 88 N.J. 393, 419 (1982). Although Lind's relinquishment of the CCCSA presidency upon her resignation from the College might have had the tendency to interfere with CCCSA members' rights, for the reasons explained above, I find that the College's reorganization of its academic divisions had legitimate and substantial business justifications.

The CCCSA further asserts that during Lind's tenure as CCCSA President, the College, by its actions referenced above, independently violated 5.4a(1) of the Act in that it discouraged and interfered with negotiations unit members' participation in

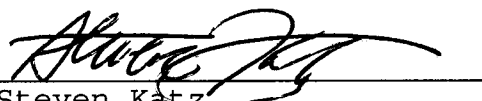
collective activity. However, except for advising Lind on August 25, 2008 that her position would be eliminated, no action taken by the College that allegedly violates 5.4a(1) occurred within the six months prior to the filing of the charge on December 9, 2008. They are therefore untimely.

Finally, I find that the preponderance of the evidence on the entire record supports concluding that Lind's transfer between offices and change in assignments would have taken place absent her protected conduct. I find that this occurred because she was the secretary to Westerfield, who was relocated herself and took on additional responsibilities soon after the College decided not to fill Kuhl's position.

Based on the above findings and the Bridgewater standards, I do not find that the College violated the Act. The reorganization of its academic divisions would have taken place absent Lind's protected conduct and the College had legitimate and substantial business justifications for the reorganization. Accordingly, I find that the College did not violate 5.4a(3) or 5.4a(1) of the Act.

RECOMMENDATION

I recommend the Commission ORDER that the Complaint be dismissed.



Steven Katz
Hearing Examiner

DATED: October 1, 2010
 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 October 12, 2010.