

P.E.R.C. NO. 84-34

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and-

Docket No. CO-82-247-4

COUNCIL 52, AFSCME, LOCAL 1761,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that Rutgers, The State University, did not commit an unfair practice when it laid off one of its business office employees who was also a shop steward of Council 52, AFSCME, Local 1761.

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Appearances:

For the Respondent, Christine B. Mowry, Director
Office of Employee Relations

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Sanford R. Oxfeld of counsel)

DECISION AND ORDER

On March 24, 1982, Council 52 of the American Federation of State, County and Municipal Employees, Local 1761 ("Local 1761") filed an unfair practice charge with the Public Employment Relations Commission ("Commission"). The charge alleged that Rutgers, the State University ("University") had violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), specifically subsections 5.4(a)(1) and (3), ^{1/} when it laid off Lana Murray, an employee of the University's business

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 (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."

office at its Camden campus and a shop steward of Local 1761, allegedly in retaliation for the exercise of union activities protected under the Act.

On July 8, 1982, the Director of Unfair Practices issued a Complaint and Notice of Hearing. On July 16, 1982, the University filed an Answer denying any retaliation against Lana Murray for her union activities.

On September 29 and 30, and December 7, 1982, Commission Hearing Examiner Arnold H. Zudick conducted hearings at which the parties examined witnesses, presented evidence and argued orally. The parties filed post-hearing briefs.

On July 15, 1983, the Hearing Examiner issued his report and recommendations, H.E. No. 84-4, 9 NJPER ____ (¶ ____ 1983) (copy attached). The Hearing Examiner concluded that Local 1761 had not met its burden of proving that Lana Murray's protected activity was a substantial or motivating factor in her layoff. Moreover, even assuming it was, the Hearing Examiner found that the University had proved, in accordance with established case law, that Murray's position would have nevertheless been selected for layoff for legitimate business reasons and that, therefore, the layoff did not violate the Act. He recommended dismissal of the Complaint.

On July 27, 1983, Local 1761 filed Exceptions. Local 1761 asserts that Murray's layoff was inherently destructive of important employee rights, regardless of the employer's motivation; that out of approximately 118 layoffs, only two or three shop

stewards have been laid off; that no other employee has ever been laid off for economic reasons at the Camden campus; that as recently as 1981, another shop steward from Local 1761 was the subject of discrimination by an agent of the business office at the University's Camden campus; that the University's proposed solution to Murray's layoff was a "set-up", which ultimately would enable the University to build a case against Local 1761's shop stewards; and that the University could have resolved its financial difficulties without having laid Murray off.

The University has filed a brief in response to the Exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact are supported by substantial evidence and specific credibility determinations. We adopt and incorporate them here.

In East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (App. Div. 1981) ("East Orange"), the Court, following the lead of the United States Supreme Court in Mount Healthy City Bd. of Ed. v. Doyle, 419 U.S. 274 (1977) and the National Labor Relations Board in Wright Line, Inc., 251 NLRB No. 159, 105 LRRM 1169 (1980), modified 662 F2d 899, 108 LRRM 2513 (1st Cir. 1981), cert. den. 102 S. Ct. 1612 (1982), articulated the following standards for determining whether an employer's motivation makes a personnel action illegal under our statute. The charging party must first establish that his protected activity was a substantial, i.e., a motivating factor in the employer's decision to

take that personnel action. If the charging party makes this initial showing, then the employer must go forward and establish by a preponderance of the evidence that the personnel action would have occurred even in the absence of the charging party's protected activity. The fact-finder must resolve the conflicting proofs. See also In re Black Horse Pike Reg. Bd. of Ed., P.E.R.C. No. 83-73, 9 NJPER 36, 37 (¶ 14017 1982); NLRB v. Transportation Management Corp., ___ U.S. ___ 113 LRRM 2857 (1983).

Under all the circumstances of this case, we hold that the University did not violate the Act when it laid off Murray. We specifically find that Murray's layoff was not inherently destructive of employee rights. We agree with the Hearing Examiner that Local 1761 did not establish that Murray's protected activity was a substantial or motivating factor in the layoff. Further, even assuming that such activity partially motivated the layoff, the University has met its burden of proving that it would have laid off Murray even absent this activity. Accordingly, we reject Local 1761's Exceptions and dismiss the Complaint.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION


James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Butch, Hartnett, Newbaker and Suskin voted in favor of this decision. Commissioner Hipp voted against the decision. Commissioner Graves was not present.

DATED: Trenton, New Jersey
September 15, 1983
ISSUED: September 16, 1983

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

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-and-

Docket No. CO-82-247-4

COUNCIL 52, AFSCME, LOCAL 1761,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the University did not violate the New Jersey Employer-Employee Relations Act when it laid off a union steward. The Charging Party failed to prove by a preponderance of the evidence that the steward was laid off because of her union activity. The Hearing Examiner found that the steward's position was selected for layoff because of existing financial and business considerations, and that the steward was only laid off because she refused the University's offer for another position which was in the same office and pay range as her former position.

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 conclusions of law.

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Appearances:

For the Respondent
Christine B. Mowry, Director
Office of Employee Relations

For the Charging Party
Rothbard, Harris & Oxfeld, Esqs.
(Sanford R. Oxfeld, Of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on March 24, 1982, by Council 52, AFSCME, Local 1761 ("Charging Party") alleging that Rutgers, The State University ("Respondent" or "University") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). The Charging Party has alleged that the University laid off employee and shop steward, Lana Murray, because of the exercise of her union activity which was alleged to be in violation of N.J.S.A. 34:13A-5.4 (a) (1) and (3) of the Act. ^{1/}

^{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; (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."

The Charging Party also asserted that there was insufficient business justification to lay off Murray. ^{2/} However, the University denied the allegations in the Charge and argued that Murray was laid off due to a University-wide shortfall of funds which impacted on every department, and that she was laid off only because she refused an offer for another position.

It appearing that that allegations of the Unfair Practice Charge may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on July 8, 1982, and hearings were held in this matter on September 29 and 30, 1982, in New Brunswick, New Jersey, and on December 7, 1982 in Trenton, New Jersey, at which time the parties were given the opportunity to examine and cross-examine witnesses, present relevant evidence and argue orally. Both parties filed post-hearing briefs the last of which was received on February 7, 1983.

2/ The Charging Party included two additional "allegations" in its Charge. First, it alleged that the University violated Murray's contractual rights by refusing to afford her super seniority as provided for by the contract. The Charging Party indicated on the face of the Charge, however, that this aspect of the Charge was proceeding to arbitration. In fact, an arbitration award was issued concerning that allegation on August 23, 1982 (Exhibit CP-11 herein), and the arbitrator found that the University had violated the super seniority clause of the parties' collective agreement. The arbitrator did not award Murray any back pay, however, because she voluntarily declined the University's offer for another position. Since this particular allegation has been resolved by the arbitration proceeding, and since no (a)(5) violation of the Act was alleged herein, the undersigned does not believe that the super seniority issue is before the Commission, and that aspect of the Charge will not be considered herein.

Second, the Charging Party asserted that in offering Murray another job the University was attempting to place her in a situation where she and another shop steward could be set up for discipline if anything went awry.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act exists, and after hearing, and after consideration of the post-hearing briefs, 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. Rutgers, The State University is a public employer within the meaning of the Act, is the employer of the employee involved herein, and is subject to the provisions of the Act.

2. Council 52, AFSCME, Local 1761, is a public employee representative within the meaning of the Act and is subject to its provisions.

3. Lana Murray is a public employee within the meaning of the Act and has been employed by the University at the Camden Campus since 1978. She was first employed as a police dispatcher, but was transferred to the business office as a cashier in August 1979, and worked in that title until August 1980. Thereafter, Murray became a senior clerk typist in the business office which was the position she held when the instant Charge was filed. She presently holds the position of senior clerk bookkeeper in the business office. Murray became a shop steward for the Charging Party in approximately October 1980, and held that responsibility at the time the Charge was filed.

4. Dorothy Moss is also employed by the University and

is a bookkeeper in the Camden Business Office. Moss was also a shop steward for the Charging Party, and sometime prior to the filing of the instant Charge, she filed a grievance alleging harassment over the moving of her desk to a less private location. Moss was responsible for counting money and apparently felt that the new location was less secure. Her grievance was subsequently resolved without going to arbitration. The Manager of the Camden Business Office at the time of the Moss grievance, and at the time of the instant Charge was Robert Neese.

5. The incidents giving rise to the instant Charge began on October 15, 1981, when Murray verbally requested vacation leave for December 23 and 24, 1981, and January 4, 5 and 6, 1982. Ronald Sternowski, the Assistant Business Manager at that time, apparently verbally approved Murray's request on October 15 (Transcript "T" p. 20), however, by memo to Murray dated October 16, 1981 (Exhibit CP-1), he officially denied her request indicating that there was a heavy workload during the holiday period. ^{3/}

Coincidentally on that same day, October 15, the Camden Provost's Office was advised by the University's Acting Executive Vice President, Dr. Pallone, that due to a University-wide \$3 million dollar shortfall of funds, the Camden Campus was required to return

^{3/} Even though Sternowski may have verbally approved Murray's vacation request on October 15, the undersigned believes that her request was officially denied because of Neese's policy to deny vacation in the Business Office during late December and early January because that was an extremely busy time for that office. The undersigned credits Neese's explanation in that regard.

\$207,000 of its fiscal 1982 budget by November 2, 1981. Pallone required Camden to submit a budget plan by the November 2 deadline. The Camden office was advised that the money could come from its salary or non-salary budgets, but not from telephone budgets.

The following day, October 16, the Provost, and the Associate Provost, Corrine Webb, held a meeting with the managers and directors of all academic and administrative offices of the Camden Campus. All of the officers were advised of the fiscal crisis and were required to submit budget plans concerning their respective departments to Webb by October 23, 1981. The Business Office in particular was required to devise a plan to save approximately \$2300. (T. pp. 87, 89)

Thereafter, on October 19, 1981, the President of the University instituted a hiring freeze for any new positions at least until the new budget plans were approved.

On October 23, 1981, Webb received the budget plans from the Camden directors based upon which she prepared the campus-wide plan on October 30, 1981. In submitting his budget plan for the Business Office, Neese recommended the layoff of the senior clerk typist (held by Murray) for twelve weeks in order to save the required \$2305. He determined that he could not save the required money from his non-personnel budget, and that the position he could most afford to lose was the senior clerk typist position because that position did not involve the collection of money which was a priority in his office. (T. pp. 135-139). ^{4/}

4/ The undersigned credits Neese's explanation for selecting the senior clerk typist position as the position he could most afford to lay off. The uncontroverted facts show that everyone else in his department collected cash which was the priority in his office. Since the senior clerk typist did not collect cash that position was selected for layoff.

On that same day, October 23, and apparently pursuant to Neese's budget recommendation, Sternowski advised Murray by memo (Exhibit CP-2) that due to the fiscal crisis her position (emphasis added) would be placed in temporary layoff beginning November 9, 1981. The memo also advised her of her right to utilize the bumping procedures. ^{5/} But, in addition to the memo, James Gormley, Camden Personnel Director, telephoned Murray on October 23 and indicated he wanted to advise her of her options. (T. p. 185) Gormley telephoned Murray again on October 26, and arranged to meet with her on October 27, 1981.

At the October 27 meeting, Gormley advised Murray of her options including her right to bid or apply for three unfilled positions: secretary for the Economics and Psychology Departments, secretary for the Nursing Department, and, cashier in the Business

^{5/} The parties' collective agreement, Exhibit J-1, sets forth particular procedures in Article 9 with regard to layoff and bumping. The pertinent provisions of that Article with respect to the instant matter are:

Section 5)

When Rutgers decides to reduce the number of employees in any particular job title in a particular department(s) the employee(s) so affected may displace the least senior employee, who is also less senior than the affected employee, in his/her particular job title in the seniority unit, provided he/she has the requisite qualifications and abilities to perform the work available.

Section 12)

For purposes of layoff and recall, the President, three Vice Presidents, the Secretary/Treasurer, Recording Secretary, Corresponding Secretary and all recognized stewards, or an alternate steward temporarily filling the role of the steward during the absence of the steward, shall be granted top seniority in their seniority units during their terms of office, provided that they have the requisite qualifications and ability to perform the work available at the time of layoff or recall. The Union will provide the University with a list of names and geographic areas of responsibility of these persons holding the positions described as being granted top seniority and will keep the list current.

Office. ^{6/} He further advised her of her right to bump less senior employees in her job title, and that as a steward she had greater seniority than other employees (T. p. 186). Pursuant to Murray's request, Gormley put those options in writing. ^{7/}

At that same meeting Gormley gave Murray a form letter to sign (Exhibit CP-3) which required her to select A) a layoff, B) exercise her bumping rights, or C) accept termination. She was requested to return CP-3 to Gormley within 24 hours. The following day, October 28, Gormley was in the Business Office and asked Murray for CP-3, but she indicated she did not have the letter at that time.

Thereafter, on November 2, 1981, Webb submitted the Camden budget plan to Pallone, and on November 3, the budget plans were approved and the University-wide (but not necessarily any local) hiring freeze was lifted.

On November 4, Gormley again asked Murray to return CP-3 which lead to a telephone conversation between Gormley and Charging Party President, Arlene Hartley. But CP-3 was still not returned. Two days later, November 6, 1981, a Friday, and Murray's last work

^{6/} Murray had previously performed the cashier job and Neese indicated that there were no problems with her performing that job, and no problems with Murray working with Moss. (T. p. 143) Since there was no evidence to the contrary, Neese's testimony in that regard is credited.

With respect to the cashier job offered to Murray, the record shows that it would be at the same pay range as her current title. (T. p. 30).

^{7/} Murray testified that Gormley offered her the two secretary jobs on or about October 29, 1981 rather than at the October 27 meeting, and that he did not offer the cashier job until November 6. The undersigned found Gormley to be a more credible witness than Murray and adopts his recollection of the events. Murray seemed less sure of her responses, and argumentative and uncooperative in many of her responses which puts the reliability of her testimony in doubt.

day prior to layoff, Murray gave Gormley her written request (Exhibit CP-4) to bump into the secretarial position in the Economics and Psychology Departments. Gormley asked her for a sample of her stenography since the same was required for that position, but none was provided. ^{8/}

Immediately following that meeting Gormley returned a call to Webb who promptly informed him that although the hiring freeze had been lifted in general, certain vacant positions, among which were the secretary in the Economics and Psychology Departments, and the secretary in the Nursing Department, continued to be frozen in accordance with the Camden Budget Reduction Plan. Webb sent Gormley a memo to that effect the same day (Exhibit CP-7). ^{9/} Following that conversation, Gormley telephoned Murray the same day and advised her that the secretarial positions were no longer available, but that the cashier position was still available and he asked her to tell him of her choice that day. (T. p. 192)

Murray, however, did not contact Gormley again until November 9, 1981, the first day of her layoff, at which time she opted to bump into her title in any other department. Gormley identified the least senior employee in the senior clerk typist position and arranged for Murray to be interviewed for that position on November 11, 1981. ^{10/} In addition, on November 6 Murray

^{8/} The evidence shows that Gormley accepted and acted upon CP-4 even though Murray never signed and returned CP-3.

^{9/} The position of secretary in the Economics and Psychology Departments was frozen to be effective November 30 through June 30, 1982, and the position of secretary in the Nursing Department was frozen from November 13 to November 27, 1981.

^{10/} Once again, Gormley accepted and acted upon Murray's request of November 9, 1981 even though Murray had been required to state her choice by November 6, 1981.

filed a grievance (Exhibit CP-5) alleging harassment.

On November 11, Murray was interviewed for the position she wished to "bump," but no decision was reached prior to her return to work on November 23, 1981.

On November 13, the Camden Campus received a copy of a memo from the University's Vice President of Personnel setting forth the bumping procedures to be utilized during the budget crisis.

Finally, on November 19, 1981, Webb received a telephone call from Charles Coyle, Director of the University's Office of Budget and Resource Studies, concerning the proposal in the Camden Budget Reduction Plan to lay off two security guards on December 7, 1981. Coyle expressed his concern over the impact on security if the guards were laid off, and he therefore agreed to cover Camden for the \$6000 it would cost to retain the guards. At that point in the conversation Webb indicated that Camden did have an employee on layoff (Murray) and she asked Coyle to cover the \$2300 needed to bring her back to work. Coyle agreed. Immediately thereafter, Webb telephoned Gormley and told him he could call Murray back to work. (T. pp. 90-91) Gormley telephoned Murray on November 19 (Thursday) but she could not be reached. He called again on Friday, November 20, and told Murray to return to work on Monday, November 23, 1981 which she did. (T. pp. 193-194)

6. The evidence shows that the University has laid off other employees in the past including shop stewards. One shop steward at the Newark Campus was laid off in 1975 (T. p. 291); another shop steward was laid off in 1979, but she bumped -- and was interviewed for and accepted -- into another position (T. pp.

239-241); and, four employees whose salaries were in the same budget account as Murray's, were laid off prior to Murray (T. p. 280). However, Murray was the first employee laid off at the Camden Campus since approximately 1978 (T. p. 275). 11/

ANALYSIS

In its posthearing brief the Charging Party argued that it had established a prima facie case that Murray was laid off because of her union activity, and it further argued that the University had subsequently failed to establish sufficient business justification pursuant to the test created in Wright-Line Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980), and endorsed by the courts and this Commission, 12/ to overcome the prima facie showing.

The undersigned disagrees with both arguments and is convinced beyond any doubt that Murray's position (rather than herself) was selected for layoff only because of the financial emergency which existed, and because her position did not involve the collection of money. Moreover, Murray was actually laid off only because

11/ There was a considerable amount of testimony about layoffs, and about the Camden budget figures for the time period relevant to the Charge. The Charging Party was attempting to challenge Neese's budget projections, as well as whether there was sufficient money in the Business Office budget to prevent a layoff. The undersigned credits Neese's explanation of the budget and his budget projection. Murray's testimony in that area is not reliable. She was inconsistent with her testimony and appeared less certain as to the budget figures.

12/ Wright-Line was endorsed by the Commission in several cases. See In re Bd/Ed Vocational Schools in Essex County, P.E.R.C. No. 82-32, 7 NJPER 585 (¶12263 1981); In re Madison Bd/Ed, P.E.R.C. No. 82-46, 7 NJPER 669 (¶12303 1981); and, In re Bergen County--Bergen Pines Hospital, P.E.R.C. No. 82-117, 8 NJPER 360 (¶13165 1982).

The Appellate Division has also adopted the Wright-Line standards in East Orange Public Library v. Taliferro, 180 N.J. Super. 155, 7 NJPER 415 (¶12182 (App. Div. 1981)).

she refused to accept the cashier position which was offered to her, and because she failed to respond to numerous requests to exercise her bumping rights within sufficient time to permit the University to determine whether there were other positions for which she may have been qualified.

The Charging Party's argument that it established a prima facie case is apparently based upon a combination of factors including the denial of Murray's vacation request, her union steward position, and the alleged lack of financial exigencies to justify a layoff. Regarding the vacation request, however, the undersigned has already concluded that it was standard policy to deny vacation for employees in the Business Office during late December and early January because of the increased workload generated by the activities associated with the start of the spring semester. There was no showing by the Charging Party that vacation is or has been permitted during that time period, and it appears that Neese was merely acting consistent with the policy in denying Murray's request. Consequently, that factor is discounted.

The Charging Party's allegation that there were insufficient financial exigencies to justify the layoff is not supported by the record. The overwhelming weight of the evidence demonstrated ample business justification for Neese's decision in selecting Murray's position for layoff. It must be emphasized here that CP-2, the Notice of Layoff, merely notified Murray that her "position" would be placed in temporary layoff. Murray was not notified that she personally would be laid off because the University fully expected Murray to exercise her bidding or bumping

rights. Since Murray had previously held the cashier position, and since it was at the same range as her own title, Gormley urged her to accept that position. If she had, she would not have been laid off.

The Charging Party's assertion that the University was "setting her up" by offering her the cashier's position is totally without merit. There was simply no evidence to prove that the University wanted to have two stewards, Murray and Moss, handling money so that it could somehow set them up apparently for discipline or discharge. The only connection between the Moss and Murray incidents was that Neese was their supervisor. But the record herein is devoid of any evidence that Neese took action against Moss or Murray because of their union activity. Moreover, had Murray accepted the cashier position she could have filed a grievance and/or a charge if some action were taken against her. But, by refusing to accept the position, Murray was merely taking her chances regarding future employment with the University.

Furthermore, if Murray had advised Gormley on October 27, 1981 (rather than on November 9) that she wished to bump, he may have been able to arrange for a quick interview and she may have found another position prior to November 9, her first day of layoff. However, the delay in advising Gormley is totally attributable to Murray and resulted in her not even having an interview for another position until November 11, 1981.

In addition, the Charging Party's allegation that Murray was laid off because of her union activity is similarly without

merit. Although the record shows that Murray was a steward in October 1981, there was no showing that she had been active in negotiations at that time, no showing that she had been or was about to file grievances at that time, and, no showing that she was otherwise actively involved in any form of union activity at that time to which the University was allegedly reacting in selecting her position for layoff. Rather, it appears that Murray was no different than the average steward or even an average employee. It therefore seems unlikely that the University would choose to lay off Murray for union activity since there was very little union activity to speak of. Rather, the most plausible reason for selecting Murray's position for layoff was advanced by the University and was supported by financial and business considerations.

Finally, notwithstanding all of the above, even if a prima facie case had been established, the undersigned finds that, pursuant to Wright-Line, ample business justification existed to overcome the prima facie case. The University proved that Murray's position would have been selected for layoff because of financial and business reasons regardless of her union activity. Consequently, no violation of the Act occurred herein.

Accordingly, the undersigned will recommend dismissal of the Charge in its entirety.

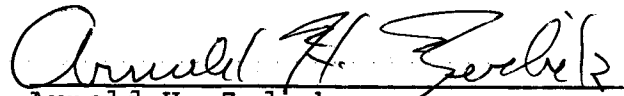
Based upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

The Respondent University did not violate N.J.S.A. 34:13A-5.4(a) (1) or (3) by laying off Lana Murray.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Complaint be dismissed in its entirety.


Arnold H. Zudick
Hearing Examiner

Dated: July 15, 1983
Trenton, New Jersey