

H.E. NO. 2013-5

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

In the Matter of

PATERSON STATE OPERATED SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CO-2011-177

PATERSON EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Paterson State Operated School District particularly Principal Paula Santana - violated the New Jersey Employer-Employee Relations Act by reprimanding and interfering with Association Vice President Calvin Harvell for representing, advocating for and filing grievances on behalf of unit employees.

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,
Robert E. Murray, LLC
(Robert E. Murray, of counsel)

For the Charging Party,
Bucceri and Pincus, attorneys
(Sheldon H. Pincus, of counsel, Albert J. Leonardo, on
the brief)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

An unfair practice charge was filed by the Paterson Education Association (Association) with the New Jersey Public Employment Relations Commission (Commission) on November 1, 2010 and amended on November 10, 2010 alleging that the Paterson State operated School District (District) violated subsections 5.4a(1), (3) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act)^{1/}. The Association alleged in

^{1/} These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with,
(continued...)"

Count 1 of the original charge that Association Vice President Calvin Harvell was disciplined, discriminated and retaliated against by Principal Paula Santana for engaging in conduct protected under our Act; that on October 12, 2010 Santana denied a grievance and made certain unprotected remarks in retaliation for Harvell's exercise of protected conduct; and that Santana refused to process a grievance presented by the Association.

In Count II of the original charge the Association alleged that on October 13, 2010 Santana denied a grievance filed by Harvell; that Santana made certain negative remarks about Harvell filing the grievance; and that Santana refused to process the grievance, all in retaliation for Harvell's exercise of protected conduct.

As to those allegations the Association seeks an Order directing Santana to cease and desist from discriminating and retaliating against Harvell and from refusing to process grievances; and ordering Santana to remove and expunge all

1/ (...continued)
restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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."

reprimand information issued to Harvell. The Association also seeks attorney fees and costs of suit.

In Count I of the amended charge the Association alleged that on September 16, 2010 Santana reprimanded Harvell for assisting a unit member; that on October 12, 2010 Santana denied a grievance filed over Harvell's reprimand; that Santana made certain unprotected remarks about Harvell's representation; and that Santana took this action against Harvell because of his exercise of protected conduct.

In Count II of the amended charge the Association alleged that on October 13, 2010 Santana denied a grievance filed by Harvell on October 5, 2010 on behalf of a unit member, and that she made certain unprotected remarks about Harvell, all in retaliation for his exercise of protected conduct.

In Count III of the amended charge the Association alleged that on or about October 29, 2010 Santana denied a grievance Harvell had filed on behalf of another employee; that she made certain unprotected remarks to Harvell about his activity; and that Santana had refused to process grievances, all in retaliation for Harvell's exercise of protected conduct.

The Association seeks the same remedies in the amended charge that it sought for the original charge.

A Complaint and Notice of Hearing was issued on May 9, 2011 (C-1)^{2/}. The District filed an Answer (C-2) on or about May 23, 2011. The District admits to certain factual information but denies having taken any action against Harvell because of his exercise of conduct protected by the Act. The District raised certain affirmative defenses including that: (1) the Association waived any right to challenge Santana's actions; (2) Harvell's conduct established the tone of the parties relationship; (3) no anti-union animus by the District was alleged, and the allegations fail to reveal intimidation by the Association; and (4) the parties collective agreement grants the District the right to take the actions complained of.

PROCEDURAL HISTORY

Subsequent to the pre-hearing conference conducted in this matter the Association, by letter dated September 19, 2011, voluntarily withdrew the 5.4a(5) allegation (1T20). Hearings were held on December 8, 2011 and January 11, February 22 and March 22, 2012^{3/}.

As the hearing commenced, the District made a number of motions. First, it moved to sanction the Association by

^{2/} "C" refers to Commission exhibits received into evidence at the hearing. "J", "CP" and "R" refer to Joint, Charging Party and Respondent exhibits, respectively.

^{3/} Transcript references to the four hearing dates are "1T" (12/8/11); "2T" (1/11/12); "3T" (2/22/12) and "4T" (3/22/12).

precluding testimony from an NJEA representative(s) ostensibly because of alleged interference with District witnesses. Second, the District moved to depose seven possible witnesses allegedly to prevent any potential interference in their testimony from the Association. Third, the District moved to stay the hearings to file an interlocutory appeal. I denied the motions first because the District had not raised alleged witness interference earlier, and because the Board has recourse under the Act. Second, depositions were denied because the District had not made a timely request. Third, there was insufficient basis upon which to stay the hearings (1T10-1T18).

After the Association rested its case on the second day of hearing, a conversation commenced regarding the Respondent's request to call six particular witnesses. The Association objected, in part, because at least some of those names had not been provided by the District during discovery. I requested a proffer by the Respondent regarding their testimony and, after hearing the proffer, I expressed concern over whether it had probative value, but I agreed to consider the request (2T113-2T136).

By letter decision of February 2, 2012 (C-3), I denied the District's request to hear testimony from one or more of the six particular witnesses regarding events concerning a March 23, 2010 meeting at School No. 15 and a conference on October 19 and 20,

2011. Santana was not involved in either event nor did they take place at School No. 11, although Harvell was present in each instance with various other Administrators. Respondent sought to illustrate through the six witnesses that Harvell's behavior was loud and abusive, thus, establishing that Harvell acted similarly in his interactions with Santana at School No. 11. I determined that this testimony about events occurring six months before and over a year after the operative events in the Association's charge as well as under different circumstances was irrelevant, not probative, potentially prejudicial and would necessitate undue consumption of time.

Finally, on cross-examination Harvell testified that the Association's charge was amended to specifically include a letter of September 8, 2010 from Santana to him (CP-9; 1T161). But neither the charge nor the amended charge specifically refer to that document or that date. Nevertheless, even if the Complaint was not specifically amended to include CP-9, since that document was admitted into evidence and testimony was elicited from both parties regarding that document, CP-9 can still be considered in deciding whether it provides support for the 5.4a(1) or (3) allegations.

Post-hearing briefs and reply briefs were filed by July 3, 2012.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. The District and the Association were parties to a collective negotiations agreement first covering 2004-2005, then covering 2005-2008. The parties then reached a two year agreement covering 2008-2010 (J-1).

2. Paula Santana has been the Principal of District Public School No. 11 since September 1989 (4T7). Calvin Harvell has been a District Art teacher since 1984 and began working in District Public School No. 11 just prior to year 2000 (1T29, 1T32). Harvell served as the Association PEA Delegate and/or Third Vice-President during the years related to this case (1T34). He filed grievances and engaged in meetings and discussions with Santana regarding issues related to terms and conditions of employment, and on behalf of employees represented by the Association. At the end of the 2010-2011 school year Harvell became the Association's Second Vice-President which resulted in his becoming a full-time release officer for the Association beginning with the 2011-2012 academic year (1T30-1T31).

3. Harvell was an Association delegate in 2004. At the end of the 2003-2004 academic year, Santana recommended he be transferred to another school. Harvell and the Association believed his transfer was either disciplinary or in response to his engaging in activities on behalf of the Association. On or

about August 4, 2004, the Association filed a grievance seeking to have Harvell's transfer reversed (CP-1). The grievance resulted in Harvell's transfer being rescinded by August 30, 2004, and he remained at Public School No. 11 (CP-1; 1T35, 1T38-1T39, 1T41-1T43).

4. Despite being out on sick leave in April 2008, Santana came in to observe Harvell on April 14, 2008 and issued an Observation Report (CP-2) which contained twenty-two "outstanding" and one "commendable" grades, and Santana recommended Harvell's re-employment with increment (1T122-1T123). The Observation also included the following general comments:

Mr. Harvell needs to:

- 1) Speak with the principal in moderate tone of voice whether staff is present or not.
- 2) Adhere to his job description, art teacher, not Vice Principal.
- 3) Not interrupt staff during his prep.
- 4) Not allow staff members to interrupt his art classes (1T47).

Harvell objected to those comments and wrote the following rebuttal:

Despite the fact that Ms. Santana is currently on sick leave, she came to school and conducted an observation to complete this evaluation form. In the 'General Comments' section, Ms. Santana does not offer constructive criticism for me to improve my delivery of instruction; rather she offers her opinion on my conduct as a representative of the Paterson Education Association. As an

officer in the Association, it is my responsibility to ensure that the rights of all members are guaranteed. This obligation is one I take seriously. The only thing that I hold with greater regard is my responsibility to the students of Paterson. At no time, in the execution of my professional responsibilities, have I ever worked outside my job description. I would like to reiterate, for the record, that this evaluation was produced on April 14, 2008 from 11:30am to 12:15pm by an administrator who is on sick leave, while a covering administrator was in the building. I challenge the validity of this evaluation based on the aforementioned circumstances. [CP-3].

Harvell believed that, as Association Delegate, he had the right to meet with Association members regarding work issues during the school day as provided by Article 5.6 of the parties' collective agreement (J-1; 1T49-1T50).

Article 5.6 provides:

FACULTY REPRESENTATIVES

The District authorizes that the President of the Association and any Association Representative shall have the right to conduct Association business, and receive messages during the school day where it does not interfere with their required duties or the required duties of other employees. [J-1]

Harvell admitted that sometimes he did interrupt staff during his prep because that was when he could discuss work issues with staff members. He acknowledged that staff members occasionally interrupted his art classes but not during his class instruction and only to obtain materials related to lesson

preparation. He did not allow staff to interrupt his art classes to conduct Association business (1T50-1T51, 1T126). There was no contrary evidence, thus I credit Harvell's testimony. Despite having some concerns, Harvell did not file a grievance over the observation (1T128-1T129).

5. On or about June 30, 2010, Harvell received a letter from Santana informing him she had requested he be transferred to another school for the 2010-2011 academic year (CP-4). Around that same time Harvell learned Santana was also seeking to transfer three other teachers to another school - Carmen Benjamin, Melissa Gencarelli and Jason Goldberg (1T52-1T53). Harvell contacted Assistant Superintendent Marisol Barrios regarding the transfers informing her he thought Santana's transfer requests were disciplinary in nature. Barrios did not entertain Santana's transfer requests and Harvell, Benjamin, Gencarelli and Goldberg were reassigned to School No. 11 (1T53-1T54).

On July 28, 2010, Harvell received a form letter from Santana noting his transfer to another school (CP-5). But on or about August 17 and 31, 2010, Harvell received letters from Superintendent Donnie Evans that he was assigned to School No. 11. Santana was copied with those letters (CP-6, CP-7).

6. On September 1, 2010, the first day of school, an incident occurred involving Harvell and teachers Tartaglia and

Davidoff. Davidoff was a teacher assigned to School No. 11. Tartaglia had been a Media Specialist teacher at School No. 11 during the 2009-2010 school year but, apparently, received notice during the summer to report to School No. 15 for the 2010-2011 year (1T72, 4T19-4T20, 4T94). Because of many personnel changes in the District, Tartaglia was unsure to which school she was assigned. She returned to School No. 11 on September 1 and spoke to Santana. Santana wanted to keep Tartaglia at School No. 11 and told Tartaglia she (Santana) would speak to the Administration about the matter. Santana then told Tartaglia that the Administration instructed her that if teachers go to the school where they had worked, to keep them until a decision was made regarding their placement. Santana told Tartaglia that if she didn't receive official notice she could report to School No. 11, and they would find out afterwards where she should report (4T20-4T22, 4T93-4T94).

Davidoff and Tartaglia were friends and were sitting together at a lunch table in School No. 11 on September 1st. Harvell knew the District had directed Tartaglia to report to School No. 15, so when he saw her in School No. 11, he began discussing the matter with her. He wanted to continue the discussion with Tartaglia privately. Davidoff wanted to know why a private conversation was necessary. Harvell told Davidoff it was a private matter and "none of her business", but he

vigorously denied telling Davidoff to "shut up" (1T73-1T74, 1T161-1T162). I credit his testimony. Santana agreed that Harvell told Davidoff it was none of her business (4T96).

Harvell and Tartaglia moved to another area, and he explained why he believed Santana had misdirected her into staying at School No. 11. Harvell telephoned someone in the District personnel office who told Tartaglia to report to School No. 15 (1T74). Santana was not present during Harvell's private discussions with Tartaglia (1T72-1T73).

On September 8, 2010, Santana issued Harvell the following letter:

Please be advised, that on Wednesday, September 1, 2010 you were in non-compliance with your job description of "Art" Teacher at School No. 11. You "self-appoint" yourself to any situations, concerns, etc. that staff may have. However, when the staff member comes to voice their concern(s) to me; they say they did not ask you for any advice or to intercede on their behalf.

On September 1, 2010 Ms. Tartaglia did not request your assistance; you told Mrs. Davidoff to "Shut up, and mind your business." When I told you that "Mrs. Kellett had asked the building principals to accept any teacher that reported to the building to remain there." However, you took upon yourself to contact Human Resources/Personnel Department and had Mr. Rojas speak with Mrs. Tartaglia. Mrs. Tartaglia had to report to School No. 15 upon your insistence.

Mr. Harvell, you are an "Art" teacher, stay in your job description and that's the only certification you have.

I thank you for your cooperation in the future. [CP-9]

When Santana was asked why she wrote the third paragraph in CP-9 she said:

Well, Mr. Harvell felt that he was my Vice Principal and that he was not employed as an art teacher, and that's not his domain. And that he was there to assist me with my staff and with things in the building.

And when it came to doing the art, there wasn't anything really being done. [4T25]

Melissa Gencarelli

7. Melissa Gencarelli had been a language arts teacher in School No. 11 for eight years through the 2010-2011 academic year teaching grades five through eight (2T75-2T76). In the 2009-2010 school year, she taught seventh and eighth grades (2T80). Santana testified on direct examination that Gencarelli taught fifth grade in 2009-2010 (4T29, 4T30), but on cross-examination she said Gencarelli taught seventh or eighth grade that year (4T110). Santana's testimony on that point is unreliable. I credit Gencarelli's testimony.

On August 17, 2010, Gencarelli received her official classroom assignment for 2010-2011 which assigned her to fifth grade in Room 20 (CP-15). Gencarelli knew that teacher Denise Gibson was also assigned to the fifth grade in Room 20 (CP-15) and realized a conflict existed, because there was only one fifth

grade (2T79). She also realized that such a move would create a vacancy for seventh and eighth grade.

Having received CP-15 and aware of the vacancy created in seventh and eighth grade, Gencarelli sought Harvell's assistance to find out why she was being moved. Gencarelli expected Harvell to contact the Administration to find out why this was happening. She suspected Santana wanted her out of the building (2T79-2T81).

On September 1, 2010, Harvell and Gencarelli spoke to Santana about the assignment. Santana first told them that Gencarelli would be transferred. Gencarelli wanted to know why she was not given a plan or roll book or other materials usually provided on the first day (1T62-1T63). In response to Gencarelli's concerns, Santana explained that since two teachers were assigned to fifth grade and the other teacher (Ms. Gibson) had more seniority, Gibson would get the plan and roll books for them to share (4T31, 4T115). Santana directed Gencarelli to a sixth grade classroom where she stayed for two to three weeks before she returned to the fifth grade classroom to which she was assigned (2T84-2T86).

As a result of Gencarelli's problem and a number of assignment issues occurring at School No. 11, Harvell contacted Louis Rojas, the District's Director of Labor Relations. On September 6, 2010, Harvell sent Rojas a lengthy e-mail describing the assignment issues and criticizing Santana for failing to

follow certain District assignments and for taking other actions (CP-8; 1T64). Rojas responded by e-mail on September 7, 2010 telling Harvell he would have Assistant Superintendent Kathy Kellett address his concerns (CP-8; 1T64-1T65).

Shortly after receiving Rojas' response, Harvell met with Kellett and explained the issues and the problems with Santana. Kellett came to School No. 11 and resolved several issues but not Gencarelli's situation (1T66). On September 26, 2010, Harvell sent Kellett an e-mail recognizing some progress but criticizing Santana for acting contrary to District directions and policy. The e-mail alerted Kellett to Gencarelli's situation, noting that Santana refused to assign her a classroom (CP-10; 1T77). Harvell discussed Gencarelli's situation with Kellett again, but the District took no further actions to change Gencarelli's situation, and she remained co-teaching fifth grade for the 2010-2011 school year (1T77-1T78).

Gencarelli testified that on several occasions, in front of both teachers and students, and often with a screaming voice, Santana said "remember, Ms. Gencarelli, you're not the teacher" (2T88). On cross-examination Santana was asked if she (Santana) told Gencarelli that she (Gencarelli) was not the primary teacher in the fifth grade, and that she (Gencarelli) was not going to get the grade and record books because she was not the primary teacher. Santana responded "that is incorrect" (4T114-4T115). I

do not credit Santana's response. She previously testified that she gave those books to the more senior teacher (Ms. Gibson) (4T31, 4T115), who she (Santana) considered the lead teacher, and she (Santana) knew Gencarelli was not happy with the result (4T116). It appears consistent with Santana's handling of the situation, that she would remind Gencarelli that she was not the lead teacher in the fifth grade. Consequently, I credit Gencarelli that Santana told her she was not the teacher.

As a result of her assignment and the comments made by Santana, Gencarelli did not feel Santana welcomed any further discussions about her (Gencarelli's) situation and she (Gencarelli) turned to Harvell for assistance (2T89-2T90). After discussing the matter with Harvell, Gencarelli authorized him to file a grievance on her behalf (1T95-1T97, 2T88, 2T90).

On October 5, 2010, Harvell filed a grievance with Santana on behalf of Gencarelli alleging several contract violations. The grievance noted violations of contract and law stating that:

. . . on September 1, 2010 contrary to documentation approved by the State appointed Superintendent you [Santana] refused to notify Ms. Gencarelli of her class, subject and room assignment or provide her with a schedule, a planbook, a rollbook and other materials required for teaching [CP-14].

The grievance sought access to information, resources and materials Gencarelli needed for effective teaching.

Santana issued her response to the grievance to Harvell on October 13, 2010 (CP-16). She said the District made the assignment and she was following procedure. She disputed Gencarelli's allegation that she was denied access to anything at the school. Santana claimed she suffered no harm. Santana concluded her remarks to Harvell in CP-16 stating:

Again, Mr. Harvell, allow your colleagues to voice themselves and don't "self-appoint" yourself to their situation. Let them communicate on their own.

Santana testified that the reason for that statement to Harvell in CP-16 was that she had already had a conversation with Gencarelli about the matter and she thought the issue was resolved (4T32). I do not credit her testimony. Santana did have a conversation with Gencarelli over her assignment and the plan and record books, but she knew Gencarelli was unhappy with the results (4T116). Santana's explanation relied in part upon Gencarelli's 2009 verbal request to transfer out of School No. 11 because of a prior incident. But that request was not in writing and had no relationship to the pertinent facts of this case (2T95-2T96). Santana did not appear to be a naive witness or school principal. She knew Gencarelli's situation was a problem and, as I have found, she was reminding Gencarelli she was not the lead teacher in the classroom. I find Santana didn't write that statement to Harvell in CP-16 because of her discussions

with Gencarelli, she wrote it in an effort to stop Harvell from taking action on behalf of employees in the unit.

Carmen Benjamin

8. Carmen Benjamin has been employed by the District for 14 years as a social studies teacher teaching grades six through eight almost entirely in School No. 11 (2T6). Beginning in year 2000, she requested an accommodation to teach on the first floor, because she cannot go up and down stairs due to a medical condition (2T7). In 2009, Benjamin requested Harvell's assistance in getting the accommodation from Santana. She (Benjamin) also sought assistance from Assistant Superintendent Barrios (2T8, 2T9). Social studies for the upper grades is usually taught on the third floor in School No. 11 but, after getting assistance from Harvell and the Administration, Benjamin was granted the accommodation for the 2009-2010 school year (2T9).

At the end of the 2009-2010 school year, Santana requested Benjamin's transfer to another school for the 2010-2011 year, because she did not believe she could provide Benjamin her accommodation. But during the summer of 2010, Benjamin received notice from the District that she would be teaching social studies to the upper level classes in School No. 11. On the first day of school, September 1, 2010, however, Santana told Benjamin she would be teaching first grade. Benjamin taught

first grade for about two weeks, and, then, on September 15 or 16, 2010, Santana directed Benjamin to teach social studies to the upper grades on the third floor. Benjamin told Santana that she could not go up to the third floor and would seek the District's involvement if necessary. Santana told her to go to the District's Human Resource Department at that point (2T10-2T13, 4T36, 4T79). Santana denied telling Benjamin to go to the Human Resource Department (4T85). I credit Benjamin's testimony. Santana's recollection of events is not reliable.

After her conversation with Santana and before leaving the school, Benjamin contacted Harvell and asked for his assistance in the matter (2T13-2T15). Harvell and Benjamin first met with Santana in the first floor hallway but moved into or next to a teachers lounge (1T139, 4T12).

Harvell began the discussion asking Santana to grant Benjamin's accommodation (1T84). Santana characterized the meeting at first as being a nice, calm discussion (4T11), but she insisted there was nothing she could do based upon directives from the Administration (1T84, 4T11-4T12). Harvell suggested they did not need to involve Central Administration (1T85).

Harvell had copies of Benjamin's doctor's notes in his hand and while facing Santana he raised them up with one hand to show Santana and pointed to them with his other hand (1T87, 1T141). Santana testified that Harvell raised the documents right in

front of her face, waving the documents in front of her face and touching her nose in the process. Santana said she felt intimidated by Harvell's actions (4T12, 4T87-4T88). Harvell denied putting the documents into Santana's face (1T88). Benjamin testified that Harvell held the document in one hand and pointed to and/or touched them with his other hand. She said Harvell never put the documents into Santana's face, and she said Harvell did not touch Santana (2T22-2T24).

I credit Harvell and Benjamin. They testified about one month apart but consistently. Santana on direct examination said nothing about being touched by the documents and actually held up a piece of paper as an example about four inches from her face (4T12). But on cross-examination Santana, for the first time, said she was touched by the papers (4T87, 4T88). Her subsequent reprimand of Harvell (CP-11), said he shoved the papers "in front of my face", it did not say he touched her face. Santana's testimony regarding this matter is unreliable.

On September 16, 2010, Santana issued Harvell the following reprimand regarding their exchange concerning Benjamin:

Please be advised, I was appalled when we were having a "calm" discussion in the First Floor Teacher's Lounge in the presence of Ms. Carmen Benjamin, and you took her physician's notes and shoved them in front of my face. Remember, you are an "Art" teacher, you answer to me, I don't answer to you. I find your conduct unbecoming, disrespectful and will not tolerate it.

Please maintain your self-control and don't allow your emotions to take over.

I expect a change in your behavior.

I thank you. [CP-11].

Harvell denied being disrespectful to Santana, he said he spoke to her in a calm voice but acknowledged pleading with her to deal with the issue themselves (1T88). Harvell even acknowledged that Santana's tone was not elevated, and he agreed they were having a "calm discussion" (1T89). I credit Harvell's explanation of CP-11 and find he was neither disrespectful to Santana, nor did he shove the papers into her face.

Since the discussion between Harvell and Santana did not resolve Benjamin's situation, Santana directed her to "swipe out" of School No. 11 and go speak to Assistant Superintendent Kellett about the matter. Kellett resolved the issue directing Santana to allow Benjamin to teach social studies to the upper level classes on the first floor (IT155, 2T24-2T25, 2T35).

On October 4, 2010, Harvell filed a grievance with Santana on behalf of Benjamin (CP-12) alleging Santana violated J-1 by directing Benjamin to report to the third floor and refusing to honor her medical accommodation. The grievance sought to eliminate certain conduct by Santana. Benjamin fully supported the Association's assistance and involvement in resolving her issues (2T26).

On October 12, 2010, Santana sent Harvell a letter (CP-13) in response to CP-12. She said she takes directives from Central Office not from an Association Representative; she said Benjamin was told to submit doctor notes to the Administration and she denied directing Benjamin to swipe out. Santana concluded CP-13 with a remark similar to the one she included in CP-16, her response to Gencarelli's grievance. In CP-13 she wrote:

Mr. Harvell remain in your position which is "Art" teacher at School No. 11. Do not "self-appoint" yourself to situations that your colleagues would rather handle themselves.

No evidence was presented to suggest that Benjamin wanted to handle her situation herself. Quite the contrary, Benjamin testified she wanted the Association's and Harvell's assistance (2T26). I credit her testimony.

Daria Canta

9. Daria Canta has been a teacher at School No. 11 for eight years mostly teaching second or third grade (2T41-2T42). She knows Harvell as the Association's building representative and understood she could seek his assistance concerning terms and conditions of employment (2T43).

On or about July 28, 2010, Canta received a letter from Santana assigning her (Canta) to third grade for the 2010-2011 school year (CP-21). Subsequently, on or about August 17, 2010, Canta received a letter from Superintendent Evans assigning her

to grades one and two to teach math for the upcoming year (CP-18). Prior to the beginning of school, Canta asked Santana which assignment she should follow. Santana directed her to teach third grade (2T45). On cross-examination Santana was asked if she told Canta to teach third grade, and Santana claims she told Canta she would get back to her on that issue once she met with the Administration about the reorganization (4T98-4T99). I do not credit Santana's testimony on that point. Santana acknowledged she knew Canta moved into the third grade classroom and that the custodian assisted in the move (4T100). Santana is a forceful principal with strong control of her school. It is not believable that a teacher would be moving from one classroom to another without Santana's permission. I found Santana's testimony intentionally evasive on this point and credit Canta's testimony that Santana directed her to move into third grade. Canta proceeded to set up her third grade classroom for the new school year by moving her teaching aides from second grade to third grade (2T45-2T46). Canta taught third grade for about one week when Santana notified her she needed to teach second grade as CP-18 and Assistant Superintendent Kellett had directed (2T47, 4T47). Canta didn't object to the reassignment at that point (4T49).

When Santana told Canta to move to second grade she (Santana) also told her she (Canta) would receive a second letter

reassigning her to third grade (2T47). Santana denied telling Canta there would be another letter (4T101). I credit Canta's explanation of that discussion. Santana has not been a reliable witness.

When Santana told Canta she had to teach second grade, the directive was immediate and Canta had no time to move her materials from the third grade to the second grade classroom. Santana told Canta "we will move your things again into room 2" (4T101), but Canta remained in the second grade room for the remainder of the year and was never able to move all of her materials out of the third grade room (2T48, 2T68-2T70, 4T100-4T101).

Canta was unhappy about her situation. She felt inconvenienced "teaching out of two rooms" (2T49) and considered it unfair that Santana had placed her in that situation (2T51). As a result, Canta asked Harvell for his assistance to deal with the matter. Canta authorized Harvell to file a grievance on her behalf (2T49, 2T51-2T52, 2T55). Canta did not object to Harvell's involvement, and never told Santana that she wanted to try to work it out with her (Santana) alone, without Harvell's assistance (2T56).

On October 14, 2010, Harvell filed a grievance with Santana on Canta's behalf alleging contract violations for directing her

to immediately move from third to second grade. The grievance sought action to remedy Cantá's situation (CP-17).

Santana responded to CP-17 on October 29, 2010 (CP-19). She noted that Kellett had directed her to change Cantá's assignment, and she argued that Cantá had seemed pleased with the change.

Near the end of CP-19 Santana told Harvell,

Again, Mr. Harvell, when you "self-appoint" yourself to protect their rights you create trials and tribulations for everyone - - especially your colleagues.

Cantá was upset with Santana's remarks in CP-19 which prompted her to respond in writing. On November 2, 2010, Cantá issued CP-20, her response to CP-19. In CP-20, Cantá stated she filed her grievance because of the lack of cooperation and respect from Santana regarding her teaching assignment and classroom moves.

10. None of the grievances discussed above, CP-12, CP-14 and CP-17, were processed to arbitration (1T160).

ANAYLSIS

The charges in this case raised several broad issues. First, did the District discriminate against Harvell because of and to discourage him in his exercise of protected conduct and/or, secondly, did the District retaliate against, interfere with, restrain or coerce Harvell in the exercise of his protected conduct by the issuance of the reprimands in CP-9 and CP-11. Both of these issues implicate 5.4a(3) allegations; and third, did the

District interfere with and discourage Harvell in his exercise of protected conduct by the language included in Exhibits CP-13, CP-16 and CP-19 in response to the grievances filed on behalf of Benjamin, Gencarelli and Canta, an independent 5.4a(1) allegation.^{4/} I find that the District violated the Act in each circumstance as detailed below.

First, despite arguments presented by the District in its post-hearing brief and reply brief, this case is not about the merits of the grievances Harvell filed on behalf of Benjamin, Gencarelli or Canta, it is about Santana's response to those grievances and the reprimands Harvell received. Similarly, this case is not about whether Tartaglia should have reported to School No. 11 or School No. 15, but about whether CP-9 was issued in response to Harvell's exercise of protected conduct.

In its reply brief the District spent considerable time criticizing the Associations recommended findings of fact. I did not rely on those recommendations, I found the facts as contained in my Findings of Fact section. The District also argued that the discussion with Santana, Harvell and Benjamin leading to CP-11 occurred in a small room which it contends supports an inference that Harvell's hand movements lead to inappropriate and intimidating behavior. I found, based primarily on comparing

^{4/} The charges had also alleged Santana refused to process the grievances, a 5.4a(5) violation, but that allegation was withdrawn and will not be considered.

Santana's direct and cross-examination, that Santana embellished the degree of Harvell's actions, and that he did not touch her with the papers.

The District also criticized Harvell for, in its opinion, causing room reassignments and Kellet's involvement in assignments. But this case is not really about the room reassignments, its about the reprimands Santana issued to Harvell, CP-9 and CP-11, and about the responses to the grievances he filed. Even if Santana thought she had resolved the matters involving Benjamin, Gencarelli and Canta with each individually and she (Santana) thought their grievances lacked merit, that did not justify her intimidating remarks to Harvell in the grievance responses.

The 5.4a(3) standard was established by the Commission and the Court in Bridgewater Tp. v. Bridgewater Public Works Assn, 95 N.J. 235 (1984). 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 5.4a(1) standard was established by the Commission in New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421, 422-423 (¶4189 1978); and repeated in New Jersey

Sports and Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 2 550, 551 note 1 (§10285 1979) and provides:

It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification. [5 NJPER at 551, note 1]

In Commercial Tp. Bd. Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (§13253 1982), aff'd 10 NJPER 78 (§15043 App. Div. 1983), the Commission held that where an employer's conduct deliberately attempts to restrain employee participation in protected activity, it independently violates subsection 5.4(a)(1) of the Act. It further reiterated that proof of actual interference, intimidation, restraint, coercion or motive is unnecessary to prove an independent a(1) violation. The tendency to interfere is sufficient. UMDNJ-Rutgers Medical School; Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (§17197 1986).

The Reprimands

Santana reprimanded Harvell in CP-9 over the incident involving Tartaglia and Davidoff. She reprimanded him in CP-11 over the Benjamin discussion alleging he shoved papers in her face. The Benjamin incident was specifically alleged in the charge. Since the facts of the Tartaglia/Davidoff matter appear to have

been fully and fairly litigated in this case I consider both matters properly before me for consideration. Commercial Tp. Bd. of Ed.

In CP-9 Santana did not just scold Harvell for what she believed he said to Davidoff, she criticized him for his actions in his role as an Association representative. Her actions violated both 5.4a(3) and independently a(1) of the Act. Her criticism of his efforts in reaching out to the personnel office and speaking with Tartaglia were meant to intimidate and interfere with his efforts as a union representative. Her remarks in CP-9, that he self appointed himself and that he stay in his job description, and her testimony that he was not her vice principal was evidence of her hostility toward him because of his exercise of protected conduct. See Black Horse Pike Reg. Bd. Ed., P.E.R.C. No. 82-19, 7 NJPER 502 (¶12223 1981).

The District, in its post-hearing brief, argued that Santana had a free speech right to express her opinion about Harvell. Indeed, the Commission recognized in Black Horse Pike that both labor and management could criticize one another, but there were limitations. The Commission explained:

A public employer is within its rights to comment upon those activities or attitudes of an employee representative which it believes are inconsistent with good labor relations, which includes the effective delivery of governmental services, just as the employee representative has the right to criticize those actions of the employer which it believes are

inconsistent with that goal. However, the employer must be careful to differentiate between the employee's status as the employee representative and the individuals coincidental status as an employee of that employer (citations omitted).

When an employee is engaged in protected activity the employee and the employer are equals advocating respective positions, one is not the subordinate of the other. [7 NJPER at 503]

The Commission expanded on the employers limitation emphasizing:

The Board may criticize employee representatives for their conduct. However, it cannot use its power as employer to convert that criticism into discipline or other adverse action against the individual as an employee when the conduct objected to is unrelated to that individual's performance as an employee. To permit this to occur would be to condone conduct by an employer which would discourage employees from engaging in organizational activity. [7 NJPER at 504]

Having already found that the facts did not support Santana's claim that Harvell told Davidoff to "shut-up", applying Black Horse Pike to CP-9, I find that Santana's criticism of Harvell's actions as a union representative was also the basis upon which she scolded him for getting involved in Tartaglia's school placement. Santana's criticism, thus, crossed the line into taking action against Harvell for conduct unrelated to his performance as an employee. Accordingly, the issuance of CP-9 violated both 5.4a(1) and (3) of the Act. These facts are similar to the facts in several cases wherein the Commission found 5.4a(1) and (3) violations when union representatives were disciplined for conduct

(protected conduct) unrelated to their performance as employees. Irvington Bd. Ed., P.E.R.C. No. 2009-48, 35 NJPER 67(¶26 2009); Florham Park Bd Ed., P.E.R.C. No. 2004-83, 30 NJPER 230(¶86 2004); Lakehurst Bd Ed., P.E.R.C. No. 2004-74 30 NJPER 186 (¶69 2004); Orange Bd Ed., P.E.R.C. No. 94-124 20 NJPER 287 (¶25146 1994).

The result regarding CP-11 is the same. Santana was obviously unhappy with Harvell's passionate advocacy on behalf of Benjamin. Santana accused him of touching her with doctor's notes he was showing her. If the evidence supported a finding that Harvell intentionally touched Santana with the notes and/or intentionally waved them or shoved them at her to harass and intimidate her, such action would not be protected. But the record does not support that he shoved them in her face or touched her with those documents. He may have been moving them while he showed them to her, but the record does not support that he was disrespectful or unprofessional toward Santana. Given the fact that Santana's attempts to transfer Harvell in the summer of 2010 was not supported by the Superintendent, the Tartaglia/Davidoff incident, and his vigorous efforts on behalf of Benjamin, Gencarelli and Canta, I find the reprimand in CP-11 was issued because of Harvell's exercise of protected conduct and not because of his conduct or performance as an employee. Thus. the issuance of CP-11 violated 5.4a(3) of the Act.

The Grievance Responses

Filing grievances on behalf of employees is one of the most significant exercises of protected conduct. See Lakehurst Bd. Ed. When engaging in that conduct union representatives have the full protections envisioned by Black Horse Pike.

An employer representative may obviously deny a grievance, disagree with its allegations, criticize its filing, but cannot harass or intimidate the union representative and/or the affected employee(s)/grievant(s) for filing the grievance. Santana had the right to deny the grievances filed on behalf of Benjamin, Gencarelli and Canta regardless of whether the grievances and the denials had merit. Since the denials did not directly lead to any discipline for Harvell or the grievants, I cannot find the denials violated 5.4a(3) of the Act.

Santana's "self-appoint" sentences in each denial letter, however, independently violated 5.4a(1) of the Act. Those sentences had the tendency to interfere with Harvell's exercise of protected conduct, not just because the evidence showed that each grievant authorized him to file the grievance, but also because even if he did "self-appoint", it was his right and responsibility as a union representative to take such action when it appeared warranted. That part of Santana's remark - telling Harvell to let the employee communicate on her own - had an intimidating effect on both Harvell and the employees which in turn had the tendency to

chill their exercise of protected conduct. Black Horse Pike.

Similarly, telling Harvell to remain in his Art teacher position is a not too subtle directive that he should refrain from taking action on behalf of employees which is a protected right under the Act. Such language violated the Act and must not be repeated.

CONCLUSIONS OF LAW

1. The District/Santana violated 5.4a(1) and (3) of the Act by issuing reprimands (CP-9 and CP-11) to Association Vice President Calvin Harvell because of his exercise of protected conduct.

2. The District/Santana violated 5.4a(1) of the Act by including language in grievance denials (CP-13, CP-16 and CP-19) which had the tendency to interfere with Harvell's and certain employees' exercise of protected conduct.

3. The District/Santana did not violate 5.4a(1) or (3) of the Act by denying the grievances.

RECOMMENDATION

I recommend that the Commission ORDER:

A. That the District - particularly Principal Paula Santana -
- 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 reprimanding Association Vice President Calvin Harvell for the exercise of protected conduct.

2. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by including language in grievance denials criticizing Harvell for filing grievances on behalf of employees.

3. Discriminating in regard to the 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, particularly by reprimanding Association Vice President Calvin Harvell for engaging in conduct protected by the Act.

B. That the Respondent take the following affirmative action.

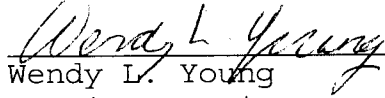
1. Remove and expunge certain reprimands, namely CP-9 and CP-11, from Calvin Harvell's personnel file and refrain from considering or relying upon those documents for any reason.

2. Direct Principal Paula Santana to cease criticizing Association representatives for filing grievances on behalf of employees the Association represents.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix A. Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and 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.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

C. That the allegation that Santana's grievance denials violated 5.4a (1) and (3) of the Act be dismissed.


Wendy L. Young
Hearing Examiner

DATED: August 17, 2012
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 August 27, 2012.



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 reprimanding Association Vice President Calvin Harvell for the exercise of protected conduct.

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 including language in grievance denials criticizing Harvell for filing grievances.

WE WILL cease and desist from discriminating in regard to the 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, particularly by reprimanding Association Vice President Calvin Harvell for engaging in conduct protected by the Act.

WE WILL remove and expunge certain reprimands, Exhibit CP-9 and CP-11, from Calvin Harvell's personnel file and refrain from considering or relying upon those documents for any reason.

WE WILL direct Principal Paula Santana to cease criticizing Association representatives for filing grievances on behalf of employees the Association represents.

Docket No. CO-2011-177

Paterson State Operated School District
(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