

H.E. No. 2012-6

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

In the Matter of

NEWARK STATE OPERATED SCHOOL DISTRICT,

Respondent,

-and-

Docket No. CI-2009-021

ANNETTE ALSTON,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Newark State Operated School District did not violate the New Jersey Employer-Employee Relations Act by withholding the increment of teacher Annette Alston. The Charging Party alleged that the District took that action in response to Alston's exercise of protected conduct, particularly of an event that occurred one year before Alston was working for the principal who recommended her increment be withheld. The Hearing Examiner held that there was insufficient evidence from which to conclude that the principal's decision was based upon that event or any other union activity. The Hearing Examiner also concluded that the District was not required to explain the rationale of certain other events and he could not draw a negative inference therefrom because the Charging Party had the initial burden to prove how those events were based on union animus which the Charging Party failed to prove.

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,  
The Newark Public Schools Office of the General Counsel  
(Arsen Zartarian, Deputy General Counsel, of counsel)

For the Charging Party,  
Oxford Cohen, P.C. attorneys  
(Sanford R. Oxford, of counsel)

HEARING EXAMINER'S REPORT  
AND RECOMMENDED DECISION

On December 2, 2009, Annette Alston (Charging Party) filed an unfair practice charge with the New Jersey Public Employment Relations Commission (Commission) alleging that the Newark Public Schools (now the Newark State Operated School District) (Respondent or District) violated subsections 5.4a(1) and (3)<sup>1/</sup>

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<sup>1/</sup> These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (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  
(continued...)

of the New Jersey Employer Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act). The Charging Party alleged that the District withheld her increment for the 2008-2009 school year in retaliation for her exercise of activities protected by the Act. The Charging Party seeks restoration of her increment for the year in question and an opportunity to transfer to another school.

A Complaint and Notice of Hearing (C-1)<sup>2/</sup> was issued on June 9, 2009. The District filed an Answer (C-2) on June 22, 2009 denying the allegation and raising certain affirmative defenses.

Hearings were conducted on August 25, 2010, February 3 and August 17, 2011.<sup>3/</sup> Both parties filed post-hearing briefs by October 24, 2011.

Based upon the entire record, I make the following:

FINDINGS OF FACT

1. Annette Alston has been employed by the District as a tenured elementary teacher for over twenty years, beginning her employment in 1986 (1T28). Alston first taught at the Quitman Street Community School, but eventually moved to the Newton

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<sup>1/</sup> (...continued)  
act."

<sup>2/</sup> "C" refers to Commission exhibits. "J" designates exhibits jointly submitted by the parties. "CP" refers Charging Party's exhibits and "R" refers to Respondent's exhibits.

<sup>3/</sup> The transcripts will be referred to as 1T, 2T and 3T, respectively.

Street School where she was employed from February 1994 through the 2006-2007 school year teaching mostly fifth or sixth grade (1T28, 1T115).

Alston had a good work history at the Newton School. Her observation reports and annual evaluation reports covering the 1999-2000 through the 2006-2007 school years at Newton reflect nearly all satisfactory or proficient markings from the vice-principal or principal (Exhibits CP-1-CP-8; 1T40-1T69).

2. The Newark Teachers Association (NTA) is the majority representative of all school nurses employed by the District. Even though she is a teacher whose job title is represented by a different labor organization, Alston became the vice-president and eventually president of the NTA. She was NTA president during the 2006-2007 and 2007-2008 school years (1T30-1T31).

3. As NTA president, Alston was involved in at least two matters involving two different nurses. Nurse Irene Spangler had issues with the District Administration over a period of years regarding her transfers amongst different schools. These problems continued into the 2006-2007 school year. Over the years preceding the 2007-2008 school year, Alston had to meet with Assistant Superintendent Joanne Bergamotto and her Assistant, Gus Della Pia, on several occasions on behalf of Spangler (1T31-1T34).

Hazelton Myers was a nurse at the Quitman School. In September 2006 an issue arose over whether Myers was expected to register students during her organization day or her staff development work days prior to the students starting school for the year. The collective agreement between the District and the NTA (Exhibit J-1) provides that nurses work three days prior to labor day as staff development days and have one organization day before students report for school. Article VII, Section 1D of J-1 provides those three work days shall be on a Tuesday through Thursday preceding Labor Day. Exhibit R-35 shows that for 2006, those three staff development days were August 29 through August 31, 2006. Events were pre-planned by the District for each of those days. The contract is silent about student registration.

Dr. Marguerite Leuze, the District's Director of Nursing at that time (Fall 2006), prepared R-35 and explained that the nurses were assigned to meet with her on those three days (August 29-31, 2006) and would not be in their assigned schools (2T8-2T9). She couldn't recall if Myers attended (2T13). Leuze indicated that no students report on organizational day, and nurses need to spend some time with their principals that day (2T20-2T21).

Alston acknowledged that nurses always assisted in student registration, but must also be given time to prepare their office (1T105). In late August 2006, Quitman School Principal

Jacquelynn Hartsfield asked Myers if she was ready to register students and Myers explained she was not supposed to register students at that time, she was supposed to organize her office. Hartsfield indicated she would check into that and contacted Assistant Superintendent Bergamotto. Hartsfield acknowledged they did not take registration that day (2T109, 2T178-2T179). Hartsfield considered Myers a good nurse and worker and she said the matter just worked itself out (2T109, 2T180).<sup>4/</sup>

Alston testified that Myers had called her in early September 2006 and said she was being required to do registration on her organizational day. Alston attempted to contact Hartsfield about the matter. They finally connected later that day and Alston described Hartsfield as disregarding a message that nurses were not required to do registration until the following day (1T34-1T35; 1T102-1T104). Alston and Hartsfield had not met at that point, but Alston felt Hartsfield was ignoring her calls and refusing to respond to the Myers matter (1T35-1T36).

The Myers matter apparently did resolve itself and no grievance was filed (1T113, 2T109-2T110). Hartsfield did not recall speaking to Alston regarding this matter and did not

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<sup>4/</sup> While testifying, Hartsfield guessed that the Myers event occurred in August or September 2007 (2T177-2T178), but it actually occurred in August-September 2006, the year before Alston transferred into the Quitman school (1T102; R-35).

recall the involvement of any union representative (2T110). I credit Hartsfield testimony.

4. In the Spring of 2007, Alston decided to transfer from the Newton School. She had a good relationship with Principal Willie Thomas, but was unhappy that the school was in its sixth year of a State evaluation and Newton had not met certain requirements for several years. Alston was also concerned about a pilot program that the school and the Newark Teachers Union (the NTU, the union that represented teachers including Alston) was planning to implement (1T71-1T72, 1T109-1T110).

Alston said she was told she would be moved to a school that was not under State evaluation (1T72). I credit her testimony. She filed her written request for transfer with Thomas rather than the Board's central office (1T111). Although she did not believe Thomas initiated where she would be placed (1T112), she was transferred to Quitman which was also under State evaluation. Alston accepted Quitman nevertheless, believing she was transferred there because of her language experience (1T90).

5. When they first met in September 2007, Alston alleges Hartsfield told her she was there (presumably meaning at Quitman) because she was an unsatisfactory teacher (1T81-1T82, 1T108). Alston questioned the veracity of the statement and Hartsfield allegedly responded, "I'll make my own assessment. I'll make my own judgment" (1T82). I credit Alston's testimony.

6. Alston was assigned to teach fifth grade when she was assigned to Quitman in September 2007. She apparently attended some staff development meetings in August-September 2007 to assist her in understanding the work requirements at Quitman. Alston thought it was difficult to see Hartsfield, who preferred teachers use email to communicate with her (IT120).

On October 11, 2007, Alston received her first "Areas Needing Attention/Improvement" (ANI) form from Hartsfield (Exhibit R-1). Exhibit R-1 noted Alston's bulletin board was not updated, instructional objectives were not written down for each discipline, the classroom was not "print rich", and student work was not updated monthly (1T123-1T126).

Alston acknowledged that she may not have hung-up as much class work as Hartsfield wanted, but she did hang-up student work (1T126). Alston explained that instead of talking to a teacher about what might be missing or lacking, Hartsfield used ANI forms as her primary form of communication (IT122). Hartsfield would use the form to "write-up" a teacher and develop a file (1T123). Even if a teacher produced what was missing or corrected an item, the ANI form was still placed in their file (1T124). Alston believed R-1 was in retaliation for her protected activity (1T127).

Hartsfield explained the purpose of R-1. She said the teachers knew what they were required to do and her expectations



because they were shared during the staff development meetings, before school started in September (2T26-2T28).

On October 12, 2007 Alston received another ANI (Exhibit R-2) from Hartsfield noting she (Alston) failed to come to a grade level meeting on time. Grade level meetings are (or at least then "were") scheduled for 2:05 p.m. R-2 noted Alston arrived at 2:25 p.m. Although Hartsfield said there is some leeway for allowing a teacher to arrive late, twenty minutes was too much (2T32). Alston acknowledged being late, but only five minutes and explained it was due to her other duties (1T129). She thought R-2 was retaliation for protected conduct (1T130).

Hartsfield gave Alston two ANI forms on October 15, 2007. Exhibit R-3 noted her students were noisy returning from lunch, and Exhibit R-4 noted her substitute plans had not been updated or placed in the main office. Hartsfield issued R-3 because she believed Alston's students were interrupting classes while walking through the building (2T33).

Alston acknowledged her students may have been noisy returning from lunch, but she believed she had one of the better behaved classrooms when walking through the school (1T131). With respect to R-4, Alston explained she updated her substitute plans and placed on file any missing plans on October 15 or 16, 2007 (1T132).

On October 18, 2007, Alston received another ANI form from Hartsfield (Exhibit R-5) noting Alston had failed to report to work on time on October 18, and had failed to sign the time book in the morning and afternoon on several days in October. Alston did not directly dispute R-5, but said she may have signed in at the wrong place (1T133).

7. Hartsfield performed her first classroom observation of Alston on October 20, 2007. The observation had been announced earlier (2T35). On November 2, 2007, Hartsfield issued Alston's Formative Teacher Observation Report (Exhibit R-6) which contained three proficient, six basic and six unsatisfactory markings, with an overall unsatisfactory marking.

Hartsfield explained that Alston only demonstrated a minimal understanding of the discipline, content and student misconceptions, and failed to talk about how individual students in her classroom learn (2T36-2T38). I credit her explanation of the document. Alston refused to sign R-6, but issued a written response on November 13, 2007 which is attached to R-6.

In her response, Alston criticized Hartsfield (and R-6). She said Hartsfield had no intention of providing formative, professional feedback; intends to make her (Alston) a target of derision; suggests she (Hartsfield) made summative conclusions about Alston and plans further discipline; was malevolent and did not make constructive comments and concrete suggestions. But

Alston did not directly refute the specific findings made by Hartsfield about her (Alston's) teaching ability.

8. Hartsfield required at least the classroom teachers at Quitman to maintain, update and produce for her periodic review, a "management book" which contained exams, student grades, attendance information, parent contact information and any other documents Hartsfield intended to review (1T140; 3T8, 3T22-3T23). Hartsfield generally prepares the management book as a binder in August and distributes them to teachers at separate grade level meetings before school started where she reviews the inserts with the affected teachers. The content of the books are different from grade to grade which is why they are reviewed separately at grade level meetings (2T54-2T55).

Hartsfield issued Alston ANI forms on November 21, 2007 (Exhibit R-7) and December 18, 2007 (Exhibit R-8). Exhibit R-7 alleged Alston had not submitted her management book on November 15, failed to submit math problem solving information and writing samples for October, and failed to submit intervention plans for students (2T55-2T57). Hartsfield explained that the management book contained a sheet with due dates for different forms and a place to record student rubric scores (2T57). Exhibit R-8 alleged Alston failed to submit her management book in October, November and December (2T58).

Alston and teacher Lynette Hillman-Loyd were the two fifth grade teachers at Quitman for the 2007-2008 school year (3T7, 3T9). Loyd, like Alston, received warning letters from Hartsfield that she had not submitted her management book for September through December 2007 and January 2008 (3T8-3T9). Both Alston and Loyd testified that Hartsfield did not give them a management book at the start of the year and that they did not receive their books until mid-January 2008 (1T140-1T141, 1T147; 3T9-3T10, 3T15-3T16, 3T24, 3T65-3T-66, 3T68-3T69, 3T74).

Alston elaborated that she was new to Quitman and Ms. Hartsfield's requirements in 2007 and had no idea what a management book was in the Fall of 2007 and had no idea that certain documents had to be submitted to Hartsfield by certain dates (1T139-1T140, 1T148). Alston explained that she did not question Hartsfield about the management book in November and December 2007 because she claims she never received R-7 or R-8 and Hartsfield did not raise the issue at grade level meetings in November and December (1T144, 1T146, 1T149-1T153). Alston explained that the management book was raised at the January grade level meeting at which time Alston and Loyd informed Hartsfield she had not given them the book. According to Alston, Hartsfield then gave them (Alston and Loyd) the book at the same time and explained how it worked (1T141, 1T147).

Loyd testified that after she received a "write-up" from Hartsfield for not submitting her management book in October, November and December, she told Hartsfield that she had not given Alston or herself (Loyd) a management book. Loyd explained that when she (Hartsfield) looked in her office, she found the two fifth grade management binders and handed them the books (3T23-3T34, 3T66, 3T69).

Hartsfield disputed Alston and Loyd. She testified that she gave Alston her management book in October 2007 (2T52-2T53, 2T55, 2T58, 2T153), but she (Hartsfield) did not have a receipt to prove it (2T139). Hartsfield claims she did not give Loyd her book at the same time, but she did not know when Loyd received it (2T155).

I credit Alston's and Loyd's testimony. Not only did they corroborate one another, but it is not plausible that Alston would have received R-7 and R-8 and taken no action to defend herself and find out what the management book was about. It seems more logical that Alston did not receive those documents and was unaware of the management book until mid-January 2008. Loyd's testimony that Hartsfield found the fifth grade management books in her office in January 2008 was not disputed. That is a believable explanation for why both Alston and Loyd didn't submit

the book in the fall of 2007. Consequently, I find that neither Alston nor Loyd had a management book until mid-January 2008.<sup>5/</sup>

9. Alston received two ANI forms from Quitman Vice Principal Cayce Hassell in January 2008 (Exhibits R-29 and R-30). On January 7, 2008, Hassell issued R-29 because despite giving verbal warnings, Alston was late in submitting attendance information and information for the monthly newsletter (3T80-3T81). Hassell issued R-30 on January 23, 2008 because Alston was twenty-five minutes late for a grade level meeting on January 22, 2008. Hassell issued R-30 because Alston had been late for the same meetings in the past (3T82).

Alston did not deny that she failed to complete the newsletter information referred to in R-29 (1T212), and she thought she was fifteen minutes late for the grade level meeting

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<sup>5/</sup> The District presented Exhibits R-37, R-38 and R-39, all ANI forms from the 2006-2007 school year noting Loyd's failure to complete her management book, or failure to submit the book on time to demonstrate a motive for her to testify against Hartsfield (3T32). The District also presented Exhibit R-41, an ANI form to Loyd from June 2008; Exhibit R-43, a memorandum to Loyd about information not submitted in the fall of 2009, and Exhibit R-36, the March 12, 2010 inefficiency charges against Loyd which may have been used to attack Loyd's tenure except for her retirement in June 2010, as a reason for Loyd's testimony against Hartsfield. Although all these documents were admitted into evidence, I found their value had minimal impact. I understand Loyd had a motive to testify against Hartsfield. But I credited her testimony about the management book in part because it corroborated Alston's, and in part because it was a viable explanation for why Alston and Loyd didn't submit any book in fall of 2007.

referred to in R-30 (1T213-1T214). I credit Hassell and the accuracy of R-29 and R-30.

On January 24, 2008, Hartsfield issued Alston a memorandum (Exhibit R-9) noting her (Alston's) behavior on January 8, 2008 had been unprofessional and unacceptable because of the manner in which Alston confronted Hartsfield regarding unsatisfactory lesson plans. Alston did not dispute the basis of R-9.

On January 28, 2008, Hartsfield issued Alston an ANI (Exhibit R-10) claiming her warning notices to students were not being submitted on time. Alston disputed the accuracy of R-10 (1T160). Hartsfield claimed Alston had not placed the notices in her mailbox (2T69). While Alston may have issued the notices to students on time, I credit Hartsfield that they were not also placed in her mailbox.

10. In February 2008, Alston received four ANI forms and four memoranda from Hartsfield, and one ANI form from Hassell. An ANI form dated February 4, 2008 (Exhibit R-11) from Hartsfield noted Alston failed to submit her management book on January 28, 2008. Alston did not recall receiving R-11 but said she had just recently received the management book and didn't have enough time to complete it (1T161-1T164). On February 4, 2008, Alston also received an ANI form from Hassell (Exhibit R-31) indicating that her management book had not been submitted on January 30, 2008, and that she had failed to submit information for attendance and

the newsletter. Hassell did not seem to know that Alston had only received her management book in January (3T83-3T84). Alston thought Hassell knew she (Alston) had just received her management book (1T216-1T217).

While Alston was certain that Hassell knew she (Alston) was a union representative and involved in union activities, Alston indicated that Hassell had not made any comments regarding her union activities (1T211). I credit that testimony.

Alston received a memorandum from Hartsfield on February 5, 2008 (Exhibit R-12) criticizing her for leaving four students unattended on January 24, 2008. Hartsfield warned Alston that similar behavior would result in discipline. Alston admitted she should not have left those students unattended (1T165-1T166).

Alston received ANI forms on February 10 and 15, 2008 (Exhibits R-13 and R-14). Exhibit R-13 stated Alston's report card scholarship books contained numerous errors. Alston did not deny it (1T167). Exhibit R-14 claims Alston failed to submit a program for Black History Month. Alston disputed the allegation (1T169).

Hartsfield notified Alston on February 19, 2008 (Exhibit R-15) that her progressive writing wall was incomplete and she was directed to update the wall by February 21, 2008. Hartsfield found that Alston's wall included work from October through December but should have been from September through January



(2T77-2T78). Alston did not remember receiving R-15 but disputed whether she had a "complete" writing wall posted. Alston claimed she always had writing posted, but did not say whether it included September through January (1T170-1T171).

On February 26, 2008, Hartsfield issued two memo's of concern to Alston, Exhibits R-16 and R-17. Exhibit R-16 noted that Alston was fifteen minutes late for a grade level meeting and came unprepared. It also warned her that further actions could lead to discipline. Alston did not remember receiving R-16 but did not deny the information contained therein. Exhibit R-17 accused Alston of insubordination for failing to follow Hartsfield's directive to move her class back upstairs and away from the cafeteria. It also warned of future discipline. Hartsfield testified that Alston's failure to take her class back upstairs disrupted the movement of other students into and out of the cafeteria (2T82-2T83). Alston did not remember receiving R-17 and said it would have taken ten minutes to get back to the classroom and then her students would have been late for lunch. She didn't remember not complying but did not deny she did not take her students back to their classroom (1T173-1T177). I credit Hartsfield testimony and R-17. While Alston may have been correct that it would take too long to get back to her class, then back to the cafeteria, it appears she did not follow Hartsfield's directive.

On February 27, 2008, Hartsfield issued Alston an ANI (Exhibit R-18) claiming she had not submitted lesson plans for February 25, 2008. Hartsfield explained those plans had been due by February 25, but had not been submitted by February 27 (2T85). Alston disputed that claim, calling it a lie (1T178). She testified she made sure they were submitted on time but never sought a meeting with Hartsfield to clarify the matter (1T179). I credit the veracity of both witnesses on this point, there is insufficient basis to conclude what happened with the lesson plans.

Alston also explained that Hartsfield knew, and teachers knew, that she (Alston) was an active union advocate engaging in activities either as NTA representative or assisting the NTU representative (1T180-1T182). But Alston also testified that she did not meet with Hartsfield during the 2007-2008 academic year in her capacity as a union representative, and Hartsfield never said anything to her (Alston) about her (Alston's) involvement in the Myers situation (1T182). I credit Alston's testimony.

11. Alston received two ANI forms in March 2008, one from Hartsfield (Exhibit R-19) and one from Hassell (Exhibit R-32). Exhibit R-19 dated March 12, 2008 noted that math problem solving documents and writing samples had not been submitted. Alston disputed that assertion (1T183). In Exhibit R-32 dated March 17, 2008, Hassell claimed Alston was late in bringing her students to

lunch. She testified this was not the first time (3T84-3T85). Alston did not dispute the assertion. (1T217).

12. On April 2, 2008, Alston was issued two documents, an ANI form from Hassell (Exhibit R-33) noting she (Alston) failed to submit math problem solving tasks and writing samples; and a memorandum from Hartsfield (Exhibit R-20), noting Alston had failed to submit math problem solving tasks. Alston did not remember receiving R-20 (1T184), and said she submitted the information sought in R-33, but offered it may have been a day late (1T219).

On April 14, 2008, Alston sent a letter to the District (Exhibit CP-11), requesting a transfer from Quitman for the 2008-2009 school year (1T88). That request was received by the Human Resources Department on May 1, 2008, and was referred to the School Leadership Team for determination. The request was eventually denied.

Hartsfield issued Alston an ANI form on April 18, 2008 (Exhibit R-21) noting her management book had not been submitted from October through April. Alston didn't recall R-21, but said she submitted her management book in late February or early March and would have said something about October if she received it (1T186-1T187). Since I found that she did not receive her management book until January 2008, I tend to believe Alston that

she did not receive R-21, and that she did submit her management book in February or March 2008.

On April 24, 2008, Hartsfield sent an identical memoranda to Alston (Exhibit R-22) and to Loyd (Exhibit R-40). Those memoranda said that they had been notified on April 14 to submit their management books to her (Hartsfield) on April 15 but had failed to follow her directive. The memoranda concluded they (Alston and Loyd) were insubordinate. Alston acknowledged she received R-22 (1T193), but did not say she submitted her management book in mid-April. She could only recall handing in the book in March (1T190). Alston recalled handing in her management book in March and not receiving it back from Hartsfield until May 30, 2008 or later (3T121-3T122; CP-13).

On April 25, 2008, Hassell issued Alston a memorandum (Exhibit R-34) for failing to properly manage student behavior at a performance that day. Alston remembered the incident and did not dispute the facts (1T221-1T222).

13. Alston was issued two ANI forms from Hartsfield in May. Exhibit R-23 was issued on May 7, 2008 noting Alston had failed to properly log out of the school's time keeping system on May 2, 5 and 6, 2008. Exhibit R-24 was issued on May 30, 2008 noting Alston had failed to submit her management book in May and previous months; failed to submit math problem solving information and failed to submit writing samples.

Alston acknowledged she may have missed logging out on the three days listed in R-23 (1T195-1T198). She testified, however, that she did submit her management book in March, and submitted the math and writing information (1T196-1T198).

14. Hartsfield issued Alston an ANI on June 16, 2008 (Exhibit R-25) noting she had not submitted her management book the entire year and failed to submit math problem solving information and writing samples. Alston contested all of those claims (1T198). I credit Alston that she did not receive her management book until January, and did submit her book in March, 2008.

Alston received an unsatisfactory Formative Teacher Observation (Exhibit R-26) from Hartsfield on June 16, 2008. Hartsfield noted numerous alleged failures by Alston in R-26. Hartsfield also issued Alston's Annual Teacher Evaluation Report on June 16, 2008 (Exhibit R-27). Although Alston received some "Basic" performance rankings, most of her rankings in R-27 and her overall ranking was "Unsatisfactory". Hartsfield's summary in R-27 provided:

Throughout the school year Ms. Alston has failed to submit documentation to monitor the progress of her students. She has failed to accurately reflect on her knowledge of content and pedagogical skills throughout the school year. Though there was a concentrated effort to implement differentiated instruction, walk-throughs showed consistent whole group instruction. Her areas of professional growth continue to remain in all

domains. Ms. Alston's PIP for the 2008-2009 reflects suggestions for professional growth. Additional support will continue to be provided next school year in the areas of literacy and math along with goals identified as a result of CAPA recommendations.

Results are not in for NJASK scores.

Hartsfield concluded R-27 with a recommendation that Alston's increment be withheld. A Professional Improvement plan for Alston was attached to R-27.

On June 20, 2008, Hartsfield sent Assistant Superintendent Bergamatto a recommendation to withhold Alston's increment (Exhibit R-28). Hartsfield based the recommendation on insubordination and unsatisfactory ratings.

15. Alston was a summer school teacher at Quitman during the summer of 2008. Her supervisor was Kimberly Santos. Santos issued Alston an evaluation for her summer work on July 25, 2008 (Exhibit CP-10). Alston received nearly all satisfactory ratings, and her overall rating was satisfactory.

On July 31, 2008, Acting State District Superintendent Kevin West notified Alston by letter that her increment for the 2008-2009 school year would be withheld due to her unsatisfactory performance in planning and preparation; classroom environment; instruction, and professional responsibilities (Exhibit CP-9).

#### ANALYSIS

The issue in this case is did the District withhold Alston's increment because of her exercise of protected conduct? This

case is not about whether Alston's increment should or should not have been withheld based upon Alston's teaching ability. If I find it was withheld in retaliation for protected conduct, an appropriate remedy will be provided. But if I find there was insufficient evidence to prove that the increment withholding was related to protected conduct then the charge must be dismissed without any further examination of the decision to withhold the increment. This is not the forum within which to review the viability of an increment withholding.

The Charging Party sought to support its case at least in part based upon what it argues the District did not explain. The Charging Party contends that the District did not explain: 1) why Alston was transferred to the Quitman School even though she sought to avoid schools that were being monitored; 2) how Alston could be a proficient teacher at the Newton School for so many years and immediately be so poorly evaluated at Quitman; 3) how Alston could receive such a poor evaluation at Quitman from Hartsfield in June 2008, and such a good evaluation at Quitman from Santos for summer school in July 2008; and 4) why Alston's transfer for the 2008-2009 school year was denied. In conjunction with its arguments regarding the inaccuracy of the ANI forms and the management book findings, the Charging Party seems to suggest that the District's failure to explain the above enumerated events creates an inference that it was motivated to

withhold Alston's increment by Alston's exercise of protected conduct.

As explained in the analysis below, I cannot draw that inference.

Under In re Tp. of Bridgewater, 95 N.J. 235 (1984), no violation will be found unless the charging party has proved, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both 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 anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The 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).

Both parties relied on the Bridgewater requirements to support their respective cases. The Charging Party argued it made its prima facia case of hostility and that the District failed to prove that it would have taken the same action (withholding Alston's's increment) absent her exercise of protected conduct. The District argued the Charging Party did not demonstrate hostility and that, nevertheless, it (the District) demonstrated Alston's increment would have been withheld based upon legitimate business reasons.

The Charging Party demonstrated the first two Bridgewater elements: Alston was engaged in protected conduct as the President of the NTA, and although Hartsfield did not know Alston was a union representative when she began work at Quitman in September 2007 (2T110), she learned of Alston's involvement

during the school year (2T211-2T212). The evidence, however, does not support a finding that Hartsfield was hostile toward Alston because of her involvement in union activity.

The primary focus of Alston's protected conduct in relationship to this case was the Myers incident which occurred in September 2006, a year before Alston was working at Quitman. Hartsfield recalled Myers had said she was not supposed to register students at a particular time, but she did not recall speaking to Alston about the matter, nor did she recall that a union representative was involved on behalf of Myers. I credited her testimony because Alston and Hartsfield spoke only briefly in 2006, no grievance was filed, and the matter appeared to be resolved quickly. Considering that Hartsfield did not know that Alston was a union representative when she began her employment at Quitman, and the time between the Myers incident and Alston's employment at Quitman, and noting Hartsfield made no statements about union activity, it is easy to believe that Hartsfield made no connection between the Myers incident and Alston. Consequently, I do not find that Hartsfield's relationship with Alston in the 2007-2008 academic year was influenced by or in reaction to the Myers event.

Eliminating the Myers event as a source of animus for Hartsfield does not end the examination of this case. The Charging Party alleged her transfer to Quitman, Hartsfield's

remark about why Alston was transferred there, the discrepancy between her two Quitman evaluations in 2008, and the disputes over the management book and certain ANI forms were evidence of animus.

Under the Bridgewater standards, the Charging Party has the burden of proof in the first instance to prove a prima facie case which includes hostility, before the burden shifts to the employer to show business justification for its actions. Here that means the Charging Party had to explain and prove that Alston's transfer to Quitman, the difference in her Newton and Quitman evaluations, and the difference between her regular year and summer school evaluations at Quitman were based upon and/or in reaction to her exercise of protected conduct. Unless that burden of proof was met, the District was not obligated to explain those events.

The problem with the Charging Party's case is that while the transfer and evaluation events raise suspicion, there is no evidence tying them to Alston's protected conduct. There was no evidence that Hartsfield or Bergamotto were involved in the decision to transfer Alston to Quitman, or even if Bergamotto was involved, there was no evidence she (Bergamotto) made a decision in reaction to Alston's exercise of protected conduct.

Similarly, in presenting the differences between the Newton and the Quitman summer evaluations and the regular Quitman

evaluation there was no direct evidence the regular Quitman evaluation was in reaction to Alston's protected conduct. Having dismissed the Myers incident as a possible source of animus, and having found that neither Hartsfield nor Hassell said anything to Alston about union activity and Alston did not meet with Hartsfield as a union representative during the 2007-2008 school year, I find there was no basis upon which to even infer that the differences in the various evaluations was based on Alston's union activity.

The alleged remark by Hartsfield about why Alston was transferred to Quitman, even if made, does not suggest Alston was transferred to Quitman because of her union activity, it suggests she was transferred there because of work related issues. Once again, there is insufficient evidence that Hartsfield in September 2007-even if she made the remark about why Alston was transferred there-was aware of Alston's protected conduct.

The Charging Party also criticized Hartsfield's use of ANI forms and questioned her apparent unwillingness to first discuss an issue with a teacher before issuing an ANI form. While Hartsfield's use of those forms may not be the best way to manage or interact with a professional staff, there was no evidence that Hartsfield treated other teachers differently than she treated Alston with respect to verbal communication or the lack thereof.

The testimony and issues concerning the management book provided the most pronounced dispute in this case. But even crediting Alston and Loyd, as I have, that they did not receive the books until January 2008, does not rise to the level of proving hostility toward the exercise of protected conduct. While I believe that several ANI forms and even R-26, R-27 and R-28, the actual recommendation to withhold Alston's increment, inaccurately suggest that Alston failed to submit her management book in September through December 2007 and several months in 2008, there is insufficient evidence to tie Hartsfield's management book allegations to Alston's protected conduct.

Hartsfield's testimony and ANI forms and observations regarding Alston's classroom teaching ability and failure to submit information and/or timely attend grade level meetings is corroborated to an extent by Hassell's actions and testimony. Hassell had no involvement in the Myers incident and there was no allegation she had any reason or basis to criticize Alston because of protected conduct. It appears that Hassell's criticisms of Alston were based upon her (Hassell's) own observation of or involvement with Alston in regard to her job related obligations and responsibilities.

Consequently, I conclude that the Charging Party did not prove hostility to Alston's protected conduct, and the burden of proof never shifted to the District.

Nevertheless, and despite the suppositions and the unanswered questions raised by the Charging Party, having reviewed all the evidence, I feel compelled to conclude that Hartsfield had numerous educational reasons to justify requesting Alston's increment be withheld even in the absence of her protected conduct, and I believe it's likely the District would have taken the same action based on the educational issues raised in her evaluation. Alston exhibited a number of instructional/educational problems. She acknowledged she should not have left students alone in a classroom; she failed to take her students back to their classroom as Hartsfield directed; she consistently arrived late to grade level meetings; she often failed to submit required information or documents and sometimes submitted them late; she sometimes arrived late and failed to properly sign out; and at times her students were noisy and misbehaved in the hallway or at an event.

Many of Hartsfield's criticisms of Alston concerned her work in the classroom. Her teaching methods, knowledge of subject content, designing coherent instruction and her ability to understand the needs, skills and interests of her students were all criticized. Ultimately, it is the Commissioner of Education, and not this Commission, that has the jurisdiction to determine the accuracy of and what weight to give to those criticisms. I merely conclude that there is insufficient evidence to prove that

those criticisms were based upon union animus rather than upon legitimate educational considerations.

Although, I appreciate the Charging Party's concern over Hartsfield's management style and her apparent misuse of ANI forms and the evaluation in criticizing Alston about the management book, based upon the above findings and analysis, there is insufficient evidence to conclude Hartsfield was acting in response to Alston's exercise of protected conduct. The charge must therefore be dismissed.

CONCLUSIONS OF LAW

The District did not violate 5.4a(1) and (3) of the Act by withholding Annette Alston's increment.

RECOMMENDATION

I recommend that the Commission ORDER that the Complaint be dismissed.



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Perry O. Lehrer  
Hearing Examiner

DATED: January 30, 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 February 10, 2012.