

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

TOWNSHIP OF EAST BRUNSWICK,

Respondent,

-and-

Docket No. CO-82-21-71

EAST BRUNSWICK PBA LOCAL 145
and PATROLMAN JAMES SULLIVAN,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the Commission and in the absence of Exceptions, adopts a Hearing Examiner's report and recommendations. The Hearing Examiner found that the Township of East Brunswick had violated the New Jersey Employer-Employee Relations Act, specifically subsections 5.4(a)(1) and (3), when it denied an employee union representation during an interview in which he reasonably anticipated that discipline could result and when it disciplined that employee for refusing to participate in that interview in the absence of union representation.

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EAST BRUNSWICK PBA LOCAL 145
and PATROLMAN JAMES SULLIVAN,

Charging Party.

Appearances:

For the Respondent, Busch and Busch, Esqs.
(Bertram E. Busch, of Counsel)

For the Charging Party, Rothbard, Harris & Oxfeld,
Esqs. (Nancy Iris Oxfeld, of Counsel)

DECISION AND ORDER

On July 30, 1981, the East Brunswick PBA, Local 145 (the "PBA") and Patrolman James Sullivan filed an unfair practice charge against the Township of East Brunswick (the "Township") with the Public Employment Relations Commission. The charge alleged that the Township violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1), (3) and (5), ^{1/} when it denied Sullivan PBA representation at a conference which might have led

^{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; 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."

to disciplinary action and when it suspended Sullivan for five days for refusing to participate in that conference in the absence of PBA representation.

On January 29, 1982, the Director of Unfair Practices, determining that the allegations of the charge, if true, might constitute an unfair practice within the meaning of the Act, issued a Complaint and Notice of Hearing. The Township filed an Answer in which it asserted that it was entitled to conduct a confidential, internal investigation without interference and that Sullivan's insistence on PBA representation violated the rights of management.

An evidentiary hearing was held on April 30, 1982 before Commission Hearing Examiner Alan R. Howe. Both parties were afforded the opportunity to examine witnesses, present evidence, and argue orally.

On June 11, 1982, the Hearing Examiner issued a report and recommendations, H.E. No. 82-114, 8 NJPER ____ (¶ ____ 1982). He concluded that the Township violated subsections 5.4(a)(1) and (3) of the Act when it denied Sullivan PBA representation at a meeting where Sullivan reasonably expected that discipline might result. The Hearing Examiner also concluded that the Township did not violate subsection 5.4(a)(5).

The Hearing Examiner served a copy of his report on all parties and notified them that Exceptions, if any, were due on or before June 24, 1982. No Exceptions were filed.

I have reviewed the record. Based on this review, and in the absence of Exceptions, I agree with the Hearing Examiner

that the Township violated subsections 514(a)(1) and (3) in denying Sullivan union representation during an interview in which he reasonably anticipated that disciplinary measures could result and in disciplining Sullivan for refusing to participate in that interview in the absence of union representation.^{2/}

Acting pursuant to authority delegated to me by the Commission, I adopt the Hearing Examiner's decision and recommended order.

ORDER

IT IS ORDERED that Respondent Township of East Brunswick:

A. Cease and desist from

1. Interfering, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing employees' requests, such as that of Patrolman James Sullivan, for PBA representation at meetings where an employee reasonably anticipates that discipline may result.

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 employees' requests, such as that of Patrolman James Sullivan, for PBA representation at meetings where an employee reasonably anticipates that discipline may result.

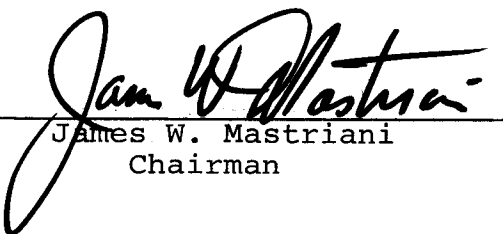
^{2/} The right to union representation during disciplinary interviews is well established. See Weingarten v. U.S., 420 U.S. 257, 88 LRRM 2681 (1975); East Brunswick Board of Education, P.E.R.C. No. 80-31, 5 NJPER 398 (¶10206 1979); Camden County Vocational Technical School, P.E.R.C. No. 82-16, 7 NJPER 466 (¶12206 1981); and County of Cape May, P.E.R.C. No. 82-2, 7 NJPER 432 (¶12192 1981).

B. Take the following affirmative action:

1. Forthwith rescind the five-day suspension of Patrolman James Sullivan, expunge any reference to said suspension from Sullivan's personnel file, and make Sullivan whole for five days' lost earnings together with interest at the rate of 12% per annum from July 16, 1981.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked "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 a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent Township 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 Township has taken to comply herewith.


James W. Mastriani
Chairman

DATED: Trenton, New Jersey
August 6, 1982

"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, restrain or coerce employees in the exercise of the rights guaranteed to them by the Act, particularly by refusing employees' requests, such as that of Patrolman James Sullivan, for PBA representation at meetings where an employee reasonably anticipates that discipline may result.

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, particularly by refusing employees' requests, such as that of Patrolman James Sullivan, for PBA representation at meetings where an employee reasonably anticipates that discipline may result.

WE WILL forthwith rescind the five-day suspension of Patrolman James Sullivan, expunge any reference to said suspension from Sullivan's personnel file, and make Sullivan whole for five days' lost earnings together with interest at the rate of 12% per annum from July 16, 1981.

TOWNSHIP OF EAST BRUNSWICK
(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.

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

In the Matter of

TOWNSHIP OF EAST BRUNSWICK,

Respondent,

-and-

Docket No. CO-82-21-71

EAST BRUNSWICK PBA, LOCAL 145 &
PATROLMAN JAMES SULLIVAN,

Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent Township violated Subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act when its agent, Captain James E. Newmeyer, on December 4, 1980 refused the request of Patrolman James Sullivan for representation by a PBA representative at a meeting where Sullivan reasonably anticipated that discipline might result. The Hearing Examiner relied as precedent on the Commission's decision in East Brunswick Board of Education, P.E.R.C. No. 80-31, 5 NJPER 398 (1979) where the Commission adopted the Federal precedent of N.L.R.B. v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975).

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.

STATE OF NEW JERSEY
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Appearances:

For the Township of East Brunswick
Busch & Busch, Esqs.
(Bertram E. Busch, Esq.)

For the Charging Party
Rothbard, Harris & Oxfeld, Esqs.
(Nancy Iris Oxfeld, Esq.)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (hereinafter the "Commission") on July 30, 1981 by the East Brunswick PBA, Local 145 and Patrolman James Sullivan (hereinafter the "Charging Party" or the "PBA") alleging that the Township of East Brunswick (hereinafter the "Respondent" or the "Township") 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 on December 4, 1980 Patrolman James Sullivan was informed that Captain James Newmeyer wanted a conference with Sullivan and, when Sullivan arrived with a PBA representative, Newmeyer stated that the representative could not be present and, notwithstanding that Newmeyer indicated that the interview might or might not lead to discipline, Newmeyer refused Sullivan's request for a PBA representative to be present, which request by Sullivan was twice refused by Newmeyer and, following a departmental hearing, Sullivan was suspended for five days, all of which is alleged to be a violation

of N.J.S.A. 34:13A-5.4(a)(1), (3) and (5) of the Act.^{1/}

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within of the Act, a Complaint and Notice of Hearing was issued on January 29, 1982. Pursuant to the Complaint and Notice of Hearing, a hearing was held on April 30, 1982 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Counsel for the Respondent argued orally and the parties filed post-hearing briefs by June 4, 1982.

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violation of the Act, as amended, exists and, after hearing, and after consideration of the oral argument of the Respondent and 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 Township of East Brunswick is a public employer within the meaning of the Act, as amended, and is subject to its provisions.
2. The East Brunswick PBA, Local 145 is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.
3. Patrolman James Sullivan is a public employee within the meaning of the Act, as amended, and is subject to its provisions.
4. On November 16, 1980 a citizen, Tom Williams, called the East Brunswick Township Police Department with a problem involving a need for assistance for

^{1/} These Subsections prohibit public employers, their representatives or agents from:

"(1) Interfering with, restraining or coercing employees in the exercise or 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.

"(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."

Williams' son and Patrolman James Sullivan received the telephone call. A transcript of the telephone conversation was received in evidence as CP-2. An examination of the transcript indicates that Sullivan was less than responsive to Williams' request for assistance.

5. On November 17, 1980 Director Frank J. Pasch sent a memorandum to Captain Robert E. Floy, which stated that Mary Williams came to Pasch's office and complained about the action of Sullivan on November 16, when her husband, Tom Williams, called Headquarters for assistance (CP-1).

6. Captain Floy directed Captain James E. Newmeyer to investigate the complaint of Mary Williams (CP-6, pp. 17, 18).

7. On December 4, 1980 Sullivan, at the request of Newmeyer, appeared at Newmeyer's office with Patrolman Byron Kath, a PBA representative, for the purpose of having someone "...to bear witness to any conversation that would take place" (CP-6, p. 36).

8. Newmeyer questioned Kath as to the need for his presence and, when Kath stated that he was the PBA representative, Newmeyer responded that "There will be no one sitting in with me with Officer Sullivan... in reference to a complaint that I received" (CP-6, pp. 21; 37, 56).

9. Sullivan asked Newmeyer if an investigation was taking place and, when Newmeyer replied that he "...was looking into a matter," Sullivan again requested that Kath be permitted to be present (CP-6, pp. 37, 56). Newmeyer refused Sullivan's repeated requests and stated that if Sullivan did not talk to him he would turn the matter over to the Prosecutor's Office (CP-6, p. 38). Sullivan then asked Newmeyer if charges were pending or could be pending from the investigation, to which Newmeyer replied "There could be" (CP-6, p. 56).

10. Sullivan finally offered to meet with Newmeyer alone to determine the substance of the charges against him. Newmeyer played the tape of the telephone conversation between Williams and Sullivan of November 16, 1980 (CP-2). Sullivan again stated to Newmeyer that he wanted to have a PBA representative present if

the matter was to be discussed further. Sullivan again asked if "...this was an investigation that was going to result or would result in disciplinary charges," to which Newmeyer responded either "It may be" or "could be" (CP-6, p. 40). Sullivan then stated that he would not discuss the matter further unless he was allowed to have a representative present, at which point Newmeyer dismissed him from the meeting.

11. Later that same evening, December 4, 1980, Newmeyer again ordered Sullivan to meet with him in his office. Essentially the same sequence of events occurred with Sullivan stating that he would only discuss the matter with Newmeyer if he could have a PBA representative present. When the request was again refused Sullivan left Newmeyer's office without discussing the matter with him.

12. Newmeyer was equivocal as to what he said to Sullivan at the two meetings on December 4, 1980 regarding whether or not discipline would ensue. On the one hand, Newmeyer said "...I didn't know what the end result of my interview was going to end up with" (CP-6, p. 28) and, at another point, Newmeyer acknowledged that the interview would determine the course of action to be taken, stating "The end result of the investigation may -- would determine what action I might have taken, yes" (CP-6, p. 30).

13. On December 15, 1980 Newmeyer sent to Director Pasch three departmental charges, the material one to the instant case being a violation of Rule and Regulation 142,^{2/} which alleged that on December 4, 1980 Sullivan, when directed to explain his actions relative to the handling of a citizen's complaint while on communications, did refuse to fully discuss same with Newmeyer (CP-3).

14. Sullivan was sent a copy of the departmental charges on December 23, 1980

^{2/} Rule and Regulation 142 provides that: "A Patrolman shall, when notified by a Superior Officer of any dereliction or neglect of duty, immediately explain the facts to such superior officer. If thereupon ordered to submit a written report to the Chief of Police, the Patrolman will so comply, leaving said report with Desk Officer." (CP-5).

and advised that a hearing would be held on January 12, 1981. (CP-3). A hearing was ultimately held on March 25, 1981 and a transcript of the proceedings was introduced in evidence as CP-6, supra.

15. Sullivan was found guilty of the departmental charge material hereto and was suspended for five days without pay by Director Pasch.

THE ISSUE

Did the Respondent Township Violate Subsections(a)(1) and (3) of the Act^{3/} by the conduct of Captain James E. Newmeyer on December 4, 1980 when he refused Patrolman James Sullivan's requests for union representation?

DISCUSSION AND ANALYSIS

The Respondent Township Violated Subsections(a)(1) And (3) Of The Act By The Conduct Of Captain Newmeyer On December 4, 1980

The Hearing Examiner finds and concludes that the Respondent Township violated Subsections(a)(1) and (3) of the Act by the action of Captain James E. Newmeyer on December 4, 1980 when he requested Patrolman James Sullivan to appear at his office and then denied Sullivan's several requests for the presence of a PBA representative. The record supports the conclusion that Sullivan reasonably believed that his meeting with Newmeyer might result in disciplinary action against Sullivan.

The case of N.L.R.B. v. Weingarten, Inc., 420 U.S. 251, 88 LRRM 2689 (1975) was decided under the National Labor Relations Act and held that an employee is entitled to the presence of his union representative at an interview, which the employee reasonably believes may result in his being disciplined. Since the New Jersey Supreme Court has twice held that the Commission may look to the federal model for

^{3/} There is nothing in the record that would support a finding of a violation of Subsection(a)(5) of the Act and, accordingly, the Hearing Examiner will recommend dismissal of this allegation.

guidance in the public sector in New Jersey,^{4/} the Commission as early as 1978 commenced relying upon Weingarten in deciding the issue of the right of public employees to representation by union representatives at investigatory and/or disciplinary meetings: Clinton Township Board of Education, P.E.R.C. No. 78-45, 4 NJPER 78 (1978) and North Warren Regional Board of Education, P.E.R.C. No. 79-9, 4 NJPER 417 (1978). In each of these cases the Commission adopted the recommendations of its Hearing Examiners.

The Commission first clearly relied on Weingarten in the case of East Brunswick Board of Education, P.E.R.C. No 80-31, 5 NJPER 398 (1979) where it found a violation of Subsection(a)(1) of the Act in the case of the denial of an employee's request for representation at an investigatory interview. On appeal the Commission was reversed on the facts of the case, but not on the adoption of Weingarten as the applicable law in the public sector: App. Div. Docket No. A-280-79 (1980).

Since East Brunswick the Commission has twice found violations of Weingarten in Camden County Vocational Technical School, P.E.R.C. No. 82-16, 7 NJPER 466 (1981) and Cape May County, P.E.R.C. No. 82-2, 7 NJPER 432 (1981).

In Camden County the Commission found that the denial of union representation where the employee had reason to believe discipline would result is an independent violation of Subsection(a)(1) of the Act. In that case there was no disciplinary suspension involved.

In Cape May County a five-day suspension resulted when an employee stated that he would not attend an interview without union representation and the Commission held that this was a violation of Subsections(a)(1) and (3) of the Act. Interestingly, the Commission ordered that the suspension be rescinded and reference to it removed from the employee's personnel file and, additionally, that the employee be made whole with interest.

^{4/} Lullo v. Int'l. Ass'n. of Firefighters, 55 N.J. 409, 424 (1970) and Galloway Twp. Bd. of Ed. v. Galloway Twp. Ass'n. of Ed. Secs., 78 N.J. 1,9 (1978).

Thus, with Weingarten firmly entrenched in Commission precedent the only area of inquiry required of the Hearing Examiner is whether or not Sullivan had reason to believe that discipline might result from his two meetings with Newmeyer on December 4, 1980.

While 18 days had elapsed between the date that Sullivan spoke to Tom Williams on the telephone and Newmeyer's summoning of Sullivan into his office, the conduct of Newmeyer on December 4, 1980 clearly led Sullivan reasonably to believe that he was in apprehension of discipline. First, Newmeyer early made reference to a "complaint that I had received" (Finding of Fact No. 8, supra). Further, when Sullivan asked Newmeyer if charges were pending or could be pending from the investigation, Newmeyer replied that "There could be" (Finding of Fact No. 9, supra). Finally, when Sullivan finally agreed to meet with Newmeyer alone, Newmeyer played the tape of the telephone conversation between Williams and Sullivan of November 16 and, immediately thereafter, Sullivan again requested PBA representation (Finding of Fact No. 10, supra).

It is further noted that Newmeyer was equivocal as to what he said to Sullivan during the two meetings on December 4, 1980. The more convincing statement made that day by Newmeyer was that the "...end result of the investigation may -- would determine what action I might have taken..." (Finding of Fact No. 12, supra).

There is, of course, no way of knowing what, if anything, Sullivan might have stated to Newmeyer on the merits of the investigation even with a union representative present. The Hearing Examiner need not speculate on what might have transpired with a union representative present since union representation was denied by Newmeyer on several occasions on December 4, 1980.

Thus, the Hearing Examiner has no hesitation in concluding that Sullivan was in reasonable apprehension of discipline on December 4, 1980 in his several meetings with Newmeyer. Accordingly, Newmeyer's refusal on each occasion to permit Sullivan to have PBA representation was a clear violation of Weingarten and the

Commission precedent cited above. An appropriate remedy will be recommended hereinafter.

* * * *

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

CONCLUSIONS OF LAW

1. The Respondent Township violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when Captain James E. Newmeyer refused Patrolman James Sullivan's several requests on December 4, 1980 for PBA representation when Sullivan had reason to believe that the meetings with Newmeyer might result in discipline.

2. The Respondent Township did not violate N.J.S.A. 34:13A-5.4(a)(5) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Township cease and desist from

1. Interfering, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly, by refusing employees' requests, such as that of Patrolman James Sullivan, for representation by a PBA representative at meetings where an employee reasonably anticipates that discipline may result.

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 employees' requests, such as that of Patrolman James Sullivan, for representation by a PBA representative at meetings where an employee reasonably anticipates that discipline may result.

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

1. Forthwith rescind the five-day suspension of Patrolman James Sullivan

and, further, expunge any reference to said suspension from Sullivan's personnel file and, finally, make Sullivan whole for five days' lost earnings together with interest at the rate of 12% per annum from July 16, 1981.

2. Post in all places where notices to employees are customarily posted, copies of the attached notice marked 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 a period of at least sixty (60) consecutive days thereafter. Reasonable steps shall be taken by the Respondent Township 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 Township has taken to comply herewith.

C. That the allegations that the Respondent Township violated N.J.S.A. 34:13A-5.4(a)(5) be dismissed in their entirety.



Alan R. Howe
Hearing Examiner

Dated: June 11, 1982
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 employees' requests, such as that of Patrolman James Sullivan, for representation by a PBA representative at meetings where an employee reasonably anticipates that discipline may result.

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, particularly, by refusing employees' requests, such as that of Patrolman James Sullivan, for representation by a PBA representative at meetings where an employee reasonably anticipates that discipline may result.

WE WILL forthwith rescind the five-day suspension of Patrolman James Sullivan and, further, expunge any reference to said suspension from Sullivan's personnel file and, finally, make Sullivan whole for five days' lost earnings together with interest at the rate of 12% per annum from July 16, 1981.

TOWNSHIP OF EAST BRUNSWICK

(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