

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

In the Matter of

BRANCHBURG TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2018-071

BRANCHBURG TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner grants a motion for summary judgment in favor of the Branchburg Township Board of Education (Board) and recommends dismissal of an unfair practice charge filed by the Branchburg Township Education Association (Association). The amended charge alleges that throughout the 2016-2017 school year, particularly in performance observations on March 6, 2017 and a summative evaluation dated June 30, 2017, the Board violated subsections 5.4a(2) and (3) of the Act by holding Association President Rhonda Sherbin (Sherbin) to performance standards different from and higher than colleagues due to her participation in the Association; and that this disparate treatment culminated in the imposition of a corrective action plan in June 2017 for the 2017-2018 school year. The Hearing Examiner dismissed the 5.4a(2) allegation because the Association failed to provide any evidence or legal argument in support of its claim. The Hearing Examiner dismissed the 5.4a(3) allegation because the Association failed to sufficiently establish, demonstrate and/or plead protected activity, adverse employment action, and/or a nexus between Sherbin's alleged protected activity and adverse employment action; and because the Board established that the adverse employment action would have taken place absent Sherbin's alleged protected activity.

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. 2022-3

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

In the Matter of

BRANCBURG TOWNSHIP BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2018-
071

BRANCBURG TOWNSHIP EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, David B. Rubin, P.C.,
attorneys (David B. Rubin, of counsel)

For the Charging Party, Bergman & Barrett,
attorneys, (Michael T. Barrett, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On September 6 and 12, 2017, the Branchburg Township Education Association (Association) filed an unfair practice charge and amended charge against the Branchburg Township Board of Education (Board). The amended charge alleges that throughout the 2016-2017 school year, particularly in performance observations on March 6, 2017 and a summative evaluation dated June 30, 2017, the Board violated the New Jersey Employer-Employee Relations Act (Act), N.J.S.A. 34:13A-1 et seq.,

specifically subsections 5.4a(2) and (3),^{1/} by holding Association President Rhonda Sherbin (Sherbin) to performance standards different from and higher than colleagues due to her participation in the Association; and that this disparate treatment culminated in the imposition of a corrective action plan (CAP) in June 2017 for the 2017-2018 school year. See Association's Charge and Amended Charge.

On April 2, 2018, the Acting Director of Unfair Practices issued a Complaint and Notice of Hearing. Also on April 2, 2018, the Board filed an Answer denying the allegations in the amended charge and asserted the following:

-the Board did not attempt to hinder or discourage Sherbin or Association members in the exercise of their lawfully protected employment rights;

-the Board did not treat Sherbin unfairly or improperly in violation of N.J.S.A. 34:13A-5.4a(3);

-the Board did not hold Sherbin to performance standards different from and higher than colleagues as a result of her union participation; and

-the Board did not impose a CAP to

^{1/} These provisions prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization"; and "(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."

punish Sherbin for her union participation.

[Board's Answer, ¶¶2-5].

On July 27, 2021, the Board filed a motion for summary judgment, together with a brief, exhibits, and the certification of Superintendent Rebecca Gensel (Gensel) and Whiton School Principal Danielle Shober (Shober). On September 22, 2021, the Association filed opposition to the motion for summary judgment, together with a brief and the certification of Rhonda Sherbin (Sherbin). On October 6, 2021, the Board filed a reply brief and the supplemental certification of Whiton School Principal Shober. On November 22, 2021, the Board also filed the certification of its attorney, David B. Rubin (Rubin).^{2/}

On September 23, 2021, the Commission referred the motion for summary judgment to me for a decision. N.J.A.C. 19:14-4.8(a). On October 19, 2021, I held a settlement conference via ZOOM and continued mediation efforts thereafter. On November 15, 2021, counsel engaged in oral argument during a telephone conference call. At the conclusion of oral argument, I asked counsel to meet/confer with the parties regarding further mediation efforts. Ultimately, it became clear that it was necessary to render a decision with respect to the instant motion for summary judgment because there was no mutual interest in

^{2/} On November 18, 2021, I requested that the Board provide a copy of Sherbin's 2016-17 CAP, interim CAP performance report, and results of CAP.

mediation.

Accordingly, I have reviewed the parties' submissions. The following material facts are not disputed by the parties. Based upon the record, I make the following:

FINDINGS OF FACT

1. The Branchburg Township Education Association (Association) represents all non-supervisory certificated and certain non-certificated staff (including bus drivers, secretaries and clerks, custodians, library/media assistants, and instructional aides) employed by the Branchburg Township Board of Education (Board), excluding secretary to the superintendent, secretary to the business administrator, and payroll secretary. See 2016-2019 CNA, Section 1, Art. I.
2. The Board and the Association were parties to a collective negotiations agreement (CNA) in effect from July 1, 2016 through June 30, 2019. See 2016-2019 CNA, Section 1, Art. XV. The Board and the Association are parties to a CNA in effect from July 1, 2019 through June 30, 2022. See 2019-2022 CNA, Section 1, Art. XV.
3. Section 1, entitled "Common Provisions," Article III, entitled "Nondiscrimination Clause," of the parties' expired 2016-2019 CNA provides:

The parties agree to follow a

policy of nondiscrimination against any employee in accordance with the New Jersey Law Against Discrimination ("NJLAD"), N.J.S.A. 10:5-1 et seq.

4. Section 1, entitled "Common Provisions," Article V, entitled "Evaluation Procedure and Personnel Files," of the parties' expired 2016-2019 CNA provides:

A. Evaluation Procedures. All evaluations shall be in accordance with New Jersey law (N.J.S.A. 18A and N.J.A.C. 6A).

1. Any supervisor observing the work performance of an Employee for the purpose of the evaluation report shall do so openly and with the knowledge of the Employee.

2. Evaluations shall be signed by the Employee to signify that he/she has been given the opportunity to read the observation evaluation. Such signature shall not be construed to indicate agreement with or acceptance of the evaluation.

3. If an Employee is dissatisfied with an evaluation, he/she may make a written statement or response and have it permanently attached to the evaluation and made part of the file.

4. Any complaints regarding an Employee made to any member of the Administration by any parent, student, or other person, which are used in any manner in evaluating an Employee, shall be promptly investigated and called to the attention of the Employee. The Employee shall be given an opportunity to respond to and/or rebut any such complaints.

B. Personnel Files

1. No material derogatory to an Employee's conduct, service, character, or personality shall be placed in such individual's personnel file unless the Employee has had an opportunity to review the material. The Employee shall acknowledge that he/she has had the opportunity to review such material by affixing his/her signature to the copy to be filed, with the express understanding that such a signature in no way indicates agreement with the contents thereof. The Employee shall have the right to submit a written answer to such material.

2. The Board agrees to protect the confidentiality of personal references, academic credentials, and

other similar documents
in personnel files.

3. The Board shall
provide to each Employee
copies of the records and
reports pertaining to
evaluations contained in
the Employee's personnel
file, upon request.

4. An Employee shall have
the right, upon request
to the Superintendent, to
review the contents of
his/her personnel file at
reasonable times during
the normal work hours of
the Superintendent's
office.

5. An Employee's response
to any matter filed shall
be attached to such filed
matter.

6. The Board shall not
establish any separate
personnel file which is
not available for the
Employee's inspection.

5. The stated goal of the Teacher Effectiveness and
Accountability for the Children of New Jersey (TEACHNJ)
Act, N.J.S.A. 18A:6-117 et seq., is "to raise student
achievement by improving instruction through the
adoption of evaluations that provide specific feedback
to educators, inform the provision of aligned
professional development, and inform personnel
decisions" N.J.S.A. 18A:6-118.

6. Under TEACHNJ, New Jersey school districts are required to convene a "school improvement panel" to "oversee the mentoring of teachers and conduct evaluations of teachers, including an annual summative evaluation"; to "identify professional development opportunities for all instructional staff members that are tailored to meet the unique needs of the students and staff of the school"; and to "conduct a mid-year evaluation of any employee in the position of teacher who is evaluated as ineffective or partially effective in his most recent annual summative evaluation" N.J.S.A. 18A:6-120 (emphasis added).
7. Under TEACHNJ, New Jersey school districts "shall annually submit to the Commissioner of Education, for review and approval, the evaluation rubrics that the district will use to assess the effectiveness of its teachers, principals, assistant principals, and vice-principals and all other teaching staff members"; and "[t]he board shall ensure that an approved rubric meets the minimum standards established by the State Board of Education." However, "a school district may choose to use the model evaluation rubric established by the commissioner pursuant to . . . [N.J.S.A.] 18A:6-123 . . . to assess the effectiveness of its teachers,

principals, assistant principals, and vice-principals and all other teaching staff members." N.J.S.A. 18A:6-122 (emphasis added).

8. Under TEACHNJ, the Commissioner of Education "shall review and approve evaluation rubrics submitted by school districts . . . [and] [t]he board shall adopt a rubric approved by the commissioner." N.J.S.A. 18A:6-123(a). Moreover, the "State Board of Education shall promulgate regulations . . . to set standards for the approval of evaluation rubrics for teachers, principals, assistant principals, and vice-principals" and "[t]he standards at a minimum shall include:

(1) four defined annual rating categories for teachers, principals, assistant principals, and vice-principals: ineffective, partially effective, effective, and highly effective;

(2) a provision requiring that the rubric be partially based on multiple objective measures of student learning that use student growth from one year's measure to the next year's measure;

(3) a provision that allows the district, in grades in which a standardized test is not required, to determine the methods for measuring student growth;

(4) a provision that multiple measures of practice and student learning be used in conjunction with professional standards of

practice using a comprehensive evaluation process in rating effectiveness with specific measures and implementation processes. Standardized assessments shall be used as a measure of student progress but shall not be the predominant factor in the overall evaluation of a teacher;

(5) a provision that the rubric be based on the professional standards for that employee;

(6) a provision ensuring that performance measures used in the rubric are linked to student achievement;

(7) a requirement that the employee receive multiple observations during the school year which shall be used in evaluating the employee;

(8) a provision that requires that at each observation of a teacher, either the principal, his designee who shall be an individual employed in the district in a supervisory role and capacity and who possesses a school administrator certificate, principal certificate, or supervisor certificate, the vice-principal, or the assistant principal shall be present;

(9) an opportunity for the employee to improve his effectiveness from evaluation feedback;

(10) guidelines for school districts regarding training and the demonstration of competence on the evaluation system to support its implementation;

(11) a process for ongoing monitoring and calibration of the

observations to ensure that the observation protocols are being implemented correctly and consistently;

(12) a performance framework, associated evaluation tools, and observation protocols, including training and observer calibration resources;

(13) a process for a school district to obtain the approval of the commissioner to utilize other evaluation tools; and

(14) a process for ensuring that the results of the evaluation help to inform instructional development.

[N.J.S.A. 18A:6-123(b) (emphasis added); see also N.J.S.A. 18A:6-124; N.J.A.C. 6A:10-1.1 et seq.].

9. Under TEACHNJ, “[a] school district’s evaluation rubric approved by the commissioner . . . shall not be subject to collective negotiations” (N.J.S.A. 18A:6-125 (emphasis added)) and “[n]o collective bargaining agreement or other contract entered into by a school district . . . shall conflict with the educator evaluation system established pursuant to [TEACHNJ]” (N.J.S.A. 18A:6-126). However, “aspects of evaluation not superseded by statute or regulation shall continue to be mandatory subjects of collective negotiations.” N.J.S.A. 18A:6-126 (emphasis added).
10. Under TEACHNJ, “[a] board of education, principal, or

superintendent shall provide additional professional development for any teaching staff member who fails or is struggling to meet the performance standards established by the board, as documented in the teaching staff member's annual summative evaluation" and "[t]he additional professional development shall be designed to correct the needs identified in the annual summative evaluation." N.J.S.A. 18A:6-128(a-b). Moreover, "[a] corrective action plan shall be developed by the teaching staff member and a teaching staff member serving in a supervisory capacity to address deficiencies outlined in the evaluation when the employee is rated ineffective or partially effective" and "[t]he corrective action plan shall include timelines for corrective action and responsibilities of the teaching staff member and the school district for implementation of the plan." N.J.S.A. 18A:6-128(b) (emphasis added).

11. Under the regulations promulgated pursuant to TEACHNJ, certain observation, evaluation, and CAP requirements are specified as follows:

- evaluation of teaching staff members (N.J.A.C. 6A:10-2.1)

- duties of district boards of education (N.J.A.C. 6A:10-2.2)

- evaluation procedures for all teaching staff (N.J.A.C. 6A:10-2.4)
- corrective action plans for all teaching staff (N.J.A.C. 6A:10-2.5)
- components of the teacher evaluation rubric (N.J.A.C. 6A:10-4.1)
- student achievement components (N.J.A.C. 6A:10-4.2)
- teacher practice components (N.J.A.C. 6A:10-4.3)
- teacher observations (N.J.A.C. 6A:10-4.4).

12. Rebecca Gensel (Gensel) was employed by the Board as Superintendent of the Branchburg Township School District (District) during the period in question. Gensel recently retired from the District, effective October 1, 2021. See Gensel/Shober Certification, ¶1; see Shober Supplemental Certification, ¶3.

13. Danielle Shober (Shober) is employed by the Board as Principal of Whiton Elementary School. See Gensel/Shober Certification, ¶1; see Shober Supplemental Certification, ¶¶1, 3.

14. Rhonda Sherbin (Sherbin) has been employed by the Board as a teacher from 1998-present. Sherbin's assignments during that period were as follows:

- a. 1998-2010: gifted/talented teacher (Old York School). See Sherbin Certification, ¶2(a).

- b. 2010-2011: gifted/talented & instructional support teacher (Old York School). See Sherbin Certification, ¶2(a).
 - c. 2011-2020: instructional support teacher (Whiton School). See Sherbin Certification, ¶2(a).
 - d. 2020-2021: 3rd grade homeroom teacher (Whiton School). See Sherbin Certification, ¶2(a).
 - e. 2021-2022: district level substitute teacher (Whiton School and others). See Sherbin Certification, ¶2(a).
15. Sherbin also served as the Association President during the 2016-2017 school year. See Sherbin Certification, ¶2(b).
16. Superintendent Gensel and Principal Shober certify that the District "employs a rigorous, evidence-based teacher evaluation process based on the Stronge Teacher Effectiveness Performance Evaluation System (TEPES)" which "requires that teachers be observed and evaluated under seven different standards: Professional Knowledge, Instructional Planning, Instructional Delivery, Assessment of/for Learning, Learning Environment, Professionalism, and Student Progress." Gensel and Shober certify that "[a]n annual summative performance report rates teachers' performance under each of those seven standards as either 'highly effective', 'effective', 'partially effective', or 'ineffective'"; and that "[w]hen one or more standards

are rated 'ineffective', or two or more are rated 'partially effective', or the overall rating is 'ineffective' or 'partially ineffective', [the District] develop[s] a corrective action plan (CAP) to focus on improving the teacher's performance in those areas during the following school year." Gensel and Shoher certify that "[p]rogress toward successful fulfillment of a CAP is noted on an interim corrective action performance report and, at the end of the following school year, a final report indicating results of corrective action plan." See Gensel/Shoher Certification, ¶3; see also Shoher Supplemental Certification, ¶4; Sherbin Certification, ¶¶2(c-g); [https://www.motsd.org/cmsAdmin/uploads/nj-stronge-tepes-hb-\(1-11-16\).pdf](https://www.motsd.org/cmsAdmin/uploads/nj-stronge-tepes-hb-(1-11-16).pdf)

17. Sherbin certifies that "the administration does not follow TEPES accurately and, according to the [Board] and the determination of [her] previous Level 3 grievance to the [Board], the administration does not need to follow TEPES and can evaluate anyway they want." See Sherbin Certification, ¶2©.
18. During the 2013-2014 school year, Sherbin was observed and evaluated as follows:
 - f. 10/24/2013 - walk-through/informal classroom visit pertaining to instructional support (reading) by

- Rebecca Gensel. See Gensel/Shober Certification, Exh. A at 1-2.
- g. 11/26/2013 - formal observation by Laura Porcaro. See Gensel/Shober Certification, Exh. A at 3-6.
 - h. 3/14/2014 - walk-through/informal classroom visit pertaining to LLI (literacy) by Rebecca Gensel. See Gensel/Shober Certification, Exh. A at 7-13.
 - i. 7/2/2014 - summative performance report by Rebecca Gensel. See Gensel/Shober Certification, Exh. A at 14-19, 26.
19. Sherbin received two "partially effective" ratings (i.e., Performance Standard 2 - Instructional Planning; Performance Standard 4 - Assessment of/for Student Learning) and a composite score of 2.87 in her 2013-2014 summative performance report. See Gensel/Shober Certification, Exh. A at 14-19, 26. Accordingly, Sherbin was placed on a CAP for the 2014-2015 school year. See Gensel/Shober Certification, Exh. A at 20; see also Shober Supplemental Certification, ¶4.
20. Sherbin certifies that "the CAP for 2014-2015 was triggered by [her] specific involvement in a grievance involving missing teacher prep time"; and that "the grievance went to Level 3 and eventually was resolved by an arbitrator costing the District thousands of dollars." See Sherbin Certification, ¶¶2(g, I).
21. Sherbin also certifies that she "filed a grievance over [the 2014-2015] CAP and took it to . . . Level 3 in

front of the Board"; that she argued "that [Superintendent] Gensel did not follow TEPES and the CAP was invalid"; that "the Board's position was that the administration [was] free to evaluate any way [that it] want[s]"; and that "[Superintendent] Gensel apologized to [Sherbin] and told [Sherbin] the CAP meant nothing and that [they] just had to go through the motions" and "[Sherbin] did not remediate any deficiencies since none were valid." See Sherbin Certification, ¶¶2(I).

22. During the 2014-2015 school year, Sherbin was observed and evaluated as follows:

- j. 11/11/2014 - formal observation by Rebecca Gensel. See Gensel/Shober Certification, Exh. A at 28-30.
- k. 1/15/2015 - formal observation by Carol Kelley. See Gensel/Shober Certification, Exh. A at 31-34.
- l. 1/28/2015 - formal observation by Danielle Shober. See Gensel/Shober Certification, Exh. A at 35-37.
- m. 2/11/2015 - formal observation by Laura Porcaro. See Gensel/Shober Certification, Exh. A at 38-40.
- n. 6/19/2015 - summative performance report by Danielle Shober. See Gensel/Shober Certification, Exh. A at 41-43, 27.

23. Sherbin received five "effective" ratings and a composite score of 3.2 in her 2014-2015 summative performance report. See Gensel/Shober Certification, Exh. A at 41-43, 27. Accordingly, and based upon

meeting all of the goals set forth in her CAP, Sherbin was not placed on a CAP for the 2015-2016 school year. See Gensel/Shober Certification, Exh. A at 21-25; see also Shober Supplemental Certification, ¶5.

24. During the 2015-2016 school year, Sherbin was observed and evaluated as follows:

- o. 11/16/2015 - short observation by Danielle Shober. See Gensel/Shober Certification, Exh. A at 44-46.
- p. 2/11/2016 - observation by Danielle Shober. See Gensel/Shober Certification, Exh. A at 53-55.
- q. 6/15/2016 - summative performance report by Rocco Fornaro. See Gensel/Shober Certification, Exh. A at 47-52.

25. Sherbin received five "effective" ratings, two "highly effective" ratings, and a composite score of 3.34 in her 2015-2016 summative performance report. See Gensel/Shober Certification, Exh. A at 47-52.

Accordingly, Sherbin was not placed on a CAP for the 2016-17 school year. See Shober Supplemental Certification, ¶6.

26. During the 2016-2017 school year, Sherbin was observed and evaluated as follows:

- r. 10/26/2016 - short observation by Danielle Shober. See Gensel/Shober Certification, Exh. A at 56-59.
- s. 1/27/2017 - additional observation by Kristen Kries. See Gensel/Shober Certification, Exh. A at 60-62.
- t. 2/15/2017 - observation by Jennifer Hauser. See

Gensel/Shober Certification, Exh. A at 63-66.

- u. 3/6/2017 - additional observation by Danielle Shober. See Gensel/Shober Certification, Exh. A at 74-77.
- v. 6/30/2017 - summative performance report by Danielle Shober. See Gensel/Shober Certification, Exh. A at 67-73.

27. Sherbin received two "partially effective" ratings (i.e., Performance Standard 1 - Professional Knowledge; Performance Standard 3 - Instructional Delivery) and a composite score of 2.72 in her 2016-2017 summative performance report. See Gensel/Shober Certification, Exh. A at 67-73. Accordingly, Sherbin was placed on a CAP for the 2017-2018 school year. See Rubin Certification; see also Shober Supplemental Certification, ¶7; Rubin Certification.
28. Sherbin certifies that "the CAP for 2017-2018 was triggered by . . . [her becoming] President of the . . . Association" and "fil[ing] a grievance for bus drivers relating to an issue that was overlooked for years by the previous [Association] President." Sherbin certifies that "[d]ue to this dispute, [her] first teacher observation after becoming President of [the Association] was not done authentically or ethically, nor was it valid according to the District's own information regarding curriculum." Sherbin

certifies that “[t]his first observation was the initial episode of harassment that continued over the last five years.” See Sherbin Certification, ¶2(h).

29. Superintendent Gensel and Principal Shober certify that “CAPs are not disciplinary events, nor do they result in any diminution in a teacher’s compensation, tenure or seniority rights”; that CAPs “are simply a vehicle for identifying teachers in need of support and assuring they get all [of] the supervision and resources the district has available to maximize their chances for improving their performance.” See Shober Supplemental Certification, ¶11; see also Gensel/Shober Certification, ¶11.
30. Superintendent Gensel and Principal Shober certify that “Sherbin was observed by numerous evaluators whose collective input resulted in [Sherbin’s] annual performance ratings”; that they “respected and supported [Sherbin’s] activities as union president”; and that they “[had/have] [no] retaliatory motive toward Sherbin” See Shober Supplemental Certification, ¶12; see also Gensel/Shober Certification, ¶¶2-10.
31. On September 6 and 12, 2017, the Association filed the underlying unfair practice charge and amended charge.

See Association's Charge and Amended Charge.

STANDARD OF REVIEW

Summary judgment will be granted if there are no material facts in dispute and the movant is entitled to relief as a matter of law. Brill v. Guardian Life Ins. Co. of America, 142 N.J. 520, 540 (1995); see also, Judson v. Peoples Bank & Trust Co., 17 N.J. 67, 73-75 (1954).^{3/} In determining whether summary judgment is appropriate, we must ascertain "whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party in consideration of the applicable evidentiary standard, are sufficient to permit a rational factfinder to resolve the alleged disputed issue in favor of the non-moving party." Id. at 523. "Although summary judgment serves the valid purpose in our judicial system of protecting against groundless claims and frivolous defenses, it is not a substitute for a full plenary trial" and "should be denied unless the right thereto appears so clearly as to leave no room for controversy." Saldana v. DiMedio, 275 N.J. Super. 488,

^{3/} N.J.A.C. 19:14-4.8(e) provides:

If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and that the movant or cross-movant is entitled to its requested relief as a matter of law, the motion or cross-motion for summary judgment may be granted and the requested relief may be ordered.

495 (App. Div. 1995); see also, UMDNJ, P.E.R.C. No. 2006-51, 32 NJPER 12 (¶6 2006).

While a party is not required to file an affidavit or certification in support of summary judgment, where a "party opposing the motion [for summary judgment] does not submit any affidavits or documentation contradicting the moving party's affidavits and documents, then the moving party's facts may be considered as true, and there would necessarily be no material factual issue to adjudicate unless, per chance, it was raised in the movant's pleadings." State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020) (citing CWA Local 1037 (Schuster), H.E. No. 86-10, 11 NJPER 621, 622 (¶16217 1985), adopted P.E.R.C. No. 86-78, 12 NJPER 91 (¶17032 1985); City of Hoboken, H.E. No. 95-17, 21 NJPER 107 (¶26065 1995), adopted P.E.R.C. No. 95-91, 21 NJPER 184 (¶26117 1995); Nutley Tp., H.E. No. 99-18, 25 NJPER 199 (¶30092 1999) (final agency decision); N.J.A.C. 1:1-12.5(b) ("[w]hen a motion for summary decision is made and supported, an adverse party in order to prevail must by responding affidavit set forth specific facts showing that there is a genuine issue which can only be determined by an evidentiary proceeding"). As the New Jersey Supreme Court explained in Judson:

[I]f the opposing party offers no affidavits or matter in opposition, or only facts which are immaterial or of an insubstantial nature . . .

he will not be heard to complain if the court grants summary judgment, taking as true the statement of uncontradicted facts and the papers relied upon by the moving party, such papers themselves not otherwise showing the existence of an issue of material fact.

[17 N.J. at 75].

ANALYSIS

I. Allegations Preceding March 6, 2017

N.J.S.A. 34:13A-5.4(c) provides in pertinent part:

The commission shall have exclusive power as hereinafter provided to prevent anyone from engaging in any unfair practice Whenever it is charged that anyone has engaged or is engaging in any such unfair practice, the commission, or any designated agent thereof, shall have authority to issue and cause to be served upon such party a complaint stating the specific unfair practice charged and including a notice of hearing containing the date and place of hearing before the commission or any designated agent thereof; provided that no complaint shall issue based upon any unfair practice occurring more than 6 months prior to the filing of the charge unless the person aggrieved thereby was prevented from filing such charge in which event the 6-month period shall be computed from the day he was no longer so prevented.

The Commission has held that “[t]he Act does not rigidly bar relief on all causes of action arising more than six

months before a charge was filed” and “[i]n determining whether a party was ‘prevented’ from filing an earlier charge, the Commission must conscientiously consider the circumstances of each case and assess the Legislature’s objectives in prescribing the time limits as to a particular claim.” State of New Jersey (Juvenile Justice) and Judy Thorpe, P.E.R.C. No. 2014-71, 40 NJPER 512 (¶164 2014), aff’d 43 NJPER 353 (¶100 App. Div. 2017), certif. den. 231 N.J. 211 (2017). “Relevant considerations include whether a charging party sought timely relief in another forum; whether the respondent fraudulently concealed and misrepresented the facts establishing an unfair practice; when a charging party knew or should have known the basis for its claim; and how long a time has passed between the contested action and the charge.” Id. (citing Kaczmarek v. New Jersey Turnpike Auth., 77 N.J. 329 (1978)); accord West Orange Bd. of Ed., H.E. No. 2018-11, 44 NJPER 426 (¶120 2018), adopted P.E.R.C. No. 2019-10, 45 NJPER 144 (¶37 2018).

Here, the underlying unfair practice charge was filed on September 6, 2017. Therefore, absent an allegation and sufficient demonstration that the Association was prevented from filing a timely charge, any claim preceding March 6, 2017 is barred by N.J.S.A. 34:13A-5.4(c). The Association’s charge and amended charge only reference the 2016-2017 school year - i.e., Sherbin’s March 6, 2017 observation, Sherbin’s June 30, 2017

evaluation, and Sherbin's June 2017 CAP. See Association's Charge and Amended Charge. Notwithstanding same, Sherbin's certification appears to assert various claims that precede the 2016-2017 school year (specifically, March 6, 2017) absent any allegation or demonstration that the Association was prevented from filing a timely charge. See Sherbin Certification, ¶¶2(h-I).

It is undisputed that Sherbin was provided with the unequivocal results of each of her observations, evaluations, and CAPs (where applicable) during the 2013-2014, 2014-2015, 2015-2016, and 2016-2017 school years, and that she acknowledged receipt of same. See Gensel/Shober Certification, Exh. A at 1-77; Shober Supplemental Certification, ¶¶4-9; Rubin Certification. Moreover, during oral argument, the Association acknowledged application of the six-month statute of limitations in this matter and conceded that it was not asserting any claim preceding the 2016-2017 school year (specifically, March 6, 2017). See also, e.g., Middlesex Cty. Sheriff's Office and Mandato, P.E.R.C. No. 2017-8, 43 NJPER 90 (¶26 2016), aff'd 44 NJPER 333 (¶95 App. Div. 2018) (holding that when there is nothing "equivocal" about an employer's notice to an employee regarding his/her transfer or reassignment, "the limitations period to challenge the [transfer or reassignment] beg[ins] to run that day").

Accordingly, the Association was required to file an unfair practice charge challenging any observation, evaluation, and/or CAP regarding the 2013-2014, 2014-2015, and/or 2015-2016 school years within six months of Sherbin's receipt of same.^{4/} Therefore, I find that the charge and amended charge are untimely and barred by N.J.S.A. 34:13A-5.4(c) with respect to any related claim asserted in Sherbin's certification that precedes the 2016-2017 school year (specifically, March 6, 2017).

II. Allegations On/After March 6, 2017

With respect to the Association's allegations regarding Sherbin's observation(s), evaluation(s), and/or CAP during the 2016-2017 school year (specifically, on/after March 6, 2017), I find that the Association has failed to establish and/or sufficiently demonstrate a prima facie claim under subsections 5.4a(2) and (3)^{5/} of the Act.

A. 5.4a(2) Claim

^{4/} For example, Sherbin acknowledged receipt of her 2015-2016 summative performance report on June 15, 2016. See Gensel/Shober Certification, Exh. A at 47. Accordingly, the Association was required to file an unfair practice charge regarding same by/before December 15, 2016. See N.J.S.A. 34:13A-5.4(c).

^{5/} These provisions prohibit public employers, their representatives or agents from: "(2) Dominating or interfering with the formation, existence or administration of any employee organization"; and "(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."

Public employers are prohibited from "[d]ominating or interfering with the formation, existence or administration of any employee organization." N.J.S.A. 34:13-5.4a(2).

"[D]omination exists when the organization is directed by the employer, rather than by employees . . . [while] [i]nterference involves less severe conduct than domination but goes beyond merely interfering with an employee's section 5.3 rights; it must be aimed at the employee organization as an entity." Atlantic Comm. Coll., P.E.R.C. No. 87-33, 12 NJPER 764 (¶17291 1986). The Commission has held that the type of activity prohibited by 5.4a(2) must be pervasive employer control or manipulation of the employee organization itself. See North Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980).

Here, the Association has failed to provide any factual or legal argument in support of its 5.4a(2) claim. See Ass'n Br. at 1-4. Moreover, in opposition to the Board's motion for summary judgment, the Association has failed to provide any evidence in support of its 5.4a(2) claim. Sherbin's certification and attached exhibits do not demonstrate any domination or interference with the formation, existence, or administration of the Association, nor do they demonstrate any pervasive Board control or manipulation of the Association. See Sherbin Certification, ¶¶1-2, Exhs. A-B.

Under these circumstances, I find that the

Association's 5.4a(2) claim must fail as a matter of law. Even when viewed in the light most favorable to the Association, the competent evidential materials presented are insufficient to permit a rational factfinder to resolve this issue in its favor. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b). Accordingly, I find that this aspect of the amended charge must be dismissed.

B. 5.4a(3) Claim

Allegations of anti-union discrimination under N.J.S.A. 34:13A-5.4a(3) are governed by In re Bridgewater Twp., 95 N.J. 235, 240-245 (1984). "The charging party must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action." Newark Housing Auth., P.E.R.C. No. 2016-29, 42 NJPER 237, 239 (¶67 2015). This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity, and the employer was hostile toward the exercise of the protected rights. Ibid. If the employer did not present any evidence of a motive not illegal under our Act, or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Ibid. Sometimes, however,

the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. Ibid. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Ibid.

(i) Failure to Establish Protected Activity

With respect to the first prong of the Bridgewater test, I find that the Association has failed to sufficiently establish, demonstrate, and/or plead that Sherbin engaged in protected activity.

The Commission has held that "a public employee's status as a union officer or representative does not, by itself, insulate the union representative from an employer's investigation into workplace harassment or discrimination." State of New Jersey (Juvenile Justice Commission), D.U.P. No. 2015-1, 41 NJPER 142 (¶47 2014) (emphasis added) (noting that "[t]his holding is premised on the fact that state and federal anti-discrimination and anti-harassment laws require employers to investigate all allegations of discrimination or harassment and take prompt remedial action"; that "[a]n employer has a legitimate and substantial business justification for complying with these statutory requirements even where the allegations in question turn out to be without merit"); accord Rockaway Tp. Bd.

of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2013) (emphasis added) (“[s]erving as a union vice-president or representative on a negotiations team does not, standing alone, insulate an employee from an investigation of an affirmative action complaint” because a local board of education “has a managerial prerogative as well as a legal obligation to investigate [same]”).

The Commission has also held that “[p]rotected activity’ [is] . . . defined as conduct in connection with collective negotiations, grievance processing, contract interpretation or administration, or other related activity on behalf of a union or individual.” Rockaway Tp. Bd. of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2013) (citing North Brunswick Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), aff’d NJPER Supp. 2d 63 (¶45 App. Div. 1979); Woodbridge Tp., D.U.P. No. 94-14, 19 NJPER 523 (¶24243 1993)). “In addition to pleading protected activity and an adverse employment action resulting from that activity, ‘the protected conduct must be pled with the specificity required by N.J.A.C. 19:14-1.3(a)(3)^{6/}.’”

6/ N.J.A.C. 19:14-1.3, entitled “Form; contents,” provides in pertinent part (emphasis added):

(a) Such charge shall be in writing. The party or representative filing the charge shall make this dated and signed certification: “I declare that I have read the above charge and that the statements are

(continued...)

Id. (quoting Edison Tp., D.U.P. No. 2012-9, 38 NJPER 269, 272 (¶92 2011), adopted P.E.R.C. No. 2013-84, 40 NJPER 35 (¶14 2013)). "The charge must set forth a 'clear and concise statement of the facts constituting the alleged unfair practice.'" Id. (quoting N.J.A.C. 19:14-1.3(a)(3)). "The statement in the charge must also 'specify the date and place the alleged acts occurred' and the 'names of the persons alleged to have committed such acts.'" Id. (quoting N.J.A.C. 19:14-1.3(a)(3)).

Here, Sherbin's status as Association President during the 2016-2017 school year, by itself, does not insulate her from the Board's timely compliance with statutory and regulatory requirements set forth under TEACHNJ. See N.J.S.A. 18A:6-117 et seq.; N.J.A.C. 6A:10-1.1 et seq. Specifically, the Board had/has a legal obligation as well as a managerial prerogative - which extends to Sherbin - to

6/ (...continued)

true to the best of my knowledge and belief."
Such charge shall contain the following:

. . . 3. A clear and concise statement of the facts constituting the alleged unfair practice. The statement must specify the date and place the alleged acts occurred, the names of the persons alleged to have committed such acts, the subsection(s) of the Act alleged to have been violated, and the relief sought.

-observe all teaching staff multiple times during the school year which shall be used in evaluating the employee (N.J.S.A. 18A:6-123(b) (7));

-evaluate teaching staff annually (N.J.S.A. 18A:6-120(b)) based upon a non-negotiable evaluation rubric submitted to, and approved by, the Commissioner of Education (N.J.S.A. 18A:6-122, -123, -125, -126), and

-impose a CAP when any teaching staff is rated "ineffective" or "partially ineffective" in their annual evaluation (N.J.S.A. 18A:6-128).

See also Bergenfield Bd. of Ed., P.E.R.C. No. 2017-43, 43 NJPER 319 (¶90 2017) ("[a] school board has a managerial prerogative to observe and evaluate employees") (citing Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed., 91 N.J. 38 (1982)); Newark Bd. of Ed., P.E.R.C. No. 2021-48, 47 NJPER 524 (¶122 2021) (holding that "[s]chool boards have a non-negotiable, managerial prerogative to determine who will prepare evaluations of teaching staff members").

Moreover, the Association's charge and amended charge only specify that Sherbin was subject to "[d]isparate treatment . . . directly [as] a function of [her] union participation" and that a CAP was imposed "to punish her for her union activities." See Association's Charge and Amended Charge. This statement wholly fails to meet the pleading specificity requirements under N.J.A.C. 19:14-1.3(a) (3). Sherbin's certification asserts that "the CAP for 2017-2018 was triggered by . . . [her becoming]

President of the . . . Association" and "fil[ing] a grievance for bus drivers relating to an issue that was overlooked for years by the previous [Association] President"; that "[d]ue to this dispute, [her] first teacher observation after becoming President of [the Association] was not done authentically or ethically, nor was it valid according to the District's own information regarding curriculum"; and that "[t]his first observation was the initial episode of harassment that continued over the last five years." See Sherbin Certification, ¶2(h). Again, this assertion fails to meet the pleading specificity requirements under N.J.A.C. 19:14-1.3(a) (3). Not only are Sherbin's assertions absent from the Association's charge and amended charge, they also fail to "specify the date and place the alleged acts occurred" and the "names of the persons alleged to have committed such acts." N.J.A.C. 19:14-1.3(a) (3).

Accordingly, I find that the Association has failed to sufficiently establish, demonstrate, and/or plead that Sherbin engaged in protected activity. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b).

(ii) Failure to Establish Adverse Employment Action

Even assuming, arguendo, that the Association has established that Sherbin engaged in protected activity, I find

that the Association has failed to sufficiently establish, demonstrate, and/or plead that Sherbin suffered an adverse employment action under the second prong of the Bridgewater test.

New Jersey courts have held that "in order to be actionable, an allegedly retaliatory act must be 'sufficiently severe or pervasive to have altered plaintiff's conditions of employment in an important and material manner" and "a negative employment evaluation, unaccompanied by a tangible detriment, such as a salary reduction or job transfer, is insufficient to rise to the level of an adverse employment action." El-Sioufi v. St. Peter's University Hospital, 382 N.J. Super. 145, 176 (App. Div. 2005) (emphasis added); accord Cokus v. Bristol Myers Squibb Co., 362 N.J. Super. 366, 378-379 (Law Div. 2002), aff'd 362 N.J. Super. 245 (App. Div. 2003), certif. den. 178 N.J. 32 (2003) (emphasis added; citations omitted) (holding that "[a]lthough actions short of termination may constitute adverse employment action . . . , not everything that makes an employee unhappy is an actionable adverse action"; that statutes such as the NJLAD and CEPA "[were] never intended to be a general civility code for conduct in the workplace"). See also NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 34 (1967) (emphasis added) (holding that "if the adverse effect of . . . discriminatory conduct on employee rights is 'comparatively slight,' an [anti-union] motivation must be proved to sustain the charge if the employer

has come forward with evidence of legitimate and substantial business justifications for the conduct”).

The Commission has held that “[a]n adverse employment action is an essential element of [a] 5.4a(3) . . . claim” and that “[a] negative, evaluative memorandum does not, by itself (i.e., without a nexus to protected activity) rise to the level of an adverse employment action under section 5.4a(3).” State of New Jersey (Dep’t of Community Affairs), D.U.P. No. 2015-8, 41 NJPER 315 (¶102 2014) (emphasis added); accord State of New Jersey (Judiciary), 40 NJPER 24 (¶10 2013) (emphasis added) (holding that the charging party had not “suffered an adverse employment action related to protected activity” because “[s]he was not transferred, demoted, fired or suspended, and suffered no reduction in compensation, rank or title” and “[n]o facts suggest[ed] that any of her terms and conditions of employment [were] adversely affected”); Ridgefield Park Bd. of Ed., H.E. No. 84-52, 10 NJPER 229 (¶15115 1984), adopted P.E.R.C. No. 84-152, 10 NJPER 437 (¶15195 1984), aff’d NJPER Supp.2d 150 (¶133 App. Div. 1985) (dismissing a 5.4a(3) claim because an employer’s “comment[s] were within the sphere of permissible criticism and . . . did not threaten any employees, change any terms and conditions of employment, or seek to undermine the exclusive representative status of the [union]”).

Here, the Association’s charge and amended charge

allege that Sherbin "was held to performance standards different from and higher than colleagues," particularly in performance observations on March 6, 2017 and a summative evaluation dated June 30, 2017, and that "[t]his disparate treatment . . .

culminated in the imposition of a corrective action plan (CAP)

. . . in June 2017 . . . [for] the 2017-2018 school year."

See Association's Charge and Amended Charge. However, the Association has failed to provide any evidence to support its vague assertion that Sherbin was treated disparately by the Board compared to any other employee with respect to any observation, evaluation, and/or CAP. The Association has also failed to articulate or specify any particular aspect(s) of Sherbin's 2016-2017 observation(s), evaluation, and/or CAP that are disparate and/or disciplinary in nature.^{7/} See Association's Charge and Amended Charge; Ass'n Br. at 1-4; Sherbin Certification, ¶¶1-2, Exhs. A-B.

To the contrary, a review of Sherbin's 2016-2017 observation(s), evaluation, and CAP demonstrate that they are in fact evaluative in nature. See Gensel/Shober Certification, Exh. A at 1-77; Rubin Certification. See also Moonachie Bd. of Ed.,

^{7/} A review of Sherbin's 2016-2017 observation(s), evaluation, and CAP (see Gensel/Shober Certification, Exh. A at 1-77; Rubin Certification) demonstrate that when she was "dissatisfied with an evaluation", she availed herself of the opportunity to "make a written statement or response and have it permanently attached to the evaluation and made part of [her] file" (2016-2017 CNA, Section 1, Art. V(A)(3)).

P.E.R.C. No. 2018-17, 44 NJPER 217 (¶63 2017) (emphasis added) (holding that “[w]here a withholding flows from a board’s subjective educational judgment about what type of interaction should take place in a classroom, it is predominately related to an evaluation of teaching performance”); Secaucus Bd. of Ed., P.E.R.C. No. 2019-14, 45 NJPER 156 (¶41 2018) (emphasis added; citing Plainsboro Tp., P.E.R.C. No. 2009-26, 34 NJPER 380 (¶123 2008)) (holding that “[c]orrective action plans are generally evaluative in nature and intended to enhance teacher performance”); Pleasantville Bd. of Ed., P.E.R.C. No. 2019-34, 45 NJPER 313 (¶83 2019) (emphasis added) (noting that “[w]hen a document is challenged as constituting the imposition of discipline, the content, language/tone and context of the documents are all relevant in considering whether they, on balance, read more like benign forms of constructive criticism intended to improve teaching performance, or more like reprimands intended as a form of discipline” and “[i]n that respect, comments regarding non-teaching performance concerns are not arbitrable if they are neutral and non-punitive”; “[o]ther generally evaluative indicators include whether a corrective action plan is imposed and whether the disputed statements are issued as part of the regular evaluation process”).

Again, as set forth above, the Board was/is required to timely comply with statutory and regulatory requirements set

forth under TEACHNJ. See N.J.S.A. 18A:6-117 et seq.; N.J.A.C. 6A:10-1.1 et seq. Specifically, the Board had/has a legal obligation as well as a managerial prerogative - which extends to Sherbin - to

-observe all teaching staff multiple times during the school year which shall be used in evaluating the employee (N.J.S.A. 18A:6-123(b) (7));

-evaluate teaching staff annually (N.J.S.A. 18A:6-120(b)) based upon a non-negotiable evaluation rubric submitted to, and approved by, the Commissioner of Education (N.J.S.A. 18A:6-122, -123, -125, -126), and

-impose a CAP when any teaching staff is rated "ineffective" or "partially ineffective" in their annual evaluation (N.J.S.A. 18A:6-128).

See also Bergenfield Bd. of Ed.; Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed.; Newark Bd. of Ed., P.E.R.C. No. 2021-48, 47 NJPER 524 (¶122 2021). Moreover, during oral argument, the Association conceded that Sherbin's terms and conditions of employment (e.g., compensation, benefits, rank/title, etc.) had not been adversely affected, and that Sherbin was not transferred, demoted, fired, suspended, or brought up on tenure charges as a result of any observation, evaluation, and/or CAP. See El-Sioufi, 382 N.J. Super. at 176; Cokus, 362 N.J. Super. at 378-379; State of New Jersey (Dep't of Community Affairs); State of New Jersey (Judiciary).

Accordingly, I find that the Association has failed to

sufficiently establish, demonstrate, and/or plead that Sherbin suffered an adverse employment action. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b).

(iii) Failure to Establish Substantial/Motivating Factor

Even assuming, arguendo, that the Association has established that Sherbin engaged in protected activity and suffered an adverse employment action, I find that the Association has failed to sufficiently establish, demonstrate, and/or plead a nexus between Sherbin's protected activity and adverse employment action - and that the Board has established that the adverse employment action would have taken place absent the protected activity - under the third prong of the Bridgewater test.

The Commission has held that in order "[t]o prevail on [a] [5.4]a(3) claim, a charging party 'must assert some nexus between activities protected by the Act and the adverse personnel action.'" Rockaway Tp. Bd. of Ed., D.U.P. No. 2014-6, 40 NJPER 293 (¶112 2013) (quoting Woodbridge Tp., D.U.P. No. 94-14, 19 NJPER 523, 524 (¶24243 1993)). "Where a charge alleges unfair treatment that has no relationship to the protections afforded employees under the Act, no violation of section 5.4a(3) may be found." Id. (emphasis added) (citing Woodbridge Tp.; Camden Cty.

College, D.U.P. No. 91-7, 16 NJPER 523 (¶21229 1990); Essex Cty. Div. of Welfare, D.U.P. No. 85-25, 11 NJPER 439 (¶16150 1985); Edison Bd. of Ed., D.U.P. No. 85-18, 11 NJPER 103 (¶16044 1985)).
“The mere fact that an employee is a union activist or officer is not, without more, sufficient to show that there is a nexus between union activity and subsequent employer action” and “[t]o suggest that nexus automatically exists is to infer that those who participate in union activity are entitled to greater protection than any other employee.” Passaic Cty. Sheriff’s Office, H.E. No. 2016-3, 42 NJPER 145 (¶38 2015) (final agency decision; emphasis added) (quoting Warren Cty. Prosecutor’s Office, P.E.R.C. No. 2000-88, 26 NJPER 223 (¶31091 2000)).

The Commission has also held that “[a]dverse employer conduct cannot be a retaliatory response to a grievance if the conduct was initiated without the public employer’s prior knowledge of the grievance.” Salem Cty., D.U.P. No. 2014-9, 40 NJPER 381 (¶131 2014) (citing State of New Jersey (Dep’t of Environmental Protection & Energy), H.E. No. 95-2, 20 NJPER 306 (¶25123 1994), adopted P.E.R.C. No. 95-6, 20 NJPER 324 (¶25166 1994)); accord State of New Jersey (Montclair State College), D.U.P. No. 89-12, 15 NJPER 201 (¶20085 1989). “Timing is an important factor in determining whether or not hostility or union animus may be inferred” and “only where the personnel action is unanticipated and is taken at a time or in a manner inconsistent

with the ordinary course of business does that inference arise."

Bloomingtondale Bor., H.E. No. 2006-2, 31 NJPER 267 (¶106 2005)

(final agency decision; emphasis added) (citing West Orange Tp.,

P.E.R.C. No. 99-76, 25 NJPER 128 (¶30057 1999); Essex Cty.

Sheriff's Dep't, P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071

1988); Dennis Tp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16, 18

(¶17005 1985); Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER

3 (¶17002 1985)).

Here, the Association has failed to provide any direct evidence of a nexus between Sherbin's alleged protected activity and adverse employment action. The Association has failed to articulate or specify any particular aspect(s) of the record that demonstrates that the Board treated Sherbin disparately in her March 6, 2017 observation, June 30, 2017 evaluation, and/or June 2017 CAP due to, or causally-connected in any way, to the Board's hostility to any known/unknown protected activity. See Association's Charge and Amended Charge; Ass'n Br. at 1-4; Sherbin Certification, ¶¶1-2, Exhs. A-B. See also Passaic Cty. Sheriff's Office ("[t]he mere fact that an employee is a union activist or officer is not, without more, sufficient to show that there is a nexus between union activity and subsequent employer action"); Willingboro Bd. of Ed., H.E. No. 2016-4, 42 NJPER 156 (¶39 2015) (final agency decision; emphasis added) (in dismissing a 5.4a(3) claim, holding that the union's proofs "[were] not

persuasive of [its] claims" and "without more, do not support an inference that [unit members] were treated differently because of their protected activity"; Rockaway Tp. Bd. of Ed.

More broadly, given that the Board was/is required to timely comply with statutory and regulatory requirements set forth under TEACHNJ, the Association is unable to simply rely upon temporal proximity in order to circumstantially establish an inference of hostility to any known/unknown protected activity. See N.J.S.A. 18A:6-117 et seq.; N.J.A.C. 6A:10-1.1 et seq. The Board had/has a legal obligation as well as a managerial prerogative - which extends to Sherbin - to

-observe all teaching staff multiple times during the school year which shall be used in evaluating the employee (N.J.S.A. 18A:6-123(b) (7) (emphasis added));

-evaluate teaching staff annually (N.J.S.A. 18A:6-120(b)) based upon a non-negotiable evaluation rubric submitted to, and approved by, the Commissioner of Education (N.J.S.A. 18A:6-122, -123, -125, -126) (emphasis added), and

-impose a CAP when any teaching staff is rated "ineffective" or "partially ineffective" in their annual evaluation (N.J.S.A. 18A:6-128) (emphasis added).

See also Bergenfield Bd. of Ed.; Bethlehem Tp. Ed. Ass'n v. Bethlehem Tp. Bd. of Ed.; Newark Bd. of Ed., P.E.R.C. No. 2021-48, 47 NJPER 524 (¶122 2021).

Regardless of her alleged protected activity, the Board was obligated to observe and evaluate Sherbin annually, including

during the 2016-2017 school year; and the Board was obligated to impose a CAP on Sherbin if she was rated "ineffective" or "partially effective" in any given year, including during the 2016-2017 school year. The record demonstrates that Sherbin's 2016-2017 observation(s), evaluation, and CAP were fully-anticipated and completed in a time/manner consistent with the ordinary course of business; that they would have taken place absent any known/unknown protected activity. See Gensel/Shober Certification, ¶¶1-12, Exhs. A-B; Shober Supplemental Certification, ¶¶1-13; Rubin Certification. As such, temporal proximity is - at best for the Association - coincidental and insufficient to establish or demonstrate a nexus. See Bloomingtondale Bor. ("only where the personnel action is unanticipated and is taken at a time or in a manner inconsistent with the ordinary course of business does that inference arise"); see also, e.g., State of New Jersey (Juvenile Justice Commission), H.E. No. 2009-6, 35 NJPER 51 (¶22 2009), adopted P.E.R.C. No. 2009-57, 35 NJPER 133 (¶48 2009) (finding that "the timing of . . . [a shop steward's] reassignment and his grievance activity was at best coincidental" and holding that same was "[insufficient] to infer that hostility to [the shop steward's] grievance activity played any part in the [employer's] decision to reassign him"); Cape May Cty., P.E.R.C. No. 2018-21, 44 NJPER 266 (¶76 2017) (holding that "time alone is insufficient to prove

hostility . . . [where] later acts are inconsistent with a finding that the [employer] was trying to punish [unit] members for engaging in protected activity”).

Accordingly, I find that the Association has failed to sufficiently establish, demonstrate, and/or plead a nexus between Sherbin’s protected activity and adverse employment action – and that the Board has established that the adverse employment action would have taken place absent the protected activity. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b).

(iv) Conclusion

Under these circumstances, I find that the Association’s 5.4a(3) claim must fail as a matter of law. Even when viewed in the light most favorable to the Association, the competent evidential materials presented are insufficient to permit a rational factfinder to resolve this issue in its favor. See Brill, 142 N.J. at 523; Judson, 17 N.J. at 75; State of New Jersey (Corrections), H.E. No. 2020-2, 46 NJPER 195 (¶49 2019), adopted P.E.R.C. No. 2020-49, 46 NJPER 509 (¶113 2020); N.J.A.C. 1:1-12.5(b). Accordingly, I find that this aspect of the amended

charge must be dismissed.^{8/9/10/}

CONCLUSION

For these reasons, I grant the Branchburg Township Board of Education's motion for summary judgment.

-
- 8/ If the Association wished to challenge any aspect of Sherbin's 2016-2017 observations, evaluation, and/or CAP, it was not without recourse. "The commissioner [of education] shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education, or under the rules of the State board or of the commissioner." N.J.S.A. 18A:6-9, et seq.; see also N.J.A.C. 6A:3-1.1 et seq.
- 9/ If the Association wished to challenge any "evaluation procedures that are consistent with statutes and regulations and do not impair a [local school] board's ability to evaluate staff performance", same are "mandatorily negotiable" and "[a]lleged violations of such negotiable evaluation procedures are enforceable through binding arbitration." Willingboro Bd. of Ed., P.E.R.C. No. 2020-48, 46 NJPER 450 (¶102 2020); see also, e.g., Lacey Tp. Bd. of Ed. v. Lacey Tp. Ed. Ass'n, 259 N.J. Super. 397 (App. Div. 1991), aff'd 130 N.J. 312 (1992) (upholding an arbitration award vacating an evaluation because the teacher had not been provided with a copy of a document prior to conference); North Hunterdon-Voorhees Reg. H.S. Dist. Bd. of Ed., P.E.R.C. No. 2015-81, 42 NJPER 48 (¶14 2015) (emphasis added) (noting that an arbitral remedy on evaluation procedures could result in the local board being "directed to re-evaluate the teacher" which could result in her "rating . . . be[ing] raised" and "resolve the remainder of the dispute").
- 10/ If the Association wished to challenge "the interpretation and application of statutes setting terms and conditions of employment", same "may be subject to binding arbitration so long as the grievance resolution does not contravene statutory mandates." Willingboro Bd. of Ed., P.E.R.C. No. 2020-48, 46 NJPER 450 (¶102 2020).

RECOMMENDATION

I recommend that the complaint be dismissed.

/s/ Joseph P. Blaney
Joseph P. Blaney
Hearing Examiner

DATED: December 7, 2021
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 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. N.J.A.C. 19:14-8.1(b).

Any exceptions are due by December 17, 2021.