

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and-

Docket No. CO-81-195-103

LOCAL 1761, COUNCIL 52, AFSCME,
AFL-CIO,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission adopts a recommendation of a Hearing Examiner that it dismiss a Complaint issued on an unfair practice charge which Local 1761, Council 52, AFSCME, AFL-CIO had filed against Rutgers, The State University. The charge had alleged that Rutgers violated the New Jersey Employer-Employee Relations Act when it unilaterally ordered most employees not to work on January 2, 1981, otherwise a normal work day, and required these employees either to use a vacation day or not be paid. The Commission bases its dismissal on the evidence of past practice the Hearing Examiner cited and Local 1761's pre-charge acquiescence in Rutgers' announced intention to follow this practice with respect to the January 2, 1981 closing.

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LOCAL 1761, COUNCIL 52, AFSCME,
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Charging Party.

Appearances:

For the Respondent, Carpenter, Bennett & Morrissey, Esqs.
(John J. Peirano, of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld, Esqs.
(Barry A. Aisenstock, of Counsel)

DECISION AND ORDER

On January 5, 1981, AFSCME, Council 52, AFL-CIO, Local 1761 ("Local 1761") filed an unfair practice charge against Rutgers, The State University ("Rutgers") with the Public Employment Relations Commission.^{1/} The charge alleged that Rutgers violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsection 5.4(a)(5),^{2/} when it unilaterally ordered most employees not to work on January 2, 1981, otherwise a normal work day, and required these employees either to use a vacation day or not be paid.

1/ Local 1761 represents Rutgers' clerical, office, laboratory, and technical employees.

2/ This subsection prohibits public employers, their representatives or agents from: "(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."

On February 18, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. Rutgers filed an Answer in which it averred that on June 16, 1980, it notified Local 1761 of its intention to close the University on January 2, 1981 in order to provide an extended holiday period for employees and realize fuel and energy savings. Rutgers gave its employees the option of using a vacation day, an administrative leave day, a personal day, or, if necessary, borrowing a vacation day from fiscal year 1981-1982 in order to avoid loss of pay. As separate defenses, Rutgers pleaded Local 1761's failure to demand negotiations after receiving notice of the extended closing and the statute of limitations.

On June 8 and September 21, 1981, Commission Hearing Examiner Alan R. Howe conducted hearings and afforded the parties an opportunity to examine witnesses, present evidence, and argue orally. At the hearing, Rutgers raised two additional defenses: (1) a managerial prerogative to close the university to save fuel costs, and (2) a past practice permitting Rutgers to close its facilities temporarily without paying employees unless they take a vacation day, an administrative leave day, or a personal holiday. Also, Local 1761 limited its requested relief to an order to negotiate. Both parties filed post-hearing briefs on or before November 16, 1981.

On November 20, 1981, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 82-20, 8 NJPER 8

(¶13004 1981) (copy attached). He found that Rutgers had proved its past practice defense and accordingly had not refused to negotiate in good faith. Because he recommended dismissal of the Complaint on this ground, he did not consider Rutgers' three other defenses.

On December 2, 1981, Local 1761 filed Exceptions. It challenged the Hearing Examiner's finding of a past practice, stressing that three of the four incidents cited involved emergency closings and the fourth was a limited closing for necessary maintenance. On December 16, 1981, Rutgers filed Cross-Exceptions reiterating its alternative defenses and also contending that it had offered to negotiate and that Local 1761 had not filed proper Exceptions.

In In re East Brunswick Board of Education, P.E.R.C. No. 82-76, 8 NJPER ____ (¶_____ 1982), we recently held that an employer violated subsections 5.4(a)(1) and (5) of our Act when, in connection with its decision to close school facilities for six days to save fuel costs, it unilaterally required its employees to take vacation days on those days, make up the time lost by working beyond normal hours without overtime pay on subsequent days, or receive no pay. We stated:

In the instant case, there is no intrusion whatsoever into the academic year calendar and no desire on the part of the Association to dictate when the Board shall open or close its facilities for non-academic personnel during student and teacher vacations. There are no educational policy objectives at stake, only budgetary ones. Of the budgetary considerations involved, no one disputes the Board's ability to save energy-related costs; the Board accom-

plished this purpose when it closed the schools. The dispute is only whether the employer can legally refuse to observe contractual provisions on employee compensation, vacations, and overtime. These areas are at the heart of mandatory negotiations under our Act.
(Slip opinion at pp. 9-10, footnote omitted).

Under East Brunswick, then, the question of whether or how employees will be recompensed when an employer closes its facilities to save fuel costs is a negotiable subject matter.

Nevertheless, under all the circumstances of this case, we do not believe that Rutgers violated its duty to negotiate in good faith. We base our holding on the evidence of past practice which the Hearing Examiner cited and an apparent pre-charge acquiescence in Rutgers' announced intention to follow this practice with respect to the January 2, 1981 closing.^{3/}

In 1972, Rutgers, in connection with an incident in which several employees were sent home when the air conditioning failed in the University's Physics Building, formulated and sent Local 1761 a clear cut written policy: In the event of temporary shutdowns, Rutgers would not pay for work not performed. If alternate work stations were not feasible, the employees would be

^{3/} Neither party has excepted to the Findings of Fact, besides Rutgers' contention that it did offer to negotiate. Putting aside that contention -- really a dispute over a conclusion rather than the accuracy of the underlying factual findings -- our review of the record confirms their accuracy. Accordingly, we adopt them.

sent home and not paid unless they took a vacation day or used administrative leave.

Since 1972, Rutgers has applied this policy three times in shutting down its facilities. On July 18, 1977, Rutgers sent home without pay employees in its Camden Library when the air conditioning system failed. Local 1761 filed a grievance which Rutgers denied at the third step. The grievance was not pursued further.

In August 1977, Rutgers, after giving Local 1761's president two months written notice and attaching a copy of the 1972 policy, closed the Eagleton Institute for one week so that planned repairs could be performed on the electrical distribution system and did not pay its employees for this period unless they took administrative leave or a vacation day. There was no evidence that Local 1761 grieved or otherwise contested this action.

From August 16-20, 1980, Rutgers partially closed its New Brunswick campus for routine and planned building maintenance. As a result, some employees were sent home and, in accordance with the 1972 policy, not paid unless they took a vacation day or administrative leave day. There was no evidence that Local 1761 grieved or otherwise contested this action.

On June 16, 1980, Rutgers issued the 1980-81 holiday schedule and sent a copy to the presidents of all employee organizations, including Local 1761, representing Rutgers'

employees. The schedule provided that the University would be closed Friday, January 2, 1981 and that to avoid loss of pay, employees should use a vacation day, administrative leave day, or personal holiday. When notified of this action, Local 1761 did not protest or demand negotiations. A service representative of Council 52, who assisted Local 1761, testified that his organization understood the University's fuel problem and had no objection if employees were treated equally.^{4/}

In November, 1980, the Executive Director of Council 52, on behalf of Local 1761, called Rutgers' Associate Director of Employee Relations, pointed out that January 2 was a paycheck distribution day, and asked that the employees be able to receive their checks that day. The Associate Director agreed.

Also, in November, Local 1761 learned that some of the libraries might be open January 2 and asked the Associate Director for information. She promptly responded, orally and in writing, that if exams were scheduled in a particular school in early January, its library would be open. Local 1761 then filed a grievance alleging a lockout in violation of the recognition clause, but the Associate Director denied it as untimely. Local 1761 took no further action.

Local 1761 did not request negotiations over any aspect of the January 2 closing, besides the question of paycheck distribution. Moreover, it appears that Local 1761 had no

^{4/} Local 1761 recognized at all times that certain employees - for example, security guards and telephone operators - would have to work on January 2.

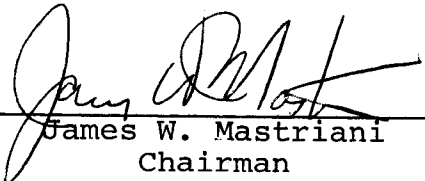
objection in general to closing the facilities and requiring employees to take a vacation day, personal day, or administrative leave if they wanted to be paid. Finally, it does not appear that Rutgers' policy on temporary shutdowns had been the subject of previous contract negotiations.

Under all these circumstances, we find Rutgers' announcement on June 16, 1980 was consistent with a policy which it had followed since 1972 and which Local 1761 had not disputed^{5/}. Based on the evidence presented, we find that Rutgers did not unilaterally change any term and condition of employment. Therefore, it did not refuse to negotiate in violation of N.J.S.A. 34:13A-5.4(a)(5).

ORDER

IT IS HEREBY ORDERED that the Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

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

DATED: Trenton, New Jersey
May 4, 1982
ISSUED: May 5, 1982

^{5/} We do not accept, under the facts of this case, Local 1761's purported distinction between planned and emergency closings. The crucial fact is that Rutgers had a consistently applied policy of not paying its employees when, for whatever reasons, it closed its facilities temporarily.

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

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RUTGERS, THE STATE UNIVERSITY,

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Docket No. CO-81-195-103

LOCAL 1761, COUNCIL 52, AFSCME, AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent did not violate Subsection 5.4(a)(5) of the New Jersey Employer-Employee Relations Act when it unilaterally decided to close the University on January 2, 1981 and required employees who were not scheduled to work on that day to utilize a vacation day, an administrative leave day or a personal holiday in order to receive pay for the day. The Respondent established that there existed a longstanding policy or practice, which dated back to at least 1972, that employees who were not scheduled to work in cases of a temporary shut-down of a University facility due to extreme heat or cold, power failure, repairs, etc, to utilize a vacation day, an administrative day or a personal holiday in order to be paid. The University's stated reason for closing on January 2, 1981 was to conserve fuel and not having to open on the Friday following the Thursday, January 1, 1981 holiday. The Charging Party failed to prove by a preponderance of the evidence that there had been any change or modification in an existing working condition by the University's action on January 2, 1981.

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 Rutgers, The State University
Carpenter, Bennett & Morrissey, Esqs.
(John J. Peirano, Esq.)

For the Charging Party
Rothbard, Harris & Oxfeld, Esqs.
(Barry A. Aisenstock, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on January 5, 1981 by Local 1761, Council 52, AFSCME, AFL-CIO (hereinafter the "Charging Party" or "Local 1761") alleging that Rutgers, The State University (hereinafter the "Respondent" or "Rutgers") 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 unilaterally ordered most unit employees not to work on January 2, 1981, ordinarily a normal work day, and required that said employees use a vacation day, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(5) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of

^{1/} This Subsection prohibits public employers, their representative or agents from:
"(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."

Hearing was issued on February 18, 1981. Pursuant to the Complaint and Notice of Hearing, hearings were held on June 8 and September 11, 1981^{2/} in Newark, 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 November 16, 1981.

An Unfair Practice Charge 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 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, as amended, and is subject to its provisions.
2. Local 1761, Council 52, AFSCME, AFL-CIO is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. The most recent collective negotiations agreement between the parties was effective during the term July 1, 1979 through June 30, 1981 (J-1).
4. Article 11 - "Holidays" provides, in pertinent part, as follows:
 - "1. The regular paid holidays observed by Rutgers are: New Year's Day, Martin Luther King's Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Thanksgiving Day, and Christmas Day. When any of the above holidays falls on a Sunday, the following Monday is observed in lieu of the holiday.

"In addition, Rutgers shall observe as holidays either one full holiday or two half holidays during Christmas Season, three (3) other holidays to be annually determined by Rutgers, and one holiday to be selected by the individual employee..." (J-1, p. 12).

^{2/} The delay in scheduling the initial hearing date was due to a change of counsel by Rutgers. The matter was originally listed for a second day of hearing on July 10, 1981 but was cancelled due to the illness of the Hearing Examiner. The first mutually agreeable date thereafter was September 11.

5. Article 37 - "University Procedures" provides as follows:

"Rutgers and the Union agree that employees shall be entitled to enjoy, and shall be subject to, all terms and conditions of employment applicable to the bargaining unit provided for in the University Regulations, Procedures, and Forms Usage Manual and not provided for herein. During the life of the Agreement, any change in the University Regulations, Procedures, and Forms Usage Manual affecting terms and conditions of employment of members of the bargaining unit shall be negotiated." (J-1, p. 25).

6. Under date of June 16, 1980 the Director of Employee Relations of Rutgers sent to the President of Local 1761 the holiday schedule for Rutgers for the fiscal year 1980-81, commencing July 1, 1980 (CP-1, CP-2). Both the covering letter (CP-1) and the holiday schedule (CP-2) made reference to the closing of the University on Friday, January 2, 1981 for the purpose of providing "...an extended holiday period for staff employees and to realize essential fuel and energy savings..." Employees were advised that in order to avoid loss of pay for the day they should plan to utilize "...a vacation day, administrative leave day or personal holiday..." (CP-2). Identical notices were sent to the Presidents of all other collective negotiations units at or about the same time in June 1980 (R-1 to R-5).

7. Upon receipt of CP-1 and CP-2, supra, the President of Local 1761, John Waiblinger, brought the matter to the attention of Richard Gollin, a representative of Council 52, AFSCME, but Gollin did nothing until November 25, 1980 when he sent a letter to Christine B. Mowry, who was then the Associate Director of Employee Relations for Rutgers (CP-3). In this letter Gollin stated that it had come to his attention that Rutgers "...may be closing its facilities, on a selective basis, on January 2, 1981..." and he requested that she look into the matter and advise him. Mowry replied to Gollin both verbally and in writing on or about December 2, 1980, first, stating verbally that some of Rutgers libraries would be open on January 2, 1980 and, second, sending a letter to Gollin dated December 2, 1980 (CP-4), in which she enclosed the June 16, 1980 letter (CP-1), the holiday schedule (CP-2) and also a November 18, 1980 letter from the Payroll Department, which set forth the mechanics for a special pay check distribution on January 2, 1981 (R-6).

8. At no time prior to January 2, 1981 did the Charging Party request negotiations with the Respondent regarding the provision in the holiday schedule for the closing of the University on January 2, 1981, nor did Rutgers offer to negotiate the matter with the Charging Party at any time.

9. Local 1761 filed a grievance under the collective negotiations agreement (J-1) on December 9, 1980 alleging that the unilateral closing on January 2, 1981 would constitute a lock-out in violation of Article 2 - "Recognition." This grievance was denied by Mowry on December 16, 1980, stating that the grievance was untimely in view of the notification to Local 1761 in June, 1980 (R-7). Arbitration was not pursued.

10. There are approximately 1875 employees in the unit represented by Local 1761. Among these employees there are several job classifications scheduled on a 365-day basis such as Clerk-Dispatchers, Telephone Operators and Laboratory employees.

11. On January 2, 1981 approximately 100 unit employees worked either in the libraries or performing various clerical functions such as payroll. The employees that worked were paid and did not have to take a vacation day, an administrative leave day or a personal holiday. The remainder of the unit employees who did not work were not paid unless they had taken a vacation day, an administrative leave day or a personal holiday. No unit employee has claimed a loss of pay for the day.

12. As precedent for closing the University on January 2, 1981 and not paying employees who did not work, Rutgers offered convincing documentary evidence of a policy or practice dating back at least to 1972 (R-8 to R-13). This policy or practice dictates that in the case of a temporary shut-down of a University facility due to extreme heat or cold, power failure, repairs, etc. employees for whom alternate work cannot be obtained at another location in the University are sent home and are not paid for time not worked in the absence of taking a vacation day, an administrative leave day or a personal holiday. The instances of application of this policy or practice and the response of Local 1761 is as follows:

- a. In the Summer of 1972 there was an air conditioning failure in the University Physics Building, as a result of which several employees in the unit represented by Local 1761 were sent home and not paid for the rest of the day in the absence of using a vacation day or an administrative leave day. Local 1761 filed a grievance on behalf of four employees, which was denied at the fourth step on December 13, 1972 based upon the University's policy on payment of employees in cases of temporary shut-downs as set forth therein (R-8, R-12, R-13; 2 Tr. 21-23). Local 1761 did not pursue the matter to arbitration.
- b. On July 18, 1977 the Camden Library of the University was shut-down in the afternoon due to the failure of the air conditioning system and certain employees represented by Local 1761 were sent home without pay for the balance of the day. A grievance was filed on behalf of four employees under the date of December 9, 1977, which was denied by the Respondent at step three and was not pursued further by Local 1761 (R-9; 2 Tr. 26, 27).
- c. In August 1977 the University closed the Eagleton Institute from August 15 to August 19 in order that work might be done on the electrical distribution system. Employees who did not work during this period were not paid in the absence of taking a vacation day or an administrative leave day for the days involved. A letter, to which was attached a copy of R-8, supra, was sent by the University to Local 1761 and the matter was not pursued further by Local 1761 (R-10; 2 Tr. 27-29).
- d. During August 1980 the Respondent's New Brunswick Campus was partially closed or was operated at a reduced level for routine maintenance, as a result of which certain employees in the unit represented by Local 1761 were sent home and not paid in the absence of taking a vacation or administrative leave day. Those employees who did work received their

regular pay. There was no evidence adduced that Local 1761 grieved this matter (R-11; 2 Tr. 30-33, 37).

THE ISSUE ^{3/}

Was the Respondent's decision to close the University on January 2, 1981 consistent with past practice and therefore not a unilateral change in a term and condition of employment in violation of Subsection(a)(5) of the Act?

DISCUSSION AND ANALYSIS

The Respondent's Decision To Close The University On January 2, 1981 Was Consistent With Past Practice And Was Not Therefore A Unilateral Change In A Term And Condition Of Employment In Violation Of Subsection(a)(5) Of The Act.

The Hearing Examiner finds and concludes that the Respondent did not violate Subsection(a)(5) of the Act by its decision to close the University on January 2, 1981 since the decision was consistent with past practice dating to at least 1972 and was therefore not a unilateral change in a term and condition of employment.

The past practice findings of the Hearing Examiner are found in Finding Of Fact No. 12, supra. Suffice it to say that in at least four instances since 1972 there have been instances where the Respondent has, under emergency or other conditions, closed a facility of the University and required employees, for whom the University could not schedule work, to utilize a vacation day, an administrative leave day or personal holiday and, failing that, to receive no pay for the day or days. The Hearing Examiner takes especial note of the fact that Local 1761 has never pursued any of the denied grievances to arbitration in an effort to reach a contrary result.

3/ Although four legal issues are raised by the Respondent, including past practice, management prerogative, waiver and timeliness, the Hearing Examiner elects to decide the instant case on past practice alone without reaching the other issues. The Hearing Examiner is satisfied that the record and the Findings of Fact, supra, are sufficient for resolution of all issues in the event that the Commission is of a contrary view.

It is also noted that there is nothing in the parties' collective negotiations agreement (J-1), which bears upon the problem presented herein, i.e., the past practice, supra. The "University Procedures" referred to in Article 37 of the agreement, particularly the language in that Article requiring negotiations over changes in University regulations, procedures and forms, is not involved since we are concerned here with a policy or practice not set forth in formal written procedures.

The Respondent has cited in its Brief (pp. 10-16) the pertinent decisions of the Commission on past practice vis-a-vis a term and condition. For example, in Watchung Borough, P.E.R.C. 81-88, 7 NJPER 94 (1981) the Commission dismissed a charge of unfair practices, which alleged that the Borough's unilateral decision not to provide holiday pay to police officers on disability leave constituted an unlawful refusal to negotiate. The Commission noted the Borough's consistent adherence to a single policy, which denied holiday benefits to disabled police officers. Clearly, that case stands for the proposition that a past practice, which defines terms and conditions of employment, is entitled to the same status as a term and condition of employment defined by statute or by the provisions of a collective negotiations agreement.

The Respondent correctly cites the decision of Township of Jackson, P.E.R.C. 81-76, 7 NJPER 31 (1980) for the proposition that where a collective negotiations agreement is silent or ambiguous on the issue at hand past practice alone becomes dispositive. See also South River Board of Education, P.E.R.C. No. 81-108, 7 NJPER 156 (1980) where the public employer was found to have violated Subsection(a)(5) of the Act by unilaterally curtailing employee-requested leave in the face of a sufficiently consistent and longstanding past practice to the contrary.

Most recently the Commission in Barrington Board of Education, P.E.R.C. No. 81-122, 7 NJPER 240 (1981) dismissed an Unfair Practice Charge where regular teachers had traditionally staffed a school camping trip on a volunteer basis. When the teachers requested compensation for this activity in 1980 the Board unilaterally ordered the teachers to participate in the camping trip without additional compen-

sation. This action of the Board was absolved by the Commission as being consistent with the past practice of no compensation being paid. Indeed, the Commission noted that it was the teachers and not the Board, who were attempting to alter the status quo.

So, too, is Local 1761 attempting to alter the status quo herein by pursuing the instant Unfair Practice Charge.

Finally, the Hearing Examiner notes that the Respondent is required to negotiate only changes or "...modifications of existing rules governing working conditions... before they are established..." (N.J.S.A. 34:13A-5.3). Here the Charging Party has failed to prove by a preponderance of the evidence that there was any change or modification in working conditions. See Town of Kearny, P.E.R.C. No. 81-34, 6 NJPER 446 (1980).

Based upon the foregoing recital of facts concerning the adoption and consistent following of a policy or practice on payment to employees for whom no work is available, the Hearing Examiner must recommend dismissal of the instant Unfair Practice Charge that the Respondent violated Subsection(a)(5) of the Act when it unilaterally decided to close the University on January 2, 1981 and required employees to utilize a vacation day, an administrative leave day or a personal holiday in order to be paid for the day.

* * * *

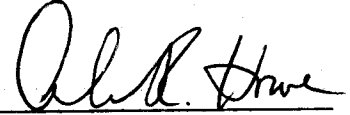
Upon the foregoing, and upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSION OF LAW

The Respondent did not violate N.J.S.A. 34:13A-5.4(a)(5) when it unilaterally decided to close its University facilities on January 2, 1981 and to require employees not scheduled to work to utilize a vacation day, an administrative leave day or a personal holiday in order to be compensated for the day.

RECOMMENDED ORDER

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



Alan R. Howe
Hearing Examiner

Dated: November 20, 1981
Trenton, New Jersey