STATE OF ILLINOIS
EDUCATIONAL LABOR RELATIONS BOARD

In the Matter of:	)	
	)	
Barbara Sanchez and ECHO Education Association, IEA-NEA,	)	
	)	
Complainants,	)	
	)	
and	)	Case No. 2005-CA-0023-C
	)	
Exceptional Children Have Opportunities,	)	
	)	
Respondent.	)	

OPINION AND ORDER

On August 18, 2006, an Administrative Law Judge ("ALJ") issued a Recommended Decision and Order in this case. She determined that Exceptional Children Have Opportunities ('ECHO") did not violate Sections 14(a)(3) and 14(a)(1) of the Illinois Educational Labor Relations Act, 115 ILCS 5/1 et seq. ("Act") by non-renewing Barbara Sanchez. Therefore, she dismissed the charge.

Complainants Sanchez and ECHO Education Association, IEA-NEA ("Association") (collectively, "Complainants") filed timely exceptions to the ALJ's Recommended Decision and Order. ECHO filed a timely response to the exceptions.

We have considered the ALJ's Recommended Decision and Order, Complainants' exceptions, and ECHO's response. We have also considered the record and applicable precedents. For the reasons in this Opinion and Order, we affirm the ALJ's Recommended Decision and Order as modified.

I.

We adopt the ALJ's findings of fact as modified in this Opinion and Order. In order to assist the reader, we summarize the facts as follows.

ECHO is a special education cooperative. Through the end of the 2003-2004 school year, Sanchez was employed by ECHO as a physical education teacher at ECHO's Academy for Learning.

On September 9, 2003, Sanchez and another physical education teacher, Joseph Hovanes, suggested in a memorandum to Twila Garza, the Principal at the Academy for Learning, that physical education classes be divided to reduce the number of students that required supervision in a single class. Garza responded that the schedule did not permit such a division.

On September 10, 2003, Sanchez contacted Illinois Education Association UniServ Director Janet Zitzer about her concerns over class size. On the same date, Zitzer contacted ECHO's Director, Dennice Ward-Epstein, and expressed her concern that the size of the physical education classes exceeded that established by Illinois State Board of Education regulations. Ward-Epstein told Division Manager Ambrose Panico and Principal Garza about Zitzer's concern. Garza connected Zitzer's concern to Sanchez's previous suggestions on class size.

On September 21, 2003, Garza met with Sanchez and Hovanes. At that meeting, Garza told Sanchez "how disappointed she was in [her] and that all th[ese] complaint[s] had to come from [her]." Garza also stated that "she thought [she and Sanchez] had a better relationship than that" and that she was "disappointed in [Sanchez]." On September 22, 2003, Garza had a second meeting with Sanchez and Hovanes, at which she again expressed how disappointed and surprised she was that Sanchez had contacted the Association. Garza told Sanchez to "keep it in the community next time."

At a meeting concerning an injury to Sanchez, Sanchez asked Division Manager Panico if the employees who were required to stay for the meeting could have 20 minutes of early release time because the rest of the employees were allowed to leave early. Panico denied Sanchez's request and said that, if she disagreed with his decision, she could file a grievance. On December 4, 2003, Zitzer filed a grievance on behalf of Sanchez. At a grievance meeting in December 2003, Panico stated that he was disappointed in Sanchez. He denied Sanchez's grievance on or about December 17, 2003. Ward-Epstein denied the grievance at the second step on or about February 4, 2004.

In December 2003, ECHO's principals and other administrators prepared a list of probationary teachers whom they recommended for non-renewal. This list consisted of teachers subject to automatic non-renewals, specifically regular education teachers teaching special education classes and staff that had performance issues. Sanchez was not on the list. The list was approved by ECHO's Board of Directors on February 3, 2004.

In January and February 2004, ECHO's fiscal situation for the 2004-2005 school year was uncertain because of the financial difficulties of one of its member districts, School District 205. School District 205 was the primary contributor of students and dollars to the Academy for Learning, providing 86% of its budget. In January, Ward-Epstein had conversations with School District 205 Superintendent Dr. Camilla Buckner that School District 205's financial difficulties could impact the Academy for Learning by $100,000 to $250,000. (Tr. 202-03). Thus, Ward-Epstein decided to prepare for the possibility of deep cuts at the Academy for Learning. (Tr. 158-59).

In February 2004, Director Ward-Epstein recommended that the two physical education teachers, Sanchez and Hovanes, also be non-renewed. Ward-Epstein testified that she decided to recommend non-renewal of more staff to ensure that ECHO had the flexibility to make whatever programming cuts became necessary once the budget was finalized.[1] Ward-Epstein testified that she chose to focus on the physical education area because it was the only non-instructional area, outside of the deans, in the budget of the Academy for Learning. Ward-Epstein also considered that Sanchez and Hovanes were regular education physical education teachers and, thus, could not be transferred to another program because they were not certificated in special education. (Tr. 159). ECHO had no issue with respect to Sanchez's performance. Based on Ward-Epstein's recommendation, Sanchez and Hovanes were non-renewed by ECHO's Board of Directors at its March 3, 2004 meeting, and subsequently by ECHO's administrative district.

In a memorandum dated March 24, 2004, Panico and Garza set forth their proposed cost reductions for the Academy for Learning. The teachers listed did not include Sanchez. (Respondent's Exhibit 11).

On March 25, 2004, Sanchez and Hovanes were informed of their non-renewals and given non-renewal notices. When Sanchez received her non-renewal notice, both Garza and Panico told her that questions existed over class size and teacher certification, and that such issues would affect whether the physical education program would continue the following year.

Ward-Epstein testified that the decision to recommend that Sanchez and Hovanes be non-renewed was hers alone and based solely on budgetary concerns arising from District 205's uncertain financial situation. Ward-Epstein testified that, although Panico was made aware of the budgetary concerns, as well as of Ward-Epstein's intent to non-renew the entire physical education staff at the Academy for Learning, she had every intention of making the decision regardless of whether Panico agreed with her or not. Similarly, Ward-Epstein testified that the decision to non-renew Sanchez and Hovanes was made without any input from Principal Garza.

In July 2004, ECHO learned that School District 205 would continue to send its students to the Academy for Learning during the 2004-2005 school year. At that time, ECHO determined that the budget cuts could be made without cutting the physical education program at the Academy for Learning. Once this was clear, Panico informed Garza that she could offer Sanchez and Hovanes their jobs back.

[1] If a budget shortfall is not as severe as contemplated, the non-renewed staff can be recalled when the budget is finalized.

Principal Garza testified that she left a message for both Sanchez and Hovanes stating that they should contact her. Hovanes responded to Garza's call, but did not return to ECHO because he had already accepted another job. Sanchez did not return Garza's call. Sanchez testified that neither she nor her family received a message from Principal Garza, nor was she notified by mail about returning to the Academy for Learning physical education program. The ALJ found that, based on the record and Garza's disposition at the hearing, there was no reason for her to discredit Garza's testimony.[2]

The State of Illinois set required course standards for physical education. (Tr. 28).

II.

The ALJ concluded that Complainants had not established a prima facie case that ECHO had violated Sections 14(a)(3) and 14(a)(1) of the Act by non-renewing Sanchez. She determined that Complainants had failed to establish proximity in time between Sanchez's protected concerted activities and her non-renewal. She determined that no evidence was presented of anti-union animus on the part of Ward-Epstein, and that Garza and Panico played no role in the decision to non-renew Sanchez. The ALJ also concluded that, even if the Complainants were able to establish a prima facie case, ECHO had demonstrated that it had a legitimate business reason for its actions and that Sanchez would have received the same treatment in the absence of her protected concerted activity.

III.

Complainants contend that ECHO violated Sections 14(a)(1) and 14(a)(3) of the Act by non-renewing Sanchez and failing to recall her. Complainants argue that the hostility of Garza and Panico must be imputed to ECHO. Complainants also argue the timing of ECHO's conduct. Complainants argue that the circumstances of Garza's alleged call to Sanchez are not credible evidence of a legitimate recall, and that ECHO offered no legitimate reason for not recalling Sanchez. Complainants assert that ECHO would not have taken adverse action against Sanchez in the absence of hostility toward her protected concerted activity.

ECHO contends that the ALJ's Recommended Decision and Order must be affirmed. ECHO argues that there is no basis for imputing the alleged hostility of Panico or Garza to Ward-Epstein. ECHO argues that there is

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[2] With respect to the witnesses' credibility, we have stated:

> Because the Hearing Officer sees the witnesses and hears them, we will accord substantial deference to the Hearing Officer's credibility resolutions. Accordingly, we will not overturn them unless they are against the clear preponderance of the relevant evidence.

Illinois State Scholarship Commission, 2 PERI 1125 at VII-372, Case No. 85-RC-0004-C (IELRB, September 26, 1986). Therefore, we find that Garza left a message for Sanchez.

no basis for overruling the ALJ's factual findings and credibility determinations. ECHO asserts that the timing of its non-renewal of Sanchez does not support an inference of discrimination. ECHO argues that Sanchez was recalled. ECHO maintains that the record supports the ALJ's conclusion that ECHO had a legitimate business reason for its actions and that Sanchez would have received the same treatment in the absence of her protected activity.

IV.

Section 14(a)(3) of the Act prohibits educational employers and their agents or representatives from "[d]iscrriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization." Section 14(a)(1) of the Act prohibits educational employers and their agents or representatives from "[i]nterfering, restraining or coercing employees in the exercise of the rights guaranteed under this Act." We find that Complainants have established a prima facie case that ECHO violated Section 14(a)(3) by non-renewing Sanchez, but that ECHO has shown that it did not in fact violate Section 14(a)(3).

A prima facie case of a Section 14(a)(3) violation is established by demonstrating that the employee was engaged in activity protected by Section 14(a)(3), that the employer was aware of that activity, and that the employer took adverse action against the employee for engaging in that activity. *Board of Education, City of Peoria School District No. 150 v. IELRB*, 318 Ill.App.3d 144, 741 N.E.2d 690 (4th Dist. 2000); *Bloom Township High School District 206 v. IELRB*, 312 Ill.App.3d 943, 728 N.E.2d 612 (1st Dist. 2000). Section 14(a)(3) applies to discrimination based on union activity. *Bloom Township*. In Section 14(a)(1) cases involving alleged employer retaliation for protected activity, a prima facie case is established by showing that the employee's activity was protected and concerted, that the employer knew of the protected concerted activity, and that the adverse employment action was motivated by the employee's protected concerted activity. *Neponset Community Unit School District No. 307*, 13 PERI 1089, Case No. 96-CA-0028-C (IELRB, July 1, 1996).

In order to establish a prima facie case, a charging party must provide at least some evidence on every essential element of his/her claim. *Kokinis v. Kotrich*, 81 Ill.2d 151, 407 N.E.2d 43 (1980); *First National Bank of Elgin v. St. Charles National Bank*, 152 Ill.App.3d 923, 504 N.E.2d 1257 (2nd Dist. 1987); *Minooka Community Consolidated School District No. 201*, 9 PERI 1127, Case Nos. 91-CA-0015-C, 92-CA-0023-C (IELRB, August 19, 1993); *Consolidated High School District 230*, 7 PERI 1079, Case No. 90-CA-0058-C (IELRB, June 19, 1991). " 'Some' evidence is defined as more than a scintilla," *Minooka, quoting Southern Illinois University Board of*

Trustees, 4 PERI 1053, Case Nos. 86-CA-0004-S, 86-CA-0031-S (IELRB, March 10, 1988); *District 230, quoting Southern Illinois University*; *see First National Bank.*

Here, Sanchez engaged in protected concerted activity when she and Hovanes submitted their memorandum on class size to Principal Garza. *See Board of Education of Schaumburg Community Consolidated School District 54 v. IELRB*, 247 Ill.App.3d 439, 616 N.E.2d 1281 (1st Dist. 1993) (employees engage in concerted activity when they invoke a right based on a collective bargaining agreement or engage in the activity with or on the authority of other employees). Sanchez engaged in union activity when she contacted Zitzer about her concerns over class size and when she filed a grievance through the Association. In *Georgetown-Ridge Farm Community Unit School District No. 4 v. IELRB*, 239 Ill.App.3d 428, 606 N.E.2d 667 (4th Dist. 1992), the court determined that an employee engaged in activity protected under Section 14(a)(3) of the Act when he sought the union's assistance. In *City Colleges of Chicago (Wright College)*, 11 PERI 1055, Case No. 95-CA-0012-C (IELRB, May 26, 1995), the Illinois Educational Labor Relations Board decided that filing a grievance through a union is union activity.

Director Ward-Epstein, who made the decision to non-renew Sanchez, was not necessarily aware that Sanchez and Hovanes had written the memorandum on class size to Garza. However, she was aware that Sanchez had engaged in union activity. She was aware of the grievance Sanchez filed through the Association, because she responded to the grievance at the second step. Panico was likewise aware of Sanchez's grievance, and Garza was aware of Sanchez's union and other protected concerted activity.

The Complainants have established more than a scintilla of evidence of an improper motivation for ECHO's decision to non-renew Sanchez. An improper motivation may be inferred from a variety of factors, such as an employer's expressions of hostility toward protected activity, together with knowledge of the employee's protected activity; timing; disparate treatment or a pattern of conduct that targets employees who engage in protected activity; inconsistencies between the reason the employer gives for its action and other actions of the employer; and shifting explanations for the employer's action. *See City of Burbank v. ISLRB*, 128 Ill.2d 335, 538 N.E.2d 1146 (1989).

Here, the timing of ECHO's non-renewal of Sanchez is suspicious. ECHO non-renewed Sanchez at its first opportunity after Ward-Epstein became aware of Sanchez's union activity. As the ALJ found, the first non-renewal list was composed of staff subject to automatic non-renewals, specifically regular education teachers teaching

special education classes and staff that had performance issues. As Complainants argue, ECHO could not have placed Sanchez, with whose performance ECHO had no issue, on that list.

In addition, shifting explanations were given for the non-renewal. While Ward-Epstein testified that the decision to recommend that Sanchez and Hovanes be non-renewed was based solely on budgetary concerns, both Garza and Panico told Sanchez that questions existed over class size and teacher certification, and that such issues would affect whether the physical education program would continue the following year.

Garza's and Panico's expressions of hostility toward Sanchez's union and/or protected concerted activity are not evidence that Ward-Epstein acted based on an improper motivation in non-renewing Sanchez. *See Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493 (7th Cir. 2003); *Sunrise Health Care Corp. d/b/a Mediplex of Stamford*, 334 NLRB 903 (2001); *City of Elmhurst*, 17 PERI 2040 (ILRB, State Panel 2001); *Department of Environmental Protection*, 27 FPER ¶ 32150 (Fla. PERC 2001); *Board of Regents of University of California*, 7 PERC ¶ 14177 (Cal. PERB 1983). The ALJ found that the sole decision-maker in determining whether there would be a second non-renewal list and, if so, what employees would be on the list was Ward-Epstein.[3] The Complainants assert that a supervisor's hostility is imputed to the employer even though the person or persons making the ultimate decision does not have that hostility. However, this principle applies where the employer's decision is based on a recommendation or report by the supervisor who expresses hostility to union and/or protected concerted activity, which was not the case here. *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112 (6th Cir. 1987); *City of Harvey*, 18 PERI 2032 (ILRB, State Panel 2002). While Panico and Garza played a role in the decision whether to recall Sanchez, Sanchez was in fact recalled. Thus, it cannot be said that Garza's and Panico's hostility motivated any adverse action against Sanchez.

Therefore, Garza's and Panico's expressions of hostility toward union and/or protected concerted activity are not evidence that an improper motivation contributed to ECHO's non-renewal of Sanchez. However, Complainants have established a prima facie case concerning ECHO'S non-renewal of Sanchez based on other grounds.

[3] Complainants argue that this finding does not accord with the weight of the evidence. However, the ALJ implicitly credited Ward-Epstein's testimony that she made the decision to non-renew Sanchez and Hovanes without any input from Garza and that she had every intention of making the decision regardless of whether Panico agreed with her or not.. As discussed above, we accord substantial deference to an ALJ's credibility findings and will not overturn them unless they are contrary to the clear preponderance of the relevant evidence. *Illinois State Scholarship Commission, supra*. Therefore, we affirm the ALJ's finding that Ward-Epstein was the sole decision-maker.

Where a prima facie case has been established, the employer must show that it would have taken its actions for a legitimate business reason notwithstanding its improper motivation in order to avoid a determination that it violated the Act. *See City of Burbank, supra*. A case may be characterized as "pretext" or "dual motive." In a "pretext" case, the employer's suggested reasons for its action are created for the purpose of litigation or were not relied on. In a "dual motive" case, the employer states legitimate reasons for its action and is found to have relied on them in part. The employer must then show that it would have taken the action against the employee notwithstanding his/her union and/or protected activity. *See id.*

Thus, ECHO must show that it had legitimate reasons for its action, and that it relied on them in part. Here, ECHO has demonstrated that there was a budgetary motivation for Sanchez's non-renewal, on which it in fact relied. This budgetary motivation was well explained. School District 205, which provided 86% of the budget of the Academy for Learning, was in financial difficulties. The Superintendent of School District 205 informed Ward-Epstein that the district's financial difficulties could cause the district to reduce its contribution to the Academy for Learning by a significant amount. Given these financial constraints, it was logical that ECHO non-renew staff who worked in a non-instructional area and could not be transferred to another program in order to have the flexibility to make whatever programming cuts became necessary. The non-renewal of these employees did not mean that they could not be recalled, as in fact they were. Therefore, this is a dual motive case.

ECHO must then show that it would have non-renewed Sanchez notwithstanding her union activity. ECHO has made the necessary showing. The fact that Garza called Sanchez in order to recall her demonstrates that, once the budgetary reason for non-renewing Sanchez was removed, ECHO intended to employ her. Therefore, budgetary constraints, rather than Sanchez's union activity, constituted ECHO's determinative motivation.

Moreover, it has not been shown that Ward-Epstein, who was the decision-maker concerning Sanchez's non-renewal, was aware of any union or protected activity by Hovanes. Yet Hovanes was also non-renewed. This fact implies that ECHO would have treated Sanchez similarly to Hovanes and non-renewed her in the absence of her union activity.

Complainants argue that ECHO did not offer any documentary evidence that the first round of non-renewals did not adequately address any potential shortfall. However, Ward-Epstein testified that she decided to recommend non-renewal of more staff to ensure that ECHO had the flexibility to make whatever programming cuts

became necessary once the budget was finalized. This need for flexibility, combined with ECHO's financial constraints, explains Ward-Epstein's decision to non-renew Sanchez and Hovanes.

Complainants also argue that Ward-Epstein, Panico and Garza made contradictory statements concerning the role budget played in the non-renewal of Sanchez. However, as noted above, Ward-Epstein was the sole decision-maker with respect to this issue. Accordingly, statements of Panico and Garza are of little significance.

In addition, Complainants argue that physical education was required by the State of Illinois. However, this fact does not indicate that ECHO had any particular motivation in non-renewing the physical education teachers.

In conclusion, Complainants presented a prima facie case that ECHO non-renewed Sanchez because of her union activity, but ECHO has shown that it would have non-renewed Sanchez notwithstanding her union activity. We conclude that ECHO did not violate Sections 14(a)(3) and 14(a)(1) of the Act. The Complaint is dismissed.

V. Right to Appeal

This is a final order of the Illinois Educational Labor Relations Board. Aggrieved parties may seek judicial review of this Order in accordance with the provisions of the Administrative Review Law, except that, pursuant to Section 16(a) of the Act, such review must be taken directly to the appellate court of the judicial district in which the Board maintains an office (Chicago or Springfield). "Any direct appeal to the Appellate Court shall be filed within 35 days from the date that a copy of the decision sought to be reviewed was served upon the party affected by the decision," 115 ILCS 5/16(a).

Decided: April 12, 2007
Issued: April 25, 2007
Chicago, Illinois

/s/ Lynne O. Sered
Lynne O. Sered, Chairman

/s/ Ronald F. Ettinger
Ronald F. Ettinger, Member

/s/ Bridget L. Lamont
Bridget L. Lamont, Member

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Members Prueter and Robinson, dissenting

We agree with our colleagues' conclusion that the Complainants established a prima facie case that Exceptional Children Have Opportunities ("ECHO") violated Sections 14(a)(3) and 14(a)(1) of the Illinois Educational Labor Relations Act, 115 ILCS 5/1 et seq. ("Act") by non-renewing Barbara Sanchez. We further agree with their conclusion that this is a dual motive case. However, we do not agree with their conclusion that ECHO has shown that it would have non-renewed Sanchez notwithstanding her union activity. Therefore, we respectfully dissent.

In a dual motive case, the employer must show that it would have taken the action against the employee notwithstanding his/her union and/or protected activity in order to avoid a finding that it violated the Act. *See City of Burbank v. ISLRB*, 128 Ill.2d 335, 538 N.E.2d 1146 (1989). Here, ECHO has not made this showing.

The legitimate reason that ECHO asserts for the non-renewal of Sanchez is its financial constraints resulting from the financial difficulties of School District 205. However, after it was clear that those financial constraints would not prevent Sanchez and Joseph Hovanes from being employed for the 2004-2005 school year, ECHO took only perfunctory and inadequate action to recall Sanchez. The only action taken to notify Sanchez that she was being recalled was a single telephone message from Principal Twila Garza. Garza did not even state in her telephone message that Sanchez was being recalled or that there would be a physical education program at the Academy for Learning in 2004-2005. Nor is there evidence that Garza took any other action to reach Sanchez when Sanchez did not respond to Garza's single message. This was an inadequate attempt to recall a teacher with whose performance ECHO had no issue.

The fact that ECHO took only perfunctory and inadequate action to recall Sanchez after the budgetary motivation for non-renewing her was removed demonstrates that ECHO's determinative motivation was other than the budgetary motivation. Therefore, ECHO has not shown that it would have non-renewed Sanchez based on its budgetary motivation in the absence of her union/protected activity. .ECHO did not show that it had any other legitimate reason for its conduct. Accordingly, ECHO has not demonstrated that it would have non-renewed Sanchez notwithstanding her union and/or protected activity. ECHO has not made the showing required to avoid a finding that it violated the Act under *City of Burbank*.

For these reasons, we would conclude that ECHO violated Sections 14(a)(3) and 14(a)(1) of the Act by non-renewing Sanchez. Accordingly, we respectfully dissent.

/s/ Michael H. Prueter_____
Michael H. Prueter, Member

/s/ Jimmie E. Robinson_____
Jimmie E. Robinson, Member