H.E. No. 2012-7

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

In the Matter of

CAMDEN COUNTY COLLEGE,

Respondent,

-and-

Docket No. CO-2011-293

CAMDEN COUNTY COLLEGE
ASSOCIATION OF ADMINISTRATIVE PERSONNEL,

Charging Party.

SYNOPSIS

A Commission Hearing Examiner finds that the Camden County College violated 5.4a(3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it issued a testing technician an annual performance review worse than any she had received in prior years, placed her on a 90-day probationary evaluation period without notice, and terminated her at the end of the probationary period. The College took these adverse employment actions shortly after the Camden County College Association of Administrative Personnel filed a grievance on her behalf challenging a one-day suspension she received for alleged misconduct. The Hearing Examiner found that this protected activity was a substantial, motivating factor in the College's actions.

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,
Brown & Connery. LLP
(Michael J. DiPiero, of counsel)

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

HEARING EXAMINER'S REPORT AND RECOMMENDED DECISION

On January 28 and December 28, 2011, the Camden County College Association of Administrative Personnel (Charging Party or Association) filed an unfair practice charge and an amended charge against the Camden County College (Respondent or College). The charge, as amended, alleges the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act), specifically 5.4a(1) and (3)[1/], when it issued testing

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

technician Veneka Pussewela an annual performance review worse than any she had received in prior years, placed her on a 90-day probationary evaluation period, and ultimately terminated and non-renewed her. On May 7, 2010, the Association had filed a grievance on Pussewela's behalf which challenged a one-day suspension she received for alleged misconduct. The grievance proceeded to arbitration.[2/] The Association alleges that this protected activity was a substantial, motivating factor in the College's actions.

On July 25, 2011, a Complaint and Notice of Hearing was issued (C-1).[3/] On August 5, 2011, the College filed an Answer denying the allegations and asserting that its actions were taken without regard to Pussewela's protected activity (C-2).

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."

2/ With the College's consent, I granted the Association's post-hearing request to amend the Complaint to withdraw language which suggested that the timing of the arbitration award was relevant to actions taken by the College.

3/ "C" refers to Commission exhibits received into evidence at the hearing. "CP", "R", and "J" refer to Charging Party's, Respondent's, and joint exhibits, respectively.

A pre-hearing conference was held on September 22, 2011. The hearing was held on December 5 and 7, 2011.[4] The parties submitted all post-hearing briefs by March 9, 2012. Based upon the record, I make the following:

FINDINGS OF FACT

Background

1. The College and the Association are, respectively, a public employer and a public employee representative within the meaning of the Act (1T9). They are parties to a collective negotiations agreement effective July 1, 2007 through June 30, 2012. The Association represents a unit of full-time professionals employed in administrative and technical positions. The unit employees are issued annual individual employment contracts stipulating professional title, salary, and placement on the salary guide (J-1).

2. The College's testing center administers placement testing, make-up testing, English as a second language (ESL) testing since 2006, and general education diploma (GED) testing since 2008. Many of the tests it administers are given online. The volume of work at the testing center has increased considerably over the years, but the number of staff has remained the same (1T103, 2T5-2T9).

4/ Transcript references to hearing dates are "1T" and "2T", respectively.

3. Pussewela began her employment with the College as a proctor. She was hired as a full-time testing technician in 2005. Pussewela's supervisor, Eve Highstreet, recommended her for the testing technician position after observing that she was a good proctor and learning that she was interested. Testing technicians administer tests, proctor tests, register people for tests, oversee the testing center, and ensure that tests are given properly and that all testing policies and procedures are followed. Testing technicians also have customer service responsibilities. They have significant contact with students, faculty, and administrators (1T46-1T48, 1T103-1T104, 2T5-2T7).

4. Pussewela was notified on November 19, 2010, that she was terminated, effective immediately, and would be non-renewed. Pursuant to Article 6 of the parties' agreement (notice requirements for non-renewal; severance pay) she remained on the payroll and received her full salary through July 31, 2011, which included one month's severance pay. She was paid for her accrued vacation time. Pussewela's health and prescription coverage continued through July 31, 2011 (CP-11; J-1; 1T56). In the 12.5 months between the date she was terminated and December 5, 2011 (the first day of the hearing in this matter), Pussewela was employed elsewhere for five months in a part-time position. As of December 5, 2011, she was unemployed (1T46-1T47).

5. Highstreet has been employed by the College as the Director of Testing for seven years. She oversees all of the College's testing services (2T4-2T5). Highstreet does not have any input into employee non-renewal decisions. She did not recommend to her supervisor or anyone else at the College that Pussewela not be renewed, nor was she consulted on the matter (2T41-2T42, 2T68, 2T84-2T85).

6. In 2010, Sharon Weddington was employed by the College as the Vice President for Enrollment and Student Services. She supervised the Dean of Enrollment Services, who supervised Highstreet (2T76-2T77).

7. Roseanne Coston-McHugh has been employed by the College as the Executive Director of Human Resources for more than six years (2T93).

Before the Grievance

8. As the volume of work at the testing center increased, Highstreet began to notice a curtness and abruptness in the way that Pussewela interacted with people (2T9).

9. In Pussewela's 2007 performance review, Highstreet gave Pussewela a rating of "average" in the customer focus category and commented, in pertinent part:

> Veneka is always in a good mood at work which creates a pleasant and upbeat feeling in the office. She continues to improve her ability to communicate policies and procedures to students and the faculty. All of her colleagues enjoy working with her [CP-4].

Highstreet gave Pussewela an overall rating of "above average" on this review (CP-4).

10. In Pussewela's 2008 performance review, Highstreet gave Pussewela a rating of "average" in the customer focus category and commented, in pertinent part:

> Veneka has an upbeat and pleasant attitude at work which creates a nice working atmosphere for everyone around her . . . Veneka has had to handle some difficult situations with students, faculty, and parents, and she has always been professional and helpful [CP-5].

Highstreet gave Pussewela an overall rating of "average" on this review (CP-5).

11. Highstreet wrote in both Pussewela's 2007 and 2008 performance reviews that Pussewela needed to communicate more effectively with management by informing Highstreet when she had completed tasks and keeping Highstreet apprised of issues that arose in the testing center during her absence (CP-4, CP-5). In Pussewela's 2009 performance review, Highstreet noted that Pussewela had improved communicating with management (CP-6).

12. In May 2009, Pussewela's relationship with Highstreet became strained after Pussewela had a work-related conflict with Elizabeth Rodriguez, a part-time proctor. Highstreet had hired Rodriguez, who was her personal friend. Highstreet began treating Pussewela differently, in a negative way, beginning in May 2009 (1T81-83, 1T85, 1T108, 1T116).

13. In Pussewela's 2009 performance review, Highstreet gave Pussewela a rating of "average" in the customer focus category, and commented:

> Veneka's upbeat and pleasant attitude at work creates a nice working environment for everyone that works around her [CP-6].

Highstreet gave Pussewela an overall rating of "average" on this review (CP-6).

She also wrote:

> As the testing center grows, it is essential for (Pussewela) to continue sharpening her skills in problem solving and communicating effectively with students, proctors, faculty, and supervisors [CP-6].

Highstreet testified that she wrote this because she was "getting to the point where she was concerned" (2T45). To the extent that this testimony was offered to prove that concerns regarding Pussewela's manner were first documented in the 2009 performance review, I do not credit it because in the same performance review Highstreet described Pussewela's attitude as upbeat and pleasant.

14. On September 15, 2009, Highstreet emailed Pussewela a summary of a meeting they had on August 21, 2009, to discuss a problem Pussewela was having with a proctor. At the meeting, Highstreet told Pussewela that she felt that Pussewela's manner with Highstreet and others was "sometimes abrupt," and "could be interpreted in a negative light," citing two examples (R-1).

On December 2, 2009, Highstreet emailed Pussewela a summary of a meeting they had on November 12, 2009. Highstreet called the meeting after she received complaints about Pussewela's manner. At the meeting, Highstreet told Pussewela that she had observed and received complaints about Pussewela being "short" and "dismissive" with students, and "unhelpful" with faculty, citing examples. She also discussed concerns that she had about the accuracy of Pussewela's work and provided examples. Pussewela denied that there were any complaints and disagreed that there were any problems (R-1; 1T61-1T62).[5/]

Pussewela invited Highstreet to approach her regarding any issues she was having with Pussewela's performance, but always reacted in an extremely defensive manner whenever Highstreet brought performance issues to her attention (CP-7; R-1; 2T12-2T14).

One-Day Suspension and Grievance

15. On April 9, 2010, the College suspended Pussewela for one day without pay for insubordination and for failing to report outside employment with Castle World Wide, a testing company.

5/ Highstreet testified that her concerns about Pussewela's attention to detail began in 2007 (2T9-2T10). If Highstreet had such concerns, there is no evidence that she communicated her concerns to Pussewela until December 2009. Highstreet's December 2, 2009 email to Pussewela which summarized their November 12, 2009 meeting was the first time Highstreet documented her concerns about the accuracy of Pussewela's work (R-1). Accordingly, I do not credit Highstreet's testimony in this regard.

The insubordination charge concerned Pussewela's receipt of Castle World Wide testing materials at the College. Pussewela disputed that Highstreet ever told her she could not have Castle World Wide testing materials delivered to the College because the College would not assume responsibility for the materials' security.

On May 7, 2010, the Association filed a grievance contesting Pussewela's suspension which proceeded to binding arbitration. The arbitration hearing was held on November 8, 2010. The arbitrator issued an award on November 17, 2010, which was received by the College on November 22, 2010.

The arbitrator determined that the insubordination charge lacked supportive evidence and that although Pussewela did not intend to deceive the College by failing to disclose her outside employment with Castle World Wide, her failure to disclose nonetheless violated the College's Conflict of Interest and Conflict of Commitment Policy. The arbitrator ordered the College to reimburse Pussewela for one day's pay, issue her a written reprimand for failing to report the outside employment, and adjust her personnel record in accordance with the award (CP-9, CP-10; R-2).

After the Grievance

16. Pussewela believed that her colleagues began to ignore her after the grievance was filed. Pussewela asked Highstreet

why people were ignoring her and Highstreet said, "Oh, I thought you didn't want to work here anymore" (1T58-59, 1T73). I find that this was an implied threat to Pussewela that filing the grievance had jeopardized her continued employment at the College. Highstreet also asked Pussewela a couple of times regarding the grievance, "Is this such a big deal?" (1T59).[6/]

17. In Pussewela's 2010 performance review, Highstreet gave Pussewela a rating of "needs improvement" in the customer focus category, in the job knowledge/technical expertise category, and as an overall rating. She was not rated as "unacceptable" in any category. Among Highstreet's comments in the evaluation summary, she wrote:

> During the past couple of years as the testing center was growing, I began to notice that Veneka was very often abrupt and did not always explain things well to students or staff. At other times she was kind and helpful. There were also times in which I felt she was rude and abrupt with me [CP-7].

Throughout the evaluation, the word "abrupt" is used six times to describe Pussewela's manner; the word "rude," five times; the word "dismissive," twice; and the word "unhelpful," once (CP-7). None of these words, or like words, were ever used

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6/ Highstreet denied that she ever discussed the discipline with Pussewela after she issued it on April 9, 2010 (2T30). She did not admit or deny that she spoke with Pussewela about the grievance filed to challenge the discipline.

before to describe Pussewela in an annual performance review (CP-4, CP-5, CP-6).

Pussewela agrees generally that her speaking style is "a little heavy," and that she sometimes speaks "too fast." She did not believe that past verbal comments Highstreet made to her regarding her speaking style were in retaliation for filing the grievance. Pussewela, however, did not agree with any criticism of her manner or attention to detail in her 2010 performance review (1T113-1T114).

17. Unbeknownst to Pussewela, after she received her 2010 performance review the College placed her on a 90-day probationary period. The College did not notify her of this action, and she did not become aware that she had been placed on probationary status until November 19, 2010 - the day she was terminated. Pussewela only learned of her probationary status when she received a "90-Day Follow-Up Probationary Evaluation Form" and cover letter, which accompanied her (separate) termination and non-renewal letter (1T60-1T61, 2T62-2T65; R-3; CP-8).

In the 90-Day Follow-Up Probationary Evaluation Form, Highstreet gave Pussewela a rating of "needs improvement" in the quality of work, attitude, and customer service categories. She noted that Pussewela's problems in these areas persisted throughout the probationary period and cited examples (CP-8).

There is a directive on the form which requires supervisors to provide justification for all "unsatisfactory" and "needs improvement" ratings and attach a performance improvement plan outlining the steps needed for the employee to improve performance. Highstreet did not create a performance improvement plan for Pussewela. The College terminated her at the end of the probationary period (CP-8; R-3).

18. Highstreet testified that the issues she identified in Pussewela's 2010 performance review, and the performance goals and suggestions to improve performance included in that review, sufficiently notified Pussewela of her probationary status (2T62-2T65). Coston-McHugh testified that the words "next review period" in the second part of the summary section of the annual performance review form, which begins, "List and discuss 3 to 5 performance goals for the *next review* period, including target dates and methods of measurement," include probationary periods (2T107-2T108; CP-4, CP-5, CP-6, CP-7).

Even if the words "next review period" encompass probationary periods, I do not find this to be sufficient notice to Pussewela that she had been placed on probationary status. Moreover, one of Highstreet's performance goals in the summary section of the 2010 review was for Pussewela to create new instructions for incoming proctors; she indicated that she wanted Pussewela to submit the final draft in January 2011 - two months

after the end of the 90-day probationary period (CP-7). This performance goal contemplates Pussewela's employment beyond the 90 days. Accordingly, it is not credible that Pussewela would know from her 2010 performance review that she had been placed on probationary status.

<u>The Collective Negotiations Agreement and The College's Annual Performance Review Form</u>

19. Article 8 Paragraph G of the parties' agreement provides:

> An employee who has received two or more satisfactory evaluations and then receives an unsatisfactory evaluation shall be reevaluated within 90 days [J-1].

The annual performance review form used to evaluate Association unit members provides five different ratings for employee performance. The ratings are excellent, above average, average, needs improvement, and unacceptable. The performance review also requires that:

> Employees receiving an unacceptable rating for any category must have a follow-up performance review in 90 days [CP-4, CP-5, CP-6, CP-7].

Reading Article 8 Paragraph G in conjunction with this directive, I find that a rating of "unacceptable" in any category is automatically considered an "unsatisfactory" performance review triggering the 90-day probationary period. However, the contract does not state that a rating of "unacceptable" in at

least one category is *required* before the College can deem a performance review to be unsatisfactory. Therefore, I find that the contract afforded the College the discretion to determine that Pussewela's 2010 review, in which she received a rating of "needs improvement" in three categories, was an "unsatisfactory" review triggering the probationary period.

Weddington wrote a cover letter to Pussewela regarding the 90 Day Follow-Up Probationary Evaluation Form in which she wrote that because Pussewela received three ratings of "needs improvement" on her 2010 performance review, in accordance with the parties' collective negotiations agreement she was "automatically" scheduled for a 90-Day review (R-3). Despite the College's discretion under the parties' agreement to determine that a review where no rating of "unacceptable" is given is nonetheless "unsatisfactory," since Pussewela was not rated as "unacceptable" in any category on her 2010 review, I find that she could not have known that the College deemed her 2010 review unsatisfactory and placed her on probationary status unless it explicitly told her so. It did not.

Concerns about Pussewela's Integrity

20. Pussewela attempted to misuse her sick time when on January 27, 2010, she submitted a request to use seven hours of sick time on February 13, 2010, to take her daughter to a doctor's appointment. Sometime after the appointment was made,

Pussewela learned that she was scheduled to proctor a test for Castle World Wide on February 13, 2010. The College became aware of this conflict on January 29, 2010. Highstreet approached Pussewela and encouraged her to modify her leave request in accordance with the type of leave she would be taking. Pussewela initially declined to modify it. Only after many conversations and Highstreet's repeated urging did Pussewela agree to change the leave request to five hours of sick time and two hours of vacation time (CP-7; R-5; 1T50-1T51, 2T19-2T25, 2T95, 2T122-2T123).

21. Coston-McHugh felt that although Pussewela was not disciplined for the misrepresentation on her leave request for February 13, 2010, she was nonetheless dishonest. Weddington, too, suspected that Pussewela was misusing her sick time when the incident was brought to her attention (2T123, 2T78-2T80).

22. In October 2010, Pussewela informed Highstreet that she needed a Saturday morning off from work to take an English test. The test was offered at many times throughout the week.[7/] The morning is the busiest part of the day at the testing center on Saturdays. Just a week before, Pussewela informed Highstreet that more proctors were required to handle the volume of work at

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7/ In addition to Highstreet's testimony, the fact that Pussewela was at one time scheduled to take the test on Thursday, December 2, 2010, proves that the test was offered on a day other than Saturday (CP-12, CP-13).

the center. Highstreet thought Pussewela had exercised "incredibly poor judgment" scheduling a test for a busy Saturday morning at a time when she was supposed to work instead of scheduling the test for one of the many other times it was offered throughout the week (2T38-2T41).[8/] Coston-McHugh and Weddington similarly believed that Pussewela's scheduling of the English test for a day she was supposed to work was unreasonable and demonstrated a lack of integrity (2T83, 2T109-2T110). Coston-McHugh testified that this was the "coup de grace" (2T117). Pussewela's behavior concerned Weddington because she believed it was similar to the prior incident where she attempted to misuse her sick time. Weddington recommended to the College President that Pussewela not be renewed (2T83-2T85, 2T88, 2T109).

8/ There is conflicting testimony regarding whether Highstreet gave Pussewela permission to schedule the test on a Saturday, and it is not clear from the record whether Pussewela at one time had scheduled it for a Saturday. On October 27, 2010, Pussewela registered to take the test on Thursday, December 2, 2010 (CP-12). Pussewela testified that she took the test on a Saturday after she was terminated (1T104-1T106).

These discrepancies are immaterial. Pussewela considered scheduling the test for a busy Saturday morning when she was supposed to work when the test was offered at many different times throughout the week. I find that this provided a legitimate basis for the College to at least question her commitment to her job and her consideration for her colleagues.

ANALYSIS

The Association contends that the College issued testing technician Veneka Pussewela an annual performance review worse than any she had received in prior years, placed her on a 90-day probationary evaluation period, and ultimately terminated her in violation of 5.4a(3) and 5.4a(1) of the Act.

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

If an illegal motive has been proven and if the employer has not presented any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will

not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the Hearing Examiner and Commission to resolve.

The decision on whether a charging party has proved hostility in such cases is based upon consideration of all the evidence, including that offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987).

I have considered all evidence in the record. I find that the Association's grievance filed on Pussewela's behalf challenging her one-day suspension was a substantial, motivating factor in the College's actions, and the preponderance of the evidence on the entire record supports concluding that Pussewela would not have been terminated and non-renewed absent her protected conduct.

I find that the following statements and actions of the College demonstrate its hostility toward Pussewela's protected activity:

1) Highstreet's implied threat to Pussewela after the grievance was filed ("Oh, I thought you didn't want to work here anymore"), and Highstreet's expression of incredulity to Pussewela on more than one occasion about the fact that a grievance was filed ("Is this such a big deal?");

2) The repetition of the criticisms in Pussewela's 2010 performance review;

3) The College's failure to notify Pussewela that she had been placed on probationary status; and,

4) The College's decision to terminate and non-renew Pussewela in lieu of placing her on a performance improvement plan, which was a deviation from the directive on the 90-Day Follow-Up Probationary Evaluation Form.

I do not believe criticism of Pussewela's manner in the 2010 performance review was untruthful or unwarranted. The criticism was consistent with Pussewela's manner during her testimony, which was abrupt and defensive. It was also consistent with Highstreet's observations of Pussewela's manner in the Fall of 2009, when Highstreet first discussed her concerns with Pussewela at two meetings. Since then, up through and including her testimony in this proceeding, Pussewela has refused to accept virtually any responsibility for her manner.

Timing is an important factor in assessing the motivation for adverse actions and putting them into context. <u>Downe Tp. Bd.</u>

<u>of Ed</u>., P.E.R.C. No. 86-66, 12 <u>NJPER</u> 3 (¶17002 1985). The volume of work at the testing center increased considerably over the years, notably with the additions of ESL testing in 2006 and GED testing in 2008. Highstreet's issues with Pussewela's manner arose when the volume of work began to increase. But she made no mention of these issues in any of Pussewela's annual performance reviews until 2010 - four years after the volume of work began to increase and just a few months after the Association grieved Pussewela's one-day suspension. On the contrary, Highstreet's comments regarding Pussewela's manner in each performance review between 2007 and 2009 were laudatory.

Even if the Association had not filed a grievance challenging Pussewela's one-day suspension, Highstreet would have referenced her concerns about Pussewela's manner in her 2010 performance review. I do not find Highstreet's decision to reference the concerns hostile. But I find the repetition of the criticisms within her comments and her decision to reach beyond the one year review period to emphasize the duration of the problem to be circumstantial evidence of hostility toward Pussewela's protected activity, particularly when viewed in conjunction with Highstreet's comments to Pussewela about the grievance.

Highstreet wrote:

> **During the past couple of years as the testing center was growing**, I began to notice

> that Veneka was very often abrupt and did not always explain things well to students or staff. At other times she was kind and helpful. There were also times in which I felt she was rude and abrupt with me [CP-7]. [emphasis added]

I find Highstreet's statement that she began to notice issues with Pussewela's manner "during the past couple of years" to be truthful. But in prior years' performance reviews, Highstreet elected not to reference those issues. In Pussewela's 2010 performance review, Highstreet emphasized the duration of a problem she willfully overlooked for years.

In describing Pussewela's manner in her 2010 review, Highstreet used the word "abrupt" six times; the word "rude," five times; the word "dismissive," twice; and the word "unhelpful," once. None of these words, or like words, were ever used before to describe Pussewela in an annual performance review. I find that Highstreet's repetition of these criticisms, particularly when juxtaposed with her laudatory comments about Pussewela's manner in prior reviews, is evidence of hostility.

After this evaluation, the College placed Pussewela on probationary status without notifying her. Highstreet testified that the issues she identified in Pussewela's 2010 performance review, and the performance goals and suggestions to improve performance in that review, sufficiently notified Pussewela of her probationary status.

I agree that the 2010 review put Pussewela on notice that her performance needed improvement and find that Highstreet made her performance expectations clear in the 2010 review. But I do not find that the review put Pussewela on notice that the College was taking formal employment action which would set a course toward either improved performance or the issuance of a performance improvement plan followed by possible termination. If Pussewela had known that her employment was this tenuous, she might have worked harder to meet Highstreet's expectations.

During the probationary period, Pussewela considered scheduling a test for a busy Saturday morning she was supposed to work, when the test was offered at many other times during the week. The College believed this was the second instance Pussewela demonstrated a lack of integrity; the first was when she attempted to misuse her sick time earlier in the year.

Pussewela was not disciplined for the misrepresentation on her sick leave request, but the College had a legitimate basis to question her integrity as a result of that incident. I don't believe the "test scheduling" incident demonstrated a lack of integrity, but I understand why it troubled the College. It raised questions about Pussewela's commitment to her job and her consideration for her colleagues. Coston-McHugh testified that the incident was the "coup de grace." But had Pussewela not been on probationary status, it is hard to believe the College would

have been justified in disciplining (let alone terminating and non-renewing) her for this incident, short of Pussewela's failure to appear for work on that Saturday morning after a request to take off was denied.

Near the end of Pussewela's 90-day probationary period, the College terminated and non-renewed her despite the directive to supervisors on the 90-Day Follow-Up Probationary Evaluation Form that employees who receive "needs improvement" ratings be placed on performance improvement plans. The College did not explain this deviation from the directive, which is an apparent deviation from protocol. I find the deviation to be evidence of hostility toward Pussewela's protected conduct.

Absent Pussewela's protected conduct, her 2010 performance evaluation would have raised legitimate concerns about her manner, but it would have been less critical. She might not have received "needs improvement" ratings, and might not have been placed on a 90-day probationary period. Had she not been on probationary status, the "test scheduling" incident would not have resulted in her termination and non-renewal.

Even if Pussewela had received "needs improvement" ratings and were placed on probationary status in the absence of her protected conduct, I find that the College would have notified Pussewela of her probationary status.

I find that the Pussewela's protected activity was a substantial, motivating factor in the College's actions and that the preponderance of the evidence on the entire record supports concluding that Pussewela would not have been terminated and non-renewed absent her protected conduct.

Based on the above findings and the Bridgewater standards, I find that the College violated 5.4a(3) and derivatively 5.4a(1) of the Act.[9/]

RECOMMENDED ORDER

I recommend that the Commission ORDER:

A. That Respondent Camden County College cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by failing to notify Veneka Pussewela that she had been placed on a 90-day probationary evaluation period and then terminating and non-renewing her at its conclusion.

2. 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

9/ The CCCAAP alleges that the College's actions also independently violate 5.4a(1) of the Act. However, in light of my finding that the College violated 5.4a(3) and derivatively 5.4a(1) of the Act, and the fact that a finding of an independent 5.4a(1) violation would not affect the recommended remedy, I decline to make a finding on that allegation.

them by the Act, particularly by failing to notify Veneka Pussewela that she had been placed on a 90-day probationary evaluation period and then terminating and non-renewing her at its conclusion.

B. Respondent Camden County College take the following affirmative action:

1. Immediately offer Veneka Pussewela reinstatement to the position of testing technician with all emoluments, as if there had been no break in her employment with the College.

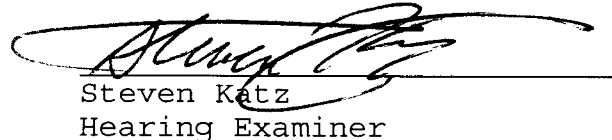
2. Provide complete restitution to Pussewela - less mitigation - including: all compensation she would have received from the College between August 1, 2011 and the date on which she is offered to be reinstated, plus interest at the rate set by the rules of Court; all expenses incurred for health care premiums between August 1, 2011 and the date on which she is offered to be reinstated.

3. Remove the 2010 performance evaluation, the 90-Day Follow-Up Probationary Evaluation Form and cover letter, and the notice of termination and non-renewal letter from Pussewela's personnel file and expunge them from all College records.

4. 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.

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

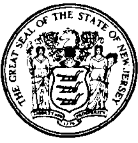


Steven Katz
Hearing Examiner

DATED: March 12, 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 March 22, 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 failing to notify Veneka Pussewela that she had been placed on a 90-day probationary evaluation period and then terminating and non-renewing her at its conclusion.

WE WILL cease and desist from 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 the Act, particularly by failing to notify Veneka Pussewela that she had been placed on a 90-day probationary evaluation period and then terminating and non-renewing her at its conclusion.

WE WILL immediately offer Veneka Pussewela reinstatement to the position of testing technician with all emoluments, as if there had been no break in her employment with the College.

WE WILL provide complete restitution to Pussewela - less mitigation - including: all compensation she would have received from the College between August 1, 2011 and the date on which she is offered to be reinstated, plus interest at the rate set by the rules of Court; all expenses incurred for health care premiums between August 1, 2011 and the date on which she is offered to be reinstated.

WE WILL remove the 2010 performance evaluation, the 90-Day Follow-Up Probationary Evaluation Form and cover letter, and the notice of termination and non-renewal letter from Pussewela's personnel file and expunge them from all College records.

Docket No. CO-2011-293   Camden County College
(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

APPENDIX "A"