H.E. NO. 2017-3

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

In the Matter of

FORT LEE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2015-231

FORT LEE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Fort Lee Board of Education violated the New Jersey Employer-Employee Relations Act when it required instructional days over spring break in retaliation for the Association's challenge of professional development days, conduct protected by the Act. The Hearing Examiner also found the Board violated the Act by failing to negotiate the impact of a change in the school calender upon demand.

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.

H.E. NO. 2017-3

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

In the Matter of

FORT LEE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2015-231

FORT LEE EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent
Sciarrillo, Cornell, Merlino, McKeever & Osborne, LLC
(Dennis McKeever, of counsel)

For the Charging Party
Zazzali, Fagella, Nowak, Kleinbaum & Friedman
(Aileen O'Driscoll, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On March 31, 2015, the Fort Lee Education Association (Charging Party or Association) filed an unfair practice charge against the Fort Lee Board of Education (Respondent or Board). The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5),[1/] when, in contravention of

1/ These provisions prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (3) Discriminating
(continued...)

past practice, the Board issued the 2014-2015 calendar increasing the teachers' work year by adding professional development days. Subsequently, after the issuance of an arbitration award prohibiting the addition of the professional development days without negotiations but permitting an increase in the work year for three additional instructional days, it is alleged that the Board revised the calendar adding the three instructional days to be taken during spring break.

The Association contends that the timing of the Board's decision to change the school calendar six weeks after the issuance of the arbitration award and less than two weeks before the scheduled spring break evidences anti-union animus and supports that the Board's actions were in retaliation for the filing of the grievance regarding the 2014-2015 calendar. The Association alleges that the Board posted a notice to its web site indicating that the Association had refused any offer of compromise by the Board to substitute professional development days (PDD) for instructional days, essentially blaming the

---

1/ (...continued)
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."

Association for the calendar change. Finally, the Association also alleges that it made a formal demand to negotiate the impact of the additional three instructional days. The Association seeks as remedies cancellation of the instructional days during spring break, an order to negotiate prior to modifying the teachers' work year, a cease and desist order and a posting.

On December 10, 2015, a Complaint and Notice of Pre-Hearing was issued (C-1).[2/]

On January 4, 2016, the Board filed an Answer (C-2) admitting that it changed the school calendar but denying that it was in retaliation for the filing of the Association's grievance. It also admits that the Association made a formal demand to negotiate the impact of the calendar change.[3/]

Hearings were held on April 28, May 25 and June 13, 2016.[4/] The parties examined witnesses and presented documentary evidence. Post hearing briefs and a reply brief by Charging

---

2/ "C" refers to Commission exhibits received into evidence at the hearing. "CP" and "R" refer, respectively, to charging party and respondent exhibits.

3/ Although the charge alleges that a formal demand to negotiate impact was made (C-1 at paragraph 17), it does not allege what the Board's response, if any, was to the demand. Accordingly, the Board's Answer, other than admitting that a demand was made, does not address its response, if any, to the demand.

4/ Transcript references to these hearing dates are "1T" through "3T" respectively.

Party were submitted by October 18, 2016. Based upon the record in this case, I make the following:

FINDINGS OF FACT

1. The Fort Lee Board of Education and the Fort Lee Education Association are, respectively, public employer and public employee representative within the meaning of the Act (1T7).

2. The Board and Association were parties to a collective negotiations agreement (CNA) effective from July 1, 2008 to June 30, 2011. The 2008-2011 CNA was modified by a memorandum of agreement (MOA) which extended the term of the parties' agreement from May 1, 2010 through April 30, 2013 (C-1).

3. Negotiations for a successor agreement began in May 2013 (1T16, 1T23, 2T57, 2T59). Association President/Chief Negotiator Bruna Capalbo and Former Association President Gary Novosielski were on the negotiations team. Later during mediation, New Jersey Education Association (NJEA) UniServ Representative Richard Loccke was added to the Association's team (1T15-1T16, 2T6, 2T57, 2T59). Then Acting Superintendent Dr. Sharon Amata represented the Board in negotiations and was later replaced by Interim Superintendent Paul Saxton who began employment in the District in August 2013 (2T58, 3T30-3T31).

4. By December 2013, when negotiations stalled, the Association filed a request for mediation (CP-2). Mediation began

in earnest in February 2014 (2T58). The parties met with the mediator two or three times in March and April 2014 but were unable to resolve their differences (1T20, 2T7).

5. At the last mediation session, the Association told the mediator that they wanted to go to fact finding and requested that he inform the Board of their decision (2T8-2T9). The mediator spoke to the Board and returned to the Association with a message from the Board. The Board had determined that upon reviewing the parties' expired CNA, in particular, Article XXIII entitled "Teacher Work Year" at paragraph 1 entitled "In-School Work Year," teachers should be working a longer work year, namely three extra days (1T22, 2T9, 2T88).

6. The Association team was incensed upon hearing of the Board's intentions, since this was the first time the subject of the increased work year had been raised in negotiations (2T9, 2T60). Historically for the past forty years, veteran teachers worked a 180-day pupil contact schedule with three orientation days before the school year and one wind-up day at the end of the school year for a total of 184 days (newly hired teachers worked several extra orientation days) (1T26, 2T88).[5/]

5/ Capalbo explained that typically unused snow days were returned at the discretion of the administration usually during Memorial weekend (2T86-87). However, during the 2013-2014 school year the Board had to revise the calendar taking away two days during spring break because of excessive snow days that year (R-4; 3T7-3T8).

For example in 2013-2014, the school calendar contained only 180 instructional days which is the legal requirement (3T31-3T33). Saxton did not create the calendar for 2013-2014, because he only began working in the district in August 2013. The calendar was established the prior spring (3T31-3T32). Saxton admits that even in 2011-2012, there were only 180 instructional days scheduled (3T31). In fact historically, Saxton admits, veteran teachers worked 184 days comprised of 180 instructional days, three orientation days and one wind-up day (CP-3; CP-4; 3T41).[6/] However, the increase in the number of instructional days from 180 to 183 in 2014-2015 – a calendar that he created – was, Saxton concluded, required by the parties' collective agreement (3T36-3T37). In other words, what the Board and Saxton were now proposing for veteran teachers was a 187-day schedule, plus snow days, for a total of 190 days contrary to past practice (2T88).

7. Having failed to mediate an agreement, at the request of the Association, a fact finder was appointed in May 2014 (CP-2). The parties agreed that the issue of the longer work year would not be raised in fact finding but would be resolved through the parties' grievance arbitration procedures (1T33-1T34).

6/ Newly hired teachers always worked an extra few days for orientation (CP-1 at page 5).

8. However, before fact finding commenced in July 2014 with pre-mediation sessions, on May 19 and June 9, 2014, the Board issued the 2014-2015 school calendar (CP-6 and R-1 respectively). Both calendars scheduled 187 days for veteran teachers with three built in snow days for a total of 190 days. Students were scheduled for 180 days plus three snow days for a total of 183 days.

Specifically, the Board-approved calendar included six professional development days interspersed throughout the 2014-2015 school year, on September 3, 4 and 5, October 21 (½ day), December 9 (½ day), 2014 and February 17 and 18, 2015 (CP-6; 1T40-1T41). Spring recess was scheduled for April 6 through 10, 2015. The last days of school for students and teachers were respectively June 25 and 26, 2015 (CP-6) for a total of 190 days for veteran teachers with three built in snow days. Basically, without the three snow days, the calendar for veteran teachers accounted for 187 days (including the six professional development days and instructional days), and for students 180 days (CP-6).

Both calendars had a box at the bottom advising that if the three snow days were used and additional days needed, April 10th through 6th would be used, in that order, and that all scheduled vacations during recess periods were made at the individual's risk (CP-6; R-1).

9. On June 6, 2014, the Association filed a grievance alleging that the Board's 2014-2015 school calendar violated the parties' collective negotiations agreement (CP-1). At the December 5, 2014 arbitration hearing, the parties agreed that the following issue was before the arbitrator:

> Did the Board of Education violate the CBA when it created a school calendar of 187 work days for returning ten-month unit members, and 190 work day calendar for new ten-month unit members? If so, what shall be the remedy? [CP-1]

10. Meanwhile, the pre-mediation efforts of the fact finder failed, and a fact finding hearing was scheduled for November 2014 (CP-2). The parties' briefs were due by December 23, 2014.

11. While the fact finding progressed, the grievance arbitration proceeding concerning the 2014-2015 calendar and teacher work year continued. On February 10, 2015, the arbitrator issued his decision and award. He found that the Board could require a work year of 187 work days for veteran teachers and 190 work days for newly hired teachers. Those work days, he concluded, included three orientation days for veteran teachers, six orientation days for newly hired teachers and one wind-up day for everyone.

The arbitrator, however, differentiated pupil instructional days from professional development days. He concluded that the Board could not convert pupil contact days to professional development days. He stated, therefore, that the Board could not

require teachers to attend any professional development days without the concurrence of the Association through negotiations (CP-1).

Specifically, the arbitrator wrote in pertinent part:

> The Board can schedule as many pupil attendance days as it likes, but it will have its teachers for only 183 of them . . . If the parties choose to trade one, two, or three of the pupil contact days for extra orientation days, professional days, wind-up days, or any other days of teacher obligation, it can only be accomplished with the cooperation and concurrence of the Association. These are the requirements of Article XXIII until the parties choose to alter them through bargaining. [CP-1]

As a result of the arbitration award, the Board cancelled the previously scheduled professional development days on February 17 and 18, 2015, as well as the last teacher non-pupil wind-up day in June (2T18).[7/] Saxton, however, concluded that the arbitrator's award required the Board to schedule 183 work days and to substitute three instructional days for the professional development days, even though the legal requirement is only 180 instructional days for students. In 2014-2015, this requirement could have been satisfied even with the three snow days already used (CP-1; 3T17-3T18, 3T35).

12. On March 2, 2015, the fact finder issued his Fact Finder's Report and Recommendations (CP-2). Between December 23,

---

7/ The September professional development day had already taken place (CP-6).

2014 when final briefs were due to the fact finder and March 2, 2015 when the report was issued, the parties did not meet to negotiate or have any other interactions related thereto (CP-1; 1T36).

13. After the issuance of the fact finder's report, the parties met on March 18, 2015 to discuss it (CP-2) and try to reach a successor CNA (1T21). The parties' efforts were successful and a MOA was executed that day (CP-7). However, before the agreement was executed, the Board broached the issue of the arbitrator's award and sought to negotiate additional professional development days (1T23, 2T20-2T22). The Association refused to do so (2T20-2T22).

The Board suggested that since the Association would not negotiate additional professional development days, the Board needed to fill three extra teaching days because there were 187 days in the 2014-2015 calendar. Therefore, the Board explained that it would require teachers and students to attend school during spring break as allowed by the language at the bottom of the 2014-2015 school calendar (CP-6; R-1; 2T21).

The Association argued against the necessity of scheduling three additional instructional days during spring break. It pointed out that even without the three additional days, the 2014-2015 calendar satisfied the legal requirement of 180

instructional days in a calendar year and, furthermore, stated that no additional professional development was needed (2T20).

14. Despite reaching no agreement on the additional professional days, the parties executed the MOA on March 18, 2015, which was effective from July 1, 2013 through June 30, 2016 (CP-7). The MOA stated in pertinent part at paragraph 4:

> All portions of the most recently expired agreement not modified by the terms of this Memorandum shall continue to be of full force and effect and be incorporated into the successor agreement. [CP-7]

The Association then put the Board on notice that if it decided to do anything with the additional three days, the Association would challenge it (2T22).

15. On Thursday, March 19, 2015, Saxton sent out two email letters and attached the arbitrator's decision and award to each (CP-3; CP-4; 3T4). One letter was addressed to the parents/guardians and students (CP-4; 2T23). The other email contained a letter to the staff with the same award attached (CP-3; 2T23). The letters were identical in content (CP-3; CP-4).

The letters described the protracted negotiations process regarding the 2013-2016 collective agreement and advised that in the spring of 2014, the Board discovered a past practice inconsistent with the language of the parties' CNA regarding the length of the work year, namely that teachers under the CNA were

required to work a 183-day work year not the 180-day work year as had been the historic practice. The letter also explained the Association's grievance challenging the 2014-2015 calendar scheduling three additional days for teacher development and opined that although the award allowed the Board to schedule three additional instructional days, the arbitrator determined that the Board could not require teachers to attend professional development without the concurrence of the Association. The letters explained that the 2014-2015 calendar had added three professional development days to reach what the Board considered was the allowable 183-day instructional calendar (CP-3; CP-4).

Superintendent Saxton then wrote that in order to be consistent with the arbitrator's award and the parties' collective agreement, the Board needed to schedule three additional instructional days in lieu of the professional development days prohibited by the arbitrator. Specifically, Saxton wrote in pertinent part:

> During last evening's meeting, the Board asked the Association to work collaboratively to schedule these days in a way that would be least disruptive to the students, parents and staff. The Board indicated a willingness to convert the days into PDD [professional development days] or to schedule a time that is mutually agreeable. The Association refused to discuss a calendar modification and refused to meet the board half way on any of the proposed alternatives. As a consequence, the Board is left with no choice but to implement a revised schedule to include the additional instructional days.

> Consistent with the language in the calendar for this school year, the Board will be scheduling instructional days on April 8, 9 & 10. A great deal of instruction was lost due to the administration of the PARCC exam and meaningful instruction can be made up during those days. [CP-3; CP-4]

16. Despite the explanation given to students, parents and staff as to the reason for scheduling instructional days during spring break, Saxton testified that after three snow days were used that year, he felt he had to make up the days during spring break (3T39, 3T45, 3T54). However, nowhere in the letters does he mention having to make-up the three additional days because of the three snow days that had been used that year. The letters support a finding that the primary motive for adding three additional days during spring break was because of Saxton's understanding of the arbitrator's award, namely:

> That the teachers have to work 187 days. New teachers, new staff members, have to work 190 days. And professional development days could only be – were restricted to the days at the beginning of the school year, identified also as orientation days. [3T17]

17. Loccke considered the Saxton emails to be hostile. Loccke had never experienced a memo sent out like Saxton's which included the entire arbitration award (2T26).[8/] According to Loccke, the staff, parents and students were outraged (2T26).

8/ According to Saxton, this was the first time that he was aware of the Board informing staff, students and parents that it was going to take some action as a result of a grievance (3T44).

The Association considered the elimination of the spring break to be retaliatory for filing the grievance (2T27).

18. In particular, Association members were upset because many had personal plans during spring break – vacation, wedding or child care arrangements – that were disrupted by the revised schedule eliminating three days of the spring break (2T64-2T65). As a result, Loccke spoke to the Board attorney about the situation but was told of the Board's desire to convert some of these instructional days to professional development. Loccke again refused to discuss additional professional development for the instructional days and told the Board's attorney that the Association president would not meet to discuss any settlement because the Association considered the elimination of the spring break to be retaliatory for filing the grievance (2T27).

19. On Sunday, March 22, 2015, the Board's attorney acknowledged the Association's refusal to meet with Saxton about the work year dispute, but nevertheless forwarded a proposed settlement or side-bar agreement (CP-9). The side bar covered the period of March 25, 2015 through June 30, 2015 and offered to exchange the three instructional days during spring break, which he characterized as lost due to inclement weather, for fifteen hours of professional development which could be completed through on-line or in-service programs (CP-9). He requested a

response from the Association before the Board meeting the next night (2T27-2T28, 2T36).

Loccke responded the next day reiterating that the Association president would not meet with Saxton nor would the Association agree to the side bar. He wrote in pertinent part:

> Your sidebar offers professional development to teachers which is precisely what the arbitration decision states is not permitted under the contract.
>
> Saxton and the Board are attempting to hold the parents and children of Fort Lee hostage while they retaliate against the Association. At the end of the day, it will be Mr. Saxton and this Board who will have to explain their actions to the angry citizens of Fort Lee and PERC. [CP-8][9/]

20. Shortly thereafter, Capalbo was contacted by an Association representative at the middle school who informed her that her administrator had advised her that there was a

---

9/ I reserved on Respondent's objection to the admission into evidence of CP-8 and CP-9. Respondent argues that these exhibits should be considered settlement discussion which are inadmissible. However, the side-bar agreement was not offered in settlement of this litigation. Moreover, it is evidence of the parties' negotiations history regarding additional PDD which is at the heart of charging party's 5.4a(5) allegations. Additionally, Charging Party asserts that the side-bar agreement bolsters its retaliation claim in that it establishes that the Board did not really need three additional instructional days. I agree as to the relevance of these exhibits to establish both the a(3) and a(5) allegations. Finally, I admitted CP-12 into evidence which was the Board's web site posting referencing the side-bar agreement and the Association's response. This posting acts as a waiver to its argument that CP-8 and CP-9 should not be admitted. For the foregoing reasons, I overrule Respondent's objections and admit CP-8 and CP-9.

possibility of swapping on-line professional development for the three additional instructional days (2T68). This was the first time Capalbo had learned of this and called Loccke about it (2T66).

21. After speaking to Loccke, Capalbo received a call from Saxton seeking to discuss on-line professional development and the side-bar agreement. Capalbo told him that she was not interested in a side-bar agreement about on-line professional development, because it was her understanding of the arbitrator's agreement that the Association was not required to agree to any professional development days (2T67). Specifically, although the arbitrator had clarified the parties' contract to allow three additional instructional days, it did not require the Board to schedule them (2T87-2T88).

22. On Monday, March 23, 2015, the Board held its meeting. The meeting room was packed by students, parents and Association members as well as representatives from various media outlets (2T37, 2T68). Loccke and Capalbo spoke during the public session, as did others, questioning why the Board eliminated the spring break (2T37, 2T69, 2T82). Several community members spoke about the disruption caused by the Board's last minute decision to take away days from spring break (2T69).

23. Before the meeting ended, Saxton asked to speak to Loccke in the hallway (2T37-2T38). Saxton again asked Loccke if

the Association would agree to attend professional development in exchange for the three instructional days so that the students did not have to come to school during spring break (2T38). Loccke, however, refused to negotiate with what he characterized as a gun to his head (2T38).

Saxton then went back into the meeting room and whispered to the Board president who called for a vote on the resolution to take away the spring break. The Board passed the resolution (CP-10; 2T38). After the resolution was passed, the Board issued an amended school calendar for the 2014-2015 school year which reflected the added instructional days on April 8, 9 and 10, 2015 (CP-11). The amended calendar was appended to the Board's resolution (CP-11).[10/] As a result of the Board's vote to revise the calendar, Capalbo felt that the Board's action coming on the heel's of the arbitration award was in retaliation for the Association's grievance challenging the 2014-2015 calendar (2T90).

24. The revised calendar reflected the changes based upon the arbitration award, namely the removal of the previously scheduled February professional development days and added early dismissal on two other days (CP-11; 2T94, 2T96). Three snow days

---

10/ On April 2, 2015, the Association was granted temporary restraints regarding the implementation of the revised calendar but on April 6, the restraints were lifted allowing the scheduled instructional days during spring break (R-5; R-6; R-7; 3T27).

are listed as being taken on January 27, February 2 and March 5, 2015. Under the tally of total days for teachers for the year, there is a total of 187 and for students, a total of 183 (CP-11). The box at the bottom of the calendar is essentially the same as in the previous calendars (CP-6 and R-1) and states:

> There are 3 snow days incorporated into this calendar. If additional days are required, April 10th, 9th, 8th, 7th, 6th, respectively, will be used as make-up days. If necessary, Saturdays may be utilized to comply with State attendance requirements. Vacations scheduled during recess periods or in June are made at the individual's risk. The Board reserves the right to make other adjustments to the calendar, if necessary. [CP-11]

25. Posted to the school's web site the next morning was the following:

SUMMARY

> THE FORT LEE BOARD OF EDUCATION HAS SCHEDULED THREE (3) INSTRUCTIONAL DAYS DURING THE APRIL BREAK. THIS WAS DONE AS A RESULT OF A GRIEVANCE DECISION RECEIVED IN MID-FEBRUARY. THE DECISION PERMITS THE SCHEDULING OF THESE DAYS AS PROFESSIONAL DEVELOPMENT DAYS WITH THE APPROVAL OF THE ASSOCIATION. IF APPROVED, THE STUDENTS AND STAFF WOULD MAINTAIN THEIR APRIL VACATION. TO DATE, THE ASSOCIATION HAS FAILED TO AGREE TO SUCH A SCHEDULE.

BACKGROUND

> In May 2014, the BOE approved the 2014-2015 school year calendar requiring 183 instructional days as per the contract.
>
> In June 2014, the Fort Lee Education Association ("FLEA") filed a grievance which was denied by the Superintendent.

> The grievance went to a hearing in December 2014.
>
> On February 10, 2015, the Arbitrator found, in a binding decision, that the BOE was entitled to 183 instructional days per school year. Under the contract, the BOE is paying for 183 instructional days.
>
> However, the BOE can exchange instructional days for professional development days if FLEA agrees.
>
> On multiple occasions, and as recently as this past week, the BOE has offered to exchange the three outstanding instructional days for professional development days. FLEA has refused to compromise on this issue.
>
> As recently as this morning, the Association has refused to even discuss any compromise on this issue despite the Board's written offer to amend the calendar to allow instructional time to be converted to professional development. [CP-12]

26. After the Board meeting there were two newspaper articles one on March 23, 2015, headed "Fort Lee Trustees Add School Days; Teachers' Union Vows Legal Challenge" (R-2) and one on April 3, 2015, headed "Fort Lee Teachers' Union Considers Legal Action against BOE" (R-3).

In the March 23 article, Capalbo reportedly urged the Board to sit down and negotiate with the Association (R-2; 2T82). She is also quoted in the article as saying, "It is your right to schedule the three days . . . [but taking away part of the spring break] is creating more animosity than you need" (R-2). Capalbo testified that this quote was taken out of context by the

reporter but did not elaborate how it was taken out of context (2T82).

In the April 3 article, the reporter wrote:

> While union representatives acknowledged the district's right to add days, they and others questioned the timing and motive of the move, which came a few weeks before the start of the spring break and followed lengthy and contentious contract negotiations between the union and the board. [R-3]

27. On March 25, 2015, Loccke wrote Saxton a letter demanding to negotiate over the impact of the Board's decision to add three instructional days during spring break (CP-13). Saxton never responded, so the Association filed an unfair practice charge (C-1; 2T42, 2T46-2T47). The three instructional days during spring break were imposed despite the request by the Association to the Commission for a restraint of the Board's decision (C-1; 2T42-2T43).

28. On April 7, 2015, all instructional staff received an email from Technology Coordinator Jason Ruggiero stating in pertinent part:

> Student classwork scheduled for April 8th, 9th and 10th will primarily be review work for PARCC exams and Quarterly Assessments given at the Middle and High School. Homework will not be given and student review work will not be graded for assessment purposes. [CP-5]

29. Upon receipt of CP-5, Novosielski emailed Ruggiero asking where the directive regarding the activities for the three

day instructional days came from. Ruggiero replied that the directive came from Saxton (CP-5; 1T30).[11/]

Novosielski attended school only on April 8 and became ill for the remainder of the week. He observed, however, that only about half of the students were in attendance on April 8 (1T28).

30. Due to the short notice of the revised calendar, Saxton was willing to accommodate individuals who may have scheduled vacation or had child care issues, but no staff members approached him with any concerns (3T27-3T28).

ANALYSIS

The issue in this case is whether the Respondent Board violated subsection 5.4a(5) of the Act by refusing to negotiate upon demand over the impact of the 2014-2015 calendar change adding three instructional days during spring break. Also, the charge alleges that the Board violated subsections 5.4a(3) and (1) of the Act by the manner in which the calendar change was made and announced, as well as the timing of the implementation.

11/ Saxton denies giving staff instructions as to what was going to take place during the three days of spring break but testified, that it was to be a regular instructional day with no homework and also a review for the PARCC (3T48-3T49). Later he testified that he did not recall giving any instructions to the administration or teachers about what could or should be done (3T49). His testimony is fraught with "I don't recall." I do not credit his faulty memory and credit Novosielski's testimony about the Ruggiero email communication on April 7 about what Saxton instructed the staff to do during the three days, namely review work for the PARCC exam and Quarterly Assessments given at the Middle and High Schools (CP-5).

These actions, the Association contends, support that the last minute scheduling of three instructional days during spring break was in retaliation for the Association's grievance regarding the calendar and the contentious negotiations for the parties most recent collective agreement.

The Refusal to Negotiate Allegation

N.J.S.A. 34:13A-5.3 authorizes a majority representative to negotiate terms and conditions of employment on behalf of unit employees and requires that "[p]roposed new rules or modifications of existing rules governing working conditions shall be negotiated with the majority representative before they are established." In other words, collective negotiations must be conducted with the majority representative before the establishment of new or different employment terms and conditions and such changes must be addressed through the parties' negotiations process, because unilateral change is destabilizing to the employment relationship and contrary to the Act's principles. Middletown Tp., P.E.R.C. No. 98-77, 24 NJPER 28, 29-30 (¶29016 1997), aff'd 334 N.J. Super. 512 (App. Div. 1999), aff'd 166 N.J. 112 (2000).

There is no doubt that the Board has a managerial prerogative to establish a school calendar. The establishment of the calendar is not a term and condition of employment because it

is a major educational determination which is exclusively the responsibility of school administration. Bethlehem Tp0. Bd. of Ed. and Bethlehem EA, P.E.R.C. No. 2014-47, 40 NJPER 337 (¶123 2014), aff'd. 42 NJPER 71 (¶18 2015); Piscataway Tp. Bd. of Ed., P.E.R.C. No. 99-39, 24 NJPER 520 (¶29242 1998) (Commission ordered Board to negotiate impact of its decision to cancel scheduled spring recess to make up lost school days due to harsh winter); Mountainside Bd. of Ed., P.E.R.C. No. 2001-29, 27 NJPER 17 (¶32009 2000); Egg Harbor Tp. Bd. of Ed., P.E.R.C. No. 2000-50, 26 NJPER 65 (¶31023 1999).

Here, although the Board had a managerial prerogative to establish the school calendar and the right to schedule the three additional instructional days as permitted by the parties' collective agreement, it nevertheless had a duty to negotiate upon demand the impact of its decision to eliminate spring break. Piscataway. The Superintendent's non-response to the Association's demand, therefore, was a refusal to negotiate in good faith in violation of 5.4a(5). His professed willingness to accommodate any staff who came to him with child care or pre-paid vacation problems is not a substitute for the obligation to negotiate with the Association. Nor does the fact that no staff

came to him to request an accommodation relieve the Board of its negotiations obligation.[12/]

Based on the foregoing, I find that the Board violated 5.4a(5).

The Bridgewater Claims

In re Bridgewater Tp., 95 N.J. 235 (1994), articulates the standards for determining whether personnel actions were motivated by discrimination for the exercise of protected activities in violation of 5.4a(3) and (1). A charging party must prove by a preponderance of evidence on the entire record that protected conduct was a substantial and motivating factor in the adverse personnel action. This may be done by direct or circumstantial evidence showing that the employee(s) engaged in protected activity, that the employer knew of this activity, and the employer was hostile towards the exercise of protected rights. Id. at 246.

If the employer presents no evidence of a non-discriminatory or legal motive for its action(s) or if its explanation has been

---

12/ The Board requested to negotiate [the issue of professional days] on several occasions. The Association refused even though the Arbitrator explicitly instructed the Board to negotiate if it desired to schedule professional days. The Association concluded that the Arbitrator relieved them of that responsibility. Since the Board has not filed a charge alleging a violation based on the Association's refusal to negotiate, I do not consider it in this decision.

rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both unlawful motives under the Act and other motives contributed to a personnel action. In these dual motive cases, the employer has not 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 is not considered unless the charging party first provides, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action.

Here, the Association was engaged in protected activities both during the protracted negotiations for its current collective agreement and the filing of a grievance challenging the 2014-2015 calendar. I reject the Board's argument that the Association was not engaged in a protected activity because the Board's addition of the three instructional days was permitted by the Arbitration Award and the parties' collective agreement. Citing Monaco v. Hartz Mountain Corp., 178 N.J. 401, 413 (2004), and Pressler & Verniero, N.J. Court Rules, comment 4 to R. 1:36-3 (2011), the Board contends that the law of the case doctrine applies, explaining that a party cannot relitigate a previously resolved issue. First, even if that doctrine applied here, which it does not, it is discretionary and non-binding. Id. Secondly,

the issue presented by the Association is not whether the parties' collective agreement permits the Board to schedule 183 instructional days. That question was resolved by the arbitration award.[13/] Rather, the issue is whether the Board acted in retaliation for the Association's filing of the grievance, the difficult negotiations for the new collective agreement and its refusal to accept the Board's offer to exchange the spring break instructional days for professional development days. Even if an employer's activities are permitted by an arbitration award, a statutory power or a managerial prerogative, it may not exercise its authority in retaliation for the exercise of protected activities. See, e.g., Passaic County Superintendent of Elections, P.E.R.C. No. 2014-1, 40 NJPER 136 (¶51 2013) (non-negotiable personnel actions taken to discriminate against employees are unfair practices); Jackson Tp. Bd. of Ed., P.E.R.C. No. 2006-12, 31 NJPER 281 (¶110 2005); State of New Jersey, P.E.R.C. No. 2006-11, 31 NJPER 276 (¶109 2005);

13/ Citing City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375 (¶13172 1982), the Board asserts that this matter should be deferred to the Arbitration Award which, it contends, settled the issue of the number of days the Board could schedule in 2014-2015. Englewood is inapposite. There, the Commission determined that although the issue of schedule change was submitted to arbitration, the union's claim that the schedule change was in retaliation for protected activity could not be deferred to arbitration absent a showing that the alleged issue of anti-union animus was presented to and considered by the arbitrator. The Board has made no such showing here.

Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aFF'D 2005 N.J. Super. Unpub. LEXIS 78, 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006); Hudson Cty. Police Dept. Layoffs, P.E.R.C. No. 2004-14, 29 NJPER 409 (¶136 2003).

Next, the second prong of the Bridgewater test is satisfied, because the Board was aware of these activities. The remaining issue is whether the Board was hostile to the exercise of these activities. The Association contends that hostility to its protected activities is supported by both the timing and manner in which the Board added three additional instructional days to the spring break.

The Association correctly cites cases for the proposition that the timing of an adverse personnel action may give rise to an inference of hostility to the exercise of protected activity. East Orange Bd. of Ed., P.E.R.C. No. 2009-24, 34 NJPER 374, 376-377 (¶121 2008), and cases cited therein. The Association contends that the timing of the March 19, 2015 announcement of the decision to add three instructional days during spring break occurred six weeks after the arbitration award addressing the calendar issue, which was on the eve of the parties' settlement of the successor agreement on March 18, 2015 and within a few weeks of the previously scheduled spring break.

Certainly, the timing created a great deal of consternation among and negative feedback from staff, parents and pupils to what was viewed as a last minute disruption to planned vacations and child care issues. However, Superintendent Saxton's written explanation for the calendar change attempted to skillfully deflect any community upset with the Board and himself by blaming the Association for filing the grievance which Saxton wrongfully concluded mandated the Board to schedule three additional instructional days during the 2014-2015 calendar year. He also characterized the Association's refusal to negotiate any compromise, which would have averted the elimination of spring break, as leaving the Board no choice but to revise the calendar. The notice to staff, parents and students also attached the actual arbitration decision and award, something that purportedly had never been done before. Thus, it is the combination of the timing of the decision and the proffered explanation which supports hostility to the Association's protected activities.

The Association also argues that Saxton's shifting motives for the decision to schedule instructional days over spring break support that the Board's rationale should be rejected as pretextual. Specifically, Saxton stated in his public announcements that the additional days during spring break were necessary for additional PARCC review. However, during the hearing Saxton testified that after three snow days were used

that year, he had no choice but to make up the days during spring break. No public announcement to the community articulated this as a basis for scheduling additional instructional days during the spring break. I find that the primary motive for adding the three days was because he interpreted the arbitrator's award as mandating 187/190 teacher work days (see generally Fact No. 16). However, as discussed, it was the manner in which he announced the decision as well as his decision that the days would be added by eliminating a portion of the already-scheduled spring break, at a time calculated to cause the most consternation and backlash in the community, which weighs in favor of finding an a(3) violation.

Finally, it is the decision to schedule three instructional days, taking time away during spring break, which is the adverse personnel action. It is clear from the testimony that Superintendent Saxton really wanted the extra days scheduled for professional development, not additional instructional days. When the arbitration award prevented him from doing so without first negotiating with the Association, his decision to schedule student instructional days was at least partially motivated by his antipathy to the Arbitrator's decision as well as to the Association's absolute refusal to negotiate any compromise. Saxton was determined to calendar extra instructional work days whether or not they were needed to advance his educational goals.

Even if Saxton and the Board were justifiably angry over the Association's unwillingness to compromise or to negotiate at all over the issue of professional days, their decision to take away spring break in the manner that they did, blaming the Association for the consequences of that decision, crossed the line and on balance was a decision taken because of hostility to the Association's grievance and its refusal to negotiate any proposal presented by the Board.[14/]

Based on the foregoing, I recommend that the Commission find that the Board violated 5.4a(3) and derivatively a(1) of the Act.

Remedy

Accurately citing cases supporting that the Commission has expansive powers to impose remedies which effectuate the policies of the Act, the Association's charge seeks not only a posting and order to negotiate impact but also restoration of the three instructional days scheduled during spring break. As the days cannot be actually restored, monetary compensation would be a make whole remedy. N.J.S.A. 34:13A-5.4(c) gives the Commission jurisdiction to adjudicate and remedy unfair practices as defined in N.J.S.A. 34:13A-5.4(a) and (b). However, here, the equitable doctrine of unclean hands weighs against the ordering of monetary

14/ There is no evidence in the record that the award was appealed. Any disagreement, therefore, with the Arbitrator's conclusions were binding on the parties.

compensation. That doctrine is an equitable principal that a court should not grant relief to a wrongdoer with respect to the matter at issue. Faustin v. Lewis, 85 N.J. 507 (1981).

As articulated previously, although Saxton and the Board incorrectly interpreted the Arbitration Award as mandating that three additional instructional days be scheduled in the 2014-2015 calendar year, so too did the Association incorrectly conclude based on the Award that it could refuse to negotiate upon demand over the addition of professional development days during the same calendar year. Certainly, had it done so, a reasonable compromise might have been reached, averting any inconvenience to staff and students' families.

As stated by the New Jersey Supreme Court in Hunterdon County Board of Chosen Freeholders and Communication Workers of America, AFL-CIO, 116 N.J. 322:

> . . . This case bespeaks the failure by each of the parties to comprehend or realize the larger goals of the Employer-Employee Relations Act.
>
> Although the Union acted within its clear right to file an unfair practice charge challenging the implementation of the incentive program without prior negotiation, the record suggests the Union might successfully have acted more promptly and taken a less-confrontational approach to this matter . . . It thus not only threw down the gauntlet, it lost an opportunity to continue and develop a constructive program. On the other hand, in picking up the gauntlet, the County sacrificed a program that had much merit. Id. at 337-338.

The Court then opined that "aside from the legal issues that we are impelled to consider, this controversy has arisen because of an apparent inability to communicate." Id. at 339.

Similarly, had the Association considered the offers of the Board regarding the professional days rather than reject them out of hand, this situation could have been avoided. I reject the Association's explanation that its absolute refusal to negotiate was because it had "a gun to its head." Any urgency was created in large part by the timing of the Award in mid-February, the mid-March negotiations settling the parties' collective agreement and the Association's continued refusal to discuss professional development days at any time.

Moreover, professional development, like the incentive program in Hunterdon, is an admirable educational goal. The Association's refusal to negotiate a compromise was a lost opportunity to avert the loss of vacation time and to obtain the benefit of enhanced staff training.

For these reasons, I am not going to order monetary compensation as a remedy.

CONCLUSIONS OF LAW

The Fort Lee Board of Education violated 5.4a(5) by refusing to negotiate upon demand over the impact of the decision to schedule instructional days during the 2014-2015 spring break.

The Board violated 5.4a(3) and derivatively a (1) of the Act by announcing to staff, parents and students that the reason for its decision to eliminate spring break was due to the Association's grievance challenging the 2014-2015 calendar and refusal to negotiate a compromise offered by the Board to exchange instructional days for professional development days, essentially blaming the union for its unpopular actions on the Association's exercise of its protected rights.

RECOMMENDED ORDER

I recommend that the Commission find that the Board violated 5.4a(5) of the Act by refusing to negotiate the impact of its decision to eliminate spring break in the 2014-2015 calendar year. I also recommend that the Commission find that the Board violated 5.4a(3) and derivatively a (1) of the Act

I recommend that the Commission ORDER:

A. That the Fort Lee Board of Education cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by blaming its decision to eliminate the spring break during calendar year 2014-2015 on the Association's grievance challenging the 2014-2015 calendar and its refusal to negotiate a compromise adding professional development days.

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 them by this Act, particularly by announcing to staff, parents and students that the reason for its decision to eliminate spring break was due to the Association's grievance challenging the 2014-2015 calendar and refusal to negotiate a compromise offered by the Board to exchange instructional days for professional development days, essentially blaming the union for its unpopular actions on the Association's exercise of its protected rights.

3. Refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by refusing to negotiate upon demand over the impact of the decision to schedule instructional days during the 2014-2015 spring break.

B. That the Board take the following action:

1. 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) days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

2. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this ORDER.

/s/Deirdre K. Hartman
Deirdre K. Hartman
Hearing Examiner

DATED: December 28, 2016
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 January 9, 2017.

RECOMMENDED

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 its employees in the exercise of the rights guaranteed to them by the Act, particularly by blaming its decision to eliminate the spring break during calendar year 2014-2015 on the Association's grievance challenging the 2014-2015 calendar and its refusal to negotiate a compromise adding professional development days.

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 this Act, particularly by announcing to staff, parents and students that the reason for its decision to eliminate spring break was due to the Association's grievance challenging the 2014-2015 calendar and refusal to negotiate a compromise offered by the Board to exchange instructional days for professional development days, essentially blaming the union for its unpopular actions on the Association's exercise of its protected rights.

WE WILL cease and desist from refusing to negotiate in good faith with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by refusing to negotiate upon demand over the impact of the decision to schedule instructional days during the 2014-2015 spring break.

Docket No. CO-2015-231 Fort Lee Board of Education
(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"