

H.E. NO. 2018-7

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

In the Matter of

CLARK TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2016-290

CLARK EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Commission dismiss a Complaint alleging that the Clark Township Board of Education unlawfully non-renewed secretarial unit employee Denise Hessler in retaliation for her membership with the Clark Education Association negotiations team. The Hearing Examiner found that although the Board Business Administrator was hostile to Hessler's protected activity, the Association did not prove by a preponderance of evidence that that hostility was a substantial or motivating factor in her non-renewal near the end of the 2015-2016 school year, pursuant to standards set forth in Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984).

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  
Oxfeld Cohen  
(Gail Oxfeld Kanef, of counsel)

For the Charging Party  
Weiner Law Group LLP  
(Patricia C. Melia, of counsel)

**HEARING EXAMINER'S REPORT**  
**AND RECOMMENDED DECISION**

On June 27, 2016, Clark Education Association (Association) filed an unfair practice charge against Clark Public Schools (Board). The charge alleges that on April 29, 2016, Board interim Superintendent Edward Grande informed secretary and unit employee Denise Hessler that her employment [contract] with the Board ". . . was being non-renewed." The charge alleges that Hessler was non-renewed, ". . . solely for holding a position on the negotiations team for the Association, violating section

5.4a(3) and (1)<sup>1/</sup> of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1, et seq. (Act). The charge specifically alleges that in December, 2015 and January, 2016, Board Business Administrator R. Paul Vizzuso informed Hessler that he, ". . . was not happy about [her membership on the negotiations team];" repeated the statement to her the following month and asked her if she would be willing to leave the union, to which asserted her right to maintain her membership. The charge also alleges that in February or March, 2016, Vizzuso, ". . . began making [employment] demands of Hessler" that he had not required previously and criticized her unfairly.

On February 24, 2017, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On March 6, 2017 and May 17, 2017, the Board filed an Answer and "corrected" Answer, admitting some alleged facts, denying others and denying that it violated the Act.

On June 29, 2017 and October 5, 2017, I conducted a Hearing at which the parties examined witnesses and presented exhibits. Briefs and replies were filed by January 12, 2018.

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

Upon the record, I make the following:

FINDINGS OF FACT

1. Denise Hessler was hired as an office aide by the Board in September, 2007. She had previously earned a Bachelor of Science degree in Accounting (1T19, 84).<sup>2/</sup> Throughout her Board employment, Hessler was included in the broad-based collective negotiations unit represented by the Association (R-1). From September, 2009 through June, 2014, Hessler was employed as a teacher assistant, earning highly complimentary year-end written performance evaluations. In the 2014-2015 school year, Hessler was employed as a paraprofessional, receiving an "overall" year-end evaluation of "super" (CP-1, 1T20, 42).

In May, 2015, Hessler applied for and received an offer of employment as a 10-month secretary in the Board central office, commencing September, 2015 (1T21, 82, 152-154). In August, 2015, Hessler was offered and accepted another position instead as a 12-month payroll secretary, also in the central office (1T155). She remarked to the offeror, then-interim Superintendent Edward Grande, that she had no experience in payroll duties, to which he assured her, "You'll be fine. It's like a clerk position. You input for checks" (1T23).

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<sup>2/</sup> "T" represents the transcript, preceded by a "1" or "2" signifying the first or second day of hearing, followed by the page number(s); "CP" represents Charging Party exhibits and "R" represents Respondent exhibits.

2. About one week after starting payroll secretarial duties, Hessler told Grande of her difficulties in performing them (1T26-27, 84). She admitted that she was unqualified for the title (1T95). Grande and Mark Kenney, then-interim Business Administrator, concurred that, ". . . payroll is not for [her]," proposing instead that she accept the 10-month secretarial position offered to her the previous spring (1T98). Hessler agreed and also agreed to their request to remain in the payroll title until someone else could be hired, which happened about three weeks later, around the beginning of October, 2015 (1T28, 81, 84, 156-158).

3. At or around the same time, the Board wished to fill a recently vacated 12-month position, secretary for health benefits and transportation (1T158). After speaking with Kenney, Grande believed that the health benefits/transportation position was "less-skilled" than the payroll position. Grande suggested to Hessler that she accept the health benefits/transportation position, which paid the same salary and benefits as the payroll position, about \$41,500. She agreed (1T74, 158-160).

The Board proffered a "secretary - benefits and transportation" job description that does not include an "approval date," an admittedly atypical circumstance for any description (it) deemed "official" (R-1, 1T162-163). Grande attended the Board meeting at which the description and others

were approved but could neither recall, nor approximate the meeting date (1T164). The "job goal" set forth in the description provides:

To oversee the operation of the school transportation program and to help ensure the efficient transport of pupils to curricular and extracurricular activities and to manage the record keeping of the insurance/benefit package provided by the [Board]. [R-1]

The holder of the position must possess a "high school diploma or its equivalent." She or he reports to the "School Business Administrator." Hessler saw the job description for the first time sometime in November or December, 2015 (1T86). Hessler admitted on direct examination that she had never before worked in matters of health care benefits and transportation and that she received inadequate training for the position (1T29-30). On cross-examination, she admitted that she was new and unqualified for the health/transportation position (1T81). Superintendent Grande admitted that no formal training is available for the health/transportation position and that he offered Hessler assistance whenever she thought it was needed (2T8).

4. In January, 2015, Hessler joined the Association's negotiations team and was asked to help represent the unit's teacher assistants and paraprofessionals in successor negotiations to the 2013-2016 collective negotiations agreement. Her duties on the team did not change throughout the period she was employed as a secretary (1T32-33, 99).

5. In early to mid-November, 2015, R. Paul Vizzuso was hired as Board Business Administrator/Secretary, replacing Kenney (1T160, 2T29). Vizzuso's immediately prior employment for about six years was in the same capacity at Little Ferry Board of Education (2T27). He worked another nine years as school business administrator in unspecified district(s) on unspecified dates (2T59). His duties at the Board include budgeting and financial oversight of all operations, including transportation. Vizzuso initially supervised five Board employees, including Hessler (in the benefits/transportation position) (2T28-29). Vizzuso was Hessler's direct supervisor for the remainder of the 2015-16 school year (1T160). He also became Hessler's "contact person," replacing Grande, in the event she needed assistance in performing her job duties (2T78). Hessler and Vizzuso worked in the same office area, ". . . not too far from each other" (2T40). On one or more unspecified occasions, Vizzuso instructed Hessler to seek assistance from him in performing problematic or unfamiliar tasks (2T29, 44-46).

6. Hessler testified that on an unspecified date in December, 2015, Vizzuso phoned or emailed her, requesting that she come to his office (1T34, 101). There, with no others present, they engaged in this colloquy (according to Hessler):

Vizzuso: I heard you were on the  
negotiations committee. I feel  
it's a conflict of interest; you  
know too much information.

Hessler: I really don't know anything; I'm new up here. I have no idea how anything works -- I've been in a classroom for the past six years.  
[1T102]

She testified that he repeatedly said that he was, "very uncomfortable working across the table" and that he needed a legal opinion about the "conflict of interest" (1T102-104). She testified that she replied: "I don't see why I can't be on the [negotiations] team" (1T35).

Hessler testified of a subsequent, similar occasion on an unspecified date before the end of January, 2016, when Vizzuso again called her to his office and remarked that he was still unhappy that she was on the Association negotiations committee (1T35, 104-105). She testified of her reply and Vizzuso's response:

Hessler: I don't see it being an issue.

Vizzuso: What does the union do for you, anyway? I'm going to try to change your title to 'benefits/ transportation coordinator.'  
[1T36]

Hessler testified that he said that a "coordinator" title would not be represented by the Association (1T36, 105).<sup>3/</sup> On cross-examination, Hessler testified that Vizzuso wanted her to ask the

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<sup>3/</sup> Among the titles "excluded" from the unit set forth in the recognition provision (Article I) of the parties' 2013-2016 agreement are "confidential employees," "supervisors" and "curriculum coordinator" (R-2).



other two secretaries [in the business office] if they were willing to leave the union and be "coordinators" (1T105).

Hessler testified that she asked the two secretaries about their willingness, naming them on the record (1T105). Hessler denied that she asked Vizzuso for a change in job title and denied she was seeking a salary increase or other paid holidays. Her title was not changed (1T110). I infer that no other secretarial title assigned to the Board business office was changed.

Hessler testified that near the end of January, 2016, Vizzuso again called her to his office, ". . . to let me know that the Board attorney said I can stay on [the Association negotiations committee]. Just because I knew confidential items, I couldn't speak about it with the committee [sic]" (1T37). She admitted that Vizzuso never again mentioned his concern about a potential conflict raised by her participation on the Association negotiations team (1T111).

She testified that on an unspecified date at the end of February, 2016 or in March, 2016, Vizzuso again spoke with her alone during a workday in his office, remarking that the Board is proposing to change [unit employee] paydays to or from the 15th and 30th days of the month and asking her to secure the Association negotiations committee approval (1T38-40). Hessler was unaware that paydays were a subject of collective

negotiations, though she replied that she would ask the committee (1T39-40).

On cross-examination, Hessler testified that in or around January, 2016, she informed Association President Jen Louis and a New Jersey Education Association representative of Vizzuso's remarks. She testified that she did not file a grievance because she was told that, ". . . [she] had every right to be on the committee" (1T79-80).

Vizzuso testified that Hessler approached him on an unspecified workday and mentioned that, ". . . we're going to start negotiations soon, [saying] I'm on the negotiations team. I've been on the negotiations team for a number of years, while it's here [sic]" (2T30). Vizzuso testified:

I stated to her, 'Well, that's nice. However, you know it is a conflict of interest.' And it was a question, just raised a question. And, she said, 'I'm not sure.' I said: 'I need to run this by the Board attorney to see whether or not, in fact, it is a conflict of interest.' [2T30]

Vizzuso testified that in late December, 2015 or early January, 2016, a named Board attorney whom he had asked about Hessler's presence on the Association negotiations team, ". . . said there is no conflict of interest" (2T30-31). Vizzuso testified that he told Hessler of the attorney's advice and that, "shortly after, she came to me and said, 'if we change my job title, then I can be off the negotiations team'" (2T32). Vizzuso testified that he

told Hessler that he would inquire of the Board attorney about the possibility and did and later advised her that such a change was not possible (2T33).

Vizzuso denied that he told Hessler that he was unhappy about her participation on the Association's negotiations team; uncomfortable about working across-the-table from her and that he asked her about changing payroll dates (2T32, 73).

I credit Hessler's testimony. I find more likely and credible that Business Administrator Vizzuso, new to the Board in November, 2015, (with substantial experience as a school business administrator), would initiate mention of Hessler's membership on the Association negotiations team than the reverse, that is, the subordinate employee - Hessler - unsolicited, would raise the subject of negotiations and then embellish the duration of her membership on the Association team. No facts indicate a history of difficult or contentious negotiations among the parties or any circumstance that would prompt Hessler to assertively notify Vizzuso of her membership on the Association team. In the context of their incipient supervisor-supervisee relationship, I doubt that Hessler, unsolicited, wanted to implicitly advise Vizzuso that they were equals and/or adversaries at the negotiations table.

I find credible Hessler's attested reply to Vizzuso's remark that her presence on the team posed a "conflict of interest;" she

understandably referred to her relative newness to and ignorance of the extent of responsibilities in her job title. I also infer that Hessler's inexperience in collective negotiations, together with her new job title would make her unlikely to seek another change in title (let alone, a promotion) to "coordinator" in order to secure her exclusion from the negotiations unit and from the Association team; such intentions and ostensible familiarity with the recognition provision of the agreement were not evident in the record facts. For all of these reasons, I do not credit Vizzuso's testimony, including his denials that he proposed changing Hessler's job description or title and that he spoke with Hessler about a negotiable change in paydays. I credit Hessler's testimony that Vizzuso asked her, "What does the union do for you, anyway?"

7. Hessler testified credibly that the parties' first negotiations session that she, Grande and Vizzuso attended, occurred in November or December, 2015. She could not recall if the meeting occurred before or after Vizzuso expressed dismay over her participation in negotiations (1T99-100). In the context of her remembrance of Vizzuso's words, I infer that he first mentioned his concern to Hessler before their first session. She admitted that nothing substantive was discussed at that session and that the parties did not meet for a second session until after she, ". . . was let go" (1T100). Grande

recalled a "handful" of sessions in the 2015-2016 school year, including those among Board team members, exclusively (1T166-167). Vizzuso testified that the parties' teams met in three to five sessions over the 2015-2016 school year (2T33). I find that the teams (including Hessler, Grande and Vizzuso) met at least twice over the course of that term.

Grande and Vizzuso testified separately that they served in an "advisory" capacity on the Board negotiations team and "really did not participate" directly in collective negotiations (1T65; 2T34). Their testimonies were un rebutted; I credit them.

8. On the afternoon of February 23, 2016, a workday, Hessler received a phone call from her distressed daughter, a student at a nearby Board middle school, imploring to be taken home (1T47, 119). At or around 2:55 p.m., Hessler informed two business office secretaries that she was leaving to take her daughter home and that she will return to the office. She promptly left and returned at or around 3:10 p.m.<sup>4/</sup> (1T47-48, 124). Hessler admitted that she didn't inform Vizzuso or Grande that she was leaving. "I was only thinking of my daughter, to be honest with you," she admitted (1T48, 120, 125).

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<sup>4/</sup> Vizzuso testified that Hessler was absent that afternoon, ". . . anywhere from 30 minutes to one hour" (2T40). In the absence of an attested foundation for Vizzuso's estimate and my not crediting other of his testimony (finding no. 6), I do not credit Vizzuso's estimate.

During her absence, a named building principal telephoned Hessler's office extension (to no avail) to inquire about the status of a late-arriving school bus at her school at the end of the school day (2T40). The principal next called Grande, informing him of the bussing matter and Hessler's unavailability. Grande called Hessler's office phone and then walked to her office to speak with her, both to no avail (1T170). Neither of the secretaries whom Hessler informed of her leaving told Grande of her whereabouts (1T171).

Vizzuso spoke with Hessler soon after she returned to work, inquiring of her whereabouts and admonishing her for being unavailable and for leaving to Grande the resolution of the bussing matter. Hessler explained that she left to take her daughter home from school (2T41).

On February 25, 2016, Hessler was called to a meeting with Grande and Vizzuso and given a letter Vizzuso wrote recounting the February 23rd incident and admonishing her to notify and seek permission from him whenever leaving the Board office during the workday (outside of her lunch period) (1T49, 172; 2T39; CP-2).

Vizzuso's letter closes:

We cannot have business office staff leaving the Board office whenever they like without prior approval outside of lunch period. Any future occurrences will lead to disciplinary action. [CP-2]

9. Between February 25, 2016 and April 29, 2016, Hessler received no written performance evaluations, no disciplinary memoranda, and no criticism for absenteeism<sup>5/</sup> (1T51, 132; 2T78). Vizzuso testified that in matters of his subordinates' misconduct, he begins a sequence of corrective responses with a "verbal communication," followed by "an email" in the event of repetition or related misconduct, followed by an email or letter placed in the employee's personnel file (2T53). He testified:

I'm a big believer in giving people opportunities to get better and better. So you have a step process before we go to the ultimate letter and it goes into their personnel file. [2T53]

Vizzuso was not asked why (in light of his averred "step process") Hessler's February 23, 2016 hiatus during work hours summarily resulted in his warning letter placed in her personnel file. He testified that on "a number of [unspecified] occasions," Hessler left work before the end of her workday, 4 p.m. (2T65-66). No facts indicate that Vizzuso ever sent Hessler a warning email to address her alleged early departures from work (that are distinguishable from her taking unapproved breaks). In the absence of any proffered explanation of why Vizzuso issued

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5/ Grande testified that he "notifi[ed]" Hessler regarding her attendance "prior to [the end of the school year]" (2T10, 13). In the absence of specificity about when Grande notified Hessler, I do not find that he spoke to her or otherwise so informed her before April 29, 2016. He also testified that, ". . . attendance is performance" (2T10).

the February 25th letter without a "step process" and considering his omission to issue an email warning to Hessler for her alleged repeated early departures from the office, I do not find that he applied a sequence of corrective responses to Hessler's misconduct.

10. Sometime in late March, 2016, Vizzuso and Hessler discussed "leave" she intended to or could take during an upcoming scheduled vacation (1T132-133; 2T42-43). Hessler knew that she would not accrue any vacation leave until July 1, 2016 (1T63). She testified that she sought to take "personal leave" in three of the four anticipated leave days of her vacation but believed that the collective negotiations agreement prohibited use of a personal day immediately before or after a school holiday (1T63). (In this instance, the holidays were Good Friday and the Monday following Easter). She did not account for the anticipated fourth day of leave. Vizzuso called Hessler to his office to address her omission (1T63). She testified that she "might" have commented to Vizzuso, "'I know I can't use a sick day.' I want[ed] to do a no-pay day, but he didn't like when you do that" (1T64). She testified that he asked her if she had an available personal day and she answered affirmatively. He replied that he would approve her taking of a "personal day" and wished her a "great vacation" (1T63, 133).



Vizzuso admitted that Hessler told him she was taking a vacation and, ". . . mentioned that she may use a sick day to extend her vacation," to which he expressed doubt that such use was appropriate (2T42). Vizzuso asked Grande about the matter, relaying to Hessler that a sick day taken immediately before or after a vacation leave will not be approved (2T43).

Grande testified that he told Vizzuso that a sick day may not be taken for any reason except personal illness (1T184). On cross-examination, Grande admitted that Hessler had not taken a sick day in violation of the policy and that ". . . the discussion was to prevent that" (2T14). Asked if Hessler had disobeyed by, ". . . calling out sick, anyway," Grande answered: "She didn't disobey, but there was a very negative attitude" (2T14). No facts suggest that Grande interacted directly with Hessler regarding the appropriate type of leave to be taken, leaving only the possibility that Vizzuso informed Grande of her "negative attitude," if at all. Vizzuso did not testify about Hessler's "attitude" in this instance. I do not credit Grande's hearsay testimony.

Pressed on cross-examination whether Hessler had "actually violated any Board policy regarding that sick day she thought she could take . . .," Grande answered that she had violated the policy,

. . . because it was entered into AESOP [the Board's online absence management system], as

a sick day. And even entering it in that way -- entering a day into the system that's not a true sick day is [a] violation of our policy. [2T15]

On redirect examination, Grande was asked why the sick day Hessler entered into the online system was changed to a "different type of non-workday." He replied:

Again, I believe it was entered into the system. I don't recall with certainty. But if there was a change, it was because there was a request made by myself and Mr. Vizzuso to Ms. Hessler to have that data changed. [2T24]

I find that Grande's equivocation on redirect examination does not permit a finding that Hessler initially entered a "sick day" as one of her anticipated leave days during a vacation. I don't credit Grande's cross-examination testimony. The Board-proffered print-out of Hessler's absences (derived from the online absence management system) during the 2015-16 school year shows that she took four "personal days" in the disputed period (R-6). Hessler wasn't specifically asked if she initially entered a "sick day" as an anticipated fourth vacation day and then changed it to a "personal day" upon direction. I credit Hessler's testimony.

11. Grande testified that in the afternoon of April 8, 2016, he received a phone call from either the named Board middle school principal or her secretary, advising of [another] bussing issue or problem and of Hessler's immediate unavailability to

respond (1T199). He testified that he walked from his office to Hessler's desk area and observed,

. . . [s]he was there but she was on her phone. And it was obviously a personal conversation. They were talking about cheerleading and she saw me right there and did not [even] hesitate [and] get off the phone, just kept talking like I wasn't even there. [1T199]

Grande testified that while he stood nearby, Hessler remained engaged in the phone conversation for about thirty seconds to one minute, after which he spoke with her about the substantive (bussing) matter brought to his attention (1T200). He testified, ". . . [Hessler] tried to be cooperative and deal with it" (1T200).

Hessler testified that on April 8, 2016, she did not partake in a "personal phone call" and was not admonished verbally or in writing for such conduct (1T70). Considering the specificity of Grande's version of events on April 8th (some of which would have likely been apparent to Hessler, also) and Hessler's omission to rebut that testimony (or explain how she knew she didn't make or receive a personal call at work that day), I am unpersuaded by her general denial. I credit Grande's testimony.

12. On or about April 13, 2016, Hessler was asked for the first time to determine a COBRA (Consolidated Omnibus Budget Reconciliation Act) health benefits refund amount for a Board

employee (who also was the Association President) (1T65; 2T44).

On direct examination, Hessler testified:

. . . I didn't know how to obtain [the refund] number. I never had to do that before. [Vizzuso] never told me what to do, how to do it. So I just went to something to look what [the employee] paid for COBRA and said this is the amount. I wasn't given any direction. [1T65]

She admitted making an error or miscalculation in deriving a refund amount and first learning of her mistake on or around May 25, 2016 (1T64, 66; 2T61; CP-5).

On an unspecified date after April 13th, Grande received a communication and/or an email from the affected employee advising that the calculation provided was wrong and he relayed it to Vizzuso (1T188-189; 2T44). Vizzuso testified that he had directed Hessler, ". . . how to do it, how to go about doing it, to call in Brown and Brown [the named broker, a privately-held company, administering Board health benefits]" for "technical assistance and guidance" in handling COBRA payments (2T44-45). Vizzuso did not believe that Hessler had called the company for assistance (2T45). Hessler was not specifically asked if Vizzuso had ever told her to call the company for assistance. I infer that Hessler did not ask Vizzuso for assistance when she was assigned the task of ascertaining the COBRA refund amount. On cross-examination, Hessler agreed that Vizzuso never provided her

step-by-step instruction on how to perform COBRA calculations (1T117).

I find that Hessler's quoted direct examination testimony means that Vizzuso did not instruct her in the mechanics of deriving the correct refund amount. Specifically, I infer that ". . . how to do it" is Hessler's unstudied correction or refinement of her immediately previous remark, ". . . what to do." Although the last sentence of the quoted portion could mean in part that Vizzuso never instructed her to call the Board health benefits broker if she needed assistance, I do not draw that inference, in the absence of rebuttal from Hessler that specifically contradicts Vizzuso's testimony. Stated another way, Vizzuso's failure to provide Hessler "step-by-step" instruction on performing COBRA calculation(s) neither negates nor persuasively rebuts his testimony that he told her to call the Board's broker administering its health benefit policy for such "step-by-step" instruction. I credit Vizzuso's testimony. I note that Vizzuso's failure to inform Hessler of her miscalculation until May 25, 2016 (in writing and after she received the notice of non-renewal) is another example of not applying his attested "step process" to correct Hessler's misconduct (see finding no 8). The record is also unclear whether Vizzuso learned of the miscalculation before or after

April 29, 2016, when Hessler was first informed of her non-renewal.

13. On April 27 or 28, 2016, Hessler asked Vizzuso if she could use a portion of her lunch period break that day to pick-up and deliver her pet to a groomer and later use the other portion to pick-up and return the pet to her home (1T71). Vizzuso agreed and they ". . . had a great conversation about being dog owners." Hessler uncontestedly recalled that Vizzuso's dog was named, "Biscuit" (1T71).

14. On April 29, 2016, Grande called Hessler to a meeting that Vizzuso also attended (1T52). Grande said: "We were renewing contracts and [you are] not going to be renewed for the next school year" (1T52-53). Grande testified that he had recommended Hessler's non-renewal to the Board, ". . . because of her work performance -- it didn't meet standards" (1T174). Hessler was given a letter dated April 29 signed by Grande advising that she was not recommended for renewal in the 2016-2017 school year and that her employment with the Board will end on June 30, 2016. The letter also advised Hessler of her right to request a "statement of reasons for your non-renewal . . ." (1T153; CP-3). On or about May 4, 2016, Hessler received by certified mail an updated but otherwise identical letter (1T127-128; R-4).

On cross-examination, Grande was asked if, at the time of Hessler's non-renewal, the Board had any open, available teaching aide positions. He answered:

Off the top of my head, I cannot answer with certainty because most of our -- as far as our paraprofessional responsibilities, which is one subset of our aides, I can say more 'no' than 'yes' because we attempted to go with long-term substitutes in those roles.  
[2T22]

The record provides no other indication of available teaching aide positions in April or May, 2016.

On May 11, 2016, Hessler sent a letter to Grande requesting a "statement of reasons" for her non-renewal, together with a request to appear before the Board at an upcoming monthly meeting (1T129; R-5).

15. On or about May 26, 2016, Vizzuso met with Hessler and gave her a two-page completed "Classified Employee's Performance Evaluation Form" regarding her performance as "secretary benefits/transportation" from October, 2015 to May 11, 2016, the date, ". . . of this report" (1T57, 59; 2T59; CP-4). Vizzuso testified that they, ". . . went through every line item" and their meeting lasted 15 to 20 minutes (2T60). Hessler testified on direct examination that Vizzuso did not discuss the evaluation with her; "he just handed it to me and wanted me to sign it" (1T57). On cross-examination, Hessler admitted that Vizzuso provided her the opportunity to read the evaluation and ask

questions of him (1T134-135). She specifically admitted challenging his award of a poor grade to her in one criterion (concerning "learning and applying new ideas"), telling him of her initiative in calling and asking all Board secretaries to provide her with names of available lunch aides willing to accompany special needs students on their bus rides home. She reminded him that he knew of her action. He replied: "Let me think about it. I might be able to change it." Vizzuso told her a day or two later that he could not (1T135-136).

I do not credit Hessler's direct examination testimony that Vizzuso did not discuss her evaluation with her. In the absence of Vizzuso's rebuttal, I credit Hessler's testimony about his response to her challenge of a specific poor grade and infer from it his implicit acknowledgment of her initiative. I also infer that Vizzuso "could not" change her grade for that criterion because he spoke with Grande (in the brief interim), who refused to modify an already-prepared "statement of reasons" for non-renewal, specifically his citation of "d" from her performance evaluation (see finding no. 16). I alternatively infer that Vizzuso did not speak with Grande about a correction.

The evaluation is mainly comprised of a "performance rubric" chart setting forth fourteen discrete performance criteria, each assessable in descending grades (that are concomitantly numbered, 4, 3, 2 and 1), from "highly effective," to "effective," to



"improvement necessary," to "does not meet standards" (CP-4). Hessler received seven scores of "1" ("does not meet standards"); six scores of "2" ("improvement necessary") and one score of "3" ("effective") for an overall rating of "1.57." Vizzuso wrote a "narrative summary:"

[Ms.] Hessler is receiving a low score of 1.57 which is attributable to several indicators of 'not meeting standards' and 'improvement necessary' as indicated in the recommendations section listed below. Overall cooperation and team concept is also lacking and needs improvement. [CP-4]

The evaluation also sets forth Hessler's "attendance" over the school year; 3 "family illness" days; 5 "personal days," 5.5 "sick days" and no vacation days, (noting that, "vacation [is awarded] on an accrual basis"). In a "recommendations" section, Vizzuso wrote that Hessler needs to improve in "following instructions," referencing her failure, ". . . to contact health benefits agency to get correct information for a COBRA participant" (see finding no. 12). He next wrote that she needs to improve "student transportation," noting "several occasions [of] lack of follow-through, requiring [he] or [Grande] to resolve the matter." Vizzuso wrote of Hessler's unapproved departure during the workday to drive her daughter home, as an example (see finding no. 8). Finally, Vizzuso wrote of Hessler's need to improve her, ". . . overall cooperation and interest in taking on new responsibilities," providing as an example her

unwillingness to "cross-train with payroll." Hessler refused to formally acknowledge her receipt of the evaluation (CP-4). She said to Vizzuso: "This is all untrue" (1T134). Vizzuso's signature and handwritten date, May 26, 2016, is inscribed at the bottom of the second page, together with his handwritten note: "Gave and reviewed evaluation with [Ms.] Hessler. [Ms.] Hessler refused to sign evaluation" (CP-4).

Hessler denied that she was criticized for misconduct (for which she received poor grades, i.e., "does not meet standards") before receiving her year-end evaluation (1T72-74).

16. On or about May 27, 2016, Hessler received a letter dated May 25th, authored and signed by interim Superintendent Grande, setting forth a "statement of reasons for non-renewal," together with seven listed criteria for which she had received (a day or two earlier) the grade of "does not meet standards," ((#1) on her year-end written evaluation) (1T59, 177; CP-4, CP-5; finding no. 15). Grande spoke with Vizzuso about Hessler's performance before writing his letter (2T38).

Grande's eleven enumerated written reasons for Hessler's non-renewal are:

1. leaving the office without permission in February, 2016 [finding no. 8];
2. poor attendance record from September 2015, ". . . to the present. You have used 10 sick days, 5 personal days and 3 family illness days, totaling 18 days" [finding no. 17];

3. the 'verbal warning' given on Thursday, March 24, 2016, about your inability to use a sick day the following week . . . [finding no. 10];
4. inability or refusal to follow Vizzuso's directives, specifically, an error in a COBRA refund on April 13, 2016 [finding no. 12];
5. poor/resistant attitude when Vizzuso has given assignments, such as cross-training with payroll secretary [finding no. 18];
6. "restructuring of the business office to envelope certain responsibilities that you expressed discomfort with . . . e.g., payroll duties;"
7. communication with parents on several occasions that were perceived as unhelpful and rude, resulting in phone calls to [Grande's] office [finding no. 19];
8. inability to resolve transportation issues, which resulted in phone calls to Vizzuso or to [Grande's] office;
9. Your being on personal calls during work time, specifically on the afternoon of April 8, 2016 - when you were needed on a bussing issue [finding no. 11];
10. outside of vacation time, you need to be present during summer months to arrange bus routes and ensure that employee health benefits accounts are established, you commented, 'You won't be seeing me in the summer' [finding no. 20];

11. repeated requests to modify your work schedule, for example your non-renewal meeting was rescheduled to April 29, 2016, ". . . to accommodate your dog's grooming schedule [finding no. 13]." [CP-5]

The seven criteria for which Hessler "did not meet standards" are:

- a) performs work that is neat, accurate and complete;
- b) completes the work required in the allotted time;
- c) uses sound judgment in performing the required work;
- d) readily learns and applies new ideas, procedures, rules and techniques;
- e) shows interest in the performed work;
- f) is diligent and resourceful in performing her work and
- g) follows instructions when performing duties. [CP-5]

17. The Board-proffered print-out of Hessler's absences in the 2015-2016 school year shows that on and before April 29, 2016, Hessler used 4.5 sick days, 3 family illness days, 5 personal days and .5 days "without pay," totaling 13 days (R-6). Hessler used a sick day on May 4, 2016 and 23 sick days from May 12 to June 30, 2016. (She used 4.5 sick days from May 12 through May 25, 2016) (R-6). She testified about sick days used after April 29, 2016:

I was very upset that I had lost the job. And I was with the [Board] nine years and I loved the school. And it was very stressful to go to work everyday knowing that I wasn't coming back. So I did see the doctor because I was just upset. I cried everyday probably for a good year. I just couldn't be there. I just couldn't. I did not understand why. [1T62]

I credit Hessler's testimony.

18. During an unspecified period between February and April 2016, the Board undertook a "reorganization" of its "business office," the contour of which is unclear (1T193). The only evident component of it was mandatory cross-training among business office support staff, including a directive (from Vizzuso) that Hessler learn unspecified payroll duties (2T47-48). He testified that Hessler ". . . just didn't want to be bothered with it, basically." He elaborated:

I think she had done payroll prior to me being there. And she may not have been successful so she may not have wanted to do payroll again. But she was very resistant to doing the cross-training. [2T48-49]

Hessler testified that she didn't refuse training with the payroll secretary, but admitted saying to Vizzuso: "I'm not sure because you know how I feel about payroll." She also admitted telling him that she was unqualified for the payroll position (1T67). Hessler received no email or other writing in advance of her evaluation admonishing her "resistance" or reluctance (1T68).

19. Vizzuso testified that on unspecified occasions during the 2015-2016 school year, Hessler didn't return parents' phone calls about bussing matters pertaining to their children (students). He testified that he or Grande would then receive follow-up calls from those parents complaining of unresolved issues (2T52). He testified that he spoke to Hessler about her daily "transportation" responsibilities but she didn't react favorably; "she made faces and things like that and [was not] very positive" (2T53). He did not issue a written or emailed warning to Hessler about her conduct (2T53).

Grande testified that he received "numerous" phone calls from parents, ". . . regarding transportation and/or payments," whose initial calls to Hessler were unanswered or she was "not cooperative" or obviously "stressed." He testified that a named parent (who also was PTA President), ". . . received a very inappropriate response [from Hessler] and went to the [school] principal, who then encouraged the [parent] to speak to me directly" (1T196-197). Hessler testified that she was not told of any instance in which a parent had complained of her being unhelpful or rude before receiving Grande's "statement of reasons" for non-renewal (1T69). I credit Hessler's testimony. In the absence of rebuttal or other evidence specifically contesting Grande's attested example, I credit his testimony.

20. Vizzuso testified that on an unspecified date, Hessler commented that, "we wouldn't be seeing her much in the summer," from which he inferred that "she [would] take [off] whatever days she had available to her" (2T55). He testified of his concern at that time that, ". . . summers are a crucial time, especially August because you're signing up all the transportation routes" (2T55). Vizzuso admitted that he "didn't question her, 'what do you mean by that?,' but the comment was made by her" (2T56).

Hessler testified that she did not utter that remark and was never criticized for saying it (1T70-71). In the absence of specificity about the context of the alleged statement, including when it was said, I do not find that Hessler stated an intention to be significantly absent during the summer months. I also find that Vizzuso believed that she had stated that intention.

21. Sometime in June, 2016, Grande was appointed as Board Superintendent (1T151). On re-cross examination, Grande acknowledged that over the summer, the Board reassesses its needs for paraprofessionals in the upcoming school year. He admitted that Hessler was not offered a position as a paraprofessional or substitute paraprofessional between June, 2016 and September, 2016 (2T25).

#### ANALYSIS

The issue in this case is whether unit employee Hessler's employment contract was "non-renewed" in retaliation for engaging

in protected conduct. The standard for evaluating a 5.4a(3) charge is well established. Under Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235 (1984), the charging party must prove, by a preponderance of evidence, 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 that activity and was hostile toward the exercise of protected rights. Id. at 246. If the employer does not present any evidence of another motive 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 evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action.

The Association contends that Board Business Administrator Vizzuso was hostile to Hessler's membership on the Association negotiations team by insisting that it was a "conflict of



interest" and by expressing his interest to her in changing her title to one excluded from the collective negotiations unit. These actions allegedly demonstrate "direct evidence" of hostility (brief at 14). It contends that animus is circumstantially demonstrated by the false and exaggerated number of "reasons to terminate a first-time secretary;" the Board's repeated failure, ". . . to provide [Hessler] an opportunity to correct her behavior;" and its refusal to offer her an aide position for the 2016-17 school term (brief at 24).

I disagree that the record reveals direct evidence of Board hostility to Hessler's membership with the Association's negotiations team. I agree that the record yields circumstantial evidence of hostility.

Without any apparent factual justification for a concern, Business Administrator Vizzuso, within one month of his hire date, proclaimed a "conflict of interest" generated by Hessler's unspecified "knowledge" [of "confidential" matters, presumably] and membership on the Association's team. Such employer representative statements, even naively baseless ones, are lawful and, if pursued, are subject to the Act's eschewal of "confidential" employees through our scrutiny under Commission administrative procedures. N.J.S.A. 34:13A-3(d),(g); N.J.A.C. 19:11-1.5. Upon hearing Hessler's objection to that posited

"knowledge," Vizzuso replied that he would seek a "legal opinion," evincing an intended due diligence.

I find that Vizzuso's subsequent remarks to Hessler, in January, 2016, rhetorically asking her what the union, "did for her, anyway" and advising of or suggesting a prospective change or promotion in title to exclude or lure her from the unit (even before learning of the "legal opinion") demonstrates hostility to Hessler's membership on the Association team. Irvington Bd. of Ed., P.E.R.C. No. 2003-83, 29 NJPER 484 (¶152 2003) (an employer's promise of wage or benefit increases for an employee not supporting union activity may violate 5.4a(3) and (1) of the Act).

I also agree that some of Grande's enumerated "reasons for [Hessler's] non-renewal" lack merit. I have found that Hessler was significantly less absent by the non-renewal date, April 29, 2016, than Grande reported in his May 25th letter; his reporting of her 10 sick days ". . . to the [May 25th] present" more than doubled the tally of her accumulated sick day absences on April 29th. Grande's listed "verbal warning" to Hessler about taking a "sick day" during her approved personal leave [vacation] is a patent mischaracterization of the facts, to Hessler's detriment (see finding no. 10). The circumstances of Vizzuso's approval of Hessler's request to use time allotted for her lunch period to pick-up, deliver and retrieve her pet was undeservedly cited as a

reason to non-renew her employment contract; she was not informed of any "meeting" that had been scheduled or needed to be rescheduled. The Board did not demonstrate that any comment of Hessler's regarding her summer plans was uttered before April 29, 2016. Nor could I glean from the record an articulable difference between numbers 5 and 6 on Grande's list, unjustifiably padding the number of "reasons for non-renewal."

I must next consider whether the Association proved that hostility was a substantial or motivating factor in Hessler's non-renewal. Under all the circumstances, I conclude that it did not.

No animus was adduced between Vizzuso's January, 2016 statement to Hessler that then-Board Labor Counsel had advised of no "conflict of interest" and Grande's April 29, 2016 notice of non-renewal to her. No facts indicate that any Board representative pursued a job title change for Hessler. Nor did the subject closely related to Vizzuso's hostility -- collective negotiations -- arise among the principals, except in passing (i.e., Vizzuso's request of Hessler to communicate to the Association team regarding paydays) in that interim. Neither Vizzuso nor Grande played an active role in collective negotiations and the number and significance of negotiations sessions during the 2015-2016 school term were negligible or forgettable or both. Nor do I attribute animus to Vizzuso's and

Grande's overall failure to apprise Hessler of her misconduct as it occurred or to Vizzuso's professed but disproved sequential responses to that misconduct. Also, the Association did not prove that teaching aide positions were available between April and June, 2016.

A public school employer's year-end decision not to renew an individual employment contract is not the same as a decision to terminate employment, though the consequence of both actions is identical. In the absence of a contractual tenure claim on behalf of a non-professional school board employee, employers have a managerial prerogative to determine whether to reappoint an employee after an individual employment contract has expired. Wayne Tp. v. AFSCME Council 52, 220 N.J. Super. 340 (App. Div. 1987); Washington Tp. Bd. of Ed., P.E.R.C. No. 88-148, 14 NJPER 471 (¶19199 1988); Cf. Long Branch Bd. of Ed., P.E.R.C. No. 92-79, 18 NJPER 91 (¶23041 1992).

I find that the Board and Grande in particular, lawfully exercised that prerogative. In the 2015-2016 school term, Hessler admittedly left her job on one occasion for a period of time without notice to or authorization from Vizzuso; ignorantly miscalculated a COBRA refund, without seeking assistance; lingered in a personal phone call during work hours in Grande's presence; provided one or more inappropriate responses to parents' question(s) regarding bussing; and was hesitant to

cross-train. Hessler was also significantly absent in May and June, 2016, fatally undermining any Board interest in offering her employment in the 2016-2017 school year.

RECOMMENDATION

I recommend that the Association has not proved that the Board was hostile to Hessler's protected activity -- her membership on the Association's negotiations team. Accordingly, I recommend that the Complaint be dismissed.

/s/Jonathan Roth  
Hearing Examiner

DATED: April 10, 2018  
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 April 20, 2018.