



STATE OF NEW JERSEY

In the Matter of Orlena Simpson, <i>et. al</i> , Newark Public School District	:	FINAL ADMINISTRATIVE ACTION OF THE CIVIL SERVICE COMMISSION
CSC Docket Nos. 2014-676, <i>et. al</i>	:	
CSV 14755-13 and	:	
EDU 17995-13	:	
(Consolidated)	:	
	:	
	:	

ISSUED: NOV 16 2016 (SLD)

The appeals of Orlena Simpson, *et. al*, former employees with the Newark Public School District (School District), of their layoffs,¹ effective July 1, 2013, was heard by Administrative Law Judge Kimberly A. Moss (ALJ), who rendered her initial decision on February 10, 2016. Exceptions and replies to exceptions were filed on behalf of the appointing authority and the appellants.

Having considered the record and the attached ALJ's initial decision, and having made an independent evaluation of the record, the Civil Service Commission (Commission), at its meeting on October 19, 2016, accepted and adopted the Findings of Fact and Conclusions as contained in the initial decision with regard to the good faith of the layoff of the non-Attendance Counselors and the recommendation to uphold the layoffs and dismiss the appellants' appeals. However, the Commission did not adopt the Findings of Fact and Conclusions with respect to the good faith of the layoff of the Attendance Counselors. Rather, the Commission upheld the layoff of the Attendance Counselors.

¹The School District laid off approximately 136 employees who were or are members of the Newark Teachers Union Local 481. Those laid off included 46 Attendance Counselors; 25 Community Aide Schools/Teacher Aides; 20 Keyboarding Clerk 1s; 19 Teacher Aides; 14 Community Aide, Schools; seven Clerk 1s; and five Keyboarding Clerk 2s.

DISCUSSION

The appellants filed an appeal with the Commission alleging that their layoffs from their positions with the School District were in bad faith. Upon receipt of their appeals, these matters were transmitted to the Office of Administrative Law (OAL) for a hearing as a contested case. The Newark Teachers Union (Union) filed a complaint with the Department of Education (DOE), alleging that the abolishment of the position of attendance officer was in violation of *N.J.S.A. 18A:38-25 to 33*. The DOE transmitted that matter to the OAL for a hearing as a contested case. At the OAL, the appellants filed a motion for consolidation and predominant interest. On February 5, 2015, the ALJ issued an order of consolidation and predominant interest and determined that the Commissioner of the DOE had the predominant interest over whether the appointing authority violated the education law by laying off all of the attendance counselors. After making a determination on that issue, the DOE would transmit the matter to the Commission to allow it to determine whether the layoff was made in bad faith.

On February 10, 2016, the ALJ issued her initial decision in which she found that the School District laid off approximately 136 employees, including 46 Attendance Counselors, effective July 1, 2013. She found that for the 2013-2014 school year, the School District had a \$56.9 million budget deficit as a result of State aid not increasing, a loss of a one-time only source of revenue; and a significant increase in costs. The State funding was based on the number of students enrolled, however, enrollment had declined in the past few years and there was a moratorium by the State on increasing or decreasing funding. Moreover, the witnesses testified that the largest increase in expenses was the payment to charter schools, which increased by \$33.6 million. As a result, the School District made cost reductions in the following areas: school budgets by \$18.4 million; central office restructuring/elimination of titles and vacancies, which included layoffs, by \$9.4 million; portfolio changes by \$7.2 million; reduction in non-recurring expenditures by \$7.1 million; reduction in personal services, travel and supplies by \$6.6 million; creation of more inclusive learning environments by \$6 million; and efficiency increases in school operations and facilities by \$3.2 million. With regard to the layoff, the ALJ noted that the School District met with the unions on April 23, 2013, where it was announced that there would be layoffs due to the budget. Thereafter, the appointing authority submitted the layoff plan to this agency which approved the plan. As part of the layoff plan, all temporary employees were to be terminated, the title of Attendance Counselor was to be abolished and permanent employees received 45 day notices. Once the approval was received, the impacted employees were notified either that they were to be laid off or of their bumping rights.

With regard to the issue of whether the abolishment of the position of attendance officer was in violation of *N.J.S.A. 18A:38-25 to 33*, the ALJ noted that the Attendance Counselor's job was to report to the school and obtain a list of the

absent students, then contact the families or to make a house visit, and to make referrals to services to help families mitigate obstacles. Moreover, Attendance Counselors in the truant section would attempt to locate the truant students and bring them to the school, and if the student would not go to school, the matter was referred to a court representative. Prior to the abolition of the position, the School District had four buses that the attendance counselors used to look for the approximately 350-700 weekly truant students.

As a result of the abolishment of the position of Attendance Counselor, Attendance Policy 5113 was developed with the Student Support Team fulfilling some of the duties previously performed by the Attendance Counselor. The Student Support Team consists of a Principal or Vice Principal, a Social Worker, a Guidance Counselor, a Parent Coordinator, a School Resource Officer (*i.e.*, a Safety Officer), a Nurse, and two Teachers. However, the Student Support Team members do not receive any additional monetary compensation, nor do they go out and look for students who are absent. The testimony also indicated that Safety Officers, who have the same powers as a Police Officer, and Rapid Response Officers also address truancy while patrolling, but they were not specifically tasked with looking for truant students. Based on the foregoing, the ALJ determined that the School District violated *N.J.S.A. 18A:38-28*, *N.J.S.A. 18A:38-29* and *N.J.S.A. 18A:32-32* in laying off the Attendance Counselors. Specifically, she concluded that the word “find” in the statute meant that an attendance officer actively looks for and finds a truant student, and not merely happening upon a truant student in the performance of their assigned duties.

Finally, with regard to the appellants’ arguments that the layoffs were not made for reasons of economy or efficiency, the ALJ found that for all but the Attendance Counselors, the layoffs were made for reasons of economy or efficiency. Specifically, the ALJ noted that the School District had established that there was a \$56.9 million budget deficit and there was no evidence in the record that the School District made changes to its structuring solely to extinguish Civil Service positions. Moreover, she noted that the proper procedures were followed and layoff notices were sent to the appellants. Furthermore, the ALJ found that although the appellants argued that other positions should have been abolished, they failed to establish that the School District’s actions were in bad faith. However, the ALJ found that since the abolishment of the position of attendance officers violated *N.J.S.A. 18A:38-32*, the layoff of the individuals in the title of Attendance Counselors was in bad faith and recommended that the layoff of the Attendance Officers be rescinded.

The ALJ forwarded the matter to the Commissioner of the DOE to allow him to render his final administrative determination. In his May 12, 2016 final decision, the Commissioner determined that the ALJ had erred in finding that the School District violated *N.J.S.A. 18A:38-28*, *N.J.S.A. 18A:38-29* and *N.J.S.A.*

18A:32-32 by laying off the 46 Attendance Counselors. In this regard, the Commissioner noted that, when read as a whole, the clear intent of enacting *N.J.S.A.* 18A:32-25 to 35 was to compel children to attend school. Therefore, considering its plain language, the statute does not require the employment of individual employees to serve solely in the role of attendance officer, but rather that the district “designate” attendance officers to enforce the provisions of the statute. Therefore, designating a team to perform the core duties outlined in the statute is acceptable, provided that the ultimate goal of encouraging student attendance at school is achieved, regardless of whether the team members have additional job duties and responsibilities. Accordingly, the Commissioner determined that designating the Student Support Team as attendance officers does not, in and of itself, violate *N.J.S.A.* 18A:38-32. In this regard, the Commissioner notes that the purpose of the Student Support Team was to monitor student attendance and combat truancy, the same function as the former Attendance Counselors. Moreover, the Commissioner reviewed the duties of the Student Support Team, and found that they met the statutory responsibilities of an attendance officer listed in *N.J.S.A.* 18A:38-29. Additionally, although *N.J.S.A.* 18A:38-32 required that the attendance officers receive compensation, there was no requirement that the position be full-time. Therefore, the Commissioner found that as it was undisputed that all members of the Student Support Team were employees of the School District, and received compensation for their employment, the School District was permitted to designate a team, rather than individuals, to serve as attendance officer. The Commissioner then forwarded the matter to the Commission to allow it to consider the good faith of the layoffs.

In its exceptions as they pertain the Commission’s portion of the matter, the appellants argue that the ALJ incorrectly concluded that the layoff of all but the Attendance Counselors was made in good faith. The appellants maintain that the testimony established that the layoffs were made to serve the School District’s purpose and goal of circumventing Civil Service law and regulations through a *de facto* privatization of the public schools, and thereby replacing Civil Service employees with privately employed charter school employees. In this regard, the appellants assert that although it is undeniable that there was a budget gap of \$57 million, an examination of the underlying reasons reveals that the gap was not due to a temporary issue, but was rather a “feature of the School District’s longer-term goal to eliminate Civil Service employees in favor of the privatization of the School District operations through the ‘charterization [sic]’ of the public school system.” They maintain that this is evidenced by the fact that the charter school payment represented \$33.6 million of the \$57 million budget gap. As noted by the testimony, the overwhelming reason for the budget gap was the transfer of the School District financial resources to charter schools. They also assert that the scheme to continue to lose students to the charter school system was evidenced by the School District’s failure to object to the continued creation and expansion of charter schools.

Moreover, the appellants assert that the fact that the State Aid remained flat was not a primary source of the budget gap, but rather only exacerbated it.

Additionally, the appellants maintain that the School District failed to consult with the union as required by *N.J.A.C.* 4A:8-1.2(e) and instead merely informed the unions what had already been decided. In this regard, the appellants note that the layoff plan was mailed to the Commission on the same day as the meeting with the unions occurred, and that although the layoff plan was later revised to include additional employees, those revisions were sent to the Commission one week prior to the next scheduled meeting with the union representative. The appellants argue that the appointing authority's failure to meaningfully consult with the affected unions reveals its anti-union animus and indicates its intention of not avoiding any layoff of any employee.

Moreover, the appellants maintain that the Educators Without Placement Pool comprised of nearly 300 teachers who were not assigned to any specific location, comprised \$10 million of the total budget gap, all while the School District continued to hire new educators. Additionally, they noted that some of the attempts made to close the budget gap comprised of skimping on training, teacher education and professional development, school supplies, and cutting services to special needs students. However, left untouched by the layoff were the School District's highest paid employees, such as Assistant Superintendents. Based on the foregoing, the appellants maintain that the layoffs were made in bad faith and should be rescinded.

In response, the appointing authority argues that the ALJ correctly found that its layoff was based upon reasons of economy and efficiency. It also asserts that the layoff of the Attendance Counselor was also made in good faith. Specifically, it notes that it was faced with a \$56.9 million shortfall, and had exhausted all of its pre-layoff alternatives. Therefore, its decision to eliminate certain positions was appropriate.

N.J.S.A. 11A:8-4 and *N.J.A.C.* 4A:8-2.6(a)1 provide that good faith appeals may be filed based on a claim that the appointing authority laid off or demoted the employee in lieu of layoff for reasons other than economy, efficiency or other related reasons. When a local government has abolished a position, there is a presumption of good faith and the burden is on the employee to show bad faith and that the action taken was not for purposes of economy. *Greco v. Smith*, 40 *N.J. Super.* 182 (App. Div. 1956); *Schnipper v. North Bergen Township*, 13 *N.J. Super.* 11 (App. Div. 1951). As the Appellate Division further observed, "That there are considerations other than economy in the abolition of an office or position is of no consequence, *if, in fact, the office or position is unnecessary, and can be abolished without impairing departmental efficiency.*" *Schnipper, supra* at 15. (emphasis added). The question is not whether the plan or action actually achieved its purpose of saving money, but

whether the motive in adopting a plan or action was to accomplish economies or instead to remove a public employee without following *N.J.A.C. 4A:8-1 et seq.* Thus, a good faith layoff exists if there is a logical or reasonable connection between the layoff decision and the personnel action challenged by an employee. Additionally, it is within an appointing authority's discretion to decide how to achieve its economies. *See Greco, supra.*

Initially, since the Commissioner of the DOE found in his final determination that the ALJ erred in finding that the School District violated *N.J.S.A. 18A:38-28, N.J.S.A. 18A:38-29 and N.J.S.A. 18A:32-32*, the Commission finds that the layoff of the Attendance Counselors was not in bad faith. In this regard, it is noted that the ALJ solely relied on the alleged statutory violation to find bad faith. Therefore, the Commission does not adopt that portion of the ALJ's recommendation and finds that the layoff of the Attendance Counselors was made for reasons of economy and efficiency and upholds their layoffs. Moreover, the Commission agrees with the ALJ's determination that the layoffs of the non-Attendance Counselors were not enacted in bad faith. The record in this case clearly demonstrates that the School District was faced with a severe budgetary shortfall. Moreover, the appellants concede that there was a budgetary shortfall which necessitated action. The Commission emphasizes that an appointing authority has the discretion to decide how savings are achieved. Further, the ALJ found the witnesses' testimony credible that the layoff was initiated due to the \$56.9 million budget shortfall. Apart from mere allegations, the appellants have not presented credible or convincing evidence to demonstrate that their positions were targeted for discriminatory or other invidious reasons. Therefore, they have not met their burden of proof. *See e.g., In the Matter of Bergen County Layoff*, Docket No. A-5281-03T5 (App. Div. July 15, 2005) (The Appellate Division upheld the elimination of the position of Assistant Tax Administrator for Bergen County and found that it was based on legitimate budgetary reasons, finding that the appellant did not present any evidence that he was targeted for layoff based on his political affiliation). Accordingly, the ALJ's determination that the layoff of the employees in non-Attendance Counselor positions was not made in bad faith, is proper and the Commission finds the credible evidence in the record supports the ALJ's conclusion that the appellants have not met their burden of proof. Therefore, the layoffs are upheld.

ORDER

The Civil Service Commission finds that the appointing authority's actions in imposing layoffs were justified. Therefore, the Commission upholds those actions and dismisses the appellants' appeals for the reasons noted above.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 19th DAY OF OCTOBER, 2016



Robert M. Czech
Chairperson
Civil Service Commission

Inquiries
and
Correspondence

Director
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Civil Service Commission
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Attachments



State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

(CONSOLIDATED)

NEWARK TEACHERS UNION

LOCAL 481 AFT, AFL-CIO,

Appellant,

v.

STATE-OPERATED SCHOOL DISTRICT

OF THE CITY OF NEWARK, ESSEX COUNTY,

Respondent.

OAL DKT. NO. EDU 17995-13

AGENCY DKT. NO. 279-11/13

IN THE MATTER OF ORLENA SIMPSON ET. AL,
NEWARK PUBLIC SCHOOL DISTRICT.

OAL DKT. NO. CSV 14755-13

AGENCY DKT. NO. 2014-676

Colin M. Lynch, Esq., for appellants Orlena Simpson, et. al (Zazzali, Fagella,
Nowak, Kleinbaum & Friedman, attorneys)

Edward G. Liss, Esq., for appellants Newark Teachers Union

Christina Michelson, Esq., for respondent Newark Public School District
(Scarinci & Hollenbeck, attorneys)

Ramon Rivera, Esq., for respondent Newark Public School District (Scarinci &
Hollenbeck, attorneys)

Record Closed: January 22, 2016

Decided: February 10, 2016

BEFORE **KIMBERLY A. MOSS**, ALJ:

PROCEDURAL HISTORY

Orlena Simpson, et. al (appellants), allege that their layoffs from permanent full-time civil service positions with respondent, Newark Public School District (NPS), was in bad faith. Respondent contends that the layoff was for economic reasons. The matter was filed before the Office of Administrative Law under OAL Docket Number CSV 14755-13 as a contested case by the Civil Service Commission. Appellant Newark Teachers Union (NTU) alleges that NPS abolished the position of attendance officer in violation of N.J.S.A. 18A:38-25 to -33. That matter was assigned OAL Docket Number EDU 17995-2013 and filed before the Office of Administrative Law as a contested case by the New Jersey Department of Education. Appellant Simpson filed a motion for consolidation and predominant interest determination on September 22, 2014. The Motion was granted with the Department of Education having predominant interest over the education law issue and the Civil Service Commission having predominant interest over the other issues in the matter. Hearings were held on June 10, 2015, and September 9, 2015. Simpson, et. al submitted a closing brief on December 7, 2015. NTU and NPS submitted closing briefs on December 8, 2015. The parties requested additional time to respond to the closing briefs, which I granted. NTU and NPS submitted reply briefs on January 5, 2016. Simpson, et. al submitted a reply brief on January 7, 2016. NPS submitted a supplemental brief on January 12, 2016. Simpson submitted a letter and attachment on January 22, 2016, at which time I closed the record.

TESTIMONY AND FINDINGS OF FACT

The factual discussion is not intended to be a verbatim report of the testimony of all the witnesses. Rather, it is intended to summarize the testimony and evidence found by the undersigned to be relevant to the issues presented. I **FIND** the following uncontested facts:

On July 1, 2013, NPS laid off approximately 136 employees who were or are members of the Newark Teachers Union Local 481. Those laid off included forty-six attendance counselors, seven clerk 1's, fourteen community aides school, twenty-five community aides school/teacher's aides, twenty keyboarding clerk 1's, five keyboarding clerk 2's, and nineteen teachers' aides.

TESTIMONY

Nadiyah Sa'id

Nadiyah Sa'id (Sa'id) is the Deputy Executive Director of College and Career Readiness with the NPS. She has previously worked for NPS in the capacity of supervisor and social worker. During the 2012-2013 school year she was a supervisor in the office of college and career readiness.

In April 2013, she was informed that NPS would be laying off all of its attendance counselors. Sa'id was not involved in the layoff decisions. The superintendent made the decision to lay off the attendance workers. Her office had to develop a new strategy for attendance, which became attendance policy 5133. A student support team (SST) was developed as part of the attendance policy. The SST consists of a principal or vice principal, social worker, guidance counselor, parent coordinator, school resource officer, a nurse, and two teachers. The school resource officers are police officers. Each high school has one school resource officer. The elementary schools share school resource officers. Participation on the SST is voluntary but assigned by the principal. If a student has ten or more absences a pre-judicial meeting is scheduled with the court representative. Court representatives are representatives of the district. Sa'id does not know if there have been more court cases regarding attendance since the new system has been in place; however, the court representatives are in court every Tuesday. If a student is chronically absent—over ten absences in a school year—the SST is activated. At this time no one's going out looking for the students who are absent. Chronic absenteeism is a significant problem especially in the NPS high schools.

Sa'id helped create the attendance policy 5133, which was reviewed by the legal department. It was approved by the school advisory board then approved by the School Board by Resolution. Once policy 5133 was approved training in the policy was provided to principals, vice principals, support teams, and students.

On October 15 of every year NPS must provide the State with a roster of all of its students.

Nafisah Hunter

Nafisah Hunter (Hunter) is the manager of non-instructional staff for NPS. She has been in that position for the past year. She was previously a human resources coordinator for non-instructional employees. In 2013 she became aware that there would be layoffs. She was at a meeting where it was announced that there would be layoffs due to the budget and provided with a list of names of employees impacted. She was not involved in determining who gets laid off. She submitted the layoff plan to civil service on May 24, 2013. She did not participate in budgetary discussions. The abolition of positions was for cost savings and efficiency.

A forty-five-day notice of layoffs was sent to all employees. Individual notices were sent to employees who were impacted. She met with the unions regarding the layoffs on April 24, 2013. This meeting was to inform the unions of the layoffs. The Civil Service Commission approved the layoff plan. Once the approval was received, the impacted employees were notified that either they are laid off or of their bumping rights.

She is not familiar with the job listing of attendance manager and not aware of the existence of the position. Civil Service Commission is given the reason for the layoffs. It has a thirty-day review period. Civil Service Commission does not request documents during this review period.

Valerie Wilson

Valerie Wilson (Wilson) has been the business manager for NPS since December 2010. Her duties include some budget functions. The budget process begins in December for the next school year. NPS looks at expenses and revenues to project the increasing cost for the next school year. A preliminary budget is filed in the first week of March and the final budget is filed in the first week of April. When determining the budget NPS looks at costs for the next school year and where they can create efficiency and economy. Wilson assisted in putting the 2013-2014 budget together.

The revenue is assumed when formulating the budget. There was no assumption of additional State aid. NPS looked for other sources of revenue. They also looked at what was mandated and what programs and staffing could be reduced to close the gap. The budget must be balanced. The superintendent of NPS oversees the priorities that are reflected in the budget.

The layoff plan was not final at the time of the meeting with the unions on April 24, 2013. NPS is required to meet with unions when there are going to be layoffs. It discusses the parameters of the layoffs with the unions. The unions can ask questions or suggest alternatives to the layoff. NPS knew the positions where the layoffs would occur but not the individuals that would be laid off. There is a very low number of students who go to school in the district but live out of district. The superintendent determines what positions will have layoffs. Civil Service Commission determines who will be laid off.

Vanessa Rodriguez

Vanessa Rodriguez is NPS chief talent officer. She began in January 2013. She oversees payroll, human resources, health department, benefits, educational efficiency, staffing and recruitment. She works with each department to meet goals. Human Resources implements layoffs. There was a notification meeting with the union regarding the layoff on April 23, 2013. John Abeigon and Michael Maillaro represented

the some of the union. The meeting was contentious and Abeigon and Maillaro left the meeting.

There was no alternative to the layoff. All other options were exhausted. NPS had a 56 million dollar budget gap due in part to the increase in charter school enrollment and the decrease in non-charter school enrollment. Student enrolment in NPS is decreasing yearly. Rodriguez does not know if State aid has been increased to NPS. The school business administrator asked all department heads to determine which positions are critical and which are not. NPS tried to renegotiate its contracts with vendors to close the budget gap. The budget had to align with the needs of the schools. A layoff plan was sent to civil service which was approved. The attendance rate at NPS was less than sixty percent.

Rodriguez did not have any impact on the decision as to who would be laid off. She does not oversee attendance. Teachers, guidance counselors, social workers, principals, and vice principals are all involved with attendance. She does not know if any of those received a salary increase to be a part of the new attendance policy. The new attendance policy is to collaborate with security. The attendance teams are now designated by the school. The primary attendance tasks were created by people who had experience in the schools. They were designed to cover what attendance counselors did. NPS does not presently have any one designated as an attendance counselor. There are sixty-six schools in Newark.

Eric Ingold

Eric Ingold (Ingold) is the NPS executive director for safety and security. He has held that position for approximately eighteen months. He was previously a lieutenant in the Newark Police Department. When he was a police officer, if he saw a juvenile who belonged in school, he would take the juvenile to the school. He is familiar with the attendance counselor position. Rapid response officers patrol the area around the school. The security guards maintain the safety of the school. The security officers are mainly stationed at the high schools. . The Newark Police Department's role regarding truancy has not changed after the layoffs. The duties of the safety officers have

changed to a restorative effort. There are no officers or guards whose sole purpose is to look for truants. If an administrator wants to do a home visit an officer will accompany her.

Ingold does not know of anyone designated as an attendance counselor. The job description of rapid response officer and security officer does not list truant officer. Safety officer is not a civil service position. During the 2013-2014 school year there were at least twelve occasions where the Newark police were called to pick up truant students. Ingold believes that there has been a decrease in truancy since the time that he was employed by the Newark Police Department.

Abdul Rahman Saleem

Abdul Rahman Saleem (Saleem) was employed by the NPS beginning in 1982. In 1992 he became an attendance counselor. His job duties as an attendance counselor was to find out why students did not come to school; counsel students and parents, gather information for court cases and give legal notices to parties for court actions. He visited homes of students with social workers, police officers, or alone. He interacted with Welfare and DYFS as part of his job. There were four yellow busses used by the attendance counselors to look for students.

Due to the layoff he was transferred to the position of security guard, which he did for one year. After he was transferred to the position of security guard, no one held the title of attendance counselor. There was a position of specialist attendance manager that remained vacant. Most of the security guards counseled the students, but that was not part of their duties.

When he was an attendance counselor he dealt with Newark special police. Newark special police are police officers who deal with schools and restaurants. Now the rapid response officers work with the Newark special police. After he was laid off the special police continued to do truancy work. The special police were in the schools doing security work. Rapid response officers broke up fights in the schools and responded to intruders.

When Saleem was an attendance counselor he went to court as well as handing court notices to parents. He did security while he was an attendance counselor because security would not always be present. The supervisors of the attendance counselors' were located at Camden Middle School. The four busses were for the four areas of Newark. The bus could have fifty to sixty truant students on them per day. There were approximately 350-700 truant students per week. The attendance counselor took the names of all of the students who were truant and kept logs. After the attendance counselors were laid off, the busses were no longer used.

Security guards are not involved with truancy. Once he was bumped to a security guard, he would see students who he knew from his time as an attendance counselor. They were hanging out on the corner. They had slipped out of school. He would see them when he was on a break. He would see the students in stores on Springfield Avenue during the mornings and afternoons.

Having reviewed the witnesses and evidence I **FIND** the following additional **FACTS**:

The total revenue for the NPS 2013 fiscal year was one billion seventeen thousand dollars. The revenue was less than expenses for the 2013-2014 school year. There was a 56.9 million dollar budget deficit. For the 2013-2014 school year State aid did not increase, there was a loss of a onetime only source of revenue and a significant increase in costs. The largest increase in expenses is payment to charter school which increased by 33.6 million dollars. Other cost increases included a 4.7 million dollar for strategic initiatives, four million dollars for educators without permanent sites (EWPS), 3 million dollars for salaries, 1.4 million dollars for construction at Barringer High School and West Side High School, and 800 thousand dollars for health benefits. The expenses exceeded revenue by 56.9 million dollars. There are approximately 279 EWPS. NPS experienced a budget deficient for the 2012-2013 fiscal year of 36.3 million dollars. In 2011-2012 there was a funding law suit where NPS received a one-time restoration of State aid that was used in the 2012-2013 school year.

State funding is based on the number of students enrolled on October 15 of the year. There is currently a moratorium from the State on increasing or decreasing funding. Enrollment in NPS has declined in the past few years. Although there are philanthropic organizations which may provide funds to NPS, NPS must make a request for the funds. That request is not necessarily granted by the philanthropic organization.

Cost reductions were made in the following areas: school budgets 18.4 million dollars, central office restructuring/elimination of titles and vacancies 9.4 million dollars, portfolio changes 7.2 million dollars, reduction in non-recurring expenditures 7.1 million dollars, reduction in personal services, travel and supplies 6.6 million dollars, creation of more inclusive learning environments 6 million dollars, and efficiency increases in school operations and facilities 3.2 million dollars. The central office restructuring included layoffs. The district makes the choice of what to cut and not cut. There were supervisors, directors, and department chairs that were eliminated. Assistant superintendents were decreased from four to two. There is a reserve in elementary and high school budgets for flexibility to afford additional teachers.

The advertised recapitulation of balances shows the general operating balance of 39,309,035 dollars for 2013-2014, which is the fund balance. The fund balance is monies in excess of obligations. Each district is required to retain two percent of its budget in the fund balance. Two percent of NPS's budget is 17 million dollars. Anything over that amount is allocated to the next year. The remaining money in the fund balance was used by NPS before the gap funding was determined. The fund balance did not decrease the 56 million dollar budget deficit.

The superintendent determines what positions will have layoffs. Civil Service Commission determines who will be laid off. The district met with the unions on April 23, 2013, where it was announced that there would be layoffs due to the budget. Hunter submitted the layoff plan to civil service on May 24, 2013. 145 people were laid off. Temporary employees were terminated. A forty-five-day notice of layoffs was sent to all employees. Individual notices were sent to employees who were impacted. Hunter sent an email to the Civil Service Commission revising the layoff plan on May 23, 2013. The Civil Service Commission approved the layoff plan. Once the approval

was received the impacted employees were notified that either they are laid off or of their bumping rights.

There was no hiring freeze for teachers or crucial staff positions in the 2013-2014 school year. The EWPS are teachers that are not in a budgeted position in the district. They are budgeted out of the central office line. These teachers are all in classrooms, either as a teacher or co-teacher. One reason for EWPS is the decline in enrollment. Teachers apply for their positions. They are interviewed. If they are not chosen to retain their position or do not choose to be interviewed they become EWPS. NPS is consistently recruiting and hiring and staffing in the hard-to-staff areas of math, science, and bilingual.

The position of attendance counselor was abolished. Attendance counselors job was to report to the school and obtain form of absences then contact the families or make house visits. They would make referrals for families to mitigate obstacles. The attendance counselors who were in the truant section would attempt to locate the students and bring them to the school. If the student would not come to school it was referred to a court representative. One of the core functions of attendance counselors was home visitation. In addition that had community based contacts that would help them find students. They asked local business not to sell to students during school hours. Attendance counselors also found out if students living out of district were attending NPS. Prior to the abolition of the position NPS had four busses that the attendance counselors used to look for students. There were approximately 350-700 students truant weekly. The SST now has some of the responsibilities that the attendance counselors had. The Civil Service code number for attendance counselors is 00829. No one in the district is working under that code number.

Sa'id did a listening tour meeting with staff principals, students, and parents regarding attendance regarding attendance. She met with attendance counselors and court representatives on her listening tour. The listening tour consisted of twenty to twenty-five meetings. There were concerns regarding who would physically look for the students and bring them to the school. After the listening tour the attendance policy 5113 was developed. The attendance policy 5133 was matched to the State

attendance policy. If a student is absent one to four days, the teacher or power school clerk contacts the parent. Power school is a system of records for the district. The power school clerk is the school clerk. Teachers enter attendance in power school teacher program. A warning notice is mailed to the parent by the power school clerk. A legal notice is also sent to the parent by the legal representative. If a student is absent five to nine days, the SST notices the parent either verbally or by letter at least three times to schedule a meeting. The SST consists of a principal or vice principal, social worker, guidance counselor, parent coordinator, school resource officer, a nurse, and two teachers. Members of the SST do not receive any additional monetary compensation. At this time no one from the SST goes out looking for students who are absent.

NPS has 400 security guards, twelve rapid response officers, and eleven safety officers. Safety officers have the same powers as police officers. Rapid response and safety officers address truancy. Rapid response officers patrol the area around the school. The security guards maintain the safety of the school. The security officers are mainly stationed at the high schools. A rapid response officer may see a student who is truant while patrolling, but is not tasked with looking for truants. School resource officers are also called safety officers. Security officers and rapid response officers do one component of the job of attendance counselors, but that is not their sole job function. There is no rapid response officer, security officer, or security guard whose sole responsibility is to look for truant students. Rapid response officers do not keep truancy records or maintain a daily log. Newark Police have on approximately twelve occasions picked up truant students and brought them to school during the 2013-2014 school year.

Sixty percent of the NPS high school students are absent more than ten times during the school year. There is a high rate of absenteeism in the district. NPS wanted to move away from a punitive discipline to a restorative approach.

CONCLUSIONS OF LAW

One of the issues in this matter is whether NPS violated N.J.S.A. 18A:38-32 by abolishing the position of attendance counselor or did the creation of the SST comply with the statute. N.J.S.A. 18A:38-32 provides:

For the purpose of enforcing the provisions of this article, the board of education of each school district and the board of education of each county vocational school shall appoint a suitable number of qualified persons to be designated as attendance officers, and shall fix their compensation; except that if a county attendance officer or officers are appointed for any county, any district board of education of such county may be exempt from the appointment of a local attendance officer if such exemption is approved by the county superintendent. Each board shall make rules not inconsistent with the provisions of this article and subject to the approval of the commissioner, for the government of the attendance officers.

The duties of an attendance officer are stated in N.J.S.A. 18A:38-29, which provides:

The attendance officer shall examine into all violations of this article, shall warn any child violating any of the provisions of this article and the parent, guardian or other person having charge and control of the child of the consequences of the violation if persisted in, and shall notify such person in writing to cause the child to attend school within five days from the date on which notice is served, and regularly thereafter. The attendance officer shall have full police power to enforce the provisions of this article and may arrest without warrant any vagrant child or habitual truant or any child who is habitually incorrigible or who is vicious or immoral in conduct or illegally absent from school.

NPS created the SST after it abolished the position of attendance counselor. The SST is comprised of the following: a principal or vice principal, social worker, guidance counselor, parent coordinator; school resource officer, nurse, and two teachers. All of the members of SST are there voluntarily. They are not paid to be members of the SST. Instead of the attendance officer warning the child, parent, or guardian of persistent absences, the power school clerk mails an initial notice. The SST

sends a notice to the parent if a child is absent between five to nine days. The only people in the SST who have the authority to make an arrest are the security officers. However, the eleven security officers are stationed at the high schools.

N.J.S.A. 18A:38-28 provides:

Any attendance officer, who shall find any child between six and 16 years of age, who is a truant from school, shall take the child and deliver him to the parent, guardian or other person having charge and control of the child, or to the teacher of the school which such child is lawfully required to attend.

[Emphasis added.]

The testimony in this matter has shown that there is no one in the NPS who is looking for truant students since the attendance officers were laid off. The rapid response officers may find truant students, but that is incidental to performing their duties of patrolling the area of the school. There was no testimony as to how specifically the security officers are involved in locating truant students. I do not interpret the word “find” in the statute to mean that if an attendance officer, or in this case a rapid resource officer, happens upon a truant student in the course his other duties. I interpret it to mean that when an attendance officer is looking for truant students and finds one.

I therefore **CONCLUDE** that NPS violated N.J.S.A. 18A:38-28, N.J.S.A. 18A:38-29, and N.J.S.A. 18A:32-32 when it abolished the position of attendance counselor.

NPS argues that the petition of Newark Teachers Union was filed untimely. N.J.A.C. 6A:3-1.2(i) provides:

The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education, individual party, or agency, which is the subject of the requested contested case hearing. This rule shall not apply in instances where a specific statute, regulation or court order

provides for a period of limitation shorter than 90 days for the filing of a particular type of appeal.

In this matter NPS has violated N.J.S.A. 18A:38-32 by abolishing the position of attendance counselor that is statutorily mandated. In the case of Bloomfield Education Association on Behalf of The Child Study Team v. Board of Education of the Township of Bloomfield, EDU 18705-13, Order (May 1, 2014), <<http://njlaw.rutgers.edu/collections/oal/>> a similar issue arose. In that matter the board laid off the child study team and contracted their positions to a third party. The Board filed a motion that the petition be dismissed as untimely in accordance with the requirements of N.J.A.C. 6A:3-1.3(i). In that case Judge Bass stated that:

This case presents one of those rare circumstances when relaxation of the ninety-day rule is appropriate under N.J.A.C. 6A:3-1.16. This extraordinary relief has been reserved only for those situations where a substantial constitutional issue is presented or where a matter of significant public interest is involved beyond that of concern to the parties, Portee v. Board of Education of Newark, 94 N.J.A.R.2d (Edu) 381,384. Here the alleged actions of the Board in using Delta-t to provide child study team services will affect students and staff alike.

In this matter the abolition of the positions is a matter of significant public interest. The public is entitled to know whether the abolition of the position of attendance officer and replacing them with SST where there is no one whose specific duty is to go out and pick up truant students is consistent with law and regulation.

The matter of timeliness was first argued in NPS closing submissions dated December 7, 2015. This matter was filed at the OAL on December 17, 2013. NPS's Answer in the NTU matter was filed on December 12, 2013. It did not list the petition being untimely filed as an affirmative defense. During the predominant interest motion and oral argument there was no mention of the petition being untimely filed.

I **CONCLUDE** that this case presents one of those rare circumstances when relaxation of the ninety-day rule is appropriate under N.J.A.C. 6A:3-1.16.

An appointing authority may institute layoff actions for reasons of economy, efficiency, or other related reasons. N.J.A.C. 4A:8-1.1(a). On appeal from a layoff, the issue to be determined is limited to whether the appointing authority's action was motivated by good-faith considerations of economy or efficiency in effectuating the layoff.

The burden of proof is on the appellant to demonstrate a contrary or bad-faith motivation. N.J.S.A. 11A:8-4; N.J.A.C. 4A:2-1.4(c); N.J.A.C. 4A:8-2.6(c). Where it is shown that a layoff action was motivated by a bona fide desire or necessity to effect economy, the action taken is presumed to be in good faith. Greco v. Smith, 40 N.J. Super. 182, 189 (App. Div. 1956); Sieper v. Dep't of Civil Serv., 21 N.J. Super. 583, 586 (App. Div. 1952). Further,

[t]he mere fact that the removal of an individual from the municipal payroll results in an economy is not the exclusive test, since such removal will always be manifested by a saving. The question is, not narrowly whether a plan conceived and adopted for the purposes of saving money actually, in operation, attained that purpose, but whether the design in adopting the plan was to accomplish economy or, on the contrary, was to effect the removal of a public employee, protected by civil service, without following the statutory procedure for removal. City of Newark v. Civil Service Commission, 112 N.J.L. 571, 574 (Sup. Ct. 1934), affirmed, 114 N.J.L. 185 (E. & A. 1935).

[Greco, supra, 40 N.J. Super. at 190.]

Therefore, in proving that an appointing authority has acted in bad faith, the employee must show that the layoffs were not motivated by true considerations of economy and/or efficiency. It is not sufficient to meet the burden of proof for an employee to show that a layoff is uneconomical. Such evidence may assist the establishment of bad faith, but the employee must go further. He or she must show by sufficient proof that the layoffs resulted for reasons other than economy and efficiency. Amodio v. Civil Serv. Comm'n, 81 N.J. Super. 22 (App. Div. 1963); Chirichella v. Dep't of Civil Serv., 31 N.J. Super. 404 (App. Div. 1954); Prosecutors, Detectives and Investigators Ass'n of Essex Cty. v. Hudson Cty. Bd. of Freeholders, 130 N.J. Super. 30 (App. Div. 1974).

Evidence may indicate that a mixture of motives existed in connection with a layoff decision. If other motives besides economy and efficiency were involved, it makes no difference so long as the position involved was useless and its abolition was in the public interest. Pellet v. Dep't of Civil Serv., 10 N.J. Super. 52, 57 (App. Div. 1950).

It is also settled that the holder of a protected civil service position may be laid off in the interest of economy and his or her duties consolidated and assigned to others. Gianettino v. Civil Serv. Comm'n, 120 N.J.L. 531, 533 (Sup. Ct. 1938); Sieper, supra, 21 N.J. Super. at 583. It is a question of the bona fides of the action, and the burden is on the appellant to show that the action taken was in bad faith.

Other cases further define bad faith as “[g]enerally implying . . . design to mislead or deceive another . . . not prompted by an honest mistake as to one’s rights or duties, but by some interested or sinister motive.” In re Afolo, CSV 4145-07, Initial Decision, (Mar. 31, 2008) (quoting Brown v. State Dep’t of Educ., 97 N.J.A.R.2d (CSV) 537, 541 (1997)), adopted, Merit Sys. Bd. (May 22, 2008), <<http://njlaw.rutgers.edu/collections/oal/>>. In trying to prove bad faith, the appellant has a very heavy burden to meet because bad faith is “not simply bad judgment or negligence,” but the conscious doing of a wrong because of some dishonest purpose. Ibid.

Appellants other than Attendance Counselors

NPS has demonstrated that there was a 56.9 million dollar budget deficit. The majority of the budget gap comes from payments to charter schools. There was no evidence that NPS instituting charter schools solely to extinguish civil service jobs. There was substantial testimony regarding the attendance officer’s duties and the SST. There was no testimony regarding any of the other positions where layoffs occurred. The notices were sent to petitioner in accordance with the civil service regulations. Petitioners have not established that the layoffs were done for reasons other than

economy and efficiency. Petitioners may believe that the layoffs are uneconomical and that other persons such as EWAP should have been laid off; however, they have not proved that NPS laid these workers off in bad faith.

Attendance Counselors

N.J.S.A. 18A:38-32 requires districts to appoint attendance officers. From the above discussion NPS violated this statute when it abolished the attendance counselors' position. Petitioners have shown that NPS by violating the above regulation acted in bad faith.

ORDER

Based upon the foregoing, it is hereby **ORDERED** the layoff of the attendance counselors is hereby **REVERSED**.

It is further **ORDERED** that the layoff of the seven clerk 1's, fourteen community aides school, twenty-five community aides school/teacher's aides, twenty keyboarding clerk 1's, five keyboarding clerk 2's, and nineteen teachers' aides is **AFFIRMED**.

I hereby **FILE** my Initial Decision with the **COMMISSIONER OF EDUCATION** and the **CIVIL SERVICE COMMISSION** for consideration in accordance with the procedures set forth in the Order of Consolidation and Predominant Interest.


In a manner consistent with the terms of said Order, this recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION**, which by law is authorized to make a final decision in this matter. If the Commissioner of Education does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

In a manner consistent with the terms of said Order, this recommended decision may be adopted, modified or rejected by the **CIVIL SERVICE COMMISSION**, which by

law is authorized to make a final decision in this matter. If the Civil Service Commission does not adopt, modify or reject this decision within forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

Within thirteen days from the date on which this recommended decision was mailed to the parties, any party may file written exceptions with the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, ATTN: BUREAU OF CONTROVERSIES AND DISPUTES, 100 Riverview Plaza, 4th Floor, P.O. Box 500, Trenton, New Jersey 08625-0500**, marked "Attention: Exceptions" and with the **DIRECTOR, DIVISION OF APPEALS AND REGULATORY AFFAIRS, UNIT H, CIVIL SERVICE COMMISSION, 44 South Clinton Avenue, P.O. Box 312, Trenton, New Jersey 08625-0312**, marked "Attention: Exceptions." A copy of any exceptions must be sent to the judge and to the other parties.

February 10, 2016



DATE

KIMBERLY A. MOSS, ALJ

Date Received at Agency:

February 10, 2016

Date Mailed to Parties:

ljb

WITNESSES

For Appellants:

Abdul Rahman Saleem

For Respondents:

Nadiyah Sa'id

Nafisah Hunter

Valerie Wilson

Vanessa Rodriguez

Eric Ingold

EXHIBITS

For Appellants:

- A-1 Appellants' Demand for Answers to Interrogatories
- A-2 Respondents' Answers to Appellants' Interrogatories
- A-3 Respondents' Supplemental Answers to Appellants' Interrogatories
- A-4 NPS 2014 Budget Hearing Document
- A-5 April 12, 2013, District Layoff Plan
- A-6 May 23, 2013, District Modified Layoff Plan
- A-7 CSC List of Affected Layoffs
- A-8 NPS Posting of Job Description – Specialist for Attendance Management
- A-9 Job Description for Specialist for Attendance Management
- A-10 NPS Job Description – Attendance Counselor
- A-11 CSC Job Description – Attendance Counselor
- A-12 CSC Job Description – Clerk 1
- A-13 CSC Job Description – Keyboarding Clerk 1
- A-14 CSC Job Description – Keyboarding Clerk 2
- A-15 CSC Job Description – Teacher's Aide
- A-16 June 4, 2013, email from Nadiyah Sa'id, re: Attendance Information Session
- A-17 June 6, 2013, Attendance Listening Session

- A-18 Attend Today Achieve Tomorrow – Principal Check List
- A-19 Home Visitation Protocols
- A-20 Attendance Feedback Session
- A-21 October 15, 2013, Professional Development – Student Support Team
- A-22 NPS Attendance Handbook
- A-23 School Advisory Board Update
- A-24 Testimony of Dr. Leonard Pugliese
- A-25 Legal Notice to Parent to Send Child to School (Attendance Counselor)
- A-26 Legal Notice to Parent to Send Child to School (SST Representative)
- A-27 Student Support Teams

For Respondents:

- R-1 Email Dated April 25, 2013, regarding Attendance Officers
- R-2 Email Dated June 4, 2013, to Attendance Team
- R-3 Summary of Attendance Listening Session dated June 6, 2013
- R-4 Agenda for Meeting with Attendance Team
- R-5 Protocols for Attendance Team
- R-6 NPS File Code 5113 Attendance Policy
- R-7 Resolution dated November 2013
- R-8 Attendance Handbook
- R-9 Power Point of Principal Training Regarding SST
- R-10 Agenda for SST Training dated October 15, 2013
- R-11 Home Visitation Protocols
- R-12 Form 763 to Record Attendance
- R-13 Legal Notice
- R-14 Court Representative Summary
- R-15 Letter to Civil Service Dated April 24, 2013
- R-16 Email to Civil Service Dated May 23, 2013
- R-17 Revised Letter to Civil Service Dated May 20, 2013
- R-18 Letter from Civil Service Dated May 30, 2013
- R-19 Confirmation of Layoffs
- R-20 Budget
- R-21 User Friendly Budget for NPS

OAL DKT. NOS. EDU 17995-13 AND CSV 14755-13

R-22 Presentation at 2013 Budget Hearings

R-23 Budget for 2014-2015