P.E.R.C. NO. 2022-20

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TRENTON BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-2014-028

TRENTON EDUCATIONAL SECRETARIES ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants in part, and denies in part, the Board's exceptions to a Hearing Examiner's recommended decision and order finding 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) and (3), by abolishing a TESA unit secretary position in the superintendent's office and replacing it with another confidential secretary position in retaliation for TESA's exercise of its contractual seniority recall rights to fill the opening. The Commission affirms the Hearing Examiner's findings that the Board's action was retaliation for protected activity in violation of the Act and that reinstatement of a TESA unit secretary position is an appropriate remedy. However, given the superintendent's testimony that there is currently only one confidential secretary in the superintendent's office, the Commission modifies the remedy to provide that if and when the Board re-establishes an additional secretary in the superintendent's office, it must allow TESA to fill the position by exercising its contractual seniority recall rights.

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Appearances:

For the Respondent, Adams Gutierrez & Lattiboudere, LLC, attorneys (Derlys M. Gutierrez, of counsel)

For the Charging Party, Selikoff & Cohen, P.A., attorneys (Keith Waldman, of counsel and on the brief; Hop Wechsler, on the brief)

DECISION

On September 13, 2021, the Trenton Board of Education (Board) filed exceptions to a Hearing Examiner's report and recommended Decision and Order, H.E. No. 2022-1, 48 NJPER 90 (¶22 2021), issued on August 19, 2021. On July 23, 2013, October 15, 2013, and March 20, 2014, the Trenton Educational Secretaries Association (TESA) filed an unfair practice charge and amended charges alleging 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), when it abolished an Administrative II secretary position and created a second confidential secretary position in the Superintendent's office in

retaliation for TESA's exercise of protected activity when it asserted its recall rights under the parties' collective negotiations agreement (CNA). After the Director of Unfair Practices and Representation initially dismissed the charge (D.R. No. 2015-7, 41 NJPER 515 (¶161 2015)), the Commission remanded it to the Director for further processing. See P.E.R.C. No. 2015-78, 42 NJPER 39 (¶11 2015). On December 2, 2016, the Director of Unfair Practices issued a Complaint and Notice of Pre-Hearing on the N.J.S.A. 34:13A-5.4a(1), (3), and (5) allegations.[1/] On February 10, 2017, the Board filed an Answer. On May 10 and 29, 2018, the Hearing Examiner conducted a hearing at which the parties examined witnesses and introduced exhibits. Post-hearing briefs were filed by October 1, 2018.

The Hearing Examiner's report and recommended decision found that the Board violated subsections 5.4a(1) and (3) by replacing the TESA unit Administrative II secretary position in the Superintendent's office with a non-unit confidential secretary

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1/ These provisions prohibit public employers, their representatives, or agents, from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act.; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act.; and (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."

position in retaliation for TESA's exercise of protected activity when it asserted its contractual seniority recall rights and prevented the Superintendent from selecting a secretary from the TESA recall list. The Hearing Examiner found that the Board did not violate subsection 5.4a(5) of the Act. The Hearing Examiner recommended that the Commission order the Board to restore the status quo ante by converting the confidential secretary position in the Superintendent's office back to an Administrative II secretary position to be filled according to the CNA's seniority recall provisions, with the unit member who had previously selected it to have right of first refusal to the position.

The matter is now before the Commission to adopt, reject or modify the Hearing Examiner's recommendations. See N.J.A.C. 19:14-8.1(a). We have reviewed the record, the Hearing Examiner's Findings of Fact and Conclusions of Law, and the parties' submissions. We find that the Hearing Examiner's findings of fact are supported by the record; however, we modify them to add one additional fact as discussed below. We further hold that the Hearing Examiner has correctly resolved the legal issues presented by this dispute; however, we modify the Hearing Examiner's recommended order as discussed below.

Summary of Facts

We summarize the pertinent facts as follows. TESA is the majority representative of a unit of secretarial employees

employed by the Board. The Board and TESA are parties to a July 1, 2009 to June 30, 2012 CNA. Article 8 of the CNA contains provisions regarding recall rights and seniority in the event of a layoff due to a Reduction in Force (RIF). The Board's Superintendent's office has traditionally employed one confidential secretary (non-unit) and one or two secretaries who were TESA unit members. During the 2012-13 school year, there was one confidential secretary (Boyer-Wood) and one TESA Administrative II secretary (Armstrong) employed in Superintendent Duran's office. There was also a non-secretary confidential employee (Smith) employed in the Superintendent's office. In May 2013, Armstrong announced that she would be retiring effective July 1, 2013. TESA expected that Armstrong's vacancy would be filled by a TESA unit member who would be laid off at the end of the year and then be eligible for recall.

On May 20, 2013, Executive Director Smallwood-Johnson met with TESA President Vogt and TESA Secretary Elizabeth Gill to discuss TESA recall rights. Smallwood-Johnson told Vogt and Gill that Superintendent Duran would like to choose Armstrong's replacement for the Administrative II secretary position in the Superintendent's office from the TESA recall list. Vogt replied that Duran could not choose the replacement because TESA secretaries choose based on seniority. Smallwood-Johnson stated she was surprised TESA would not let Duran choose a replacement

secretary. Vogt responded that Duran already had a confidential secretary of his own choosing and that TESA wanted to keep the other secretary position in its unit. Smallwood-Johnson replied that if TESA did not allow Duran to choose his own secretary from TESA's recall list, then Duran indicated he might abolish the Administrative II secretary position and replace it with a second confidential secretary position. Vogt felt threatened but responded that TESA would challenge that action if necessary.

On May 21, 2013, TESA Vice President Ann Sciarotta called Smallwood-Johnson to schedule a date for when TESA Administrative II secretaries would choose their positions for the 2013-14 school year. Smallwood-Johnson repeatedly expressed her disbelief that TESA would not allow Duran to choose his own Administrative II secretary. Sciarotta responded that it is TESA's right to have its recalled members choose their positions. Smallwood-Johnson told Sciarotta that Duran could abolish the Administrative II position and make it confidential.

On May 22, 2013, Smallwood-Johnson told Sciarotta that she had spoken with Duran and that Duran had a "soft spot" in his heart for Vogt and Duran and therefore would allow TESA members to choose the Administrative II secretary position in the Superintendent's office from the recall list. On May 31, 2013, TESA members selected their positions for the 2013-14 school year

and the third most senior recalled Administrative II secretary (Flowers) chose the position in the Superintendent's office.

On June 4, 2013, Duran told Vogt and Sciarotta that it was very important that the Administrative II secretary in his office speak fluent Spanish so that he and Smith did not have to take calls from Spanish speakers. Although the position does not require any Spanish language qualifications, Sciarotta assured Duran that Flowers was fluent in Spanish. On June 5, 2013, Vogt and Sciarotta met with Smallwood-Johnson and Duran. Duran then announced that he was abolishing the Administrative II secretary position in his office and creating a confidential secretary position because the State Monitor told him he could. Vogt responded that the TESA Administrative II secretary had been in the Superintendent's office for many years and asked Duran for the State Monitor's name. Duran told her she could not speak to the Monitor without Duran being present. Sciarotta notified Flowers that she would no longer be able to take the Administrative II secretary position in the Superintendent's office because it was being abolished. Flowers was upset by the news and was placed elsewhere for the 2013-14 school year.

On June 10, 2013, the Board voted unanimously to abolish the Administrative II secretary position in the Superintendent's office and replace it with another confidential secretary position. The Board's meeting minutes provide:

> The abolishment of the Administrative II position in the Superintendent's office is Mr. Duran's recommendation.

At the Board meeting, Vogt stated that the Board's action violated the CNA with TESA. Duran later hired a second confidential secretary. Duran left the district in October 2015 and Smallwood-Johnson retired in 2015.

We modify the record to include one additional relevant fact from the hearing that was not included in the Hearing Examiner's report and was not otherwise briefed or documented by the parties in their submissions to the Hearing Examiner. During the second day of hearing on May 29, 2018, Superintendent Frederick McDowell testified that he currently (during the 2017-18 school year) had two confidential (non-TESA unit) secretaries in his office. That was the same composition as in 2013-14 under Superintendent Duran following the replacement of one TESA unit secretary with a second confidential secretary. However, McDowell testified that: "For the '18/'19 school year, due to budget cuts, I had to abolish one of the confidential secretary positions." 2T13-15 to -17. TESA has not rebutted that testimony or the Board's claim in its exceptions brief that there is no evidence that a second secretary has been reestablished in the Superintendent's office. We therefore modify the record to add the following Finding of Fact 49:

49. Since the 2018-19 school year, the Superintendent's office has employed one confidential secretary and no TESA unit secretaries.

Arguments

The Board excepts to findings of fact 7 and 12. Finding of Fact 7 states:

> 7. However, when the confidential secretary in the Superintendent's offices was out on sick leave, the Board would replace the confidential secretary with a TESA unit member, who was paid a $25 per day stipend in addition to the employee's regular salary. (1T64-1 to -16).
>
> [H.E. at 7.]

The Board's exception states:

> As to Fact #7, while a $25.00 per day stipend was paid to the unit secretary when the confidential secretary in the Superintendent's office was absent, that payment was made as a matter of contract. 1T64-22 to 1T65-4. For the sake of clarity, there is also nothing in the record indicating that the unit secretary did anything other than non-confidential work during this time. 1T69-11 to 15.

Finding of Fact 12 states:

> 12. TESA's expectation with regard to Armstrong's retirement was that the vacancy would be filled with a TESA unit member who would be laid off as part of the Board's regular year-end RIF and then eligible for recall. (1T62-19 to -24).
>
> [H.E. at 7-8.]

The Board's exception states:

> As to Fact #12, there is no indication in the record that a reduction in force actually took place at the end of the 2012-13 academic year. Further, the Board does not have a "regular end-of-year RIF" as found in Fact #12. The Board evaluates employees on an annual basis in order to determine whether or not to renew non-tenured employees' contracts based on their performance. N.J.S.A. 18A:27-10. However, this is not the same thing as a reduction in force, which is effectuated to cut costs when boards "are faced with cuts in funding and further limitations on their budgets," and can affect any Board employee.

The Board also makes the following exceptions to the Hearing Examiner's legal analysis:

1. The Recommended Order by the Hearing Examiner exceeds her authority;

2. It is well established that a public employer does not commit an unfair labor practice when it expresses an opinion or merely restates the law;

3. The Hearing Examiner's reliance on the Superintendent's recommendation regarding the abolition of the unit position is misplaced;

4. The Hearing Examiner relied on hearsay in determining that the Board's action was retaliatory; and

5. The Hearing Examiner placed excessive weight on the comments regarding the State Monitor.

The Board asserts that, as of the 2018-19 school year, there are no longer two confidential secretaries in the Superintendent's office, so the Hearing Examiner cannot order the Board to re-create the abolished position or replace the Superintendent's only confidential secretary with an Administrative II secretary. It argues that if the Board decides

to again create a second confidential secretary position for the Superintendent's office, then it should not be required by the Order to replace it with an Administrative II secretary. The Board asserts that Duran's and Smallwood-Johnson's statements to TESA representatives that the Board can replace the secretary position with another confidential secretary rather than filling it based on the TESA seniority recall list were not retaliatory because they were statements of fact or opinion about the Board's rights. It argues that the record does not show the Board's or Superintendent's motivation in eliminating the TESA unit secretary position. The Board asserts that Duran was an agent of the Board with the power to recommend personnel actions but not to abolish or create positions. It argues that any alleged threat communicated by Smallwood-Johnson is hearsay and does not represent the Board's policies. Finally, the Board asserts that Vogt was not threatened by Duran's comments because Vogt called the State Monitor and was not afraid to assert TESA's rights.

On September 20, 2021, TESA filed a letter brief in opposition to the Board's exceptions and in support of the Hearing Examiner's recommended decision. Regarding the Board's exceptions to Findings of Fact 7 and 12, TESA asserts that neither fact is material to the Hearing Examiner's recommended decision, as it relies on neither the nature of the work performed by the unit secretary when filling in for the

confidential secretary, nor whether a RIF occurred. It argues that the Board's proposed changes to Findings of Fact 7 and 12 should also be rejected on the merits. TESA asserts that whether the $25 daily stipend is paid to secretaries as a matter of contract is irrelevant, and the Board never raised the issue of the specific work the unit secretary substitute performed during the confidential secretary's sick leave. TESA asserts that the Board construes "RIF" too narrowly in Fact 12 because in this case the parties had a past practice of applying their contractual seniority recall rights to the Board's end-of-year layoff and subsequent recall of secretaries. It argues that the witnesses testimonies support this practice and the use of the term "RIF" because Article 8 of the CNA concerning such seniority recall rights expressly refers to "Reduction in Force."

As for the Board's exceptions to the Hearing Examiner's legal analysis, TESA asserts that the majority of the Board's arguments were raised at the hearing and in briefing and were carefully considered and rejected by the Hearing Examiner. TESA repeats and incorporates the relevant arguments made in its post-hearing brief addressing the difference between a public employer's expression of opinion versus threatening to engage in action prohibited by the Act and how the context of such statements matters. TESA asserts that Superintendent Duran's actual authority to abolish the unit position is not necessary

for his retaliatory animus to be imputed to the Board. It argues that Smallwood-Johnson's statements communicating Superintendent Duran's retaliatory threat are not hearsay because they were offered for their effect on the listeners and were verbal acts. TESA also asserts that whether Superintendent Duran's statements actually coerced or intimidated TESA officers is irrelevant under the Act if the threat had the tendency to do so and that in this case the TESA officers actually did feel threatened. Finally, TESA disputes the Board's claim that the Hearing Examiner's remedy exceeds the Commission's authority because it asserts the remedy of reinstating employees wrongfully discharged under the Act is within the Commission's broad remedial authority.

Analysis

As to the Board's factual exceptions, neither Finding of Fact 7 nor 12 is inconsistent with the record and neither is material to the Hearing Examiner's legal conclusions. Finding of Fact 7 does not address whether the $25 a day stipend was contractual and does not address whether a unit secretary substituting for the confidential secretary would perform confidential duties. Thus, the Board's assertions regarding those issues do not conflict with Finding of Fact 7. We accordingly reject the Board's exception to Finding of Fact 7. Finding of Fact 12 accurately reflects the testimonies of TESA witnesses regarding the terminology they use to describe the Board's regular year end

layoff or non-renewal process. 1T26-5 to -9; 1T29-21 to -24; 1T62-19 to -21; 1T86-11 to -18; 1T97-18; 2T30-15; 2T38-16. The Board's counsel also referred to this process as a "RIF" multiple times during the hearing. 2T39-2 and -8; 2T40-7 and -25; 2T41-14. The "Reduction in Force" or "RIF" terminology used by the parties and in Finding of Fact 12 is also consistent with the language in Article 8 of the CNA concerning the seniority recall rights asserted by TESA in this case. H.E. at 6. We accordingly reject the Board's exception to Finding of Fact 12.

We next address the Board's exceptions to the Hearing Examiner's legal analysis. Exception 5 asserts that at page 23 the Hearing Examiner placed excessive weight on Superintendent Duran's comments regarding contacting the State Monitor by asserting they were threatening. First, we note that there is no discussion on p. 23 of the Hearing Examiner's report of the State Monitor issue. Second, where the Hearing Examiner's analysis summarizes the State Monitor discussion, the Hearing Examiner accurately depicted Vogt's testimony that she felt threatened by Duran's statements about the State Monitor. H.E. at 20; H.E. at 13; 1T42-6 to -7; 1T42-15 to -17. Third, we reject the Board's assertion that because Vogt called the State Monitor and spoke at the Board meeting, she must not have actually felt threatened and/or the statements could not be considered threatening. For a 5.4a(1) violation to be found, proof of actual interference,

intimidation, restraint, coercion or motive is unnecessary; the tendency to interfere is sufficient. Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd, 10 NJPER 78 (¶15043 App. Div. 1983); City of Linden, P.E.R.C. No. 2019-39, 45 NJPER 363 (¶95 2019); N.J. Turnpike Auth., P.E.R.C. No. 2017-51, 43 NJPER 354 (¶101 2017); Paterson State-Op. Sch. Dist., P.E.R.C. No. 2014-10, 40 NJPER 173 (¶67 2013); and Mine Hill Tp., P.E.R.C. No. 86-145, 12 NJPER (¶17197 1986).

Moreover, the standard for determining a 5.4a(1) violation is objective: the "focus of the inquiry is on the offending communication rather than the subjective beliefs of those receiving it." South Orange Village Tp., D.U.P. No. 92-6, 17 NJPER 466, 467 (¶22222 1991); City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd, NJPER Supp.2d 58 (¶39 App. Div. 1979). Here, not only did Vogt testify to feeling threatened, but the record supports the conclusion that Duran's and Smallwood-Johnson's statements to TESA agents concerning abolishing the TESA unit secretary position if TESA asserted its contractual seniority recall rights would objectively tend to interfere with TESA's exercise of its rights under the Act.

Board Exception 4 asserts that the Hearing Examiner relied heavily on hearsay in determining that the Board's action was retaliatory. N.J.A.C. 19:14-6.6(a) provides that the parties are not bound by rules of evidence and all relevant evidence is

admissible, except that the hearing examiner has discretion to "exclude any evidence if its probative value is substantially outweighed by the risk that its admission will either necessitate undue consumption of time or create substantial danger of undue prejudice or confusion." Specific to hearsay, N.J.A.C. 19:14-6.6(b) provides:

> Notwithstanding the admissibility of hearsay evidence, some legally competent evidence must exist to support each ultimate finding of fact to an extent sufficient to provide assurances of reliability and to avoid the fact or appearance of arbitrariness.

We find that the testimony concerning Smallwood-Johnson's statements that Superintendent Duran might abolish the TESA unit secretary position and replace it with another confidential secretary if TESA did not allow Duran to choose his own replacement secretary (Findings of Fact 18; 23) are relevant and admissible under N.J.A.C. 19:14-6.6(a) because there is no substantial danger of undue prejudice or confusion that outweighs their probative value regarding the issue of retaliatory intent at the heart of the 5.4a(3) charge in this case.

We also find that Smallwood-Johnson's statements are not subject to the hearsay exclusion because they were offered not to prove the truth of what she said, but only to show that her statements were made and how they were understood by the TESA agents to whom she spoke. Spragg v. Shore Care, 293 N.J. Super. 33, 56-57 (App. Div. 1996). Furthermore, to the extent

Smallwood-Johnson's statements were threatening, intimidating, or coercive under our Act, they constitute verbal acts not excludable under the hearsay rule. Robinson v. Branch Brook Manor Apts., 101 N.J. Super. 117, 122 (App. Div. 1968), certif. den., 52 N.J. 487 (1968) (discriminatory statement by landlord's agent to prospective tenant admissible in civil rights hearing as verbal conduct evidencing pattern of discriminatory activity); State v. McKiver, 199 N.J. Super. 542, 547-48 (App. Div. 1985) (threats are non-hearsay verbal acts). Moreover, even assuming, arguendo, that the statements could be considered hearsay under N.J.R.E. 801(c) as alleged by the Board, they are admissible under N.J.A.C. 19:14-6.6(b) because they are consistent with ultimate findings of fact that are supported by other legally competent evidence on the record of retaliation for protected activity, including Superintendent Duran's statements and actions regarding the secretary position and announcing its abolishment within a week of TESA exercising its contractual seniority recall rights and the Board's vote five days later to replace the position with a confidential secretary. H.E. at 11-13.

Board Exception 3 asserts that the Hearing Examiner's reliance on Superintendent Duran's recommendation to the Board to abolish the TESA unit position in his office and replace it with another confidential secretary is "misplaced" because Duran is an agent of the Board with no authority to abolish or create

positions, but only to recommend such actions. Section 5.4 of the Act prohibits a public employer's "representatives or agents" from committing unfair practices, and an employer is responsible for the actions of its supervisors which are impliedly authorized or within the apparent authority of the actor. See Abbamont v. Piscataway Tp. Bd. of Ed., 138 N.J. 405, 421 (1994) (school board liable for tenure decision made based on recommendations of principal and superintendent who engaged in discriminatory, retaliatory actions); Grasso v. W. N.Y. Bd. of Educ., 364 N.J. Super. 109, 118-119 (App. Div. 2003) ("discriminatory comments made by one with input into the decision-making process are not stray remarks" and even if considered stray are "admissible as evidence of managerial preference"); Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd, 10 NJPER 78 (¶15043 App. Div. 1983) (school board violated the Act for threatening statements and actions by superintendent and Board president in response to protected activity); In re [Monroe Tp.] Bd of Fire Com'rs, P.E.R.C. No. 2015-14, 41 NJPER 156 (¶54 2014), aff'd, 443 N.J. Super. 158 (App. Div. 2015), certif. den., 226 N.J. 213 (2016) (although one board member communicated threats to union for exercise of protected activity, board's subsequent decision to terminate firefighters violated the Act).

Here, Superintendent Duran and Executive Director of Human Resources Smallwood-Johnson were clearly authorized agents of the

Board. The Board concedes that Smallwood-Johnson was responsible for implementing the Board's hiring decision and that Duran had the authority to recommend the abolishment or creation of positions and put them before the Board. It is not necessary for those Board agents to actually make the ultimate retaliatory employment decisions, which only the Board can formally effectuate, or that there be direct evidence of retaliatory intent by all or any of the Board members. See, e.g., [Monroe Tp.] Bd of Fire Com'rs, supra; Commercial Tp. Bd. of Ed., supra; and Abbamont v. Piscataway Tp. Bd. of Ed., supra. The record demonstrates that the threats from Superintendent Duran, communicated to TESA agents by Smallwood-Johnson, were informally realized when on June 5, 2013 Duran stated (following TESA's exercise of its contractual seniority recall rights) that he was replacing the TESA unit secretary position in his office with another confidential secretary. H.E. at 12. The retaliatory threat was then formally realized when on June 10, 2013 the Board voted to abolish the TESA unit secretary position and create a confidential secretary position in the Superintendent's office explicitly based on "Mr. Duran's recommendation." H.E. at 13.

The Board also asserts within Exception 3 that "while the timing of the decision to eliminate the position may be suspect, the Association witness' testimony shed no light on the Superintendent's motivation in recommending the position's

elimination..." The record supports the finding that Superintendent Duran, who was the Board's agent and responsible for personnel recommendations, was motivated by hostility towards TESA's assertion of its contractual seniority recall rights that prevented him from choosing his own Administrative II secretary from the TESA recall list. H.E. at 8-13.

Board Exception 2 asserts that Smallwood-Johnson and Duran's statements to TESA agents regarding the Board's right to replace the TESA unit secretary with another confidential secretary were merely expressions of opinion of the Board's legal or contractual rights and therefore not evidence of threats or retaliation. The record supports the Hearing Examiner's characterization of these statements as threats because they were made in connection with TESA's assertions of its seniority recall rights. Smallwood-Johnson and Duran only communicated the Board's right to abolish and create positions after TESA repeatedly rebuffed their attempts to interfere with the contractual seniority recall process by allowing Duran to personally select a replacement Administrative II secretary from the TESA list. Then, five days after TESA exercised those seniority recall rights and a member selected the Administrative II secretary placement in the Superintendent's office, Duran stated that he would abolish the position and replace it with a confidential secretary. Five days later, the Board executed those personnel actions based on

Duran's recommendation. Based on this record, we find that the statements of Smallwood-Johnson and Duran to TESA agents regarding abolishing and creating secretary positions were coercive or threatening and not merely expressions of fact or opinion. See, e.g., State of N.J. (Dept. of Education) and CWA, P.E.R.C. No. 88-72, 14 NJPER 137 (¶19055 1988), aff'd, NJPER Supp.2d 209 (¶184 App. Div. 1989) (although employer had contractual right to change vacation policy, director's statements tying reduction in vacation benefits to union's grievance filing violated 5.4a(1)); Mercer Cty., P.E.R.C. No. 86-33, 11 NJPER 589 (¶16207 1985) (Warden's statement that PBA member's position would be abolished if PBA won their grievance violated 5.4a(1)); Mine Hill, P.E.R.C. No. 86-145, supra (Mayor's statements about reducing the number of sergeants violated 5.4a(1) because they were threats linked to the union exercising its right to settle contract through interest arbitration).

Board Exception 1 asserts that the Hearing Examiner's remedy of reinstatement exceeds her authority. In order to effectuate the Act's prohibitions against "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" (N.J.S.A. 34:13A-5.4a(3)), the Act empowers the Commission to "take such reasonable affirmative action as will effectuate the policies of this act." N.J.S.A.

34:13A-5.4(c). In Galloway Twp. Bd. of Ed. v. Galloway Twp. Ass'n of Educ. Sec'ys, 78 N.J. 1, 9-10 (1978), the Supreme Court held that the remedy of reinstatement (with or without back pay) "is necessarily subsumed within the broad remedial authority the Legislature has entrusted to PERC." Indeed, the Supreme Court held that a result in which "PERC would be powerless to order the reinstatement of an employee discharged in violation of the Act [would be] repugnant to the Act's attempt to protect public employees in the exercise of the organizational rights secured them in N.J.S.A. 34:13A-5.3." Galloway, 78 N.J. at 10. The courts have consistently upheld the Commission's ordered remedies of reinstatement for violating the Act. See, e.g., [Monroe Tp.] Bd of Fire Com'rs, P.E.R.C. No. 2015-14, 41 NJPER 156 (¶54 2014), aff'd, 443 N.J. Super. 158 (App. Div. 2015), certif. den., 226 N.J. 213 (2016); Warren Hills Reg. Bd. of Ed., P.E.R.C. No. 2005-26, 30 NJPER 439 (¶145 2004), aff'd, 32 NJPER 8 (¶2 App. Div. 2005), certif. den., 186 N.J. 609 (2006); Wall Tp. Bd. of Ed., P.E.R.C. No. 2010-24, 35 NJPER 373 (¶126 2009), aff'd, 37 NJPER 61 (¶23 App. Div. 2011); and Teterboro Bor., P.E.R.C. No. 83-137, 9 NJPER 278 (¶14128 1983), aff'd NJPER Supp.2d 142 (¶127 App. Div. 1984).[2/]

2/ See also Bloomfield Tp., P.E.R.C. No. 88-34, 13 NJPER 807 (¶18309 1987), aff'd, NJPER Supp.2d 217 (¶191 App. Div. 1989), certif. den. 121 N.J. 633 (1990); Logan Tp. Bd. of Ed., P.E.R.C. No. 83-23, 8 NJPER 546 (¶13251 1982), aff'd,

(continued...)

The Board argues that even if in the future it adds a secretary back to the Superintendent's office (in addition to the one confidential secretary position currently there since the 2018-19 school year), that it cannot be ordered "to re-create a lawfully eliminated position" and fill the additional position with a TESA unit Administrative II secretary rather than another confidential secretary. However, while the Board's elimination of the second confidential secretary may have been lawful, the Hearing Examiner found and we concur that the motivation for creating that second confidential secretary in the first place, in replacement of a TESA unit secretary, violated subsection 5.4a(3) Act because it was retaliation for TESA's assertion of its contractual seniority recall rights.

In [Monroe Tp.] Bd of Fire Com'rs, the employer's decision to replace the paid union firefighters with volunteers violated the Act because it was done in retaliation for the union's protected activity. 41 NJPER at 158-159. The Commission ordered that the paid union firefighters be reinstated. Id. at 159. In a published decision, the Appellate Division affirmed, rejecting the employer's assertions that the Commission's remedy cannot

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2/ (...continued)
NJPER Supp.2d 138 (¶119 App. Div. 1983); and No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 79-14, 4 NJPER 451 (¶4205 1978), aff'd, NJPER Supp.2d 63 (¶45 App. Div. 1979).

order it to replace volunteer firefighters with paid firefighters or order reinstatement with back pay. The court held:

> Nothing in PERC's findings or conclusions prevented the Board from lawfully regulating District No. 1's fire department, including how it chooses to provide fire services and whether or not its firefighters should be compensated. Simply put, the Board's ability to govern the structure of the fire district and make personnel decisions does not, in and of itself, insulate the Board from liability or allow it to act in a retaliatory and unlawful manner. PERC acting under its statutory authority to enforce the Act is not a usurpation of the Board's authority. . . . Contrary to the Board's contention, the remedy of reinstating employees wrongfully discharged under the Act has been upheld under PERC's broad remedial authority. See Galloway Twp. Bd. of Educ. v. Galloway Twp. Ass'n of Educ. Sec'ys, 78 N.J. 1, 393 A.2d 207 (1978).
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> [443 N.J. Super. at 178-179; emphasis added.]

The Supreme Court denied the employer's petition for certification. 226 N.J. 213 (2016).

In Warren Hills Reg. Bd. of Ed., the employer's decision to subcontract its bus services was illegally motivated in retaliation for the bus drivers' formation of a union. 30 NJPER at 441-442. Even though the employer had already changed the way it staffed bus services, the Commission ordered it to replace the newly subcontracted drivers with the illegally terminated union drivers. Ibid. The Appellate Division affirmed, holding:

> A public employer has the managerial prerogative to contract with private companies for work previously performed by

> public employees. However, it is unlawful to discharge employees or take other adverse action against them in reprisal for union activity. N.J.S.A. 34:13A-5.4(a)(1) and (3). Therefore, the decision to contract out work may not be motivated by a desire to retaliate for, or discourage, union activity. See In re Twp. of Bridgewater, 95 N.J. 235 (1984).
>
> [32 NJPER at 9]

Similarly, in Teterboro Bor., a union member was illegally laid off for seeking union representation on salary issues, so the Commission ordered that he be reinstated with back pay even though the employer had shown that he was replaced with a cheaper part-time employee because work had decreased. 9 NJPER at 278-280. The Appellate Division affirmed, holding:

> The judgment is affirmed substantially for the reasons given in the decision of the Public Employment Relations Commission. . . . Restoring the improperly discharged employee's full economic loss is "reasonable affirmative action [such] as will effectuate the policies of [the New Jersey Employer-Employee Relations] Act." N.J.S.A. 34:13A-5.4(c).
>
> [NJPER Supp.2d at 142-143]

In Wall Tp. Bd. of Ed., the Appellate Division rejected the employer's argument that the Commission could not order it to reinstate an employee because it would strip its right to decide whether to renew a non-tenured employee's contract pursuant to N.J.S.A. 18:27-4.1a. The Appellate Division found:

> The Board also argues . . . that PERC could not impose a remedy that stripped the Board of its right to decide whether to renew an

> employee's contract. See N.J.S.A. 18:27-4.1a. . . . [E]ven if we were to consider that argument, PERC has authority to order an employee, terminated in violation of the Public Employer-Employee Relations Act, reinstated. See Galloway Twp. Bd. of Educ. v. Galloway Twp. Ass'n of Educ. Sec'ys, 78 N.J. 1, 10 (1978); In re Maywood Bd. of Educ., 168 N.J. Super. 45, 63 (App. Div. 1979).
>
> [37 NJPER at 63]

Consistent with the Appellate Division panels in the above-cited cases, we find that the Hearing Examiner's remedy of reinstatement by ordering the Board to convert a confidential secretary position in the Superintendent's office back to an Administrative II secretary position is consistent with the broad remedial purposes of the Act to prevent anyone from engaging in unfair practices. Such a remedial order also serves to deter the Board and others from committing future unfair practices. See Galloway, 78 N.J. at 16 ("the deterrent aspect of [PERC's] remedial authority").

However, in light of our addition of Finding of Fact 49 to the factual record, we modify the Hearing Examiner's remedy accordingly. The Hearing Examiner's remedy did not consider the Superintendent's testimony, which was not disputed by TESA, that the total number of secretaries in the Superintendent's office was reduced from two to one for the 2018-19 school year. That left the Superintendent's office with one instead of two confidential secretaries. As discussed earlier, that fact was

only elicited from Superintendent McDowell's testimony and not otherwise raised by the Board until its Exceptions brief. Nevertheless, TESA has not disputed the fact that there is presently only a single confidential secretary in the Superintendent's office. Given that fact, we modify the remedy to clarify that the Board will not be required to convert a confidential secretary position to an Administrative II secretary position if that would leave it with no confidential secretaries in the Superintendent's office. However, should the Board decide to re-establish a second secretary position in the Superintendent's office, it must be an Administrative II secretary position that TESA is allowed to fill by exercising its contractual seniority recall rights.

TESA alleges that the timing of the Board's decision to abolish the second confidential secretary position (as this unfair practice case was proceeding to a hearing) raises an inference that it was done to deprive TESA of a remedy if its unfair practices were sustained. We are constrained by the record on this issue, which provides that the Board abolished the second confidential secretary due to budget cuts. 2T13-15 to -16. The Board has a non-negotiable managerial prerogative to abolish positions and reduce its staff for organizational and budgetary reasons. See Robbinsville Twp. Bd. of Educ. v. Wash. Twp. Educ. Ass'n, 227 N.J. 192, 200 (2016); Old Bridge Tp. Bd. of

Ed. v. Old Bridge Tp. Ed Ass'n, 98 N.J. 523 (1985); In re Maywood Bd. of Ed., 168 N.J. Super. 45 (App. Div. 1979), certif. den., 81 N.J. 292 (1979). TESA has not established and the record does not demonstrate that the Board's decision to abolish the second confidential secretary position was done for illegitimate or retaliatory reasons that would be illegal under our Act.

Based on the foregoing analysis, we affirm the Hearing Examiner's legal conclusions that the Board violated subsections 5.4a(1) and 5.4a(3) of the Act. The facts are modified to include Finding of Fact 49 concerning the current number of secretaries in the Superintendent's office. We partially grant the Board's Exception 1 concerning remedy; the remedy is modified to reflect new Finding of Fact 49 so that it is applicable only if and when the Superintendent's office re-establishes another secretary in addition to the one confidential secretary presently employed there. The Board's exceptions are otherwise denied as discussed above.

ORDER

The Trenton 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 abolishing the Administrative II secretary position and replacing it with a confidential secretary position

in the Superintendent's office in retaliation for TESA's exercise of protected activity when it asserted its seniority recall rights under the parties' CNA and prevented the Superintendent from selecting his secretary from a list of recalled TESA members.

2. Discriminating in regard to hire or tenure of employment or any term or condition of employment to discharge employees in the exercise of the rights guaranteed to them by the Act, particularly by abolishing the Administrative II secretary position and replacing it with a confidential secretary position in the Superintendent's office in retaliation for TESA's exercise of protected activity when it asserted its seniority recall rights under the parties' CNA and prevented the Superintendent from selecting his secretary from a list of recalled TESA members.

B. Take the following affirmative action:

1. Restore the status quo ante by, if and when the Board determines to re-establish an additional secretary in the Superintendent's office beyond one confidential secretary, allowing TESA to exercise its contractual seniority recall rights to fill that first additional secretary position with an Administrative II secretary and granting Lisa Flowers the right of first refusal to the position.

2. If Flowers accepts the reinstated Administrative II secretary position in the Superintendent's office, allow TESA to exercise its contractual seniority recall rights to fill the TESA unit position left vacant by Flowers.

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

4. Notify the Chair of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply herewith.

BY ORDER OF THE COMMISSION

Chair Weisblatt, Commissioners Bonanni, Ford, Jones, Papero and Voos voted in favor of this decision. None opposed.

ISSUED: November 23, 2021

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 its employees in the exercise of the rights guaranteed to them by the Act, particularly by abolishing the Administrative II secretary position and replacing it with a confidential secretary position in the Superintendent's office in retaliation for TESA's exercise of protected activity when it asserted its seniority recall rights under the parties' CNA and prevented the Superintendent from selecting his secretary from a list of recalled TESA members.

WE WILL cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to discharge employees in the exercise of the rights guaranteed to them by the Act, particularly by abolishing the Administrative II secretary position and replacing it with a confidential secretary position in the Superintendent's office in retaliation for TESA's exercise of protected activity when it asserted its seniority recall rights under the parties' CNA and prevented the Superintendent from selecting his secretary from a list of recalled TESA members.

WE WILL restore the status quo ante by, if and when the Board determines to re-establish an additional secretary in the Superintendent's office beyond one confidential secretary, allowing TESA to exercise its contractual seniority recall rights to fill that first additional secretary position with an Administrative II secretary and granting Lisa Flowers the right of first refusal to the position.

WE WILL if Flowers accepts the reinstated Administrative II secretary position in the Superintendent's office, allow TESA to exercise its contractual seniority recall rights to fill the TESA unit position left vacant by Flowers.

Docket No. CO-2014-028 Trenton 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) 292-9830

APPENDIX "A"