P.E.R.C. NO. 2005-26

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

WARREN HILLS REGIONAL
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2003-002

WARREN HILLS REGIONAL HIGH
SCHOOL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Warren Hills Regional Board of Education violated the New Jersey Employer-Employee Relations Act by subcontracting its regular bus routes and terminating its full-time and regular part-time bus drivers and mechanic in retaliation for the bus drivers' electing to have the Warren Hills Regional High School Education Association represent them. The Commission orders the Board to offer reinstatement to all terminated bus drivers and the mechanic, make all terminated employees whole for all salary and benefits due from their termination date to the present, less mitigation with interest at the rate set by court rules, and negotiate in good faith with the Association on demand over the terms and conditions of employment for the bus drivers and mechanic.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

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SCHOOL EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Broscious & Fischer, attorneys
(John M. Zaiter, of counsel)

For the Charging Party, Oxfeld Cohen, P.C., attorneys
(Gail Oxfeld Kanef, of counsel)

DECISION

On August 17, 2004, the Warren Hills Regional Board of Education filed exceptions to a Hearing Examiner's report and recommendations. The Hearing Examiner found that the Board committed unfair practices and violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically 5.4a(1), (3) and (5),[1/] by subcontracting the work of its full-

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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
(continued...)

time and regular part-time bus drivers and mechanic and terminating those employees in retaliation for their recently electing the Warren Hills Regional High School Education Association to represent them and to avoid negotiating with the Association. We conclude that the Board committed these unfair practices.

The Association filed this unfair practice charge on July 1, 2002 and amended it on September 10 and 26. On October 25, a Complaint and Notice of Hearing issued. On December 16, the Board filed its Answer denying that it subcontracted because of its superintendent's alleged anti-union animus.

Hearing Examiner Arnold H. Zudick conducted three days of hearing. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On July 21, 2004, the Hearing Examiner issued his report and recommendations. H.E. No. 2005-2, 30 NJPER 298 (¶105 2004). He found that the decision to subcontract was motivated by the superintendent's hostility toward the drivers' organizing and that the Board did not prove that it would have privatized the bus service absent that hostility. Accordingly, he found that

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1/ (...continued)
act; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

the Board violated 5.4a(3), and, derivatively, a(1) of the Act. The Hearing Examiner also found that the Board violated 5.4a(5) because it sought to avoid negotiations with the Association. He recommended that the Board be ordered to offer employees reinstatement with back pay, and to negotiate upon demand with the Association. The Hearing Examiner recommended dismissing an allegation that the Board refused to negotiate over terms and conditions of employment for its eight Activity Drivers.[2/]

The Board's exceptions ask us to reject the Hearing Examiner's credibility findings and his conclusion based on those findings that the superintendent's anti-union animus motivated the recommendation and decision to subcontract bus services. The Association's answering brief asks us to adopt and implement the Hearing Examiner's recommendations.

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact (H.E. at 3-20). Absent any compelling reasons to do otherwise, we specifically adopt his factual findings based on his credibility determinations.

In re Bridgewater Tp., 95 N.J. 235 (1984), establishes the test for assessing allegations that anti-union animus illegally motivated the exercise of a managerial prerogative. A public

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2/ Absent Association exceptions, we adopt the Hearing Examiner's recommendation to dismiss the allegation concerning the Activity Drivers.

employer has a prerogative to subcontract government services, but it cannot do so for anti-union reasons.

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

If the employer did not present any evidence of 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 the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

There is no dispute that the bus drivers engaged in protected activity and that the superintendent knew of that activity. During the first week of March 2002, Association President Ralph Fiore approached Board Superintendent Peter Merluzzi and informed him of the drivers' interest in organizing with the Association. Thus, the Association established the first two elements of the Bridgewater test.

The Association also established that hostility to that protected activity motivated the subcontracting decision. This third Bridgewater element was established through the timing of the subcontracting decision and two statements of the superintendent.

Timing is an important factor in assessing motivation and understanding the context of events. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985). The decision to explore subcontracting was made immediately after the superintendent was notified of the drivers' organizing and the decision to subcontract was made immediately after the vote for Association representation. This contrasts with other years of economic hardship, including one year where the district ran a $1.5 million deficit, when the district decided not to subcontract.

When told of the drivers' desire to organize, Merluzzi replied: "They don't want to do that." Merluzzi testified that

bus drivers already received the same increases as other employees, he did not see that there was an issue, and it was their choice to organize if they wanted; but the Hearing Examiner discredited his testimony and found instead that Merluzzi did not want the drivers to join the union. We reject the Board's argument that the Hearing Examiner's interpretation of Merluzzi's comment is merely an opinion and cannot be a fact. The Hearing Examiner observed the witnesses and is charged with determining the motivation for the subcontracting decision. He reasonably assessed the credibility of Merluzzi's explanations for his statement to Fiore. N.J.S.A. 52:14B-10(c) (agency head may not reject or modify any findings of fact as to issues of credibility of lay witness testimony unless it is first determined from a review of the record that the findings are arbitrary, capricious or unreasonable or are not supported by sufficient, competent, and credible evidence in the record).

Soon after, the Association filed a representation petition, won an election, and was certified as the majority representative of bus drivers, mechanics, and security guards. Fiore informed Merluzzi's secretary of the results. Shortly after the call, Merluzzi told Fiore that he was exploring privatizing the bus drivers to see if it would save money. This was the first time

Merluzzi had ever told Fiore that he was considering privatization.[3/]

On June 25, 2002, Merluzzi recommended to the Board that it subcontract bus routes driven by its full-time and regular part-time drivers. Fiore and many bus drivers and parents attended the Board meeting. Bus driver Donna Poyer, on behalf of all the bus drivers, asked Merluzzi why they were not given the opportunity to save their jobs by negotiating a possible reduction in their salaries and benefits. Merluzzi replied that the bus drivers had "lost the right to negotiate with him." Merluzzi testified that he meant that since the drivers had organized, the Association now represented them and thus he could not negotiate directly with the drivers without the Association's involvement. But the Hearing Examiner discredited his explanation and found instead that this remark reflected Merluzzi's continuing hostility towards the drivers' becoming unionized.[4/] Absent compelling contrary evidence, we will not substitute our reading of the transcript for the Hearing

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3/ The Board had just published a request for bids, but there is no evidence that Fiore was aware of that fact.

4/ Poyer was asked on cross-examination whether Merluzzi could have meant that now that the drivers had representation, he could not negotiate with them directly. She responded affirmatively, but added that that was not what she understood him to have meant.

Examiner's credibility determination. City of Trenton, P.E.R.C. No. 80-90, 6 NJPER 49 (¶11025 1980).

The Board challenges the inferences of hostility the Hearing Examiner drew from Merluzzi's comments to Fiore and Ponty. We accept those inferences because they logically flow from an examination of the comments in the context of the unfolding events. The Board took no steps to explore privatization until just after it was informed of the drivers' organizing. Merluzzi told Fiore that the drivers did not want to organize. The Board then solicited bids from subcontractors and at a meeting to accept a bid, Merluzzi publicly told the bus drivers that they had lost their right to negotiate with him. The Board had a decrease in State aid[5/] and a need to hire additional teachers, but it also had a surplus greater than the maximum set by statute, and had not subcontracted before, even when faced with difficult financial times. Thus, the Association proved that anti-union animus was a substantial or motivating factor in the subcontracting decision.

The next question under Bridgewater is whether the Board proved that it would have subcontracted even absent Merluzzi's hostility to the drivers' organizing. The Board asserts that it subcontracted to save money. The Hearing Examiner, however,

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5/ The amount of the increase in State aid the Board had been expecting and the amount of the superintendent's raise are not material to our determinations.

found that while saving money might have been a legitimate reason to justify privatization, that reason did not motivate the Board. Instead, the evidence showed that hostility towards the drivers' organizing drive motivated the subcontracting. We accept that determination based on our review of the entire record.

The Board argues that once it is established that there was a legitimate business justification for its decision, and hostility was not the sole reason for the subcontracting, the analysis is complete and the Complaint should be dismissed. The Board relies, in part, on Local 195, IFPTE v. State, 88 N.J. 393 (1982). As we have already held, we disagree with the factual predicate for this argument. Hostility was the sole reason for the subcontracting. We also disagree with the Board's interpretation of Local 195.

In Local 195, the Supreme Court addressed the negotiability of subcontracting decisions and stated that an employer:

> could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers. State action must be rationally related to a legitimate governmental purpose. Our decision today does not leave public employees vulnerable to arbitrary or capricious substitutions of private workers for public employees. [Id. at 411]

The Court was addressing whether a public employer has a managerial prerogative to subcontract -- whether subcontracting decisions should be subject to collective negotiations. The

Court was not insulating subcontracting decisions from allegations of illegal discrimination, whether they be based on race, sex, or, in this case, anti-union animus. Two years after issuing Local 195, the Supreme Court in Bridgewater adopted the Commission's test for resolving unfair practices in retaliation for the exercise of protected union activity. If the union establishes that anti-union animus was a motivating reason for the employer's action, the employer will often assert that it acted for legitimate business reasons.

> An examination of the evidence may reveal that the asserted justification is a sham, or was not in fact relied upon. When this occurs, the reason advanced by the employer is deemed pretextual. [Id. at 241]

The Hearing Examiner found that subcontracting did save this employer money and that it would have been a legitimate business reason for subcontracting bus services. However, the Hearing Examiner also found that saving money was not this employer's motivation for this subcontracting decision. Under these circumstances, we accept the Hearing Examiner's recommendations and conclude that the Board violated 5.4a(3), and derivatively a(1), when it subcontracted bus services. We adopt the Hearing Examiner's make-whole remedy.

The Board argues that the Hearing Examiner's decision tells a school district that despite its shortfalls and budget problems, it should not have tried to save $245,000. That is not

what his decision says. A public employer has a non-negotiable right to subcontract the delivery of government services to save money. Local 195. But that is not what happened here. This employer subcontracted because the bus drivers decided that they wanted to join a union. That the subcontracting saved the Board money does not make legal its illegally motivated decision.

The Hearing Examiner also recommended finding that the Board violated 5.4a(5) by subcontracting to avoid negotiating over the bus drivers' terms and conditions of employment. We accept that recommendation and order the Board to negotiate with the Association upon request. We agree with the Board that there was never an Association request to negotiate, but a request to negotiate is not a requirement for finding a violation. The Board violated 5.4a(5) because its subcontracting decision was motivated by its desire to avoid negotiations with the Association. That action constitutes a refusal to negotiate in good faith.

ORDER

The Warren Hills Regional Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by subcontracting its regular bus routes and terminating its full-time and regular part-time bus drivers and

mechanic in retaliation for the bus drivers' electing to have the Association represent them.

2. Discriminating in regard to the hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by subcontracting its regular bus routes and terminating its full-time and regular part-time bus drivers and mechanic in retaliation for the bus drivers' electing to have the Association represent them.

3. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by terminating its full-time and regular part-time bus drivers and mechanic to avoid negotiations with the Warren Hills Regional High School Education Association.

B. Take this action:

1. Offer reinstatement to all terminated full-time and regular part-time bus drivers and the mechanic who were terminated as of June 25, 2002.

2. Make the terminated employees whole for all salary and benefits due from June 25, 2002 to the present, less mitigation with interest at the rate set by Court Rules.

3. Negotiate in good faith with the Association on demand over the terms and conditions of employment for the bus

drivers and mechanic. If impasse is reached, utilize the Commission's impasse procedures as provided in N.J.A.C. 19:12-1.1 et seq.

4. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

5. Within twenty (20) days of receipt of this decision, notify the Chairman of the Commission of the steps the Respondent has taken to comply with this order.

The remaining allegations in the Complaint are dismissed.

BY ORDER OF THE COMMISSION

Lawrence Henderson
Chairman

Chairman Henderson, Commissioners Buchanan, DiNardo, Katz, Sandman and Watkins voted in favor of this decision. None opposed. Commissioner Mastriani was not present.

DATED: October 28, 2004
Trenton, New Jersey
ISSUED: October 28, 2004

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly by subcontracting regular bus routes and terminating our full-time and regular part-time bus drivers and mechanic in retaliation for the bus drivers' electing to have the Warren Hills Regional High School Education Association represent them.

WE WILL cease and desist from discriminating in regard to the hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by the Act, particularly by subcontracting regular bus routes and terminating our full-time and regular part-time bus drivers and mechanic in retaliation for the bus drivers' electing to have the Association represent them.

WE WILL cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment, particularly by terminating full-time and regular part time bus drivers and mechanic to avoid negotiations with the Association.

WE WILL offer reinstatement to all terminated full-time and regular part-time bus drivers and the mechanic who were terminated as of June 25, 2002.

WE WILL make the terminated employees whole for all salary and benefits due from June 25, 2002 to the present, less mitigation with interest at the rate set by Court rules.

WE WILL negotiate in good faith with the Warren Hills Regional High School Education Association on demand over the terms and conditions of employment for the bus drivers and mechanic. If impasse is reached, we will use the Commission's impasse procedures as provided in N.J.A.C. 19:12-1.1.

CO-2003-002	Warren Hills Regional Board of Education
Docket No.	(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State Street, P.O. Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

H.E. NO. 2005-2

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

In the Matter of

WARREN HILLS REGIONAL
BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2003-2

WARREN HILLS REGIONAL HIGH
SCHOOL EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission finds that the Warren Hills Regional Board of Education violated the New Jersey Employer-Employee Relations Act by subcontracting the work of its full time and regular part time bus drivers and mechanic and terminating those employees because they organized into a collective negotiations unit. The Hearing Examiner further found the Board's actions were intended to avoid negotiations with the new majority representative. The Hearing Examiner recommended the employees be offered reinstatement with back pay and an order to negotiate upon demand with the Association.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which 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. 2005-2

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

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BOARD OF EDUCATION,

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-and- Docket No. CO-2003-2

WARREN HILLS REGIONAL HIGH
SCHOOL EDUCATION ASSOCIATION,

Charging Party.

Appearances:

For the Respondent,
Broscious & Fischer, attorneys
(John M. Zaiter, of counsel)

For the Charging Party,
Oxfeld Cohen, P.C., attorneys
(Gail Oxfeld Kanef, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On July 1, 2002, Warren Hills Regional High School Education Association (Charging Party or Association) filed an unfair practice charge (C-1) which it amended on September 10 and 26, 2002, with the New Jersey Public Employment Relations Commission (Commission), alleging that Warren Hills Regional Board of Education (Respondent or Board) violated the New Jersey Employer-Employee Relations Act (Act), specifically N.J.S.A. 34:13A-

5.4a(1), (3) and (5).[1/] The charge alleges that the Superintendent threatened to subcontract bus driver work when the Association requested voluntary recognition as the drivers' majority representative; that after the Association was elected as the representative, the Superintendent refused to negotiate and told the Association President he was going to subcontract bus driver work; and, that in June 2002, the Board subcontracted bus driving duties and terminated its (full time and regular part time) bus drivers, all in violation of the Act. The charge further alleges that the Board refused to negotiate with the Association over terms and conditions of employment for "part-time" bus drivers.[2/]

The Association seeks a cease and desist Order; reinstatement and back pay; an Order to negotiate terms and conditions for part-time bus drivers retroactive to their date of employment; interest, and a posting.

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; (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

2/ This second count concerned other drivers employed by the Board more commonly referred to as "activity drivers".

A Complaint and Notice of Hearing was issued on October 25, 2002 (C-1). The Board filed an Answer (C-2) on December 16, 2002. It admitted that the Association requested recognition for bus drivers, and that it sought to negotiate for part-time drivers; however, it denied violating the Act.

Hearings were held on March 11, June 5 and July 31, 2003.[3/] Both parties filed post-hearing briefs by November 19, 2003. The Board filed a reply brief by December 21, 2003.

Based upon the entire record, I make the following:

Findings of Fact

The Bus Drivers' Organizing Activities

1. Ralph Fiore is employed by the Board as a teacher. He is also President of the Warren Hills Regional Education Association and has served in that capacity for the past 3 years (1T22). The Association represents a unit which includes teachers, secretaries and aides (1T22, 2T62, 3T4, 3T8).

Peter Merluzzi is Superintendent of Schools for the Warren Hills Regional School District and has served in that capacity for the past 8 years (3T4).

Superintendent Merluzzi and Association President Fiore have negotiated collective negotiations agreements over the years.

3/ The transcripts of the successive days of hearing are referred to as 1T, 2T, and 3T, respectively. "C" refers to Commission exhibits received into evidence at the hearing . "CP" and "R" refer to Charging Party exhibits and Respondent exhibits, respectively.

During negotiations, they spoke to each other often and had an agreement not to "surprise" the other about issues on behalf of their respective sides (1T58-1T59, 1T86, 3T4, 3T36).

2. For 18 years, until June 25, 2002, the District employed 14 regular bus drivers. Specifically, it employed 12 full-time drivers who drove two assigned runs a day--one in the morning and one in the afternoon. They also employed two regular part-time drivers, who drove only one assigned run per day (1T95-1T97, 1T101-1T102, 1T113, 1T131-1T132, 2T117, 3T8-3T13). The Board also employed four substitute/athletic drivers--Ron and Linda Sigler, Ollie Schramn, and Vickie Dell--who were known as activity drivers. These individuals drove extra runs, such as sports runs, activity runs, and class trips on an as needed basis; they also filled in for absent full time and regular part-time drivers (1T98, IT105-1T108, 1T145, 3T9-3T13). The regular 14 bus drivers were paid a higher rate than activity drivers and received benefits, while activity drivers did not (1T105-1T106, 3T10-3T12).

For many years, the Board first offered the full-time and regular part-time drivers any extra runs. These drivers were not required to accept these extra runs; rather, they were done on a voluntary basis and the drivers earned extra pay for them. If all the full time or part-time drivers declined or were not available for these extra runs, the activity drivers were

assigned those runs. The activity drivers were always available for these runs because they did not have regular routes (1T103-1T104, 1T106, 1T118, 1T133-1T134, 1T138, 1T145, 1T157, 2T74, 2T76, 3T11-3T13, 3T63).

3. In late 2001 or early 2002, New Jersey Education Association representative Pam Niles learned that the bus drivers, along with the mechanic and the security guards, wanted to organize (2T61-2T62, 2T78-2T79). She met with the interested employees in late February 2002. At the meeting, the bus drivers expressed fear that the Board would privatize the transportation department if they unionized, and that they would lose their jobs (2T62-2T67, 2T81-2T82, 2T84-2T85). Niles explained to the drivers that it would be illegal for the District to privatize just because they formed a union. No bus driver, however, indicated to Niles that any Board representative, including Merluzzi, had threatened them individually with privatization, if they organized (2T82).

Niles and the drivers also discussed the different transportation department positions. The drivers explained that there were full time and part-time bus drivers, a mechanic and some substitute/activity drivers. Niles then discussed what positions would be included in the unit (2T66-2T68).

4. In the beginning of March 2002, bus driver Debbie Wilson told Association President Fiore that the bus drivers

wanted to be represented by the Association. Wilson said that the drivers needed a "voice" and "someone to go to". Fiore told Wilson that he needed to meet with the bus drivers to discuss becoming represented by the Association. Fiore and the bus drivers later met a few times in his classroom (1T23-1T24, 1T47-1T48, 1T50-1T51).

Thereafter, but still in the first week of March 2002, Fiore approached Merluzzi in the school library and informed him that the bus drivers were interested in becoming Association members (1T24-1T25, 1T27, 3T35-3T36). Merluzzi replied: "They don't want to do that" (1T25,1T51). Fiore was taken aback by the remark. He interpreted the remark to mean that Merluzzi did not want the drivers to join the union (1T25-1T26, 1T51-1T52).

Merluzzi admitted making the remark attributed to him by Fiore. He testified that he meant:

> Well, he talked about, you know, the fact that they were looking to organize. And the comment I think I made to him that he referred to was that they don't want to do that. And I think what I was trying to indicate to him was that, you know, from experience here that the Board of Education in this district in particular and it's not true in every situation but in this district treats noncertificated employees comparable to whatever they've done with the certificated staff and the bargaining unit. So in the certificated staff and the bargaining unit had a 4.8 percent increase then the increases that were given out to the nonrepresented or, you know, members of the organization, you know were comparable to that. Maybe not always to the dollar to the

> person but comparable. And that, you know, they would expect to receive what they were going to get regardless. So I don't see that there is an issue, but certainly it's their choice to do so if they wanted to do it. [3T36-3T37]

In their conversation, Fiore informed Merluzzi that the bus drivers' desire to organize had nothing to do with salary or benefit issues, and would not increase Board costs. He explained that the drivers just wanted "a voice" (1T25-1T26).

I credit Fiore's inference of Merluzzi's remark and do not credit Merluzzi's explanation of his intended meaning. If Merluzzi really believed that the drivers would mostly be treated the same as the organized employees, then their organizing shouldn't have caused him to give Fiore a subtle message to avoid organizing them.

5. On March 7, 2002, Fiore sent a letter, CP-3, to the Board President, informing him that the bus drivers and mechanic desired to become Association members. He asked the Board to grant the group voluntary recognition. Fiore never received a response to CP-3 and never discussed recognition with the Board President or any Board Representatives (1T27-1T28, 1T30, 2T67).

6. On April 5, 2002, the Association filed a representation petition with the Commission, Docket No. RO-2002-78, seeking to represent a negotiations unit of all full time and regular part-time bus drivers, security guards and bus mechanics employed by

the Board (1T29, 2T68, 3T38-3T39, J-1).[4/] An informal conference was conducted at the Commission's office on April 22, 2002. Fiore, Niles, the Board and Association attorneys and Merluzzi attended the conference (2T68, 3T40-42, J-2). There was a discussion about what titles would be included in the negotiations unit (2T68, 3T40-3T43). The discussion focused on those drivers who were eligible to vote, that is, those who drive regular runs on a daily basis, either part-time or full time, and school resource officers (also known as guards) (3T42-3T43). The Board and the Association signed a consent agreement to conduct a secret ballot election for a negotiations unit of "all regularly employed full and part-time bus drivers, bus mechanics and security guards" (2T68, 3T42-3T43, R-1, J-3).

According to Niles, the specific title "activity driver" was never raised at the conference. Only substitute drivers were discussed and the parties agreed that they would be excluded from the unit (2T69-2T70, 2T78).

Merluzzi, however, claims the term activity driver was discussed and it was agreed that this title would not be included in the election (3T42-3T43). Niles had viewed activity drivers separately from substitute drivers. She believed activity drivers belonged in the unit as she considered them part-time

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4/ I took administrative notice of RO-2002-78 to gather facts regarding the petition. N.J.A.C. 19:14-6.6(a).

drivers who drove regular runs and not substitute drivers who simply fill in for an absent bus driver as needed. After the conference, Merluzzi compiled a list of eligible voters; excluded from the list were all activity/substitute drivers (3T43, R-8). Merluzzi never received a complaint about the contents of the list (2T68-2T70, 3T44 R-8).

After the conference Niles met with the bus drivers to explain the Commission's election process. At that point, Fiore knew that the activity drivers would be excluded from the unit (1T50, 1T63). I credit Fiore and Merluzzi that the activity drivers were excluded from the proposed negotiations unit. I do not credit Niles that only substitute drivers were excluded. The facts do not support her contention.

7. The returned mail ballots for the unit of all full time and regular part-time bus drivers, security guards and mechanic were counted on May 23, 2002. A majority voted for representation. Activity drivers did not vote in the election (1T63, 1T99,1T110, 1T114, R-2). On June 3, 2002, the Association was certified as the majority representative of a unit of "all regularly employed, full and part-time bus drivers, bus mechanics, and security guards" employed by the Board (1T31, 3T48, J-3).

The Board's Decision to Subcontract

8. After the representation election count on May 23, Fiore called the Board office and informed Merluzzi's secretary of the results (1T33, 1T53, J-3). Shortly after that call, Fiore spoke to Merluzzi, advising him that the Association intended to pursue an agreement for the new bus drivers and security guards unit (1T33-1T36, 1T58, 1T86, 3T48-3T49). Merluzzi replied that he was exploring "privatizing the bus drivers" to see whether it would save money. This was the first time Merluzzi had ever indicated to Fiore that he was considering privatization (1T33-1T38, 1T57, 1T75, 3T50).

Fiore asked Merluzzi whether the Board was definitely going to subcontract. Merluzzi replied that he would not know until the bids were in. He informed Fiore that once the numbers were in, and it appeared that the Board would save a substantial amount of money by privatizing, then he'd recommend privatization. Fiore asked Merluzzi what the Board considered a "substantial" amount of money. Merluzzi replied that "substantial" meant a savings of at least $100,000 to $150,000 (1T40-41, 1T60-1T61, 1T85, 3T50). In response to Merluzzi's privatization remark, Fiore told Merluzzi that the Association would pursue negotiations for the drivers and guards anyway. They mutually agreed they were "doing what [they] both had to do" (1T38, 1T76). Fiore did not ask Merluzzi to negotiate at that

time, and Merluzzi did not say at that time that he would not negotiate (1T76).

Before this late May 2002 conversation with Merluzzi, Fiore had no reason to believe that privatization of bus drivers may occur. Approximately one year earlier, the District had purchased three or four new buses and there had never been any discussion regarding problems with bus driver salaries or benefits at any Board meetings (1T39-1T40).

Moreover, at a bus driver safety meeting in January 2002, Merluzzi had informed the drivers about a merit pay system that the Board was going to implement for the upcoming school year, beginning in September 2002 (1T90-1T92, CP-1, CP-2). Further, in its budget for the 2002-2003 school year that had been submitted to the state Department of Education in March 2002 and passed by the Board in April 2002, the Board projected a 10 percent increase in the cost of bus drivers' salaries, as well as a decrease in the projected amount of contracted services from its 2001-2002 budget. The Board did not project a decrease in transportation employees in that budget. If the District had decided in April 2002 to privatize its bus service, there would have been no projected bus driver salaries for 2002-2003, and there would have been a decrease in the number of employees (1T32, 2T12-2T13, 2T30-2T35, CP-5).

In addition, the budget estimated an increased enrollment of only 45 students, and also indicated that the District had a large budget surplus for the 2001-2002 school year and a $1.1 million dollar surplus for the 2002-2003 school year (2T18-2T19, 2T24, 2T123, 2T124, 3T33, CP-5). Under state law, districts are limited to a surplus of not more that six percent of their projected annual budget; any overage must be put back in the budget as a revenue source. For school years 2000-2001, 2001-2002 and 2002-2003, the District had a surplus of greater than six percent (2T24-2T26, 2T45-2T46, CP-11). Specifically, for the 2002-2003 school year, the District had a surplus of $1.21 million dollars, amounting to more than $240,000 above the state six percent surplus cap (2T45-2T46, 2T123-2T124, 3T70, CP-5, CP-11).

Further, for the school year 2002-2003, the District could increase its budget by $150,000 more than the state 3 percent cap, if necessary, because they had banked $150,000 from the prior year (2T27-2T29, CP-5).

9. In February 2001, the Board received notice that state funding would not be increased for the 2002-2003 school year, and thus the amount of State aid the District received for transportation would remain constant (3T14-3T15). This freeze meant a loss of thousands of dollars that the Board had anticipated receiving. Merluzzi apparently anticipated the state

aid increase would approximate $700,000 (3T15). The NJEA's Associate Director of Research, Robert Willoughby, however, testified that past budget years justified assuming an increase of around $300,000 (3T79-3T80). I credit Willoughby's testimony which was based upon projections from prior year budgets.[5/] In early 2002 the District was told there would be no increase in state aid for the 2002-2003 school year. As a result, the Board implemented several cuts to the then ongoing 2001-2002 budget which amounted to over $300,000 in savings, and it projected cuts to supplies and seven staff positions in the 2002-2003 budget (2T108, 2T109, 2T124, 2T132-2G133, 3T14-3T16, CP-12).

But in March 2002, after its budget had been prepared, the Board realized that due to increased enrollment it needed to hire 4 1/2 additional teachers for whom it had not budgeted (2T109-2T110, 3T87-3T88). At that point, which was after Merluzzi had been told of the drivers organizing intentions, Merluzzi asked Business Administrator Marie Joyce to start analyzing the cost to

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5/ In its reply brief the Board, for the first time, argued that Merluzzi's testimony that the Board received notice in February 2001 about a freeze in state aid was a misprint in the transcript (3T14). It argued that the notice was in 2002. I accept Merluzzi's separate testimony at 3T14 that he received notice in 2002 that state aid would be frozen for the 2002-2003 year, but I cannot be certain he did not also receive such notice in 2001. Consequently, I am not discounting Merluzzi's testimony that he received such notice in February 2001, but I am not relying on it in analyzing this case.

the District of running its own bus service versus the cost of privatizing bus service (2T109-2T111, CP-12).

Prior to 2002, the Board had discussed privatizing its bus service when it realized District transportation costs were higher than those of other districts. However, Merluzzi explained the Board was in a "financial position" where he (Merluzzi) "was able to afford to keep all of the employees in district as opposed to privatizing and so we didn't really look at it" (3T63). The Board was concerned then about job losses for its drivers, who were Warren Hills residents; further, Merluzzi had had a bad experience with the privatization of the custodians, while employed by another district. Moreover, subcontracting prices had always been high in the District due to a lack of competition; thus the Board never previously sought bids for privatization of the specific routes (3T13-3T14, 3T57-3T60, 3T63-3T67, 3T70).

However, having become aware of the budget shortfall by April 2002, the District, for the first time, advertised for bids from transportation companies to subcontract its transportation services. Two bids were received on May 28, 2002, one from Snyder Bus Service Inc. and one from Laidlaw Transit, Inc. Snyder's bid was lowest. (3T16-3T20, 3T59-3T60, R-3).

10. After the bids were received in late May 2002, Merluzzi asked Business Administrator Joyce to prepare an analysis of the

projected cost to the District of operating its bus service for 2002-2003, versus the cost of contracting it out to Snyder (2T118-2T119, 3T17-3T19, R-4). Joyce prepared the analysis, R-4, from which the Board estimated that it would realize a savings of $ 245,270, by contracting out its regular bus routes, that is, routes driven by its full time and regular part-time drivers, and leasing its available buses to Snyder (2T91-2T107, 3T19-3T20, R-4). The Board's savings figure was based on the projected 2002-2003 salaries and benefits for the full time and regular part-time drivers and the overhead of running its buses, versus the cost Snyder would charge for the routes and the amount Snyder would pay the Board to lease the buses (2T92-2T108, 2T112-2T123, 2T130-2T131, 3T20-3T23, R-4, CP-5).

The Board also projected that the savings from subcontracting its bus routes would increase or at least stay constant every year, because the subcontractor, by law, can only increase its rates by 2.19% per year, while District salary and benefit costs consistently increased by more than that percentage every year (2T106-2T108).

11. Merluzzi presented R-4 to the Board at the June 25, 2002 Board meeting (3T22-3T23). He recommended to the Board that the bus routes driven by the Board's full time and regular part-time drivers be contracted out to Snyder Bus Service, Inc. (3T31,3T50-3T51). Merluzzi did not recommend that any other

District employees be privatized (3T61). Merluzzi testified he did not recommend the privatization of District bus drivers because they organized (3T54). Rather, he testified that he waited until he received the subcontracting bids, so that he could compare the costs of subcontracting versus the costs of the District running its own bus service (3T49-3T50). Merluzzi also said he did not want to use the District's budget surplus to cover the cost of the additional teachers needed, because he anticipated tough years ahead for the District, due to the bad economy and the state shortfall. He said it was "even more appropriate to maintain a surplus to hedge against the bad times that we anticipated were coming" (3T33-3T35). He was also afraid that unanticipated expenditures could arise for the District and that the District could wind up with a deficit similar to the 1.5 million dollar deficit it had in 1996, if the Board did not keep an adequate reserve (3T35). Despite that deficit in 1996, the Board did not privatize any services at that time.

I believe that Merluzzi waited for the subcontracting bids to arrive in order to compare those costs with the District's own cost for bus service; that he preferred not using the District's surplus to pay for additional teachers and wanted the surplus as a hedge against bad times; and, that he wanted to avoid a deficit. But I do not credit his testimony that he did not recommend privatization because the drivers had organized. While

legitimate reasons existed to justify privatization, I find Merluzzi's anti-organizational remarks discussed in this decision and his practice of avoiding privatizing the drivers even when the Board's economic ability was leaner, demonstrated that the drivers representational efforts was the motivation for subcontracting.

12. Association President Fiore was aware that State education funding may not be increased for the 2002-2003 school year and that the costs of education would increase that school year. However, he did not think bus drivers salaries' and benefits would be affected because they were covered in the budget that had already passed in April 2002 (1T54-1T56, 1T75).

State funding to the District had not increased every year. In fact, in some of the 18 years that the Board ran its own bus service, State aid for transportation not only remained constant as it did for the 2002-2003 school year, but even decreased; yet the Board never previously privatized its drivers (2T117.)

13. Fiore and many bus drivers and parents attended the June 25, 2002 Board meeting. Fiore read aloud a statement about the perils of privatization. Bus driver Donna Poyer, on behalf of all the bus drivers, asked Merluzzi at that Board meeting why they were not given the opportunity to save their jobs by negotiating with the Board a possible reduction in their salaries and benefits (1T43-1T45, 1T62, 1T90, 1T93, 3T51).

Merluzzi replied that the bus drivers "lost the right to negotiate with him" (1T45, 1T62, 1T90, 3T51-3T52).[6/] Merluzzi testified that he meant that since the bus drivers had organized, the Association now represented them and thus he could not negotiate with the drivers without the Association's involvement (3T51-3T52). He said he understood Poyer's question to mean "why don't you just sit down with us. Us meaning the bus drivers", and he knew that wasn't permitted, he had to sit down with the Association (3T51-3T52). Poyer understood Merluzzi's response to mean that they (the drivers) lost the right to negotiate with him because they joined the union (1T90). I credit Poyer's understanding and find that that was Merluzzi's intent. In other words, Merluzzi intended to convey that the bus drivers made a choice and they now "lost the right to negotiate". Merluzzi's purported benign intent is belied by the reproach conveyed in his words to Poyer. Merluzzi was an experienced superintendent and sophisticated about the negotiations process. He knew he was obligated to negotiate with the majority representative of the bus drivers, and knowing the drivers had recently voted to be

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6/ The record does not reflect exactly how Merluzzi responded to Poyer's question. She testified more directly that he said the drivers lost the right to negotiate with him (1T90). He testified "yes" in response to a leading question that he said drivers lost that right when they organized (3T51). I credit Poyer's testimony as more accurate.

represented he knew Poyer was not referring to the drivers as individuals, but was referring to them as the union of drivers.

Fiore did not raise, and the Board, specifically Merluzzi, did not discuss possible cuts in pay for the drivers. Rather, the Board voted unanimously to subcontract to Snyder the 13 routes that had been driven by its full time and regular part-time bus drivers for the past 18 years. As a result, the Board terminated all its full time and regular part-time bus drivers and the mechanic (1T45-1T46,1T79, 1T88, 1T101, 1T116, 2T7, 3T52). Only the Board's 4 previously employed activity drivers, Ronald Sigler, Linda Sigler, Ollhoff Schramm and Vickie Dell, were not terminated (1T110, 3T52-3T53). None of the regular drivers were hired back to the Board as regular drivers; some were hired back as activity drivers (3T52).

The Board did not privatize the security officers who were also included in the unit. The parties subsequently negotiated an agreement covering those employees (3T53-3T54).

14. After June 25, 2002, the terminated drivers were advised that they could apply for part time bus driving positions (1T109-1T110). About a week later, former full-time bus driver Debbie Wilson applied for such a position. She was told that no positions were available because the four activity drivers were going to be driving any extra runs (1T110).

Four of the previously regularly employed bus drivers who had been terminated, however, Helen DePalma, Gary Hann, Anthony Sbriscia and Charmaine Politano, were hired back by the Board as activity drivers on July 16, 2002 (1T79, CP-4). NJEA representative Niles considered these 4 drivers, along with the four activity drivers who had never been terminated, to be part-time drivers that were included in the Association's unit even though she acknowledged they were doing activity runs rather than the prior regular routes (1T79, 2T76-2T77, 2T86-2T87, CP-4).[7/] Fiore then advised Merluzzi that these 8 bus drivers were part-time drivers that the Association represented; he asked about negotiating a contract for them. Merluzzi refused, explaining that they were all activity drivers, and activity drivers had never been included in the unit (1T63-1T64, 1T67-1T68, 1T73, 1T78-1T79, 1T81, 2T86, 3T11, 3T52-3T53, CP-4).

15. The District did cover the cost of the additional teachers needed for the 2002-2003 school year by using money saved from subcontracting (2T134-2T135). Further, Merluzzi received a pay raise for the 2002-2003 school year (3T74-3T75, 3T90, CP-13, CP-14).

7/ Niles first testified that she didn't believe the 8 current activity drivers were doing any regular routes, but were doing the activity runs. She then modified her testimony to say they were doing some of the former regular routes. I credit her former testimony.

ANALYSIS

The Board Violated 5.4(3) and, Derivatively, a(1) of the Act When It Subcontracted Its Bus Service and Terminated its Full Time and Regular Part-Time Drivers, in Retaliation for their Organizing Activities.

In re IFPTE Local 195 v. State, 88 N.J. 393 (1982) our Supreme Court held that an employer's decision to subcontract is a non-negotiable matter of managerial prerogative. However, an employer cannot subcontract in retaliation for the legitimate exercise of protected activities. The Supreme Court observed:

> . . . [O]ur holding today does not grant the public employer limitless freedom to subcontract for any reason. The State could not subcontract in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers. State action must be rationally related to a legitimate governmental purpose. Our decision today does not leave public employees vulnerable to arbitrary or capricious substitutions of private workers for public employees. Id. at 411.

An employer's decision to contract out unit work based on such arbitrary and capricious reasons as avoiding negotiations with the exclusive representative violates 5.4a(3) of the Act. Dennis Tp. Bd. of Ed., P.E.R.C. 86-69, 12 NJPER 16 (¶17005 1985) ("Dennis Tp."); South Brunswick Bd. of Ed., P.E.R.C. No. 83-3, 8 NJPER 429 (¶13199 1982). As the Commission said in South Brunswick:

> . . . the protections of our Act are an express guarantee against subcontracting decisions based on such arbitrary and capricious considerations as anti-union

> animus rather than legitimate governmental purposes. [Id. at 430]

Accordingly, I must consider whether the Board's subcontracting decision was unlawful retaliation against the Association's exercise of protected activities, in violation of 5.4a(3) of the Act.

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

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

the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the Charging Party has proved, on the record as a whole, that union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for the hearing examiner and Commission to resolve.

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

Based on this record, I find that the Charging Party has met its burden under Bridgewater. The Association proved the first two Bridgewater elements--that the Association engaged in protected activity and that the Board knew of this activity. Association President Fiore asked the Board to recognize the Association as the majority representative for a unit of bus drivers and security guards. Thereafter, because the Board would not grant voluntary recognition, the Association filed a representation petition with the Commission. The Board consented to an election and an election was held, after which the Association was certified as the majority representative.

I also find that the Association proved the third Bridgewater element--that the Board, specifically Merluzzi, was hostile towards the Association's protected activity.

Merluzzi's hostility toward the drivers organizational activity was initially evident in the first week of March 2002 when Fiore told him the bus drivers were organizing and Merluzzi said "they don't want to do that." Merluzzi's explanation for that remark belies its true nature. He said he was trying to explain to Fiore that the Board treats its non-certificated employees comparable to its certificated employees and if the certificated employees were receiving a specific increase, the non-represented employees would get a comparable raise. He said, "they would expect to receive what they were going to get regardless".

I find the remark "they don't want to do that" was intended to convey a threat that if the drivers organize there may be adverse consequences. Merluzzi's explanation of the remark is equally dismissive of the effort, even if it laundered the threat. It suggests organizing makes no difference and that the employees will fare no better with representation than they might individually. If Merluzzi really believed that organizing the drivers would "make no difference" then his reaction would have probably reflected neutrality or indifference, at worst: MerLuzzi's spontaneous reaction shows that he did care that

drivers were organizing; that he didn't want them to organize; and that he threatened Fiore to dissuade him from organizing those employees.

The second incident demonstrating Merluzzi's hostility occurred when, after the Association won the election and Fiore informed Merluzzi of his intent to pursue an agreement for the new unit, Merluzzi immediately informed Fiore that he was exploring privatizing the bus drivers' work. This was the first time Fiore had ever heard anything about the possibility of the Board subcontracting. Merluzzi had told Business Administrator Joyce in late April (within days after the consent agreement was signed) to compare the driver costs with privatization. This effort seems poised to await the drivers' collective decision to be organized. As soon as the count was over he raised privatization. It was made in response to the Association's initial gesture in the negotiations process and, prior to this remark, there was no indication that the Board was considering privatizing. See e.g. Dennis Twp. Timing is a significant factor in assessing motivation, and from which hostility or animus may be inferred. I find Merluzzi's response that he was considering privatization immediately after the employees' selection of the Association as their majority representative was highly suspect. See, Essex Cty. Sheriff's Dept., P.E.R.C. No. 88-75, 14 NJPER 185, 192 (¶19071 1988); Dennis Twp. Bd. Ed., 12

NJPER at 18. See also, Fairview Free Public Library, P.E.R.C. No. 99-47, 25 NJPER 20 (¶30007 1998).

The other significant evidence of Merluzzi's hostility toward the drivers organizing efforts was his remark to Poyer at the June 25, 2002 Board meeting, when he told her that the drivers "lost the right to negotiate" with him. I infer, as Poyer did, that Merluzzi meant that because they organized they lost the right to negotiate with him, i.e., they lost their opportunity to improve their terms and conditions of employment. Merluzzi's explanation of the remark, that he couldn't meet with the drivers as individuals now because they organized, is not plausible. Poyer was not asking to meet with Merluzzi on behalf of individual drivers. They had recently organized and the Association was more recently certified as the majority representative. Merluzzi knew that. Poyer asked to "negotiate", a term of art, which Merluzzi knew to be a reference to collective negotiations with a majority representative. His own testimony suggests she used the word "negotiations."

I find that Merluzzi's response intended to convey his belief that the drivers lost the "right" to "negotiate," or improve their terms and conditions of employment because they organized. Such conduct meets the Bridgewater hostility requirement and demonstrates the Board violated 5.4a(3) of the Act.

Based on Merluzzi's recommendation, the Board unanimously voted to subcontract its bus service and terminate all its full time and regular part-time bus drivers. The subcontracting decision came immediately after the bus drivers organized and expressed interest in seeking an agreement, and came without prior warnings or indications.

In South Brunswick, the Commission found the board's subcontract did not violate the Act at least in part because the board negotiated with the union in an effort to avoid subcontracting. Here, Merluzzi made no effort to negotiate with the drivers or even discuss with them an opportunity to consider how they may save money to avoid the privatization. When Poyer pointedly asked why Merluzzi wouldn't meet with them, he told them they had lost their right to negotiate with him, an indication Merluzzi's apparent refusal was more about the organizing than it was about the money.

Based on Merluzzi's hostility, I find the timing of the subcontracting decision was suspect and warrants a finding that protected activity was a motivating factor in the Board's decision to subcontract.

The Association having established its case, the burden shifts to the Board to establish by a preponderance of the evidence on the entire record that it had a business justification for the action taken, and that it would have taken

the action, even absent the protected activity. Bridgewater. The Board claims that it decided to subcontract its bus service because of financial reasons.

It demonstrated it would save over $240,000 by privatizing the bus service; that its State aid was being frozen and that it unexpectedly needed to hire more teachers. But the Board did not prove that it would have privatized the drivers absent their protected activity.

The Board did not announce any interest in subcontracting its bus service until immediately after the Association was elected and indicated to Merluzzi that it intended to pursue an agreement for the new unit. In fact, in its budget for school year 2002-2003 which had already been passed, the District projected employing the same number of bus drivers and had budgeted a ten percent increase in the cost of bus drivers salaries, as well as a decrease in the projected amount of contracted services. There was no evidence of any discussion at Board meetings before the secret ballot election suggesting any problems with bus driver salaries or benefits. Indeed, at a bus driver safety meeting in January 2002, Merluzzi had informed the drivers about a merit pay system that the Board intended to implement beginning in September 2002.

The Board admitted that State funding to the District did not always increase and, in fact, in some of the last 18 years

that the Board had employed its bus drivers it had even decreased, not just remained constant; yet the Board had not previously subcontracted the drivers. In fact, the District had a 1.5 million dollar deficit in 1996, yet Merluzzi did not seek to subcontract then, and indeed Merluzzi testified that he never privatized before the 2002-2003 school year because the Board was able to afford to keep all its employees. We know that the Board had a substantial surplus going into the 2002-2003 school year and could have afforded to employ the drivers as it did in 1996. Thus, I find pretextual Merluzzi's claim that he had to subcontract the bus driver work for financial reasons. While Merluzzi claims he did not want to use the surplus to cover the costs of the additional staff because of possible upcoming bad times and unanticipated expenditures, there was still no imminent need to subcontract. The timing of the decision to subcontract is especially suspicious given the District's large budget surplus.

Merluzzi's claim that the District began to consider privatization in February 2002, upon learning of the State funding freeze is suspect because it was not until late May 2002, when Fiore indicated to Merluzzi that he intended to pursue an agreement for the newly certified unit, that the possibility of subcontracting was ever made public. The Board's claim that it subcontracted because of the financial savings it would realize

is suspect because it did not attempt to discuss with the Association any savings alternatives to subcontracting, despite the fact that Poyer, on behalf of all the drivers and with Association President Fiore present, asked for such a discussion with Merluzzi at the June 25, 2002 Board meeting. Rather than agree to such discussions, the Board simply unanimously voted to subcontract based on Merluzzi's recommendation. I find that this refusal, or failure, to even discuss financial considerations upon request rebuts the Board's claim it would have taken this action anyway. I find the Board subcontracted to avoid negotiations with the Association over terms and conditions of employment for the regular drivers. It is of little relevance that the Board had no legal obligation to negotiate the decision to subcontract. See Local 195; Dennis Twp. As our Supreme Court said in Local 195:

> discussions [concerning subcontracting] are valuable and should be fostered . . . . They may even result in greater efficiency or economy. If a public employer is considering subcontracting as a means to achieve these goals, employees may be motivated to suggest changes in working conditions that could accomplish the same or better results . . . [Public employers] would be derelict in their public responsibilities if they did not pursue such discussions . . . if the proposed subcontracting is based on solely fiscal considerations . . . the public would clearly benefit from suggestions by public employees directed toward improving economy or efficiency.
> [Id. at 409]

The decision and result in Dennis Twp. Bd. Ed. is comparable to the result warranted in this case. There, after the association had demanded grievance arbitration for the first time for bus drivers, board members, tired of the negotiations and grievance process, put out bids for subcontracting the bus service. Despite a dispute over the projected savings, the board approved the subcontracting. The Commission held that although the board had no obligation to negotiate over subcontracting pursuant to Local 195, the subcontracting was illegally motivated by the board's desire to avoid negotiations and grievance proceedings with the association. The Commission explained that circumstantial evidence contributed to a finding of an illegal motivation and that the timing of events was suspicious. Finally, the Commission concluded that the board did not prove that it would have subcontracted the bus runs absent the protected conduct, finding that the economic savings was mostly a secondary consideration. The Commission ordered the board make the drivers whole for all salary due for the affected time period minus mitigation. A similar result must be found here.

Based on the circumstances of this case, I find that the Association has met its obligation under Bridgewater and I further find that despite establishing a legitimate business justification for its decision to subcontract, the Board did not establish it would have subcontracted absent the Association's

protected activity. Therefore, I conclude that the Board violated 5.4a(3) and, derivatively, a(1) of the Act when it subcontracted its bus service and terminated its full time and regular part-time drivers, and mechanic in retaliation for the drivers' protected activity.

The Board violated 5.4a(5) of the Act by Subcontracting to Avoid Negotiations with the Association.

Having concluded that the Board subcontracted because the drivers organized and because it wished to avoid negotiating over their terms and conditions of employment with the Association, I must also conclude the Board violated 5.4a(5) of the Act. I am not finding the Board was obligated to negotiate over the decision to subcontract. Rather, I find the Board violated 5.4a(5) because it sought to avoid negotiations with the Association. The right of public employees to organize is a cornerstone of the Act. Public employees must have confidence in the law that they can organize free of retaliation. Compare, Fairview Free Public Library. Requiring reinstatement and/or back pay to the drivers here is an insufficient remedy for the Board's violation of the Act. The drivers, through the Association, must be given the opportunity to negotiate with the Board to see whether an agreement can be reached in order to give meaning to their certification and remedy the Board's hostility to their organizing efforts. See, Glassboro Housing Authority, P.E.R.C. No. 90-16, 15 NJPER 524 (¶20216 1989). The Board is

still entitled to make a good faith decision regarding subcontracting. But now it must engage in a good faith effort to reach an agreement to avoid subcontracting before once again taking such action.

The Board Did Not Violate the Act by Refusing to Negotiate Over the Terms and Conditions of Employment for its 8 Current Activity Drivers.

After the Board subcontracted its regular bus routes and terminated its full time and regular part-time drivers, it continued to employ its four (4) activity drivers and rehired 4 of its terminated full time and regular part-time drivers to drive activity runs, as needed. The Association claims that these 8 employees are now regular part-time employees included within the description of its certified unit. The Association points out the work currently performed by them had previously been performed by former unit employees and, like those former employees, these drivers now have the "right of first refusal" with regard to the activity runs. According to the Association, these current 8 drivers now drive on a regular basis, not a temporary one; thus arguing they are now regular part-time employees who are entitled to representation in the Association's unit. Therefore, the Association asserts that the Board violated the Act by refusing to negotiate over their terms and conditions of employment.

In its post-hearing brief, the Association treats the activity drivers as regular part-time drivers and in relying on a number of Commission cases, argues that they have a community of interest with full-time drivers and should be considered appropriately included in its unit. The Association further argues that the hours limitations on activity drivers is not an impediment to their inclusion in a unit with full time employees.

The Board disagrees with the Association's argument. It claims it has no negotiations obligation with respect to these 8 employees because they are activity drivers who were never included in the Association's unit and, in fact, were intentionally omitted from it.

The Association's argument regarding the activity drivers lacks merit. I find that these 8 current drivers are activity drivers who are not included in the unit. From the outset of the Association's organizing efforts, the activity drivers were discussed. Niles seemed to believe that activity drivers were different from substitute drivers and should be included in the unit, but they were not included in the Association's petition. Ultimately, the Association did not seek to represent them in this unit. In the consent agreement, activity drivers were not specifically excluded; nor were they included in the unit, and do not otherwise fit within the definition of the included titles. I found that both Fiore and Merluzzi knew that activity drivers

were not included in the unit. Merluzzi did not include activity drivers on the voter eligibility list, they did not receive ballots, and the Association did not object to their names and titles being off the list.

After the Board privatized its bus service and terminated its full-time and regular part-time drivers, the current 8 drivers simply continued to do what Board activity drivers had always done-driving extra runs, specifically activity runs, athletic runs, class trips, etc., as needed. It makes no difference that they now have the right of first refusal for these runs. They do not perform work previously performed by unit employees as the Association claims; this work is now performed by Snyder Bus Service. These 8 drivers are activity drivers who continue to be excluded from the unit; they are not regular part-time drivers that fall within the unit description. This case is not about whether activity drivers would have a community of interest for unit inclusion with full and regular part time drivers. I presume they would be appropriate for unit inclusion. But the Association cannot achieve through this unfair practice proceeding a result it did not obtain or achieve through the representation process. If the Association is interested in representing activity drivers it should file an appropriate representation petition to achieve that result. Accordingly, the Board has no obligation to negotiate with the

Association over the terms and conditions of employment for the 8 current activity drivers.

CONCLUSIONS OF LAW

1. The Board violated 5.4a (3) and derivatively a(1) of the Act when it subcontracted its regular bus routes and terminated all its full time and regular part-time bus drivers in retaliation for the bus drivers' organizing activities.

2. The Board violated 5.4a(5) of the Act by terminating nearly all unit members to avoid engaging in negotiations with the recently certified majority representative.

3. The Board did not violate 5.4a (5) of the Act when it refused to negotiate with the Association over the terms and conditions of employment for the 8 current activity drivers.

RECOMMENDATION

I recommend that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by subcontracting its regular bus routes and terminating its full time and regular part-time bus drivers and mechanic, in retaliation for the bus drivers' organizing activities.

2. Discriminating in regard to the hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by subcontracting its regular bus routes and terminating its full time and regular part-time bus drivers and mechanic, in retaliation for the bus drivers' organizing activities.

3. Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment by terminating nearly all unit members and subcontracting the unit work to avoid negotiations with the majority representative (the Association).

B. That the Respondent take the following affirmative action:

1. Offer reinstatement to all terminated full time and regular part-time bus drivers and the mechanic who were terminated as of June 25, 2002, when the Board subcontracted their bus routes.

2. Make the terminated employees whole, for all salary and benefits due from June 25, 2002 to the present, less any interim earnings and/or what the employees would have earned in mitigation of damages with interest at the rate set by Court Rules.

3. Negotiate in good faith with the Association on demand over the terms and conditions of employment for the bus drivers and mechanic. If impasse is reached, utilize the Commission's impasse procedures as provided in N.J.A.C. 19:12-1.1 et seq.

4. Post in all places where notices to employees are customarily posted, copies of the attached notices markers as Appendix "A". Copies of such notice shall, after being signed by the Board's authorized representative, be posted immediately and maintained by it for at least sixty (60) consecutive days. Reasonable step shall be taken to ensure that such notices are not altered, defaced or covered by other materials.

5. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Board has taken to comply herewith.

C. That the allegation the Board violated N.J.S.A. 34:13A-5.4a(5) by refusing to negotiate over activity drivers be dismissed.

Arnold H. Zudick
Hearing Examiner

DATED: July 21, 2004
Trenton, New Jersey

RECOMMENDED

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,

We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining, or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly, by subcontracting our regular bus routes and terminating our full time and regular part-time bus drivers and mechanic, in retaliation for the bus drivers' organizing activities.

WE WILL cease and desist from discriminating in regard to the hire or tenure of employment or any term and condition of employment to encourage or discourage employees in the exercise of rights guaranteed to them by the Act, particularly by subcontracting our regular bus routes and terminating its full time and regular part-time bus drivers and mechanic, in retaliation for the bus drivers' organizing activities.

WE WILL cease and desist from refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment by terminating nearly all unit members and subcontracting the unit work to avoid negotiations with the majority representative (the Association).

WE WILL offer reinstatement to all terminated full time and regular part-time bus drivers and the mechanic who were terminated as of June 25, 2002, when the Board subcontracted their bus routes.

WE WILL make the terminated employees whole, for all salary and benefits due from June 25, 2002 to the present, less any interim earnings and/or what the employees would have earned in mitigation of damages with interest at the rate set by Court Rules.

WE WILL negotiate in good faith with the Association on demand over the terms and conditions of employment for the bus drivers and mechanic. If impasse is reached, we will utilize the Commission's impasse procedures as provided in N.J.A.C. 19:12-1.1 et seq.

Docket No. CO-2003-2

Warren Hills Regional Board of Education
(Public Employer)

Date: _____ By: _____

This Notice must remain posted for 60 consecutifve days from the date of posting, and must not be altere, defaced or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commision, 495 West State Street, PO Box 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"