P.E.R.C. NO. 84-153

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

SALEM CITY BOARD OF EDUCATION,

Respondent,

-and- Docket No. CO-82-242-9

SALEM TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission, adopting the recommended conclusions of a Hearing Examiner, holds that the Salem City Board of Education violated the New Jersey Employer-Employee Relations Act when it threatened to reduce the number of school nurses if the Salem Teachers Association filed a grievance and then discharged one nurse and reprimanded another nurse for supporting that grievance. No exceptions to the Hearing Examiner's findings and conclusions concerning these violations were filed. The Commission, however, dismisses that portion of the Complaint which had alleged that the Board had refused to negotiate in good faith concerning a directive requiring school nurses to remain in school buildings during their lunch period so they could handle any medical emergencies.

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SALEM TEACHERS ASSOCIATION,

Charging Party.

Appearances:
For the Respondent, Rand & Algeier, Esqs.
(Robert M. Tosti, of Counsel)

For the Charging Party, Selikoff & Cohen, Esqs.
(Steven R. Cohen, of Counsel)

DECISION AND ORDER

The Salem Teachers Association ("Association") filed an unfair practice charge, which it later twice amended, against the Salem City Board of Education ("Board") with the Public Employment Relations Commission. Count I of the original charge alleged that the Board violated subsections 5.4(a)(1) and (5) [1/] of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when its superintendent unilaterally issued a directive requiring school nurses to stay in their school buildings during their lunch periods so they could handle any medical emergencies. Count II of the original charge alleged

1/ These subsections 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; 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."

that the Board violated subsection 5.4(a)(1) when its superintendent threatened to reduce the number of nurses if a grievance was filed contesting his directive concerning staying in the school building during lunch.

The Association's first amendment added a Count III to the charge. This count alleged that the Board violated subsections 5.4(a)(1) and (5) when, after the Commission restrained binding arbitration of a grievance challenging the superintendent's directive,[2/] it refused to negotiate over the issue of additional compensation for nurses affected by that directive.

The Association's second amendment added Counts IV and V to the charge. Count IV alleged that the Board violated N.J.S.A. 34:13A-5.4(a)(1),(3),(4), and (5)[3/] when it did not renew nurse Kathryn Watford's contract, allegedly because of her support of the nurses' grievance and unfair practice charge concerning

2/ See P.E.R.C. No. 82-115, 8 NJPER 355 (¶13163 1982), aff'd App. Div. Docket No. A-5137-81T3 (6/3/83). In that scope of negotiations determination, we held that the Board, under the balancing tests of Local 195, IFPTE v. State, had a non-arbitrable managerial prerogative to require a nurse to remain in each school building during the lunch period so they would be available to handle immediately any medical emergencies. We further noted that both the Board and the Association agreed that each nurse was entitled to a half-hour uninterrupted lunch period later in the day if the lunch period interrupted their regular lunch period and that the Board was not contending that a factual dispute over whether the nurses had been able to take uninterrupted lunch periods would not be arbitrable. Id. at 358, n. 6. Thus, we did not address the negotiability of any claim that the nurses did not in fact receive an uninterrupted lunch period or the negotiability of any claim for additional compensation. Id. at 358-359, n. 8.

3/ Subsections 5/4(a)(3) and (4) prohibit public employers, their representatives or agents from: "(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 (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act."

the superintendent's directive. Count V alleged that the Board violated subsections 5.4(a)(1),(3), and (4) when its superintendent reprimanded nurse Doris Dague for publicly supporting the nurses' grievance and unfair practice charge.

On December 1, 1982, Commission Hearing Examiner Alan R. Howe conducted a hearing on Counts II and III.[4/] The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On January 27, 1983, the Hearing Examiner issued his report and recommended decision with respect to Counts II and III. H.E. No. 83-25, 9 NJPER 173 (¶14081 1983 (copy attached). With respect to Count II, the Hearing Examiner concluded, based in part upon his assessment of the witnesses' credibility, that the superintendent had illegally threatened to reduce the number of nurses if a grievance was filed over his directive. With respect to Count III, the Hearing Examiner concluded that the Board had refused to negotiate over the issue of additional compensation for the interruptions in the school nurses' duty-free lunches. He recommended that the Board be ordered to negotiate and to post a notice of its violations.

Following the issuance of the Hearing Examiner's report, the Board decided not to renew Watford's contract and the superintendent reprimanded Dague. The Association then

4/ The Director of Unfair Practices declined to issue a Complaint with respect to Count I because the Commission's scope of negotiations determination mooted that aspect of the case. The alleged retaliatory acts against Watford and Dague which led to Counts IV and V did not occur until after this hearing.

amended its charge to add Counts IV and V and requested that the Commission reopen the record to take testimony on these allegations. Because the allegations in Counts IV and V were integrally related to the allegations in Counts II and III, the Chairman, acting pursuant to authority granted to him by the full Commission, granted this request.

On October 7, 1983, November 17 and 18, 1983, and January 24, 1984, Hearing Examiner Howe conducted hearings on Counts IV and V. The parties examined witnesses and introduced exhibits. They waived oral argument, but filed post-hearing briefs.

On May 25, 1984, the Hearing Examiner issued his report and recommended decision with respect to Counts IV and V. H.E. No. 84-59, 10 NJPER ___ (¶____ 1984) (copy attached). With respect to Count IV, he concluded that the Board had terminated Watford because of her support for the Association grievance and unfair practice charge. With respect to Count V, he concluded that the superintendent had reprimanded Dague for the same reason. Because the Board had voluntarily decided to reinstate Watford before the 1983-1984 school year, the Hearing Examiner limited his recommended remedy to a cease and desist order, the posting of a notice, and the removal of Dague's reprimand from her personnel file.[5/]

5/ The Hearing Examiner denied the Association's request that he recommend an order requiring the superintendent to read the cease and desist order to all employees in the Association's negotiations unit. He further denied the Association's request for attorneys' fees and costs.

Following the issuance of the Hearing Examiner's initial report, the Board filed exceptions contesting the Hearing Examiner's findings and conclusions with respect to Count III. It asserted, in part, that the Association never demanded, and the Board never refused, to negotiate over additional compensation due to interruptions in their duty-free lunch periods. The Board did not file any exception with respect to the findings and conclusions concerning Count II. The Association did not file exceptions with respect to Count II or III.

Following the issuance of the Hearing Examiner's second report, both the Board and the Association notified the Commission that they had agreed not to file any exceptions with respect to the Hearing Examiner's findings and conclusions concerning Counts IV and V. The parties have also agreed that any obligation to post a notice should not become effective until the commencement of the next school year.

We have reviewed the record. The Hearing Examiner's findings of fact in both reports are accurate. We adopt and incorporate them here.[6/]

6/ The Board excepts to finding of fact No. 6 in the first report as misleading because the Hearing Examiner did not note that the Board subsequently amended the October 7, 1981 memorandum to make it clear that nurses merely had to "be in the school for the full school day" instead of to "be on duty for the full school day." The Board also excepts to this finding because it omits to state that the October 7, 1981 directive also specified that nurses would have an uninterrupted lunch period and that if the scheduled lunch period was interrupted, the nurse could make up her lunch period at a later time. Finding of Fact No. 6 is accurate as stated, but we also find that the directive was amended to substitute "be in school for the full school day" for "be on duty for the full school day" and that the directive did contain assurances that nurses would receive an uninterrupted lunch period, either as scheduled, or, if necessary, later in the day.

With respect to Counts II, IV, and V, we note the absence of exceptions and agree with the Hearing Examiner's conclusions. We will enter an appropriate remedial order.

With respect to Count III, however, we disagree with the Hearing Examiner's conclusion that the Board refused to negotiate over the issue of additional compensation for school nurses due to interruptions in their duty-free lunches causing a loss of duty-free time. Based on our review of the record, we conclude that the Association never demanded to negotiate over that issue and the Board never refused.

The October 7, 1981 directive that announced that nurses, unless excused, had to remain in the building for the full school day also stated that nurses were to have an uninterrupted lunch period and that if the scheduled lunch period was interrupted, the nurse could make up her lunch period later. During the scope of negotiations proceedings, the Board agreed that the nurses were entitled to an uninterrupted lunch period either during the scheduled period or, if necessary, later during the day and did not dispute that a claim that a nurse was denied her duty-free lunch period would be arbitrable.[7/]

7/ Two nurses testified that between October 7, 1981 and June 4, 1982, their regularly scheduled lunch periods had been frequently interrupted and that they had not been able to fit another lunch period into their afternoon schedules. It appears, however, that neither nurse brought this problem to the attention of the building principal, the superintendent, or the Board or sought any adjustment in their schedules; instead they both voluntarily forewent the portion of the lunch period they had missed. They both agreed that they had not been told they could not take their lunch later in the afternoon. Thus, on this record, it appears that the Board had no reason to suspect that the nurses were having a problem working an uninterrupted lunch into their afternoon schedules or that they wished to have their schedules changed to accommodate this problem.

Immediately after we decided the scope of negotiations case, the superintendent sent a letter to the three nurses and their principals, with copies to the Association's past and current presidents, suggesting "...that the principals and their nurses get together to schedule a lunch time for the nurses so they would not be interrupted. In case a nurse's lunch is interrupted, they should have their lunch rescheduled for another 30-minute uninterrupted period." The superintendent's letter closed by asking the recipients to call him if they had any questions.

On June 15, 1983, the Association's president wrote the Board a letter "...demanding immediate negotiations for increased compensation for nurses as a result of the inconvenience afforded them by having to remain on school property duty to the superintendent's memo on October 7, 1981." This letter did not assert that the nurses had been denied a duty-free lunch, either when originally scheduled or later in the afternoon, and did not seek negotiations over such problem. The Association made no other demand to negotiate.

On June 25, 1982, the superintendent responded. He stated that his "...decision to have nurses remain in school does not increase the workload of any nurse, and, therefore would not require negotiating additional compensation." The Association did not respond to this letter by specifically placing into issue any claim that the nurses had in fact been denied their right to an uninterrupted duty-free lunch, either when originally scheduled or later during the afternoon, or by seeking to negotiate over any such claim.

Given this chronology of events, we hold that the Association has not demanded, and the Board has not refused, to negotiate over the nurses' present claim that they should be compensated because they have allegedly lost some of their duty-free lunch periods.[8/] The Association has only demanded to negotiate over additional compensation for nurses as a result of the inconvenience of having to remain on school property during the lunch period. Under all the circumstances of this case, we do not believe that the Board violated any negotiations obligation concerning that issue. Accordingly, we dismiss Count III of the Complaint.

ORDER

The Salem City Board of Education is ordered to:

I. Cease and Desist from:

(a) interfering with, restraining, or coercing employees in the exercise of the rights guaranteed to them by the Act by threatening to reduce the number of nurses if a certain grievance was filed and by terminating one nurse and reprimanding another nurse after that grievance was filed;

(b) 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 the Act by terminating one nurse and reprimanding another nurse because they supported that grievance when filed; and

8/ Such a claim, in any event, would have raised a question of contractual violation which would have been properly resolved through the parties' negotiated grievance procedure. The Board has repeatedly expressed its willingness, and indeed obligation, to submit such a claim to binding arbitration.

(c) discharging or otherwise discriminating against any employee because that employee has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act by terminating one nurse and reprimanding another nurse because they filed affidavits and testified in unfair practice and scope of negotiations proceedings;

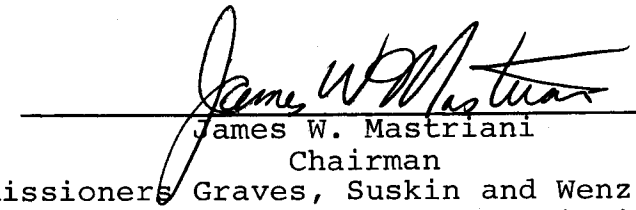
II. Remove from the personnel files of Doris Dague the document entitled "Minutes of Meeting on June 3, 1983;

III. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon commencement of the 1984-1985 school year and, after being signed by the Respondent's authorized representative, shall be maintained by it for at least sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent Board to insure that such notices are not altered, defaced or covered by other materials; and

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

Count III of the Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves, Suskin and Wenzler voted in favor of this decision. None opposed. Commissioners Hipp and Newbaker abstianed. Commissioner Butch was not present.

DATED: Trenton, New Jersey
June 25, 1984
ISSUED: June 26, 1984

APPENDIX "A"

NOTICE TO ALL 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 NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by the Act by threatening to reduce the number of nurses if a certain grievance was filed and by terminating one nurse and reprimanding another nurse after that grievance was filed.

WE WILL NOT discriminate 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 the Act by terminating one nurse and reprimanding another nurse because they supported that grievance when filed.

WE WILL NOT discharge or otherwise discriminate against any employee because that employee has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act by terminating one nurse and reprimanding another nurse because they filed affidavits and testified in unfair practice and scope of negotiations proceedings.

WE WILL remove from the personnel files of Doris Dague the document entitled "Minutes of Meeting on June 3, 1983."

SALEM CITY BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

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, 429 East State, Trenton, New Jersey 08608 Telephone (609) 292-9830.

H. E. No. 83-25

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

In the Matter of

SALEM CITY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-82-242-9

SALEM TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board violated Subsections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when its Superintendent made threatening and coercive statements to two of its nurses regarding the filing and processing of a grievance over the issue of interruptions in the taking of the duty-free lunch by school nurses and, further, the refusal of the Respondent Board to negotiate with the Charging Party over the issue of additional compensation for school nurses due to the foregoing interruptions. There exists ample Commission precedent regarding the conduct of the Superintendent and the refusal of the Board to negotiate a "workload" issue.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Emploument Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H. E. No. 83-25

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

In the Matter of

SALEM CITY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-82-242-9

SALEM TEACHERS ASSOCIATION,

Charging Party.

Appearances:

For the Salem City Board of Education
William C. Horner, Esq.

For the Salem Teachers Association
Selikoff & Cohen Esqs., P.A.
(Barbara E. Riefberg, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 16, 1982, and amended on August 19, 1982. by the Salem Teachers Association (hereinafter the "Charging Party" or the "Association") alleging that the Salem City Board of Education (hereinafter the "Respondent" or the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent by its Superintendent threatened to cause a reduction in force of school nurses should a grievance be filed challenging the Superintendent's directive of October 7, 1981, which mandated that school nurses must take lunch each day within the building to which they are assigned, and that on June 25, 1982 the Respondent by its Superintendent rejected a demand by the Charging Party to negotiate the issue of additional compensation for school nurses resulting from the Respondent's directive of October 7, 1981, supra, all of which is alleged to be a violation of

N.J.S.A. 34:13A-5.4(a)(1) and (5) of the Act.[1/]

It appearing that the allegations of the Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 26, 1982. Pursuant to the Complaint and Notice of Hearing, a hearing was held on December 1, 1982 in Trenton, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by January 24, 1983.

An Unfair Practice Charge, as amended, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission, a question concerning alleged violations of the Act, as amended, exists and, after hearing, and after consideration of the post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

FINDINGS OF FACT

1. The Salem City Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Salem Teachers Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The current collective negotiations agreement between the parties is effective from July 1, 1981 through June 30, 1984 (J-1).

4. School nurses are covered by the Recognition Clause (Article I) of

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1/ These Subsections 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.

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

the collective negotiations agreement (J-1, p.1).

5. Under Article XIII, Section B, teachers (including school nurses) shall have a duty-free lunch period of not less than thirty (30) minutes (J-1 p. 15). The agreement does not specify where the duty-free lunch is to be taken.

6. Upon learning that all school nurses were not taking their duty-free lunch within their respective school buildings, the Superintendent on October 7, 1981 issued a directive that nurses were to be on duty for the full school day and that the duty-free lunch was to be taken within the school building to which they were assigned (J-2).

7. On October 9, 1981 a first-level grievance was filed under the agreement protesting the loss by the school nurses of the duty-free lunch period, in that they were unable to leave their school building for the said duty-free lunch. The said grievance was reduced to writing and formally filed on October 16, 1981 at level two (CP-1). The grievance was denied by the Superintedent at level three thereafter. The grievance was appealed to the Board at level four where the grievance was denied (R-1). Thereafter an effort by the Association to invoke arbitration was restrained by the Commission in a Scope of Negotiations proceeding, P.E.R.C. No. 82-116, 8 NJPER 355 (1982).

8. On October 15, 1981 the Superintendent, Frank J. Napoli, came to the office of school nurse Doris Dague when she indicated that the nurses were unhappy over the Superintendent's directive of October 7, 1981, supra, requiring that the nurses take their duty-free lunch in their school building. Dague testified credibly that Napoli stated that if a grievance was filed and he lost he was going to "fire" a nurse and that under State rules he was only required to have one nurse.

9. In or around the same time in October 1981 Napoli had a conversation with nurse Catherine J. Watford, to which her school Principal, Francis C. Ponti, was a witness. Napoli stated that he was aware that a grievance was going to be filed

and that if it was pursued a nurse would be lost inasmuch as only one was required in the District. Ponti was called as witness and essentially corroborated Watford.[2/]

10. On June 15, 1982 the President of the Association wrote to the Board demanding negotiations for increased compensation for school nurses as a result of their having to remain on school property during their duty-free lunch period, which had resulted from the Superintendent's directive of October 7, 1981, supra (J-3).

11. Under date of June 25, 1982 the Superintendent responded to the President of the Association, citing the decision of the Commission, supra, and refused to negotiate on the ground that he was exercising a management prerogative on behalf of the Board for the safety and welfare of the students (J-4).

12. Under date of June 8, 1982 the Superintendent sent a memo to the school principals and the school nurses suggesting that they get together to schedule a lunch period so that the nurses would not be interrupted, and indicating that if a nurse's lunch was interrupted that it should be rescheduled for another 30-minute uninterrupted period (R-3).

THE ISSUES

1. Did the Respondent Board independently violate Subsection(a)(1) of the Act when its Superintendent stated to nurses Dague and Watford in October 1981 that if a grievance was filed and processed regarding the nurses' lunch situation he intended to "fire" or "cut" a nurse since under "State rules" he was only required to have one nurse for the entire District?

2. Did the Respondent Board violate Subsections(a)(1) and (5) of the Act when, upon demand, it refused to negotiate with the Charging Party over the issue of additional compensation for school nurses due to interruptions in

2/ Napoli denied making the statements attributed to him by Dague and Watford. The Hearing Examiner does not credit Napoli's denials in view of the consistent testimony of Dague, Watford and Ponti and his observation and appraisal of the demeanor of the respective witnesses.

in their duty-free lunch?

DISCUSSION AND ANALYSIS

The Respondent Independently Violated Subsection(a)(1) Of The Act When Its Superintendent Stated To Two Nurses In October 1981 That If A Grievance Was Filed And Processed Regarding The Nurses' Lunch Situation He Intended To "Fire" or "Cut" A Nurse Since He Was Only Required To Have One Nurse For The Entire District

The Respondent contends that the Charging Party has failed to prove by a preponderance of the evidence that Superintendent Frank Napoli made certain statements to nurses Dague and Watford in October 1981 with respect to what would happen if a grievance was filed and processed regarding the nurses' duty-free lunch situation. The Hearing Examiner finds and concludes that the Charging Party has met its burden of proof by elicting from three witnesses, nurses Dague and Watford and Principal Francis Ponti, testimony that Napoli stated to Dague and Watford that if a grievance was filed and processed regarding the nurses' lunch situation he intended to "fire" or "cut" a nurse since under State rules he was only required to have one nurse for the entire school District.

The Hearing Examiner likewise has no problem in finding that the Superintendent's statements to Dague and Watford were coercive and constituted an independent violation of Subsection(a)(1) of the Act. Public employer statements and actions, which are designed to discourage the filing and processing of grievances have consistently been found to be violative of the Act: North Brunswick Township Board of Education, P.E.R.C. No. 79-14, 4 NJPER 451 (1978), aff'd. App. Div. Docket No. A-698-78 (1979); Commercial Township Board of Education, P.E.R.C. No. 83-25, 8 NJPER 550 (1982), appeal pending; Trenton Board of Education, P.E.R.C. No. 80-130, 6 NJPER 216 (1980); and Clinton Township Board of Education,

P.E.R.C. No. 78-45, 4 NJPER 78 (1978). The Commission in North Brunswick, supra, stated that individual employee conduct relating to enforcing a collective negotiations agreement and existing working conditions constitutes protected activity under the Act (4 NJPER at 453, footnote 16).

The Respondent argues that it is insulated from any illegal conduct by its Superintendent since the Superintendent was not authorized by the Respondent to initiate conversations with Dague and Watford, nor was the Respondent aware that Superintendent had done so, and, finally, the Respondent has not ratified the conduct of its Superintendent. In this regard, it is first noted that Dr. Napoli, as Superintendent, is the chief administrative officer of the School District and is authorized by the Respondent Board to utilize his discretion in the conduct of the daily activities of the District. Clearly, many of his activities on a day-to-day basis are not separately authorized by the Board.

The Commission recently rejected a like defense by a Board with respect to the conduct of its Superintendent in Commercial Township, supra. There the Superintendent had written a threatening letter to an employee and the Board objected that it should not be held responsible for this action of its Superintendent. In rejecting the Board's position, the Commission noted that the writing of the letter in question was in connection with the discharge by the Superintendent of his normal duties, just as in the instant case, where the conversations of Superintendent Napoli with Dague and Watford were clearly within the scope and course of his duties. In finding a violation in Commercial Township, supra, it was held that in determining Board culpability there was no requirement that it formally ratify or even be aware of the illegal threats made by its chief administrative officer.

For all of the foregoing reasons, the Hearing Examiner concludes that the Board independently violated Subsection(a)(1) of the Act by the statements of its Superintendent to nurses Dague and Watford.

The Respondent Board Violated Subsections (a)(1) And (5) Of The Act When, Upon Demand, It Refused To Negotiate With The Charging Party Over The Issue Of Additional Compensation For School Nurses Due To Interruptions In Their Duty-Free Lunch

The Commission in Salem City Board of Education, P.E.R.C. No. 82-115, 8 NJPER 355 (1982), a "scope case," stated in footnote 8 that it was not addressing the negotiability of any claim for additional compensation by the nurses in connection with their 30-minute duty-free lunch. Thus, that issue is properly before the Hearing Examiner in this proceeding.

The Respondent argues that there is no "workday" or workload increase since the collective negotiations agreement between the parties provides for a 7-hour, 34-minute workday, which has not been increased (see J-1: Article XIII, Section A.4). Further, the Respondent contends that there is no workload increase since the work of the nurses remains the same. Finally, the Respondent points out that the request for negotiations (J-3) refers only to the "inconvenience" to the nurses in having to remain on school property during their duty-free lunch, which, it argues, is a de minimis violation of the Act at most.

The Respondent Board cites two cases involving Randolph Township where the Commission held that even though there was a unilateral increase in workload it was permitted under the language of the contract: Randolph Township Board of Education, P.E.R.C. No. 83-41, 8 NJPER 600 (1982) and P.E.R.C. No. 81-73, 7 NJPER 23 (1980). In these cases, as well as the cases cited therein by the Commission, there was an actual increase in the work required of the affected employees, which fell within the overall number of hours and minutes in the workday as defined by the contract. Thus, the Randolph cases are not dispositive or really pertinent to the issue herein since there is no question of additional minutes of work being added within the 7-hour, 34-minute workday as defined in J-1, supra. Rather, there is an alleged contraction in the 30-minute duty-free lunch, which is not able to be made up by the nurses during the balance of the workday.

In connection with the Board's contention that the Charging Party seeks merely to negotiate "inconvenience," the Hearing Examiner notes the testimony of two of the three nurses that regular interruptions in their lunch period occur during the week and they are unable to recoup the time lost during the balance of the workday. Thus, the record suggests that there is some actual time lost during the 30 minutes of the duty-free lunch for some or all or the nurses. This clearly goes to issue of increased workload and is mandatorily negotiable: Newark Board of Education, P.E.R.C. No. 79-24, 4 NJPER 486 (1979), P.ElR.C. No. 79-38, 5 NJPER 41 (1979), aff'd. Docket No. A-2060-78 (App. Div. 1980); Bridgewater-Raritan Regional Board of Education, P.E.R.C. No. 81-35, 6 NJPER 449 (1980); and Dover Board of Education, P.E.R.C. No. 81-110, 7 NJPER 161 (1981).

The Hearing Examiner does not agree with and rejects the Board's citation of Maywood Board of Education, 168 N.J. Super. 45 (App. Div. 1979) as having any bearing on the instant proceeding. Maywood held, inter alia, that where a RIF occurs the impact on the terms and conditions of employment of the remaining employees is non-negotiable. Plainly, no RIF is involved herein.

Further, there is no State regulation involved in this case which is pertinent to the workload issue. Thus, the Hearing Examiner fails to perceive the applicability of Bethlehem Township Board of Education v. Bethlehem Township Education Association, 91 N.J. 38 (1982), which is cited by the Respondent Board.

Finally, the "zipper" clause in the collective negotiations agreement between the parties (see J-1: Article II, Section F) does not, in the opinion of the Hearing Examiner, constitute a "clear and unmistakable" waiver of the right of the Charging Party to negotiate over an alleged contraction in the duty-free lunch of the school nurses: See State of New Jersey, P.E.R.C. No. 77-40, 3 NJPER 78 (1977), aff'd. Docket No. A-2681-76 (App. Div. 1978). The Charging Party correctly points to the controlling Commission decision on zipper clauses and negotiations: New Brunswick Board of Education, P.E.R.C. 78-56, 4 NJPER 156 (1978), aff'd.Docket No.A-2450-77

(App. Div. 1979). Commenting on the basic purpose of "zipper" clauses, the Commission there said:

> "...Thus, an employer can rely on such clauses to refuse to bargain on any new proposals, whether previously discussed or not, for the life of the agreement, but it cannot utilize them to assert a right to make changes in the status quo without new negotiations..." (4 NJPER at 157) (Emphasis supplied).

See also, Clifton Board of Education, P.E.R.C. No. 80-104, 6 NJPER 103 (1980)

There being, in the opinion of the Hearing Examiner, an arguable increase in the workload of some or all of the nurses due to interruptions during the duty-free lunch period, and workload being mandatorily negotiable, the Hearing Examiner will recommend that the Respondent Board negotiate with the Charging Party over the subject.

* * * *

Upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Board independently violated N.J.S.A. 34:13A-5.4(a)(1) when its Superintendent in October 1981 made threatening and coercive statements to nurses Doris Dague and Catherine J. Watford regarding the filing and processing of a grievance as to the nurses' lunch situation.

2. The Respondent Board violated N.J.S.A. 34:13a5.4(a)(5), and derivatively 5.4(a)(1), when, upon demand, it refused to negotiate with the Charging Party over the issue of additional compensation for school nurses' interruptions in their duty-free lunch.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by the

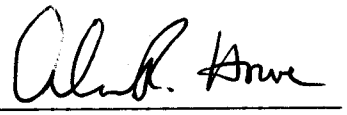
conduct of its agents and representatives in making coercive and threatening statements to employees regarding the filing and processing of grievances and, further, refusing to negotiate in good faith with the Charging Party over the issue of additional compensation for school nurses due to interruptions in their duty-free lunch.

2. Refusing to negotiate in good faith with the Charging Party regarding the issue of additional compensation for school nurses due to interruptions in their duty-free lunch.

B. That the Respondent take the following affirmative action:

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

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



Alan R. Howe
Hearing Examiner

Dated: January 27, 1983
Trenton, New Jersey

APPENDIX "A"

NOTICE TO ALL 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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by the conduct of our agents and representatives in making coercive and threatening statements to employees regarding the filing and processing of grievances and, further, refusing to negotiate in good faith with the Charging Party over the issue of additional compensation for school nurses due to interruptions in their duty-free lunch.

WE WILL NOT refuse to negotiate in good faith with the Charging Party regarding the issue of additional compensation for school nurses due to interruptions in the their duty-free lunch.

SALEM CITY BOARD OF EDUCATION

(Public Employer)

Dated _____ By _____

(Title)

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 Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780

H.E. No. 84-59

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

In the Matter of

SALEM CITY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-82-242-9

SALEM TEACHERS ASSOCIATION,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Board violated Subsections 5.4(a)(1), (3) and (4) of the New Jersey Employer-Employee Relations Act when on April 14, 1983 it failed to renew the contract of a school nurse, Kathryn Watford, for alleged reasons of economy. The Hearing Examiner found that the real reason for the non-renewal of Watford was her exercise of extensive protected activities on behalf of the Charging Party dating back to October 1981. It was significant that the Respondent Board has had a surplus in everyone of the past ten years so that "economy" was not a sustainable reason for the non-renewal of Watford for the 1983-84 school year.

The Hearing Examiner also found that the Respondent Board violated the same Subsections of the Act as to a second school nurse, Doris Dague. Dague had protested the non-renewal of Watford at several public meetings and, after seeking to communicate directly with members of the Respondent Board, Dague was admonished not to do so under threat of reprimand and was within a week or two thereafter reprimanded after speaking at a public meeting.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusion of law.

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

In the Matter of

SALEM CITY BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-82-242-9

SALEM TEACHERS ASSOCIATION,

Charging Party.

Appearances:

For the Salem City Board of Education
Rand & Algeier, Esqs.
(Robert M. Tosti, Esq.)

For the Salem Teachers Association
Selikoff & Cohen Esqs., P.A.
(Steven R. Cohen, Esq.)

HEARING EXAMINER'S SECOND RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was originally filed with the Public Employment Relations Commission (hereinafter the "Commission") on March 16, 1982, and first amended on August 19, 1982, by the Salem Teachers Association (hereinafter the "Charging Party" or the "Association") alleging that the Salem City Board of Education (hereinafter the "Respondent" or the "Board") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (hereinafter the "Act"), in that the Respondent by its Superintendent threatened to cause a reduction in force of school nurses should a grievance be filed challenging the Superintendent's directive of October 7, 1981, which mandated that school nurses must take lunch each day within the building to which they are assigned, and that on June 25, 1982 the Respondent by its Superintendent rejected a demand by the Charging Party to negotiate the issue of additional compensation for school nurses resulting from the Respondent's directive of October 7, 1981, supra, all of which was alleged

to be a violation of N.J.S.A. 34:13A-5.4(a((1) and (5) of the Act.[1/]

It appearing that the allegations of the original Unfair Practice Charge, as amended, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 26, 1982. Pursuant to the Complaint and Notice of Hearing, a hearing was held on December 1, 1982 in Trenton, New Jersey at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by January 24, 1983. On January 27, 1983 the instant Hearing Examiner issued his Recommended Report and Decision, H.E. No. 83-25, 9 NJPER 173, in which he concluded that the Respondent independently violated N.J.S.A. 34:13A-5.4(a)(1) by the conduct of its Superintendent in making threatening and coercive statements to two nurses, Doris Dague and Kathryn Watford regarding the filing and processing of a grievance, and further, that the Respondent violated N.J.S.A. 34:13A-5.4(a)(5) when it refused to negotiate with the Charging Party regarding the issue of additional compensation for the interruptions of school nurses in their duty-free lunch period. Thereafter the case was transferred to the Commission for review upon exceptions.

However, before the Commission took any action with respect to H.E. No. 83-25, supra, the Charging Party amended its Unfair Practice Charge by the addition of Counts IV and V, which were docketed, respectively, on May 24 and June 29, 1983. The Charging Party then requested that the Commission reopen the record before the instant Hearing Examiner. This request was granted and, by letter dated August 15, 1983, the parties were so advised. The instant Hearing Examiner was directed to conduct a hearing and issue a separate report on Counts IV and V.

1/ These Subsections 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.

"(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."

Count IV alleges that the Respondent violated N.J.S.A. 34:13A-5.4(a)(1), (3), (4) and (5) when it failed to renew the contract of employment of school nurse Watford for the 1983-84 school year in retaliation for her having engaged in protected activities under the Act.[2/] Count V alleges that the Respondent violated the Act by engaging in a series of retaliatory acts against school nurse Dague for having engaged in protected activities on behalf of the Charging Party and Watford.

Pursuant to the direction of the Commission a hearing was held on October 7, 1983 in Trenton, New Jersey and thereafter additional hearings were held on November 17 and 18, 1983 and January 24, 1984 in Salem, New Jersey, at which time the parties were given an opportunity to examine witnesses, present evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by May 15, 1984.

The Unfair Practice Charge, as now amended by Counts IV and V, having been filed with the Commission, a question concerning alleged violations of the Act, as amended, exists and, after further hearings, and after consideration of the second round of post-hearing briefs of the parties, the matter is appropriately before the Commission by its designated Hearing Examiner for determination.

Upon the entire record, the Hearing Examiner makes the following:

ADDITIONAL FINDINGS OF FACT[3/]

2/ These additional Subsections prohibit public employers, their representatives or agents from:

"(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.

"(4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this Act."

3/ The Hearing Examiner here incorporates by reference and confirms his original Findings of Fact Nos. 1-12, inclusive, and finds further, commencing with paragraph No. 13, infra.

13. Kathyrn Watford has, at all times material hereto, been a non-tenured school nurse at the John Fenwick School where Francis C. Ponti has been the Principal. Also, at all times material hereto, there have been three school nurses in the District. Watford is junior in seniority among the three nurses.

14. Watford has engaged in protected activities under the Act as follows: Watford assisted the Association in processing two grievances relating to the duty-free lunch period of the school nurses, one relating to the nurses' right to leave their school building during the lunch period and the other relating to compensation for interruptions to the nurses' lunch when remaining in the school building (2 Tr. 22, 23);[4/] Watford testified as a witness for the Association on December 1, 1982; and finally, Watford filed an affidavit with the Commission (CP-3) in support of the Association's position respecting the Petition for Scope of Negotiations Determination filed by the Board regarding the school nurses' right to leave the school building during the lunch period (2 Tr. 23-25; P.E.R.C. No. 82-115, 8 NJPER 355). See also, Findings of Fact Nos. 7-9 in H.E. No. 83-25, supra. The Respondent obviously knew of Watford's exercise of protected activities as heretofore set forth.

15. Under date of April 29, 1983 Watford was sent a letter by the Board Secretary, David H. Call, which stated that at a regular meeting of the Board on April 14, 1983 it voted not to offer Watford a contract for the 1983-84 school year (CP-4).[5/] Call then stated that, "This action was taken since the Board of Education

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4/ The transcript references begin with the first day of hearing on December 1, 1982 ("1 Tr.") and continue sequentially through the final day of hearing on January 24, 1984 ("5 Tr.").

5/ The Hearing Examiner is making no findings regarding events which occurred after the Board's decision on April 14, 1983 to RIF Watford. Any illegality in the Board's action on that date would not be affected by post-April 14th events. It is noted that due to a myriad of circumstances and events after April 14th, involving staff, administration, public officials and the public, the Board decided to rescind the RIF of Watford and she has continued to work as a school nurse at the Fenwick School during the 1983-84 school year. Thus, there is no element of reinstatement or back pay involved in the instant proceeding.

has eliminated this position for the 1983-84 school year for reasons of economy..." (Emphasis supplied).

16. Joseph LaCavera, III, the District's physician, who had been solicited by the Board to provide an affidavit in the "Scope" proceeding to the effect that nurses' services were essential to the well-being of pupils (CP-9), sent a letter to the Board Secretary, after the Board's decision not to renew Watford, protesting "nurse rationing" and indicating that he might have to reconsider his "own position as school physician" (CP-10). Dr. Lacavera testified that he felt that the Board was contradicting itself, in that one year they were asking him to state that it was vitally important for nurses not to leave the building for a lunch period, and then, a year or two later the Board was ready to eliminate a nurse completely and leave one of the buildings without a nurse (3 Tr. 56).

17. Superintendent Napoli at the first hearing on December 1, 1982 testified consistent with the position of the Board in the "Scope" proceeding, supra, that he did not feel that because of declining enrollment there was a need to share professional nurses in each building, leaving the remaining buildings unattended (1 Tr. 41). Napoli also testified on the same date that in the event of a reduction-in-force the reductions of particular individuals or positions are recommended by the principal; he reiterated this several times (1 Tr. 46, 47, 51).

18. The Principals of the various schools in the District are solicited by the Superintendent regarding staffing needs for the following school year. This process begins in January or February of the prior school year (4 Tr. 125). The Principal of the Salem Middle School, Sherwood Brown, attended an executive session of the Board on January 25, 1983 where Ponti was also present (R-6; 4 Tr. 127). The subject of sharing a nurse was discussed, the result of which would have been to gain an additional classroom teacher. Brown said that he was in favor of gaining an additional classroom teacher (4 Tr. 129, 130).[6/]

6/ Brown also testified that he and Superintendent Napoli spoke of the possibility of eliminating a nurse as early as December 1982, after the first day of hearing in this matter (4 Tr. 146, 147).

19. The Principals and the Superintendent met again on staffing needs for the 1983-84 school year on February 3 (R-7) and April 5, 1983 (R-8). At the April 5th meeting, which was with the Board, both Ponti and Brown were asked if they had their choice between hiring additional classroom teachers and reducing other staff positions, such as an elementary nurse, what would the choice be; both indicated that their choice would be for classroom teachers (R-8; 3 Tr. 64; 4 Tr. 139). Notwithstanding, Ponti, on the same date, April 5th, submitted to Napoli a written proposal regarding staff recommendations for 1983-84, which included keeping Watford as a school nurse (CP-12). Further, Ponti testified credibly that he never recommended the elimination of Watford's position as a school nurse at the John Fenwick school (3 Tr. 61, 62).

20. There was a spate of testimony and documentary evidence offered by the parties on the issue of the financial condition of the Board at the time of its decision to RIF Watford on April 14, 1983. Suffice it to find as follows:

a. The Board has enjoyed a surplus in its funds for at least 10 years (R-12). Over the past five to ten years, programs that the Board has deemed important have been funded through the use of surplus funds (4 Tr. 141). Historically, the Board of School Estimate, comprised of the Mayor and two City Council members of Salem, and two members of the Respondent Board, has by a vote of 3-2 compelled the Board to utilize its surplus to fund a portion of its budget and the Board has done so (3 Tr. 9, 10).

b. Under date of May 16, 1983, after conducting a hearing, Commission Fact Finder Lawrence I. Hammer issued a report in which he observed that the existence of a "healthy surplus appears the rule in Salem rather than the exception, amounting to slightly less than $2.5 million, if anticipations have been properly projected... The Tax Rate... dropped by 11 cents per $100.00 A.V. for 1983-84, something that should not have been done if the District was in truly financial straights (sic)..." (CP-7, p. 5).

c. Richard Stoner, a member of the Board of School Estimate for the

past six years, acknowledged that since he had been on the "Board" the Respondent Board's annual budget request had always been reduced by the Board of School Estimate due to the Respondent Board's existing surplus and in an effort to keep the local tax rate down (5 Tr. 29, 30). The Respondent Board's 1983-84 budget was reduced $177,000 (3 Tr. 21, 22), which was less than the prior year (R-12).

21. Respondent Board member Robert Johnson testified that economy was "never a factor" in the Board's decision to RIF Watford on April 14, 1983 (4 Tr. 166, 167). He testified further that his decision was that the District could "get by with two nurses" and that he was influenced by Ponti's and Brown's preference for a classroom teacher (4 Tr. 162-64).

22. Over the past five years the Board has eliminated approximately 50 members of its teaching staff, including five-nurse-teachers, two of the latter having left voluntarily (R-11; 5 Tr. 30-32).

23. Doris Dague has been a school nurse at the Salem High School for approximately 4 years and is District Chairperson of School Health Services. Dague was a witness for the Charging Party at the December 1, 1982 hearing in this proceeding and filed an affidavit in support of the Charging Party's position in the "Scope" proceeding (CP-14).

24. Dague first learned of the Board's decision to RIF Watford on April 30, 1983. Dague did not take any action on behalf of Watford until May 12, 1983 when she attended a public meeting of the Board and "made a public speech." (4 Tr. 6). Dague's speech lasted three-five minutes, during which she stressed the necessity of having a nurse in each school building and, in pointing out that two nurses could not monitor contagious illness, made reference to a number of contagious diseases: chicken pox, measles, lice, impetigo, hepatitis and herpes. (4 Tr. 7).

25. On May 13, 1983 Dague received a telephone call from Superintendent Napoli, who took exception to her remarks concerning contagious diseases in the Salem schools and asked for a report by May 20th for the next Board meeting, documenting

all cases of contagious illnesses in the Salem schools. Such a report had never before been requested (4 Tr. 8). Dague protested to Napoli that contagious diseases or illnesses were not the thrust of her speech, stating that the purpose was the need for a school nurse in every school.

26. Also on the same date, May 13, 1983, Napoli sent a joint memo to Dague and to Norman K. Wilson, the Principal of the High School, taking written exception to Dague's speech of May 12th, and confirming his direction to Dague to prepare a written report by May 20, 1983 (CP-15). Napoli's memo concluded by stating that if the documentation does not justify Dague's speech "concerning outbreaks, then it appears that Mrs. Dague may have used poor judgment in presenting erroneous information to the public." Dague made a written response to this memo on May 23, 1983 (CP-16).

27. Dague complied with Napoli's request for a contagion report to the Board on May 23, 1983 (CP-17). Napoli never contacted Dague to discuss the contents of this report (4 Tr. 14).

28. Dague heard nothing further from Napoli or anyone in administration until she sent a letter to Napoli, Principal Wilson and all Board members urging a "re-evaluation of the School Nurse reduction-in-force decision for the 1983-84 school year." (CP-18). This letter was sent on June 1, 1983 by regular mail to members of the Board and by intra-school mail to Napoli and Wilson.

29. On June 2, 1983 Dague received a telephone call from Napoli, who directed Dague to write to the administrators of all of the schools in Salem County to find out how they were fulfilling the State mandate with shared nurses. Dague had never been requested to do this previously.

30. On June 3, 1983 Dague was given one hour of notice that she was to meet with Napoli at 12:30 p.m. that day. Dague inquired of Principal Wilson's secretary regarding the purpose of the meeting and was told that it was to review the documentation for her contagion report. However, when Dague arrived at the meeting she was told that she did not have to bring any documentation with her. At the

meeting Dague was confronted by Napoli, Wilson and the Board President, Barbara Wright. Dague had no advance notice that Wright would be present. It was uniformly agreed upon by the witnesses that the meeting lasted ninety (90) minutes. The thrust of the meeting was the anger of Napoli and Wright over Dague's having written her June 1st letter to Napoli and the members of the Board of Education (CP-18). Dague was instructed never again to communicate directly with the members of the Board of Education except through the "chain of command" (4 Tr. 22). Dague was told that if she continued to communicate with Board members or to speak out at any public meetings she would receive a reprimand (4 Tr. 23).

31. After remaining silent at a Salem City Council meeting on June 6, 1983 and at a Board meeting on June 8, 1983. Dague spoke out publicly at a rally in support of Watford on June 11, 1983, indicating that she was "going to stand up and be counted that day" (4 Tr. 70).

32. Under date of June 15, 1983 Dague received a copy of a joint memo from Napoli to herself, Wilson and Wright, which set forth as its subject "Minutes of Meeting Held on June 3, 1983" (CP-19). Paragraph four of the June 15th memo recounted the warning that she was not to make any public statements concerning confidential school information or submit in writing to the Board any comments without sending it to the Principal and Superintendent's Office. Dague testified without contradiction that she did not recall anything having been said regarding confidential materials and was only admonished regarding school business. Dague added that she had never made statements in public regarding confidential information (4 Tr. 27). Paragraph 9 of Exhibit CP-19 stated "A copy of these minutes shall be placed in Mrs. Dague's file" (Emphasis supplied). Dague testified that she considered these "minutes" as a reprimand because they were being placed in her file, which had never been done before (4 Tr. 26, 27).

THE ISSUES

1. Was the Respondent Board discriminatorily motivated in violation of Subsections(a)(1), (3) and (4) of the Act when it decided on April 14, 1983 not to offer Kathryn Watford a contract for the 1983-84 school year?

2. Was the Respondent Board discriminatorily motivated in violation of Subsections(a)(1), (3) and (4) of the Act by its actions and conduct with respect to Doris Dague on and after April 30, 1983?

DISCUSSION AND ANALYSIS

The Respondent Board Was Discriminatorily Motivated When It Decided Not To Offer Watford A Contract For The 1983-84 School Year And, Thus, Did Violate The Act

It will be recalled that the Hearing Examiner has found that the Respondent independently violated Subsection(a)(1) of the Act by the conduct of Superintendent Napoli in October 1981 when, in the presence of Watford and Ponti, he threatened to "fire" or "cut" a nurse if a grievance was filed and processed regarding the nurses' duty-free lunch situation. Watford assisted in the processing of two grievances relating to the nurses' duty-free lunch in late 1981. Watford also testified as a witness for the Charging Party on December 1, 1982 in this proceeding and filed an affidavit in support of the Charging Party's position in the "Scope" proceeding instituted by the Respondent.

The Hearing Examiner is persuaded that the foregoing protected activities engaged in by Watford contributed to or formed the basis for the Respondent's decision on April 14, 1983 not to renew Watford's contract for the 1983-84 school year. The reasons for this conclusion by the Hearing Examiner will be apparent hereinafter.

In Bridgewater Township v. Bridgewater Public Works Association, 95 N.J. 235 (1984) the New Jersey Supreme Court approved the use by the Commission and the Appellate

Division of Wright Line, Inc., 251 NLRB 1083, 105 LRRM 1169 (1980).[7/] In Wright Line the NLRB adopted the analysis of the United States Supreme Court in Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), which involves the following requisites in assessing employer motiviation: (1) the Charging Party must make a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the employer's decision to discipline (here not renewing Watford's contract); and once this is established the employer has the burden of demonstrating that the same action would have taken place even in the absence of protected activity.

The New Jersey Supreme Court in Bridgewater, supra, described the burden placed upon the employer as having to "...'go forward and establish by a preponderance of the evidence' that the action occurred for legitimate business reasons and not in retaliation for protected activity..."

Clearly, the Charging Party has established a prima facie showing sufficient to support an inference that protected activity was a "substantial" or a "motivating" factor in the Respondent Board's decision on April 14, 1983 not to offer Watford a contract for the 1983-84 school year. The critical inquiry is whether or not the Respondent has met its burden of establishing by a preponderance of the evidence that its decision not to renew Watford would have occurred even in the absence of Watford's having engaged in protected activities on behalf of the Charging Party.

The Respondent's dilemma in establishing a legitimate business justification for its action in not renewing Watford's contract on April 14, 1983 stems from the following: the testimony of Napoli on December 1, 1982 that he saw no need to share professional nurses in each building, notwithstanding declining enrollment; the position of the Respondent in the "Scope" proceeding that its nurses were required

7/ The Appellate Division adopted the Wright Line analysis in "dual motive" cases in East Orange Public Library v. Taliferro, 180 N.J. Super. 155 (1981), which the Commission has followed in cases beginning with Madison Board of Education, P.E.R.C. No. 82-46, 7 NJPER 669 (1981). The United States Supreme Court adopted Wright Line in NLRB v. Transportation Management Corp., ___ U.S. ____, 113 LRRM 2857 (1983).

to be in the building at all times in order to serve the well-being of the pupils; the April 29, 1983 letter to Watford, stating that she was not being offered a contract for the 1983-84 school year "for reasons of economy;" and the testimony of Board member Robert Johnson that economy was "never a factor" in the Board's decision to RIF Watford on April 14, 1983. The Hearing Examiner can only resolve this dilemma by concluding that the Respondent Board was discriminatorily motivated against Watford for the exercise by her of the protected activities set forth above, and that the Board retaliated against Watford when it decided not to renew her contract on April 14, 1983.

The Hearing Examiner is convinced that Napoli as Superintendent was the moving force in bringing about the Board's decision of April 14, 1983. Napoli's discriminatory motivation originated in or around mid-October 1981 when he stated on different ocassions to Dague, Watford and Ponti that he was going to "fire" or "cut" a nurse if a grievance or grievances regarding the duty-free-lunch of the school nurses was filed and pursued. Significantly, Napoli was not called as a witness by the Respondent in the hearings on remand and the Hearing Examiner is justified in concluding that any testimony by Napoli on behalf of the Board would have been unfavorable to it: Duration Corp. v. Republic Stuyvesant Corp. et al, 95 N.J. Super. 527, 531 (App. Div. 1967). certif. den. 50 N.J. 404 (1967).

The Hearing Examiner rejects as implausible any contention that it was the principals who brought about the decision to RIF a nurse and continue on a shared basis with two nurses. In so concluding, the Hearing Examiner recognizes that there was considerable testimony regarding the role of the principals in shaping staff recommendations for the ensuing school year. If this was the only testimony in this proceeding, the Hearing Examiner might have concluded that it was the school principals who were responsible for the RIF of a nurse. However, the Superintendent is deeply enmeshed in the meetings with the principals and recommendations to the Board. Thus, the Hearing Examiner attaches no legal significance in this proceeding

to the statements by Principals Brown and Ponti that if they had to make a choice it would be in favor of a classroom teacher over a school nurse. The question arises, how did the two Principals come to be put in a position of having to make a choice given the Board's surplus in every one of the past 10 years?

It is at this point that the testimony of Board member Johnson comes into play, in particular, his statement that economy was "never a factor" in the Board's decision to RIF Watford. If economy wasn't a factor, notwithstanding that Watford was so told in her termination letter (CP-4), then what was the factor in the Board's decision to RIF? To the instant Hearing Examiner there is only one answer, and that is the discriminatory motivation of Napoli towards Watford, which tainted the deliberations of the Board leading up to its decision on April 14, 1983. In recent years the Board had always found a way to retain programs in which it was interested, drawing upon surplus when necessary. Plainly, the retention of one nurse, Watford, whose salary was not disclosed during the hearings, was within the wherewithal of the Board for the 1983-84 school year. Thus, the Hearing Examiner concludes that the Board has failed to prove that its failure to renew Watford's contract would have taken place even in the absence of her protected activity.

Because of the Hearing Examiner's finding and conclusion that the Board through its Superintendent was discriminatorily motivated toward Watford, it necessarily follows that the Board's decision of April 14, 1983 was not in furtherance of a valid educational policy.[8/] Therefore, the cases cited by the Respondent to the effect that the trier of fact cannot substitute his judgment for that of the Board, and that decisions of the Board made within its authority are entitled to a presumption of correctness, do not apply.

8/ In Bridgewater, supra, dissenting Justice O'Hern noted that: "PERC correctly concluded that agency review of an exercise of managerial discretion is permitted to determine whether the employment decision has been illegally motivated." (95 N.J. at 251).

In concluding on this point, the Hearing Examiner finds that the Respondent Board violated Subsections(a)(1), (3) and (4) of the Act when on April 14, 1983 it failed to renew the contract of Kathryn Watford for the 1983-84 school year.

The Respondent Board Was Discriminatorily Motivated In Its Actions And Conduct Regarding Doris Dague On And After April 30, 1983 And, Thus, Violated The Act

In reaching his conclusion that the Respondent Board violated the Act by its actions and conduct toward Dague, the Hearing Examiner relies upon two Commission decisions, affirmed by the Appellate Division, namely: City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (1978), aff'd. App. Div. Docket No. A-3562-77 (1979) and Commercial Township Board of Education, P.E.R.C. No. 83-25, 8 NJPER 550, 552 (1982), aff'd. App. Div. Docket No. A-1642-82T2 (1983). See also, Township of West Windsor v. P.E.R.C. and PBA Local 130, 78 N.J. 98, 110-112 (1978); Winston v. Bd. of Ed. of So. Plainfield, 125 N.J. Super. 131, 144 (App. Div. 1973), aff'd. 64 N.J. 582 (1974) Anderson v. Central Point School District No. 6, 554 F. Supp. 600 (D. Ore. 1982) and Laurel Springs Bd. of Ed., P.E.R.C. No. 78-4, 3 NJPER 228 (1977).

Dague was a witness in this proceeding at the hearing on December 1, 1982 and filed an affidavit in support of the Charging Party's position in the "Scope" proceeding (CP-14). After learning on April 30, 1983 of the Board's decision to RIF Watford, Dague made a public speech at a public meeting on May 12, 1983, during which she stressed the necessity of having a nurse in each school. In pointing out that two nurses could not monitor contagious illnesses, Dague made reference to a number of contagious diseases, including herpes. Although this latter part of her speech occupied about 30 seconds, the Superintendent, other members of administration and the Board took exception to her remarks concerning contagious diseases. The Superintendent asked for a report for the next Board meeting. (See Findings of Fact Nos. 24, 25 and 26).

On May 13, 1983 Superintendent Napoli sent a joint memo to Dague and her Principal, Norman K. Wilson, taking written exception to Dague's speech of May 12th. This memo concluded with a statement that if the documentation does not justify Dague's speech concerning outbreaks then it appears that she may have used poor judgment in presenting erroneous information to the public. Dague thereafter complied with Napoli's request for a contagion report to the Board but Napoli never contacted her to discuss the content of her report. In fact, Dague heard nothing from Napoli or anyone else in administration until she sent a letter to Napoli, Principal Wilson and all Board members on June 1, 1983 urging a re-evaluation of the school nurse reduction decision for the 1983-84 school year (CP-18). This triggered a telephone call from Napoli on June 2nd, who directed Dague to write to the administrators of all of the schools in Salem County to find out how they were fulfilling the State mandate with shared nurses. Dague had never been requested to do this previously (see Finding of Fact No. 29, supra).

On June 3, 1983 Dague was summoned to a meeting where she was confronted by Napoli, Wilson and the Board President, Barbara Wright. This meeting lasted about 90 minutes and the thrust of it was the anger of Napoli and Wright over Dague's having written her June 1, 1983 letter to Napoli and the members of the Board of Education (CP-18). Dague was instructed never again to communicate directly with members of the Board except through the "chain of command." Dague was told that if she continued to communicate with Board members or to speak out at any public meeting she would receive a reprimand. (See Finding of Fact No. 30, supra).

As a direct result of the June 3rd meeting, supra, Dague remained silent at a City Council meeting on June 6, 1983 and at a Board meeting on June 8th. However, deciding to "stand up and be counted," Dague spoke out publicly at a rally in support of Watford on June 11, 1983. Coincidentally, on June 15, 1983, Dague received a copy of a joint memo to herself, Wilson and Wright from Napoli, which purported to be "minutes" of the meeting of June 3, 1983 (CP-19). The last paragraph of these

"minutes" stated: "A copy of these minutes shall be placed in Mrs. Dague's file" (CP-19, para. 9). Dague testified credibly, and the Hearing Examiner finds, that when these "minutes" were placed in her file the action constituted a reprimand.

Dague clearly has met the first portion of the Bridgewater-Wright Line test by having made a prima facie showing sufficient to support an inference that her protected activities were a "substantial" or a "motivating" factor in the Board's decision to reprimand her by the Superintendent having placed the "minutes" in her file (see Finding of Fact No. 32, supra). Her protected activities, gleaned from the foregoing, are summarized as follows: Dague's testimony at the hearing on December 1, 1982 in this matter; her affidavit in the "Scope" proceeding; Dague's speech of May 12, 1983 stressing the necessity of having a nurse in each school, notwithstanding the contagious disease portion, which is made at the end thereof; Dague's June 1, 1983 letter to the administration and all Board members urging a re-evaluation of the school nurse reduction decision; and her public speech at a rally for Watford on June 11, 1983.

Both City of Hackensack and Commercial Township, supra, deal with the issue of a public employee departing from the "chain of command" in communicating with the public employer. The Hearing Examiner has credited Dague's testimony that she was told at the meeting on June 3rd that she would be reprimanded if she communicated with members of the Board. This is clearly forbidden by the Commission's decision in City of Hackensack, supra, where it was held that a presentation to an elected official concerning terms and conditions of employment is a protected activity and that requiring an employee, under threat of discipline, to follow the chain of command "...constitutes, in effect, a prior restraint on free speech..." (4 NJPER at 191).[9/]

The instant Hearing Examiner cited Hackensack in his several decisions, which were affirmed by the Commission in Commercial Township, supra. Laurel Springs was

9/ See Anderson, supra, where the discipline of a teacher for writing to the school board was overturned.

also cited in Commercial Township for the proposition that a public employee has the right to speak to the Board at a public meeting. The specific facts in Commercial Township were that a public employee discussed general school concerns, not involving confidential information, with a candidate for election to the school board. The Hearing Examiner found that this was protected and was affirmed by the Commission.

The Court in West Windsor, supra, has made it clear that under Article I, para. 18 of the New Jersey Constitution a public employee is granted the right not only to present grievances but to seek to influence governmental decision-making in the same manner as all other citizens. This right of public employees to participate in decisions affecting their employment is not enjoyed by employees in the private sector. (See 78 N.J. at 111).

The foregoing authorities make clear that every aspect of the enumerated activities of Dague between December 1, 1982 and June 11, 1983 were protected either under the Act or the Constitution or both. The Hearing Examiner rejects as inapplicable the Respondent's citation of Black Horse Pike Regional Board of Education, P.E.R.C. No. 82-19, 7 NJPER 502 (1981) inasmuch as this Hearing Examiner is persuaded that Dague's performance as a public employee cannot be separated from her conduct as a public employee speaking out on behalf of Watford and the reduction in the number of school nurses for the 1983-84 school year. The Respondent's emphasis on the term "herpes" in Dague's public speech of May 12, 1983 is to take an isolated incident out of context and use it as an instrument to discipline her and to restrain her freedom of communication and speech. The Hearing Examiner does not accept the contention that Dague's statement regarding contagious diseases was false or that it amounted to yelling "fire" in a crowded theater: Schenck v. United States, 249 U.S. 47 (1919).

The Hearing Examiner now turns to the second part of the Bridgewater test, namely, whether the Respondent has established by a preponderance of the evidence that Dague would have been reprimanded even in the absence of her protected activities. Dague was in "hot water" with the Superintendent on May 13, 1983, following her public

speech of May 12th. Dague had spoken at the public meeting for three-five minutes, during which she stressed the necessity of having a nurse in each school building and that two nurses could not monitor contagious illnesses. The Superintendent, and ultimately others in administration and on the Baord, seized on her reference to "herpes," following which she was asked to prepare a report for the Board and to attend a meeting on June 3, 1983.

While there may have been a legitimate business justification in the Superintendent's requesting Dague to submit a report on contagious illnesses in the Salem schools, it is noted that Napoli never contacted Dague to discuss the contents of the requested report. This raises the question as to whether or not this was a good faith request on the part of Napoli, or whether it was merely a harassing tactic in retaliation against Dague's public speech of May 12, 1983. The Hearing Examiner concludes from Napoli's failure to contact Dague and discuss the report with her that his motive was to retaliate against Dague for her May 12th public speech.

After Dague had heard nothing from Napoli or anyone in administration by June 1, 1983 she sent a letter to Napoli, her Principal and all Board members urging a re-evaluation of the school nurse reduction-in-force decision. Napoli's response on June 2nd was to direct her to write to the administrators in all of the schools in Salem County to find out how they were fulfilling the State mandate with shared nurses. Such a request had never been made previously. There is nothing in the record to indicate any follow-up by Napoli on this request, which indicates to the Hearing Examiner that it was another instance of harassment of Dague by Napoli for the exercise of her protected activities. The Hearing Examiner concludes that there was no legitimate business justification established for the request by Napoli of Dague on June 2, 1983, supra.

Next for consideration is the 90-minute meeting of June 3, 1983, which was convened by Napoli and attended by Wilson, Wright and Dague. Notwithstanding that the Respondent attaches no significance to the length of the meeting, the Hearing Examiner is not so inclined. Principal Wilson could not recall a meeting

of this nature lasting so long (4 Tr. 105, 106). The Hearing Examiner has previously found as a fact that the thrust of the meeting was the anger of Napoli and Wright over Dague's having written her June 1st letter to Napoli and the members of the Board of Education (see Finding of Fact No. 30, supra). The Hearing Examiner has credited Dague's testimony that she was instructed never again to communicate directly with members of the Board of Education except through the "chain of command." Also, Dague testified credibly that she was told that if she continued to communicate with members of the Board or to speak out at public meetings she would be reprimanded.

Based on these findings and the foregoing authorities, supra, the Hearing Examiner concludes that the June 3rd meeting, given particularly its extended duration, was disciplinary in nature and was intended to restrain Dague from undertaking legitimate communication with the Board and to suppress any efforts by her to speak out at public meetings. Plainly, this was not the exercise by the Board of a legitimate personnel action.

Finally, immediately following Dague's speaking out on behalf of Watford at a public rally on June 11, 1983, the Superintendent belatedly generated "minutes" of the June 3, 1983 meeting and provided expressly in writing that a copy of the minutes was to be placed in Dague's file (see Findings of Fact Nos. 31 & 32, supra). These "minutes" constitute the threatened reprimand, which was made by Respondent's personnel at the meeting on June 3, 1983. Clearly, no legitimate business justification existed for this action of Superintendent Napoli. It is significant to note that immediately following the June 3rd meeting Dague elected to remain silent at two meetings on June 6 and June 8, 1983 in stark contrast to her modus operandi beginning on May 12, 1983.

Thus, the Hearing Examiner rejects any contention by the Respondent that it established by a preponderance of the evidence that its actions on and after May 12, 1983 would have taken place even in the absence of Dague's protected activities.

For all of the foregoing reasons the Hearing Examiner finds and concludes that the Respondent Board violated Subsections (a)(1), (3) and (4) of the Act.

THE REMEDY

There being no issue of the reinstatement of Watford or back pay herein involved, the Hearing Examiner will recommend a cease and desist order with proper posting. The Charging Party's request for the extraordinary remedy requiring that Superintendent Napoli be compelled to read the cease and desist order to all members of the collective negotiations unit is denied. This is not a J.P. Stevens situation where egregious violations of the National Labor Relations Act had occurred over many years.

Also, the Hearing Examiner does not find and conclude that the Respondent's defense to the charges of unfair practices was frivolous and made in bad faith. Accordingly, the Charging Party's request for attorneys fees and costs related to the litigation is denied. Cf. Tiidee Products, Inc., 194 NLRB No. 103, 79 LRRM 1175 (1972).

* * * *

Upon the entire record in this case the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (4) when it decided on April 14, 1983 not to offer Kathryn Watford a contract for the 1983-84 school year.

2. The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1), (3) and (4) by its actions and conduct with respect to Doris Dague on and after April 30, 1983.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to offer

Kathyryn Watford a contract for the 1983-84 school year and by its actions and conduct with respect to Doris Dague on and after April 30, 1983.

2. 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 the Act, particularly, by refusing to offer Kathyryn Watford a contract for the 1983-84 school year and by its actions and conduct with respect to Doris Dague on and after April 30, 1983.

3. Discriminating against any employee because he or she has signed or filed an affidavit, petition or complaint or given any information or testimony under the Act.

B. That the Respondent Board take the following affirmative action:

1. Forthwith remove from the personnel file of Doris Dague the document entitled "Minutes Of Meeting On June 3, 1983."

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

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

Alan R. Howe
Hearing Examiner

Dated: May 25, 1984
Trenton, New Jersey

NOTICE TO ALL 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 NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to offer Kathryn Watford a contract for the 1983-84 school year and by our actions and conduct with respect to Doris Dague on and after April 30, 1983.

WE WILL NOT discriminate in regard to hire or tenure of employment of any term or condition of employment to encourage or discourage our employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing to offer Kathryn Watford a contract for the 1983-84 school year and by our actions and conduct with respect to Doris Dague on and after April 30, 1983.

WE WILL NOT discriminate against any employee because he or she has signed or filed an affidavit, petition or complaint or given any information or testimony under the Act.

WE WILL forthwith remove from the personnel file of Doris Dague a document entitled "Minutes of June 3, 1983 Meeting."

SALEM CITY BOARD OF EDUCATION
(Public Employer)

Dated _____ By _____
(Title)

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 James Mastriani, Chairman, Public Employment Relations Commission, P.O. Box 2209, Trenton, New Jersey 08625 Telephone (609) 292-6780