P.E.R.C. NO. 2017-71

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

FORT LEE BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-2015-231

FORT LEE EDUCATION ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts in part, and modifies in part, a Hearing Examiner's recommended decision in which the Hearing Examiner concluded that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4a(1), (3), and (5), by: (1) refusing to negotiate upon demand over the impact of the decision to schedule instructional days during spring break; (2) announcing to staff, parents, and students that the reason for its decision to eliminate spring break was a result of the Association's grievance challenging the school calendar and subsequent refusal to negotiate an exchange of instructional days for professional development. With respect to the first charge, the Commission finds that the Board violated subsection 5.4a(5), and derivatively 5.4a(1), of the Act when it failed to respond to the Association's impact negotiations demand. With respect to the second charge, the Commission finds that the Board exercised its managerial prerogative to unilaterally establish and revise the school calendar, and did not violate subsection 5.4a(3) of the Act, when it scheduled three instructional days during spring break.

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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Appearances:

For the Respondent, Sciarrillo, Cornell, Merlino & Osborne, P.C., attorneys (Dennis McKeever, of counsel)

For the Charging Party, Zazzali, Fagella, Nowak, Kleinbaum & Friedman, attorneys (Aileen M. O'Driscoll, of counsel and on the brief; Kaitlyn Dunphy, of counsel and on the brief)

DECISION

On March 31, 2015, the Fort Lee Education Association (Association) filed an unfair practice charge against the Fort Lee Board of Education (Board) alleging that the Board violated sections 5.4a(1), (3), and (5)[1/] of the New Jersey Employer-

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 (continued...)

Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (Act).

Specifically, the Association alleges that:

> -the Board refused to negotiate the impact of its decision to change the 2014-2015 school calendar (i.e., converting part of spring break into three instructional days two weeks before spring break);
>
> -the Board's decision to convert part of spring break into three instructional days was done in retaliation for the Association engaging in protected activity (i.e., filing a grievance related to the teachers' work year) and in order to coerce the Association into accepting professional development days.

On December 10, 2015, the Director of Unfair Practices issued a complaint and notice of pre-hearing. On January 4, 2016, the Board filed an answer to the unfair practice charge. A hearing was held on April 28, May 25, and June 13, 2016.

On December 28, 2016, the Hearing Examiner issued a report and recommended decision [H.E. No. 2017-3, 43 NJPER 246 (¶76 2016)] concluding that the Board violated section 5.4a(5) of the Act by refusing to negotiate upon demand over the impact of the decision to schedule instructional days during the 2014-2015 spring break. The Hearing Examiner also concluded that the Board violated section 5.4a(3), and derivatively 5.4a(1), of the Act by announcing to staff, parents, and students that the reason for

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1/ (...continued)
concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

its decision to eliminate spring break was a result of the Association's grievance challenging the 2014-2015 calendar and subsequent refusal to negotiate an exchange of instructional days for professional development days.

On January 13, 2017, the Board filed the following exceptions to the Hearing Examiner's report and recommended decision:

> Exception 1: The Hearing Examiner failed to strike the Association's testimony regarding negotiations, as the parties agreed to keep negotiations and the current matter as separate entities.
>
> Exception 2: The Hearing Examiner erroneously found the Association was engaged in protected conduct whilst simultaneously dismissing the Board's favorable legal authority on the topic in a three sentence footnote.
>
> Exception 3: The Hearing Examiner failed to follow the law of the case doctrine in deciding this matter.
>
> Exception 4: The Hearing Examiner mischaracterized the Board's conduct in scheduling three additional work days during the 2014-2015 [school year] as the scheduling was not done in the course of negotiations.
>
> Exception 5: The Hearing Examiner erroneously refers to a "legal requirement" of 180 school days when no such requirement exists as it relates to teacher work days and no testimony was given on this matter.
>
> Exception 6: The Hearing Examiner unreasonably failed to appreciate the historical contracts submitted by the Board which consistently gave notice that should

> additional instructional days be needed, the days would be taken from spring break.
>
> Exception 7: Mr. Saxton's transmitting of memos to the staff and parents explaining the Board's decision to schedule three working days during spring break is not an unfair practice as the community deserved a completely accurate and fact-based explanation as to the cancellation of the three days.
>
> Exception 8: The Hearing Examiner wrongly allowed CP-8 and CP-9 to be entered into evidence despite the fact that the proposed settlement documents were explicitly related to the current litigation.
>
> Exception 9: The Hearing Examiner unreasonably found that the Board failed to negotiate the impact of the three additional work days upon the Association's request while failing to note that the Association made the demand on Wednesday, March 25, 2015 yet filed with PERC on Tuesday, March 31, 2015 leaving the Board only four business days to formally respond to a negotiation request and that the Board ultimately met all of the Association's demands with respect to its demand to negotiate.
>
> Exception 10: The Hearing Examiner incorrectly found that the Board's scheduling of three additional work days caused a negative impact on Association members when the testimony was decidedly in the alternative.

On January 23, 2017, the Association filed opposition to the Board's exceptions and the following cross-exception:

> The Hearing Examiner incorrectly failed to award compensation to the Association members for being required to report to work on April 8, 9, and 10, 2015.

On January 26, 2017, the Board filed a reply brief. On February 1, the Association filed a sur-reply. On February 6, the Board filed a response to the sur-reply.

We have reviewed the record. Except as supplemented or modified below in the summary of facts, we find that the Hearing Examiner's findings of fact (H.E. at 4-21) are supported by the record and we adopt them.

SUMMARY OF FACTS

The Association represents all certificated personnel not engaged as supervisory employees and non-certificated classroom instructional aides employed by the Board as specified in Article I of the parties' expired collective negotiations agreement (CNA). The Board and the Association were parties to a CNA in effect from July 1, 2008 through June 30, 2011. The parties executed a memorandum of agreement (MOA) that extended the CNA, with certain modifications, from May 1, 2010 through April 30, 2013.

Article XXIII of the parties' expired CNA, entitled "Teacher Work Year," provides in pertinent part:

> 1. In-school Work Year
>
> a. Ten (10) Month Personnel. The in-school work year for teachers employed on a ten (10) month basis shall not exceed one hundred eighty-three (183) days, plus a maximum of three (3) days of orientation at the beginning of each school year, which, for newly hired teachers only, may be scheduled prior to September 1 of that school year, and

> one (1) wind-up day at the end of each school year, for a maximum of one hundred eighty-seven days of work.
> . . .
>
> d. New Teacher Orientation. All new teachers will be required to attend three (3) additional days of teacher orientation prior to the commencement of the school year.

Despite these provisions, veteran teachers historically worked a total of 184 days – 180 instructional days, three orientation days, and one wind-up day. Similarly, new teachers historically worked a total of 187 days – 180 instructional days, six orientation days, and one wind-up day.

The parties engaged in negotiations for a successor agreement between May and December 2013. On December 17, 2013, the Association filed a request for mediation with the Commission. The parties met with the mediator on multiple occasions but were unable to resolve their differences. At their last mediation session in March/April 2014, the Association indicated that it wanted to request a fact finder and the Board indicated that it had the authority to schedule three additional work days pursuant to Article XXIII of the parties' expired CNA.

On May 19, 2014, the Board approved the 2014-2015 school calendar. Students were scheduled for 183 days (180 instructional days with three built-in snow days). Veteran teachers were scheduled to work a total of 187 days (180 instructional days, six professional days, and one wind-up day).

New teachers were scheduled to work a total of 190 days (180 instructional days, six professional days, three orientation days, and one wind-up day). The calendar advised that vacations scheduled during spring break or in June were made at the individual's risk because those days would be used as make-up days if necessary. The 2013-2014 school calendar also included a similar advisement.

On May 21, 2014, a fact finder was appointed. The parties agreed that the disagreement regarding the teachers' work year would be resolved through grievance arbitration rather than through fact finding. Accordingly, on June 6, 2014, the Association filed a related grievance alleging that the 2014-2015 school calendar violated the parties' expired CNA. Fact finding and grievance arbitration proceeded simultaneously throughout the balance of 2014 and into 2015.

On February 10, 2015, an arbitration decision and award was issued. In pertinent part, the arbitrator determined:

> The Board can schedule as many pupil attendance days as it likes, but it will have its teachers for only 183 of them. There can be only three (3) orientation/pre-pupil days (six for newly hired teachers) and one (1) wind-up day for everyone. If the parties choose to trade one, two, or three of the pupil contact days for extra orientation days, professional days, wind-up days, or any other days of teacher obligation, it can only be accomplished with the cooperation and the concurrence of the Association. These are the requirements of Article XXIII until the

> parties choose to alter them through bargaining.

Based upon the arbitration award, the Board cancelled professional development days that were scheduled for February 17 and 18, 2015 and the wind-up day scheduled in June 2015. The Board also interpreted the arbitration award and the parties' expired CNA to require 183 instructional days. Given that three snow days had been used, reducing the number of instructional days from 183 to 180, the Board concluded that it had to modify the 2014-2015 school calendar to include three instructional days during spring break.

On March 2, 2015, the fact finder issued a report and recommendations. On March 18, the parties met to discuss the fact finder's recommendations. During those discussions, the Board raised the arbitrator's award and sought to negotiate additional professional development days. When the Association refused, the Board indicated that it would schedule three instructional days during spring break and the Association indicated that it would challenge such a calendar modification. Ultimately, the parties executed a memorandum of agreement (MOA) dated March 18, 2015 that extended the CNA, with modifications unrelated to the teachers' work year, from July 1, 2013 to June 30, 2016.

On March 19, 2015, Superintendent Paul J. Saxton (Saxton) sent two identical letters that attached the arbitration award -

one to staff members, the other to parents/guardians and students – describing the parties' protracted contract negotiations and the disagreement regarding the teachers' work year. Superintendent Saxton specifically indicated that the Association's "refus[al] to discuss a calendar modification of any kind" required the Board "to implement a revised schedule to include . . . additional instructional days" during spring break. Although he testified that "the calendar had to be modified . . . to make up for [three snow] days," Superintendent Saxton's letters did not suggest that the additional instructional days were related to weather. Superintendent Saxton also testified that he was unaware of any previous communications from the Board to staff or parents indicating that Board action was being taken as a result of a grievance.

On March 22, 2015, the Board's attorney sent an e-mail to the Association attaching a proposed agreement to convert three instructional days into fifteen (15) hours of professional development that could be completed on-line at home. The agreement noted that "[i]n order to be compliant with the [arbitration award]," the Board was attempting to schedule instructional days during spring break "to replace days that were lost due to weather." On March 23, the Association responded that it would not meet with the Superintendent and would not execute the proposed agreement. Subsequently, Superintendent

Saxton contacted the Association President directly by telephone in order to discuss the proposed agreement and the Association President reiterated that she was not interested in negotiating.

On March 23, 2015, the Board held a public meeting. Before the meeting ended, Superintendent Saxton asked to speak to an Association representative in the hallway and reiterated the Board's proposal to exchange instructional days for professional development. When the Association refused, Superintendent Saxton returned to the meeting room and a vote was taken on a resolution modifying the school calendar to include three instructional days during spring break. The Board passed the resolution and a revised 2014-2015 school calendar was appended to the resolution.

On March 24, 2015, the Board posted a notice to its website indicating that three instructional days were scheduled during spring break "as a result of a grievance decision." The notice indicated that the Association "refused to even discuss any compromise on this issue despite the Board's written offer . . . to allow instructional time to be converted to professional development."

On March 25, 2015, the Association sent a letter to Superintendent Saxton demanding to negotiate the impact of the Board's decision to add three instructional days during spring break. Superintendent Saxton did not respond. However, he also testified that no staff members approached him with any concerns

despite the fact that he was willing to accommodate individuals who had scheduled vacation or had child care issues.

On March 31, 2015, the Association filed an application for interim relief together with the instant unfair practice charge. On April 2, Commission Designee David N. Gambert issued an Order to Show Cause that temporarily restrained the Board from implementing instructional days during spring break pending disposition of the interim relief application. On April 6, the Commission Designee issued an Interlocutory Order dissolving the temporary restraints. On April 22, the Association withdrew its application for interim relief and the instant unfair practice charge was forwarded to the Director of Unfair Practices for further processing.

STANDARD OF REVIEW

With respect to the Hearing Examiner's findings of fact, we cannot review same de novo. Instead, our review is guided and constrained by the standards of review set forth in N.J.S.A. 52:14B-10(c).[2/] Under that statute, we may not reject or modify

2/ N.J.S.A. 52:14B-10(c) provides, in pertinent part:

> The head of the agency, upon a review of the record submitted by the [hearing officer], shall adopt, reject or modify the recommended report and decision . . . after receipt of such recommendations. In reviewing the decision. . . , the agency head may reject or modify findings of fact, conclusions of law or interpretations of agency policy in the

(continued...)

any findings of fact as to issues of lay witness credibility unless we first determine from our review of the record[3/] that the findings are arbitrary, capricious, or unreasonable or are not supported by sufficient, competent, credible evidence. See also, New Jersey Div. of Youth and Family Services v. D.M.B., 375 N.J. Super. 141, 144 (App. Div. 2005) (deference due factfinder's "feel of the case" based on seeing/hearing witnesses); Cavalieri

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2/ (...continued)

> decision, but shall state clearly the reasons for doing so. The 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. In rejecting or modifying any findings of fact, the agency head shall state with particularity the reasons for rejecting the findings and shall make new or modified findings supported by sufficient, competent, and credible evidence in the record.

3/ N.J.A.C. 19:14-7.2 provides:

> The record shall consist of the charge and any amendments; notice of hearing; answer and any amendments; motions; rulings; orders; any official transcript of the hearing; and stipulations, exhibits, documentary evidence, and depositions admitted into evidence; together with the hearing examiner's report and recommended decision and any exceptions, cross-exceptions, and briefs and answering briefs in support of, or in opposition to, exceptions and cross-exceptions.

v. PERS Bd. of Trustees, 368 N.J. Super. 527, 537 (App. Div. 2004).

Our case law is in accord. It is for the trier of fact to evaluate and weigh contradictory testimony. Absent compelling contrary evidence, we will not substitute our reading of the transcripts for a Hearing Examiner's first-hand observations and judgments. See Ridgefield Bd. of Ed., P.E.R.C. No. 2013-75, 39 NJPER 488 (¶154 2013); Warren Hills Reg. Bd. of Ed. and Warren Hills Reg. H.S. Ed. Ass'n, P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd 2005 N.J. Super. Unpub. LEXIS 78, 32 NJPER 8 (¶2 App. Div. 2005), certif. den. 186 N.J. 609 (2006).

Public employers are prohibited from "[i]nterfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act." N.J.S.A. 34:13A-5.4a(1). "It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or coerce an employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial business justification." State of New Jersey (Corrections), H.E. 2014-9, 40 NJPER 534 (¶173 2014) (citing New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978)). "[P]roof of actual interference, restraint or coercion is not necessary to make out a violation of N.J.S.A. 34:13A-

5.4a(1). . . ." Commercial Tp. Bd. of Ed. and Commercial Tp. Support Staff Ass'n and Collingwood, P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd 10 NJPER 78 (¶15043 App. Div. 1983). The tendency to interfere is sufficient. Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER 526 (¶17197 1986). An employer violates this provision independently of any other violation if its action tends to interfere with an employee's protected rights and lacks a legitimate and substantial business justification. UMDNJ-Rutgers Medical, P.E.R.C. No. 87-87, 13 NJPER 115 (¶18050 1987); see also, Cumberland Cty. College, P.E.R.C. No. 2011-65, 37 NJPER 74 (¶28 2011). The charging party need not prove an illegal motive. Id. This provision will also be violated derivatively when an employer violates another unfair practice provision. Lakehurst Bd. of Ed., P.E.R.C. No. 2004-74, 30 NJPER 186 (¶69 2004).

Allegations of anti-union discrimination under N.J.S.A. 34:13A-5.4a(3) are governed by In re Bridgewater Tp., 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.

Public employers are also prohibited from "[r]efusing 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. . . ." N.J.S.A. 34:13A-5.4a(5). "[M]ere connection between the exercise of a managerial prerogative and the impact of that exercise on employees does not render the impact issue non-negotiable." Piscataway Twp. Ed. Ass'n v. Piscataway Twp. Bd. of Educ., 307 N.J. Super. 263, 276 (App. Div. 1998). Rather, the Commission must determine "whether negotiating the impact issue would significantly or substantially encroach upon the management prerogative" and "[i]f the answer is no, bargaining should be ordered." Ibid. A determination that a party has refused to

negotiate in good faith will depend upon an analysis of the overall conduct and attitude of the party charged. Teaneck Tp., P.E.R.C. No. 2011-33, 36 NJPER 403 (¶156 2010).

ANALYSIS

Miscellaneous Exceptions

The Board's first exception contends that the Association's testimony regarding negotiations should have been stricken. We disagree. The Hearing Examiner accurately found that the parties agreed to separate negotiations for a successor agreement – which would proceed through fact finding – from the teachers' work year issue – which would be resolved through grievance arbitration. (H.E. at 6; 1T32:16 thru 1T34:9; 2T14:17-22). The Association has conceded this point. See Association's January 23, 2017 Br. at 16. Despite the parties' agreement to bifurcate the resolution of these issues, we find that testimony and evidence regarding the parties' negotiations history has significant probative value, providing essential context about the origination and ultimate resolution of the teachers' work year issue. Moreover, in support of its 5.4a(3) claim, the Association has argued that the parties' negotiations history demonstrates that the Board had knowledge of protected activity and took action to add three instructional days during spring break based upon anti-union animus. The Board has failed to demonstrate why testimony regarding the parties' negotiations

history is irrelevant or in any way prejudicial. See N.J.R.E. 402; N.J.R.E. 403; N.J.A.C. 1:1-15.1.

The Board's second[4/] and third exceptions challenge the Hearing Examiner's failure to apply the law of the case doctrine and her interpretation of City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375 (¶13172 1982). We reject these exceptions. The "law of the case doctrine" is a "non-binding rule intended to prevent relitigation of a previously resolved issue." Lombardi v. Masso, 207 N.J. 517, 538-539 (2011) (citations omitted). It is "only triggered when one court is faced with a ruling on the merits by a different and co-equal court on an identical issue." Ibid. The Commission has held that "deferral to an arbitration award is inappropriate to the extent a [c]omplaint contains allegations of anti-union motivation and discrimination which have not been presented or considered in arbitration." City of Englewood, P.E.R.C. No. 82-124, 8 NJPER 375, 377 (¶13172 1982). Moreover, a public employer may not exercise the authority it has been given by way of a managerial prerogative – or, by extension, through an arbitration award – in order to retaliate against public employees or their representatives for protected activity. C.f. Jackson Tp., P.E.R.C. No. 2006-12, 31 NJPER 281 (¶110 2005); Hudson Cty. Police Dep't Layoffs, P.E.R.C. No. 2004-14, 29 NJPER

4/ We address the Board's second exception, insofar as it relates to the Hearing Examiner's determination of the retaliation claim, below.

409 (¶136 2003), recon. den. P.E.R.C. No. 2004-39, 29 NJPER 547 (¶17 2003).

The Hearing Examiner accurately found that the law of the case doctrine did not apply in this matter. The parties arbitrated the teachers' work year issue, specifically whether the expired CNA permitted the Board to establish a school calendar with 187 work days for veteran teachers and 190 work days for new teachers. (H.E. at 25-27; CP-1). The allegations specified in the instant unfair practice charge (C-1) were not raised or litigated before the arbitrator (CP-1). Likewise, the Board's reliance on City of Englewood is misplaced. In that case, although the Commission found that deferral to the arbitrator's contractual interpretation was appropriate on the union's 5.4a(5) refusal to negotiate claim, the Commission also determined that deferral was inappropriate on the union's 5.4a(3) retaliation claim because "[t]he parties did not submit these allegations to the arbitrator, and she did not consider them." 8 NJPER at 377. Moreover, impact negotiations were not an issue.

The Board's fourth exception claims that the Hearing Examiner mischaracterized how the teachers' work year issue was raised. We disagree. The Hearing Examiner accurately found that during the parties' last mediation session, the Board "determined that . . . teachers should be working . . . three extra days" pursuant to Article XXIII of the parties' expired CNA and

conveyed this to the Association. (H.E. at 5; 1T22:2-18; 2T8:22 thru 2T9:17; 2T59:16 thru 2T60:14). Contrary's to the Board's assertion, the Hearing Examiner did not characterize the Board's determination as "a late proposal in the negotiations process." See Board's January 13, 2017 Br. at 18. Rather, she specified that the Association was "incensed" because "this was the first time the subject of the increased work year had been raised in negotiations." (H.E. at 5; 1T22:2-18; 2T8:22 thru 2T9:17; 2T59:16 thru 2T60:14). She also clarified that the parties agreed that the work year issue would be resolved through binding arbitration and was separate and apart from negotiations. (H.E. at 6; 1T32:16 thru 1T34:9; 2T14:17-22). Moreover, the Board itself has asserted that "this issue was introduced . . . during the collective bargaining process with the hopes of resolving it." (CP-3; CP-4).

The Board's fifth exception contends that despite the fact that the teachers' work year is contractually-established, the Hearing Examiner incorrectly found that there was a legal requirement of 180 school days. We reject this exception. The New Jersey Attorney General has determined that "public schools in [the State of New Jersey] are mandated by law to remain open for instruction for a period of not less than 180 days in the school year." See Formal Opinion No. 19-1975, N.J. Attorney General, August 14, 1975; see also N.J.S.A. 18A:7F-9. The

Hearing Examiner accurately found that as demonstrated by the 2013-2014 school calendar, the Board had a legal obligation to be open for a minimum of 180 instructional days. (H.E. at 6; 3T31:13 thru 3T33:18). The Board has conceded this point. See Board's January 13, 2017 Br. at 19-20. The Hearing Examiner also clarified that based upon the arbitration award and the parties' expired CNA, the Board could require veteran teachers to work 187 days and new teachers to work 190 days, although only 183 days could be instructional days. (H.E. at 8-9).

The Board's sixth exception[5/] asserts that historically, the school calendar gave notice that spring break would be used for make-up days if necessary. The Hearing Examiner accurately found that the 2014-2015 school calendar "had a box at the bottom advising that if the three snow days were used and additional days were needed, . . . [spring break] would be used . . . and . . . all scheduled vacations during recess periods were made at the individual's risk." (H.E. at 7; 3T10:13 thru 3T11:11; CP-6; CP-11; R-1). As clarified above in the summary of facts, the 2013-2014 school calendar also included a similar advisement. (3T8:21 thru 3T10:4; R-4).

The Board's eighth exception claims that CP-8 and CP-9 should not have been admitted into evidence because they

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5/ We address the Board's sixth exception, insofar as it relates to the Hearing Examiner's determination of the retaliation claim, below.

constitute proposed settlement documents.[6/] We disagree. New Jersey courts and the Commission "follow the evidentiary rule that offers to compromise are not admissible to prove that a disputed claim has, or lacks, merit." Elizabeth Bd. of Ed., P.E.R.C. No. 2015-49, 41 NJPER 346 (¶110 2015); accord, N.J.R.E. 408 ("When a claim is disputed as to validity or amount, evidence of statements or conduct by parties or their attorneys in settlement negotiations . . . including offers of compromise or any payment in settlement of a related claim, shall not be admissible to prove liability for, or invalidity of, or amount of the disputed claim"). However, "[s]uch evidence shall not be excluded when offered for another purpose" and "evidence otherwise admissible shall not be excluded merely because it was disclosed during settlement negotiations." N.J.R.E. 408; accord, Hunterdon Cty. and CWA, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), on review of remand, P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), aff'd, NJPER Supp.2d 189 (¶16888 1988), 116 N.J. 322 (1989) (holding that statements made during settlement efforts were properly admitted into evidence when introduced "to establish retaliatory motive for [a] subsequent decision" rather

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6/ CP-8 is an email thread, originated by the Board's attorney and attaching a proposed agreement, in which the parties discuss their respective positions regarding the agreement. CP-9 is the Board's proposed agreement. The agreement proposed converting three instructional days into fifteen (15) hours of professional development that could be completed on-line at home.

than "to establish either [party's] case on the merits of the original [unfair practice] charge").

The Hearing Examiner accurately found that CP-8 and CP-9 were not offered as evidence that the Board sought to settle the instant unfair practice charge, but rather in an attempt to establish retaliatory motive for the Board's subsequent decision to add three instructional days during spring break. (H.E. at 15; C-1). Moreover, given that the Board publicly suggested "a willingness to convert [instructional] days into [professional development" (CP-3; CP-4) and specifically referenced CP-8 and CP-9 in a public website posting (CP-12 provides in pertinent part that the Board "offered to exchange the three outstanding instructional days for professional development days"), we find that the Board has waived any prejudice with respect to the admission of these documents into evidence.[7/]

Retaliation Exceptions

The Board's seventh exception, and aspects of its second and sixth exceptions, challenge the Hearing Examiner's findings regarding retaliation. The Association's cross-exception asserts that the Hearing Examiner, based upon her finding of a 5.4a(3) violation, should have recommended a monetary award for Association members having to report to work on three

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7/ We do not find, however, that the offer constituted evidence of retaliatory motive. See discussion supra.

instructional days scheduled during spring break. We grant the Board's exceptions and reject the Association's cross-exception.

We disagree with the Hearing Examiner's characterization that scheduling three instructional days during spring break constituted an "adverse personnel action." (H.E. at 29). School boards have "a unilateral right to establish and revise the school calendar independent of and prior to any required impact negotiations with the Association." Greater Egg Harbor Reg. Bd. of Ed., P.E.R.C. No. 2016-43, 42 NJPER 305, 308 (¶88 2015). Accordingly, consistent with the arbitration award and the parties' expired CNA, the Board had a managerial prerogative to cancel professional development days that were scheduled for February 17 and 18, 2015 and the wind-up day scheduled in June 2015. (H.E. at 8-9; 2T18:3-18; CP-1; CP-14). Likewise, consistent with the arbitration award and the parties' expired CNA, the Board had a managerial prerogative to require veteran teachers to work 187 days and new teachers to work 190 days, although only 183 days could be instructional days. (H.E. at 8-9; CP-1). The Association was on notice since at least 2013 that the school calendar – particularly spring break – was subject to change. (H.E. at 7; 3T8:21 thru 3T10:4; 3T10:13 thru 3T11:11; CP-6; CP-11; R-1; R-4). Moreover, the Board's legal obligation to remain open for at least 180 instructional days did not obviate its managerial prerogative to schedule additional days in

accordance with the arbitration award and the parties' expired CNA.

We also disagree with the Hearing Examiner's legal conclusion "that hostility to [the Association's] protected activities is supported by both the time and manner in which the Board added three . . . instructional days . . . [during] spring break." (H.E. at 27-30). The timing of the Board's calendar modifications was a direct result of when the arbitration award was issued. (CP-1). Had the award been issued during the summer of 2015, the 2014-2015 school calendar would have been obsolete and modifications effective only for 2015-2016. Had the award been issued during the fall of 2014, the Board would have had greater flexibility when modifying the 2014-2015 school calendar. However, given that the award was issued on February 10, 2015, the Board's calendar modifications were constrained by the limited number of days left in the 2014-2015 school year.

The manner in which the Board implemented modifications to the 2014-2015 school calendar was prescribed by the terms of the arbitration award and the Association's refusal to negotiate. Rather than indiscriminately implementing the award, the Board immediately cancelled certain days and repeatedly sought to negotiate with the Association regarding the addition of other days – offering to schedule instructional days during February break, spring break, or at the end of the school year; also

offering to exchange instructional days for professional development. The Association flatly refused. (H.E. at 10-11, 14-17, 31; 2T20:9 thru 2T22:21; 2T26:4 thru 2T28:1; 2T35:1 thru 2T36:6; 2T37:5 thru 2T38:14; 2T62:11 thru 2T63:11; 2T66:14 thru 2T68:13; 3T18:11 thru 3T19:7; CP-8; CP-9). Although it was under no obligation to concede or agree with the Board, the Association did have an obligation to negotiate upon demand regarding terms and conditions of employment and its refusal to do so affected the manner in which the Board subsequently implemented calendar modifications. In re Byram Tp. Bd. of Ed., 152 N.J. Super. 12, 21-22 (1977); accord, Hamilton Tp. Bd. of Ed. and Hamilton Tp. Administrators and Supervisors Ass'n, P.E.R.C. No. 87-18, 12 NJPER 737 (¶17276 1986), aff'd, NJPER Supp.2d 185 (¶163 App. Div. 1987), certif. den., 111 N.J. 600 (1988) (holding that "an employer or employee representative may take a hard line in negotiations so long as it does so with a sincere intent to reach agreement instead of a pre-determined intention to avoid agreement"); Piscataway Tp., P.E.R.C. No. 2005-55, 31 NJPER 102 (¶44 2005), recon. den., P.E.R.C. No. 2005-79, 31 NJPER 176 (¶71 2005) (holding that "[n]egotiations require dialogue between two parties with an intent to achieve common agreement rather than [one party] presenting its view and the [other party] considering it and later announcing its decision").

Turning to the Superintendent's March 19 letters and the Board's March 24 website posting, we find that these communications provided staff, students, and parents with a factual update that accurately reflected the parties' negotiations history as well as the terms of the arbitration award. (CP-3; CP-4; CP-12). The Board was entitled to explain its rationale for the calendar modifications just as the Association was entitled to assert its position. (R-2; R-3). While we acknowledge that the Board's communications fail to fully correspond with the Superintendent's testimony that "the calendar had to be modified . . . to make up for [three snow] days" (3T39:12-19; 3T17:24 thru 3T18:1), the Superintendent also testified that "the Board determined after the arbitration that it had to add three days" (3T42:7-14) and that "additional days could be anything . . . that needed to be added to the calendar" (3T62:5-19). Moreover, there was no disparity between the total number of work days scheduled in the initial 2014-2015 school calendar when compared to the modified 2014-2015 school calendar (i.e., both calendars included 187 work days for veteran teachers and 190 work days for new teachers) regardless of whether those days are identified as instructional, professional, or otherwise. (CP-6; CP-11; R-1).

Accordingly, we find that the Association failed to establish that hostility toward the exercise of protected

activity was a substantial or motivating factor in the Board's decision to convert part of spring break into three instructional days or that it was done in order to coerce the Association into accepting professional development. We dismiss the Association's section 5.4a(3) retaliation claim.

Impact Negotiation Exceptions

The Board's ninth and tenth exceptions challenge the Hearing Examiner's findings regarding impact negotiations. We reject both. The Hearing Examiner accurately found that the Association's March 25, 2015 letter to the Board constituted a demand to negotiate over the impact of the decision to schedule three instructional days during the 2014-2015 spring break. (H.E. at 20; CP-13). Contrary to the Board's assertion that the compressed time line was not specified or considered (see Board's January 13, 2017 Br. at 24), the Hearing Examiner accurately referenced a date-stamped exhibit (C-1) in her finding that the Association filed the instant unfair practice charge when the Superintendent did not respond to its demand (H.E. at 20). In the summary of facts, we clarified that the Association's application for interim relief was filed together with the unfair practice charge on March 31, 2015. (C-1; R-5; R-6; R-7).

We agree with the parties that the compressed time line exacerbated tensions. Specifically:

> -there were approximately two weeks between the March 23rd Board meeting when the school

> calendar was modified and the April 6th beginning of spring break, consequently limiting the Association's window to demand impact negotiations and to file an application for interim relief;
>
> -there was approximately one week between the March 25th demand to negotiate and the March 31st filing of the application for interim relief together, consequently limiting the Board's window to respond to the demand to negotiate.

Despite the passage of time, however, there is no evidence that the Board has ever responded to the Association's demand to negotiate. Further, although the Hearing Examiner accurately found that the Superintendent "was willing to accommodate individuals who may have scheduled vacation or had child care issues" if they had approached him with concerns, there is no evidence that the Superintendent ever articulated his willingness to negotiate with the Association before the June 13, 2016 hearing. (H.E. at 21; 3T27:19 thru 3T28:12).

Consistent with the arbitration award and the parties' expired CNA, the Board "had a unilateral right to establish and revise the school calendar independent of and prior to any required impact negotiations with the Association." Greater Egg Harbor Reg. Bd. of Ed., P.E.R.C. No. 2016-43, 42 NJPER 305, 308 (¶88 2015). The Board "also had the correlative right to ensure that it had sufficient staff at work on the rescheduled school days to teach the students." Ibid. Moreover, since at least 2013, the Board had given notice that the school calendar -

particularly spring break – was subject to change such that vacations were scheduled at the individual's risk.

Notwithstanding these managerial prerogatives, we find that the employees' interests in negotiating over the issues identified in the Association's demand to negotiate (i.e., use of personal days, emergency days, sick days as well as childcare arrangements, religious obligations, family obligations, and vacations) outweighed the Board's interests in not negotiating and that such negotiations would not have significantly encroached on the Board's decision to modify the 2014-2015 school calendar. Piscataway Tp. Bd. of Ed., P.E.R.C. No. 99-39, 24 NJPER 520, 522 (¶29242 1998). While acknowledging the Superintendent's unarticulated sentiments regarding employee accommodations, we find that the Board had an affirmative obligation to respond to the Association's demand to negotiate rather than passively accept – or tacitly refuse – same. See, e.g., Passaic Cty. Tech. & Voc. H.S. Bd. of Ed., P.E.R.C. No. 85-39, 10 NJPER 577, 578 (¶15269 1984) (holding that a public employer's "contention that it acted in good faith does not excuse a flat refusal to negotiate").

Accordingly, we hold that the Board violated section 5.4a(5) and, derivatively 5.4a(1), of the Act by failing to respond to the demand to negotiate.[8/]

ORDER

The Fort Lee Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing to negotiate with the Fort Lee Education Association in response to its March 25, 2015 demand to negotiate over the impact of the decision to schedule three instructional days during the 2014-2015 spring break.

2. Refusing to negotiate with the majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, specifically by refusing to negotiate with the Fort Lee Education Association in response to its March 25, 2015 demand to negotiate over the impact of the decision to schedule three instructional days during the 2014-2015 spring break.

8/ We note that "the remedy for such a violation does not require any further evidence on individual losses since it would be inappropriate for us to order a monetary remedy." Piscataway Tp. Bd. of Ed., 24 NJPER at 521. Rather, "[r]estoration of the status quo requires putting the parties back in the positions they would have been in had no unfair practice been committed" and "that means the Board must respond affirmatively to the Association's request to negotiate and negotiate in good faith." Ibid.

B. Take the following affirmative action:

1. Negotiate with the Fort Lee Education Association in response to its March 25, 2015 demand to negotiate over the impact of the decision to schedule three instructional days during the 2014-2015 spring break.

2. 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.

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

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Boudreau, Eskilson and Voos voted in favor of this decision. Commissioner Jones voted against this decision.

ISSUED: June 29, 2017

Trenton, New Jersey

NOTICE TO EMPLOYEES

PURSUANT TO
AN ORDER OF THE
PUBLIC EMPLOYMENT RELATIONS COMMISSION
AND IN ORDER TO EFFECTUATE THE POLICIES OF THE
NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,
AS AMENDED,
We hereby notify our employees that:

WE WILL cease and desist from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act and from refusing to negotiate with a majority representative of employees in the appropriate unit concerning terms and conditions of employment in that unit, particularly by refusing to negotiate with the Fort Lee Education Association in response to its March 25, 2015 demand to negotiate over the impact of the decision to schedule three instructional days during the 2014-2015 spring break.

WE WILL negotiate with the Fort Lee Education Association in response to its March 25, 2015 demand to negotiate over the impact of the decision to schedule three instructional days during the 2014-2015 spring break.

Docket No. CO-2015-231

Fort Lee Board of Education
(Public Employer)

Date: _____ By: _____

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

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