

P.E.R.C. NO. 87-33

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ATLANTIC COMMUNITY COLLEGE,

Respondent,

-and-

Docket No. CO-85-258-174

CULINARY ARTS FACULTY OF
ATLANTIC COMMUNITY COLLEGE/NJEA,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission finds that the Atlantic Community College violated the New Jersey Employer-Employee Relations Act when it promised an employee, Gaetano Miracapilli, a benefit -- possible reemployment -- if he voted against union representation because it interfered with a vote in a representation election. The Commission further holds, however, that the College did not violate the Act when it refused to reemploy Miracapilli because that decision was based on his poor job performance.

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Charging Party.

Appearances:

For the Respondent, Capehart & Scatchard, P.A.
(Bruce L. Harrison, of Counsel)

For the Charging Party, Sterns, Herbert & Weinroth, Esqs.
(Mark D. Schorr, of Counsel)

DECISION AND ORDER

On April 4 and May 24, 1985, the Culinary Arts Faculty of Atlantic Community College/NJEA ("Association") filed an unfair practice charge and amended charge, respectively, against the Atlantic Community College Board of Trustees ("College"). The charge, as amended, alleges the College violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1),(2),(3) and (7),^{1/} when (1) it

^{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; (2) Dominating or interfering with the formation, existence or administration of

refused to reemploy Gaetano Minacapilli for the 1985-1986 academic year in retaliation against his protected activity; (2) its Director of Culinary Arts Faculty, Montie Ciarlo, told Minacapilli that if he voted no in the union representation election he would be reconsidered for employment; (3) its supervisor criticized Ron Lavallee, Association president; and (4) Ciarlo asked employees to vote against the Association in the union representation election.

On June 26, 1985, a Complaint and Notice of Hearing issued. On July 15, 1985, the College filed its Answer. The College admits that Minacapilli was not reappointed and that it criticized Lavallee. It contends, however, that these actions were taken due to Minacapilli's and Lavallee's poor job performance; not because of their protected activity. It denies the remaining allegations contained in the Complaint.

On October 17, 1985 and February 10, 1986 Hearing Examiner Arnold H. Zudick conducted hearings.^{2/} The parties examined witnesses and introduced exhibits. They also filed post-hearing briefs.

1/ Footnote Continued From Previous Page

any employee organization; (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; (7) Violating any of the rules and regulations established by the commission."

2/ At the October 17 hearing, the Association withdrew that portion of the charge pertaining to the criticism of Lavallee.

On July 9, 1986, the Hearing Examiner issued his report and recommended decision. H.E. No. 87-1, 12 NJPER 576 (¶17218 1986). He found that the College had ample business justification to refuse to renew Minacapilli's employment and that the letter sent by the College concerning the representation election did not contain either threats or promises. Accordingly, he recommended dismissing those aspects of the Complaint. The Hearing Examiner further found, however, that the College violated subsections 5.4(a)(1) and (2) of the Act when Ciarlo told Minacapilli that his employment might be renewed if he voted against the union.

On July 21, 1986, the Association filed its exceptions. It contends that Ciarlo's promise of reemployment to Minacapilli also violated subsection 5.4(a)(3) and that to remedy this violation Minacapilli should be reinstated.

On August 11, 1986, after receiving an extension of time, the College filed its exceptions. It contends that the Hearing Examiner erred in finding that Ciarlo promised that Minacapilli would be reconsidered for reemployment. The College contends such a finding is against the weight of the evidence. It further contends that the College could not have interfered with any employee's free choice since Minacapilli was not eligible to vote in the election. It also contends the Hearing Examiner erred in concluding that Minacapilli had a "chance" to be reemployed if he voted no since the College had already determined not to renew his employment for the following year.

We have reviewed the record. The Hearing Examiner's findings of fact (pp. 3-21) are accurate. We adopt and incorporate them here.

The College has excepted to the Hearing Examiner's finding that Ciarlo promised Minacapilli a benefit -- possible reemployment -- if he voted against union representation. This finding rests squarely on the Hearing Examiner's credibility determination: he believed Minacapilli's testimony and did not believe Ciarlo's denials of what occurred at a closed door meeting. We find no basis to disturb that determination. Ocean County College, P.E.R.C. No. 86-107, 12 NJPER 341 (¶17130 1986).

Secondly, it is irrelevant whether Minacapilli was ultimately eligible to vote in the election.^{3/} Ciarlo sought to interfere with Minacapilli's decision on which way to vote in a representation election conducted by the Commission. This violates subsection 5.4(a)(1) regardless of whether Minacapilli's ballot would have counted. See Commercial Tp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550 (¶13253 1982), aff'd App. Div. Docket No. A-1642-82T2 (12/8/83). We also note that, at least from Minacapilli's view, Ciarlo's promise gave him a "chance" to be reappointed. Ciarlo was his supervisor and had initially recommended non-retention. Therefore, his promise had a tendency to

^{3/} We believe he was because he was employed at the time of the election.

interfere with his vote which is sufficient to violate subsection 5.4(a)(1). City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (1978), aff'd App. Div. Docket No. A-3562-77 (3/5/79).

The Association has also claimed that Ciarlo's remark violated subsection 5.4(a)(2) which prohibits employer domination or interference with the formation, existence or administration of any employee organization. Domination exists when the organization is directed by the employer, rather than the employees. See, e.g., Han-Dee Spring & Mfg. Co., 132 NLRB No. 122, 48 LRRM 1566 (1961). Interference involves less severe misconduct than domination, so that the employee organization is deemed capable of functioning independently once the interference is removed. It goes beyond merely interfering with an employee's section 5.3 rights; it must be aimed instead at the employee organization as an entity. Morris, The Developing Labor Law 267-286 (2d ed. 1983); cf. North Brunswick Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (1980). Ciarlo's remark did not involve any action directed at the Association, but merely interfered with Minacapilli's right to vote. Thus, we dismiss the subsection 5.4(a)(2) allegation.

We now consider the Association's exception that Ciarlo's conduct warrants finding a violation of subsection 5.4(a)(3). This subsection prohibits discrimination in regard to hire or tenure of employment or any term and condition of employment. An employer's promise of possible reinstatement for voting a certain way in a representation election and an employee's subsequent

non-reinstatement might, in some circumstances, certainly indicate that the employee had been discriminated against. Viewing the record as a whole, however, we do not believe the Association proved that any action was taken as a consequence of Minacapilli's vote. Ciarlo did not promise reinstatement, but only told Minacapilli that he had a last chance if he voted no. We note that the decision not to reemploy was made well before the statement was made. Even if Ciarlo had changed his recommendation, it is not clear that the Board of Trustees would have accepted it.^{4/} The Hearing

Examiner's finding in this regard is worthy of note:

I am not finding that Ciarlo guaranteed Minacapilli's reemployment if he (Minacapilli) voted no. Nor am I finding that Ciarlo, on his own, could have effectuated Minacapilli's reemployment.

[Slip opinion at 30 n. 19].

In sum, we do not believe that Ciarlo's promise, alone, without proof that it would or could have been carried out, is sufficient in this case to justify a violation of subsection 5.4(a)(3), even though it did violate subsection 5.4(a)(1). See Op. of Mine Hill, P.E.R.C. No. 86-145, 12 NJPER ____ (¶____ 1986). The record, considered as a whole, reveals that Minacapilli was not offered reemployment because of his poor job performance and does not establish that he would have been reemployed had he voted against

^{4/} Indeed, it is not even clear whether Ciarlo would have changed his recommendation.

union representation. Reinstatement, therefore, is not an appropriate remedy.^{5/}

ORDER

The Atlantic Community College is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by interfering with their freedom of choice in representation elections particularly by interfering with Gaetano Minacapilli's choice in the representation election held on April 25, 1985.

B. Take the following affirmative action:


1. 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 to ensure 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 has taken to comply herewith.

^{5/} We also agree, in the absence of exceptions, that Ciarlo's other statements urging employees to vote against union representation did not violate the Act because they were not accompanied by threats or promises of benefits.

The remaining allegations contained in the Complaint are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioner Hipp abstained. Commissioner Reid was not present.

DATED: Trenton, New Jersey
September 25, 1986
ISSUED: September 26, 1986

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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by interfering with their freedom of choice in representation elections particularly by interfering with Gaetano Minacapilli's choice in the representation election held on April 25, 1985.

ATLANTIC COMMUNITY COLLEGE

(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, 495 West State Street, Trenton, NJ 08608, (609) 292-9830.

H.E. NO. 87-1

STATE OF NEW JERSEY
BEFORE A HEARING EXAMINER OF THE
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-and-

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Charging Party.

SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Atlantic Community College violated §§5.4(a)(1) and (2) of the New Jersey Employer-Employee Relations Act when it interfered with an employee's freedom of choice in a representation election, and when it promised the employee a benefit if he voted against representation. The Hearing Examiner, however, recommended dismissal of the charge that the above employee was unlawfully terminated, and that certain campaign letters disseminated by the College violated the Act. The Hearing Examiner found that the Association did not make a prima facie case of unlawful termination, and also found that the College demonstrated business justification for its actions.

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.

H.E. NO. 87-1

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For the Respondent
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(Bruce L. Harrison, of Counsel)

For the Charging Party
Sterns, Herbert & Weinroth, Esqs.
(Mark D. Schorr, of Counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on April 4, 1985, and amended on May 29, 1985, by the Culinary Arts Faculty of Atlantic Community College/NJEA ("Association") alleging that the Atlantic Community College ("College") committed unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. ("Act"). In the original Charge the Association alleged that the College violated §§5.4(a)(1), (2)

and (3) of the Act when the Director of the Academy of Culinary Arts ("Academy"), Montie Ciarlo, sent a letter to all Academy faculty asking them to vote against union representation by the Association; and the Association further alleged that the College violated §5.4(a)(7) of the Act by allegedly interfering with the Commission's direction of a secret ballot election.^{1/}

In the Amended Charge the Association alleged that the College also violated §§5.4(a)(1), (2), (3) and (7) by refusing to reemploy faculty member Gaetano Minacapilli because of the exercise of his protected activity, and when Ciarlo allegedly told Minacapilli that if he voted "no" in the representation election he would be reconsidered for renewal. The Association also alleged that the College violated the Act by allegedly criticizing Association President Ron Lavallee.

The Director of Unfair Practices issued a Complaint and Notice of Hearing on June 26, 1985. The College filed an Answer (Exhibit C-2) on July 15, 1985 denying any violation and raising several affirmative defenses.

^{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; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (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 (7) Violating any of the rules and regulations established by the commission."

Hearings were held in this matter on October 17, 1985 and February 10, 1986, 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. At the hearing on October 17, 1985 the Association withdrew its amended charge regarding Ron Lavallee (Transcript "T" 1 p. 13). Both parties filed post-hearing briefs which were received on April 11, 1986.

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

Upon the entire record I make the following:

Findings of Fact

1. The College is a public employer within the meaning of the Act.
2. The Association is an employee representative within the meaning of the Act.
3. Minacapilli was hired by the College in August 1982 as the Supervisor of Food and Beverage Operations with the primary responsibility of supplying and operating the Academy's restaurant, "Careme's," which is used to teach and train Academy students. On March 9, 1983 (Exhibit CP-1), Karl Kumm, then Vice President for Academic and Student Affairs, recommended Minacapilli for reappointment to his Supervisor position for the 1983-84 academic year.

On August 17, 1983, John Carbone, then Acting Assistant Director of the Academy, sent a memorandum (attachment to Exhibit CP-3) to George McNeill, then Academy Director, advising him that Minacapilli did not show proper leadership and could not solve simple problems. Carbone suggested that Minacapilli could not handle the Supervisor's position. As a result of that memorandum McNeill, on September 20, 1983, sent Minacapilli a formal disciplinary warning (Exhibit R-2), which informed him that further infringement of Academy policies would lead to termination.

4. On October 10, 1983 Dr. Kenneth Yowell became Vice President for Academic and Student Affairs which included overseeing the Academy and the Academy's Director, and other personnel. Shortly after becoming Vice President, Yowell met with McNeill who expressed concern about Minacapilli's ability to apply business practices to the operation of Careme's (T 2 p. 6), and expressed concern with the curriculum at Careme's which was Minacapilli's responsibility (T 2 p.7).

Yowell shared McNeill's concerns and was particularly interested in achieving fiscal responsibility for the Academy operations. As a result, Yowell and McNeill developed a new position entitled "Assistant Director Food and Beverage," whose responsibilities superseded the scope and purpose of the Supervisor of Food and Beverage responsibilities and resulted in the elimination of Minacapilli's position (T 2 p. 12). McNeill notified Minacapilli of that decision on November 8, 1983 (Exhibit CP-2), and

advised him that he was eligible to apply for the new position or for an educator position at the Academy. Shortly after receipt of CP-2, Minacapilli did apply for the Assistant Director's position.

In late 1983 the Academy faculty, including Minacapilli, held a meeting with Yowell wherein they expressed an interest in joining a union because they were dissatisfied with certain aspects of their employment. Minacapilli, and instructors Bernard Loew and Ron Lavallee, urged the formation of a union (T 1 pp. 31-32).

Minacapilli testified that Yowell told the faculty that it was fine if they wanted to go to the union, but he (Yowell) would prefer that they not do so (T 1 p. 32). The employees took no further action at that time.

5. On December 22, 1983 Carbone sent the College's Personnel Director, Kenneth Thorpe, a memorandum (Exhibit CP-3) advising him that Minacapilli had shown marked improvement in his job performance and his attitude since the August 17, 1983 memorandum was issued.

In March 1984 McNeill recommended to Yowell that Minacapilli did not have the ability to perform the new Assistant Director's position (T 2 p. 15). McNeill also recommended that Minacapilli not be retained in any position automatically (T 2 p. 40).

The committee authorized to make recommendations for the new Assistant Director's position made no recommendation that Minacapilli be hired for that position (T 2 p. 16). Apparently, the committee recommended Thomas Flynn for that position.

Although Minacapilli was not hired for the Assistant Director's position, a position of dining room educator (in Careme's) was, nevertheless, created for him at a salary lower than his Supervisor's salary. The record shows that when William Norcross, a College Board of Trustees member, and member of the hiring committee, learned that Minacapilli would not be offered the new Assistant Director's position, and would not be reemployed, he refused to support the reorganization of the Academy unless Minacapilli was offered a position. Consequently, only because of Norcross's intervention, the College created and offered an educator position to Minacapilli (T 2 pp. 17-19, 39).

As a result of the understanding reached with Norcross, McNeill on March 26, 1984, recommended to Yowell (Exhibit CP-4A) that Minacapilli be offered an educator position.^{2/} On April 24,

^{2/} The first paragraph of CP-4A states:
After taking careful consideration to [of] the climate here within the Academy, I recommend that Mr. Minacapilli be formally offered the position of Dining Room Educator at the earliest possible time without opening a search.

During Yowell's cross-examination an issue arose, at least by inference, as to why McNeill issued CP-4A despite previously recommending to Yowell that Minacapilli not be automatically renewed in any position. Yowell testified that McNeill was merely formalizing the understanding with Norcross (T 2 p. 40). I credit that explanation. I interpret the first part of CP-4A, specifically

1984 Personnel Director Thorpe sent Minacapilli an employment contract (Exhibit CP-4B) for the educator position.

In April 1984 McNeill resigned from the College and Yowell assumed responsibility for operating the Academy until the new Director, Montie Ciarlo, was appointed Academy Director in July 1984.

On September 26, 1984 College President Ronald Bush sent Minacapilli a letter, Exhibit CP-4C, advising him of his retroactive salary increase. On October 12, 1984 Bush sent Minacapilli a document (Exhibit CP-4D) noting that the College approved his reappointment for 1984-85.

6. In the Fall of 1984 Minacapilli taught Culinary 112, Introduction to Dining Room (table service), and Culinary 119, Advanced Table Service, Wines and Mixology (T 1 p. 107). Both Minacapilli and teacher Bernard Loew taught those subjects. Although there were no student complaints about Loew's performance, the students did complain about Minacapilli's performance (T 1 p. 109).

The students complained to Ciarlo that Minacapilli was not giving enough concentration in table service, that there was no

2/ Footnote Continued From Previous Page

the part that referred to the "climate within the Academy" as reflecting Norcross's intervention, and the appointment of Minacapilli "without opening a search," as reflecting the implementation of the understanding with Norcross.

course syllabus and no handouts, that students did not know how they were being evaluated, and that he (Minacapilli) authorized long, rather than short breaks during lab time (T 1 pp. 109-110). Ciarlo met with Minacapilli approximately eight times in the Fall to discuss the students' complaints and Minacapilli agreed to improve (T 1 pp. 110-111).

Ciarlo also observed Minacapilli's performance in teaching Culinary 119 in the Fall of 1984. He observed him in September and October for approximately five minutes each time (T 1 pp. 170-172). Ciarlo testified that during the October observation he noted that Minacapilli was not observing his students during bar (mixology) practice. Rather, he (Minacapilli) was talking to another instructor (T 1 pp. 172-173).^{3/}

In October 1984 Ciarlo met with Minacapilli concerning his course syllabus for Culinary 112 (a facsimile of Exhibit R-10). Ciarlo informed Minacapilli that the syllabus was not an appropriate syllabus for that course. He explained that there was a large discrepancy between the College catalogue description of the course and what was contained in the syllabus that Minacapilli had distributed (T 1 pp. 179-182). Ciarlo felt that the syllabus was too concentrated on wines and liquors.

^{3/} I credit Ciarlo's testimony regarding student complaints and his discussions with Minacapilli regarding those complaints, and I credit his observation assessments of Minacapilli. There was no evidence by Minacapilli or any other witness contradicting Ciarlo's testimony on this point.

Ciarlo directed Minacapilli to correct the syllabus and Minacapilli agreed to comply with Ciarlo's directive. Ciarlo checked several times during the Fall semester to see if the syllabus was corrected, but students informed him that it had not been corrected (T 1 pp. 183-184).

In the Fall of 1984 Ciarlo informed Yowell of the problems he was having regarding Minacapilli's performance. Ciarlo told Yowell that Minacapilli's involvement in curriculum changes could be an impediment to the overall Academy curriculum, and he complained of Minacapilli's manner with the students (T 2 p. 23). Ciarlo discussed Minacapilli's performance with Yowell on several occasions (T 2 p. 24).

In November 1984 Minacapilli's student, Martina Singer, complained to Ciarlo about the grade she received, and the lack of feedback and corrections she received from Minacapilli. Ciarlo noted that there were no marks, corrections, or comments on her term paper or class project to show the level of quality (T 1 p. 112). Ciarlo spoke with Minacapilli and asked him to explain to Singer the basis for her final grade (T 1 p. 165), but she later advised Ciarlo that he (Minacapilli) still did not specifically indicate the deficiencies in her work (T 1 p. 113, 166).^{4/} Ciarlo concluded

^{4/} Minacapilli testified that he did give Singer a "critique" of her work (T 1 p. 76), but he did not dispute Ciarlo's testimony that he (Minacapilli) did not make any corrections or comments on Singer's term paper or class project.

that Minacapilli failed to fulfill his professional responsibilities regarding Singer's work (T 1 p. 166).

Prior to January 1985 Culinary 112 was taught in 19 day units, but beginning in January 1985 it was taught in 15 day units (T 1 pp. 118-119). In January 1985 several students complained to Ciarlo about Minacapilli's teaching of Culinary 112. Student Susan Haury gave Ciarlo Exhibit R-10, the Culinary 112 syllabus that Minacapilli gave to the class in January 1985, and she highlighted the areas that Minacapilli failed to cover (T 1 pp. 120-123). Ciarlo subsequently discussed R-10 with Minacapilli (T 1 p. 123). Ciarlo noted that Minacapilli had failed to correct his syllabus (R-10) to reflect the change from a 19-day to a 15-day program (T 1 p. 205).

In addition to Haury, several other students complained about Minacapilli in January 1985. Students DeShong, Rei, Dunlop, Engle, Bruntz and others complained that Minacapilli had not advised them about course objectives and evaluation criteria, had not distributed a course outline or reading list, and had not explained the requirements for the class project and its value in arriving at the final grade. Those complaints lead to Ciarlo's issuance of Exhibit R-3 on February 15, 1985 which officially made Minacapilli aware of those complaints (T 1 pp. 119-120). Ciarlo met with Minacapilli regarding R-3, and Minacapilli denied some of the students' allegations, and admitted to others, but had an explanation for his actions (T 1 pp. 126-127, 184-189). Minacapilli, however, did not deny that students made the complaints.

7. The record shows that faculty are evaluated by students and that those evaluations are seriously considered by the administration (T 1 pp. 206-212). The faculty member is responsible for selecting a student to obtain the evaluation forms and to ensure that they are completed and returned to the main office (T 1 pp. 206-207). The evaluations must be completed by the last day of the 15-day class.

The facts show that Minacapilli did not arrange to have evaluation form packets (Exhibits R-15, R-16, and R-17) picked up, consequently, student evaluations of his work were not completed (T 1 pp. 207-208, 211-215).

Ciarlo observed Minacapilli again in January and February 1985. In January he observed Minacapilli joking with students in the dining room (of Careme's) during a time he was supposed to be teaching (T 1 pp. 173-174). In February he observed Minacapilli lecturing in his dining room class and using stick figures instead of utensils to demonstrate a table setting. Ciarlo explained that it was inappropriate to use stick figures to show a table setting when there were utensils available (T 1 pp. 175-176). Minacapilli did not deny the substance of these observations.

On February 12, 1985 Ciarlo gave Yowell a memorandum (Exhibit R-11) containing his recommendations for staff renewals and non-renewals for 1985-86. Ciarlo recommended that employees Ron Lavalley, Joseph Rath, Ulrich Eisele, and Minacapilli not be renewed.

After receipt of R-11 Yowell asked Ciarlo to justify his non-renewal recommendations. Ciarlo explained that Minacapilli had not contributed to improving the curriculum and that there were complaints about his treatment of students (T 2 pp. 25-26).

On March 14, 1985 Ciarlo gave Yowell a memorandum (Exhibit R-12) changing R-11 and recommending that employees Eisele and Rath be renewed, but he did not change his recommendation regarding Lavallee and Minacapilli. Ciarlo continued to receive student complaints about Minacapilli after March 14, 1985 (T 1 p. 130).

Yowell accepted Ciarlo's recommendation regarding Minacapilli, and did so without any knowledge of Minacapilli's union activity (T 2 pp. 33-35, 54). Having had observed Minacapilli's interaction with his students, Yowell formulated his own opinion of Minacapilli's behavior. He concluded that Minacapilli was bitter about not getting the Assistant Director position and about being offered a lower level position, and he felt that Minacapilli vented that bitterness on the students (T 2 pp. 51-52).

Yowell testified that he had learned that there were four faculty members, Ron Lavallee, Buddy Lee, George Rishod, and John Carbone who comprised the union leadership (T 2 pp. 53-54). Yowell may have known that Minacapilli was interested in the union in December 1983, but he had no knowledge that Minacapilli was also active in the Association in early 1985 (T 2 p. 54). As a result of Lavallee's position in the Association, however, Yowell vetoed Ciarlo's recommendation not to renew Lavallee (T 2 pp. 26-27, 57).

Yowell would have accepted Ciarlo's recommendation not to renew Lavallee but for his (Lavallee's) union involvement (T 2 p. 58).

Yowell presented Ciarlo's recommendation not to renew Minacapilli to College President Bush, and discussed it with the College's attorney, and Bush accepted the recommendation (T 2 p. 27). Yowell testified that any role Minacapilli may have had in union activity was never discussed with Bush or the College Board of Trustees and was not involved in the decision not to renew Minacapilli (T 2 p. 35).^{5/}

The recommendation for renewals (which creates an inference for non-renewals) of employees was submitted to the Board of Trustees by President Bush, and Bush did not recommend that Minacapilli be renewed. On April 23, 1984 the Board adopted Bush's recommendation (T 2 pp. 27-28).^{6/}

^{5/} I credit Yowell's testimony, both as to what he said and as to his discussions with Bush, and as to what Ciarlo told him. There was no evidence to contradict Yowell's assertion that neither he nor Bush were aware of Minacapilli's union activity - certainly prior to the recommendation to the College Board of Trustees that Minacapilli not be renewed. In addition, having observed Yowell during his testimony, I credit his veracity.

^{6/} Yowell testified that Bush does not make recommendations to the Board for non-renewals. The procedure followed by the College is for the President to recommend only those employees it wishes to renew, and Minacapilli's name was not submitted to the Board for renewal (T 2 p. 27).

Prior to the Board meeting on April 23, 1985, Ciarlo received two documents, Exhibits R-8 and R-14, dated that same day (T 1 pp. 141-142, 202-203). R-8 was a memorandum from two other Academy faculty to Ciarlo complaining about how Minacapilli and his class left Careme's in an unrepresentable manner. R-14

On the morning of April 24, 1985 a "Board update" (Exhibit R-4) was distributed throughout the College which listed the reappointment of specific Academy educators. Minacapilli was not listed, but all other employees who helped organize the Association were reappointed and listed on R-4 (T 1 pp. 67-68). A copy of R-4 was placed in Minacapilli's mailbox (T 1 p. 135). In the afternoon of April 24, 1985 a memorandum (Exhibit CP-6) was distributed to all faculty and students announcing the Academy faculty reappointments for 1985-86, and Minacapilli's name was not listed.

Minacapilli received CP-6 on April 24, and that same day he had a meeting with Yowell and Bush to discuss the Board action (T 1 pp. 41-43, T 2 p. 31). Minacapilli admitted that Yowell told him that he was not reappointed because Ciarlo was not satisfied with his performance (T 1 p. 43, T 2 p. 31). During that meeting President Bush gave Minacapilli a letter (Exhibit R-5), also dated April 24, informing him that he was not reappointed (T 1 pp. 44, 91).

8. On December 7, 1984 the Association filed a representation Petition, Docket No. RO-85-96, seeking to organize the Academy faculty. The Petition was not signed by any employee of the College. In compliance with Commission rules the College, on

6/ Footnote Continued From Previous Page

was a petition to Ciarlo signed by many of the students who had previously complained about Minacapilli, requesting that Bernard Loew (and not Minacapilli) be their instructor for the Advanced Dining Room course scheduled to begin on May 20, 1985.

December 21, 1984, sent the Commission a list of employees which included Minacapilli. The College would not consent to an election, however, thus on February 26, 1985 the office of the Director of Representation for the Commission notified the parties that an election might be directed.^{7/}

Prior to April 23, 1985, and certainly prior to the issuance of R-11 on February 12, 1985, there was no showing that Ciarlo or any other administrator was aware that Minacapilli was active in organizing the Academy Faculty. Minacapilli testified that he attended meetings in his office in 1984 related to organizing the faculty (T 1 p. 33), but the Association did not show when those meetings were held, and certainly did not show that Ciarlo, Yowell, or Bush was aware of the meetings or Minacapilli's participation therein (T 1 p. 137, T 2 p. 33).

Minacapilli also testified that he was active in the election campaign, but he could not be certain whether that began in January or February 1985. The Association did not show, for example, that Ciarlo was aware of Minacapilli's involvement in the campaign prior to the issuance of R-11.^{8/}

^{7/} Pursuant to N.J.A.C. 19:14-6.6, I took administrative notice of the contents of the Commission's representation file in RO-85-96.

^{8/} Minacapilli testified that the campaign took place "About two months, maybe three months. From January, February, March and so on." (T 1 p. 35). I find that testimony to be too uncertain to prove that the campaign began in January, or that Ciarlo had knowledge of Minacapilli's involvement prior to R-11.

On March 20, 1985 Ciarlo sent all faculty employees a letter (Exhibit C-2A) urging them to support the Academy against the union (T 1 p. 41).^{9/} On April 4, 1985 the Director of Representation issued a direction of election in RO-85-96, Atlantic Community College, D.R. No. 85-20, 11 NJPER 276 (¶16098 4/4/85), and

^{9/} C-2A is as follows:

It appears that there is a lot of misinformation being circulated about union interest in representing you and the other professional Chef Educators at the Academy. I am writing with the hope of clarifying the situation.

By way of background, the union, specifically the NJEA, has requested that there be an election to determine whether they will represent the faculty at the Academy. As last I heard, no date for election has been set, but I presume that an election sometime in the spring is likely.

Of course, you are an eligible voter and will be permitted the opportunity to vote. Without belaboring the point, I am hopeful that when the time comes, you will vote for the Academy and the College and against the union. As the election nears, I will specify some of my reasons for my suggestion.

Suffice it to say, however, deciding to vote for or against a union is an important decision with potentially wide-ranging personal significance. While the election is still weeks away, I hope that you will take the time to think about the pluses and minuses associated with union representation, independent of any propaganda which might glamorize the process. Statewide, I am told that unions at one time represented approximately one-third or more of all employees. They now represent approximately eighteen percent of the workforce. If being represented is all "peaches and cream", the trend would be otherwise.

After the date for election is set, I will be further communicating with you. My door is open if you wish to discuss this matter with me.

the Association filed the original Charge that same day. On April 12, 1985 the College attorney sent the Commission a letter which included an election eligibility list. In the letter the College attorney explained that all faculty members were on the list, but that the College reserved the right to challenge employees which it did not deem to be eligible. On April 19, 1985 Ciarlo sent a letter (Exhibit CP-5) to Minacapilli, and the same letter to all other faculty members, again asking for their support against the union.^{10/}

^{10/} C-5 is as follows:

On 4/25/85, a secret ballot election will be held in the Board room at which time you will have the opportunity to decide whether you wish to be represented by a union. I urge you to vote for the College and Academy and vote No Union.

As I say, the election will be by secret ballot. Thus, no one will know how you vote. You are free to vote No Union regardless of whether or not you signed an authorization card. Also, the election will be decided solely on the ballots cast. Thus, I urge you to vote.

As you know, the Academy has had its share of problems along with its share of successes. I want you to consider whether having a union will enhance the Academy, and thus yourself, or not. I don't think it will. We will enhance our reputation by putting out students who are second to none; by having a viable restaurant with a top reputation; and the like. I cannot see how a union can contribute to these objectives.

In my tenure as Director, I have attempted to foster a sense of professionalism at the Academy. The cornerstone of this professionalism is a commitment to the students, to the College and to the community that we will be as good as we can be. I am sure that you share my commitment. Grievance procedures, rigid rules and regulations, union dues and the like do not foster the goals to which I refer. Vote No Union.

Your dedication and loyalty are deeply appreciated.

9. The file in RO-85-96 shows that 18 names were included on the election eligibility list (subject to the College's retained right to challenge). Ciarlo testified that prior to the election the College believed that 12 employees would vote for the Association, 3 against representation, and 3 employees would be challenged (T 1 p. 159). Ciarlo explained that three employees, Camerer, Wiener and Pappas, told him that they would vote no, and they also told him the names of the officers of the Association (T 1 pp. 156-157). Ciarlo also knew that the College would challenge three employees, Klaus Mueller because he was a supervisor, Frank Verheul because he was being promoted, and Minacapilli because he was not being renewed (T 1 pp. 158-159). Ciarlo assumed that the remaining 12 employees would vote for the Association (T 1 p. 159).

The election was held on April 25, 1985 at 12:00 noon. The election tally of ballots showed that 12 employees voted for representation, 3 voted against representation, and 3 votes were challenged, however, those challenges were not determinative. The challenged voter list showed that both the College and the Association challenged Mueller because he was a supervisor; the Association challenged Verheul because he was an administrator; and, the College challenged Minacapilli because his contract was not renewed. The election Certification was issued on May 8, 1985.

10. Minacapilli testified that at 11:15 a.m. on April 25, the day of the election, he went to Ciarlo's office on his own volition to meet with Ciarlo to discuss his non-reappointment (T 1

pp. 44, 84-87). Minacapilli testified that Ciarlo told him that he (Ciarlo) had received many complaints about him from students, and that he (Minacapilli) did not cooperate. Minacapilli alleged that Ciarlo then told him "you [are] getting old, senile and you have a strong accent." (T 1 pp. 45, 88)^{11/} Minacapilli further alleged that Ciarlo then told him that he had a last chance, that he (Minacapilli) should vote no in the election (T 1 p. 45).

Ciarlo disputed Minacapilli's testimony. He testified that their meeting took place on April 26, the day after the election (T 1 pp. 138-139, 144), and he (Ciarlo) specifically denied making any reference to Minacapilli's accent and senility, and denied making any statement about how Minacapilli should vote in the election (T 1 p. 146).

Ciarlo testified that he told Minacapilli that his classroom performance had been unsatisfactory, that he had not improved, and that the complaints about him were constant (T 1 p. 144). Ciarlo also testified that Minacapilli said, "I know you don't like me because I am Italian." (T 1 p. 144). Ciarlo responded, "...you are talking to the wrong man" because he too was Italian (T 1 pp. 144-145).^{12/}

^{11/} Minacapilli admitted, however, that both Carbone and Verheul were older than he, and the record shows that they were reappointed (T 1 p. 90).

^{12/} Ciarlo further testified that Casimo Marcozzi, who was also Italian, was hired to replace Minacapilli (T 1 pp. 146-147).

On April 26, 1986 Personnel Director Thorpe offered to buy the remainder of Minacapilli's 1984-85 employment contract, but Minacapilli refused (T 1 pp. 50, 53). Sometime after April 25, 1985, a group of students gave Ciarlo a petition (Exhibit CP-7) asking that Minacapilli be reappointed. On May 3, 1986, the Association submitted a grievance (Exhibit R-6) on Minacapilli's behalf, and Minacapilli submitted his own grievance (Exhibit R-7) on May 14, 1985. Both R-6 and R-7 place the meeting between Ciarlo and Minacapilli on April 25, and both documents attribute Ciarlo with having told Minacapilli that he had a last chance for renewal if he voted no in the election. Finally, on August 9, 1985 Minacapilli filed a civil rights complaint (Exhibit R-13) with the New Jersey Division on Civil Rights against the College alleging that he was discharged because of his national origin and age. On October 10, 1985 a fact finding conference was conducted before the Division on Civil Rights, but as of the filing of the College's brief herein on April 11, 1986, there has been no probable cause finding regarding R-13.

I credit Minacapilli's testimony that the meeting with Ciarlo occurred on April 25, and that Ciarlo told him that he had one last chance for renewal if he voted no in the election. Ciarlo insisted that the meeting was on April 26 - after the election - and therefore he would have had no reason to tell Minacapilli to vote no. But that scenario does not make sense. Minacapilli had learned of his non-renewal on April 24, and he had his meeting with Yowell

and Bush the afternoon of April 24, and they told him his non-renewal was based upon Ciarlo's recommendation. Minacapilli was obviously upset by this development and wanted to talk to Ciarlo. It makes no sense that he would have waited a day - until April 26 - to talk to him. It is far more likely that Minacapilli talked to Ciarlo the next morning - April 25. In addition, both R-6 and R-7 place the date of the meeting on April 25. Those documents were prepared shortly after the election, and prior to the filing of the Amended Charge. I credit them to support Minacapilli's testimony on that point. Consequently, since Ciarlo was adamant that the meeting occurred on April 26, and since I do not credit that testimony, I cannot credit his testimony denying having made the "vote no" statement to Minacapilli. However, I credit Ciarlo's testimony that during that meeting he told Minacapilli that he was not renewed due to his poor classroom performance. Minacapilli in R-7 admitted that Ciarlo had made that remark.^{13/}

Analysis

Having considered the facts and relevant law I find that the College did not violate §5.4(a)(3) of the Act by refusing to renew Minacapilli's employment. There was ample business justification for the non-renewal recommendations by Ciarlo and

^{13/} Although I do not believe that Ciarlo made any unlawful remark about Minacapilli's ancestry or national origin, I am not ruling upon that issue since that issue, and an alleged age discrimination remark, are before the Division on Civil Rights for disposition.

Yowell. Further, the College did not violate §§5.4(a)(1) and (2) of the Act when Ciarlo distributed C-2A and CP-5 to the employees. Those letters were sent at a time that permitted an effective reply, and they made no promises or threats. However, the College (through Ciarlo) did violate §§5.4(a)(1) and (2) of the Act by telling Minacapilli that he may be renewed if he voted "no" in the election. That remark had the tendency to interfere with Minacapilli's free choice, and it interfered with the formation of the Association as the majority representative.

The Non-renewal - 5.4(a)(3) Issue.

The standard for finding a 5.4(a)(3) violation of the Act requires proof of an anti-union motive. Borough of Haddonfield Bd.Ed., P.E.R.C. No. 77-36, 3 NJPER 71 (1977); Cape May City Bd.Ed., P.E.R.C. No. 80-87, 6 NJPER 45 (¶11022 1980). In Bridgewater Twp. v. Bridgewater Public Works Assn., 95 N.J. 235 (1984), the N.J. Supreme Court adopted the private sector dual motive test in analyzing (a)(3) cases which required the charging party to first make a prima facie showing of a violation, and then permitted a respondent to show business justification for its actions. The elements for making a prima facie showing are particularly important in analyzing the instant matter. The Court in Bridgewater held that to make a prima facie case the existence of protected activity must be shown, the employer's awareness of the protected activity must be shown, and it must be shown that the employer was hostile toward the protected activity, i.e., manifested anti-union animus.

Bridgewater, 95 N.J. at 246.

In this case the Association did not make a prima facie showing because it failed to prove that the College, i.e., Ciarlo, Yowell, or Bush, were aware of Minacapilli's union activity. The Petition in RO-85-96 was filed in December 1984 by an NJEA representative. Neither Minacapilli's, nor any other employee's name, appeared on the Petition. Minacapilli testified that he was active in the election campaign, but he could not be certain whether it began in January or February, and other than attending meetings, he never explained how or to what extent he was active, and whether he spoke to College officials, or whether Ciarlo or Yowell even knew about his (Minacapilli's) union activity. There is simply no basis to even infer that Ciarlo knew of Minacapilli's union activity prior to his (Ciarlo's) issuance of R-11 on February 12 recommending Minacapilli's non-renewal. In addition, no evidence was presented to contradict Yowell's testimony that neither he nor Bush were aware of Minacapilli's union activity. Yowell had learned that certain employees were active on behalf of the Association, but Minacapilli's name was not among them. Yowell may have remembered that Minacapilli was interested in organizing in December 1983, but he had no knowledge that Minacapilli was active in organizing in early 1985, more than a year later. Finally, since Yowell renewed Lavallee primarily because of his union activity, it is not likely that he would have refused to renew Minacapilli for engaging in the same union activity.

Even assuming that the College had knowledge of Minacapilli's union activity, however, there was ample business justification to refuse to renew his employment. The uncontroverted evidence shows that Minacapilli's job performance was lacking. He did not comply with Ciarlo's work-related requests and directives, and there were numerous student complaints regarding his behavior, teaching ability, and his classroom performance. Ciarlo, and certainly Yowell, acted to remove Minacapilli only because he was not an effective educator. There was no anti-union motive, and their concern was entirely educationally based. Thus, the 5.4(a)(3) allegation should be dismissed.

Campaign Letters to Employees and Ciarlo's "Vote No" Remark

There are two basic standards, the representation standard and the unfair practice standard, for analyzing pre-election campaign literature and statements. I have considered both standards in analyzing this case.

The representation standard generally only becomes relevant when a union loses a representation election and files objections to overturn the results and obtain a new election. Since the Association won the election in April 1985, no objections were filed, but this standard is useful in understanding why C-2A and CP-5 were not violative of the Act, but why Ciarlo's statement was a violation.

In Jersey City Dept. of Public Works, P.E.R.C. No. 43 (1970)(slip opin. at 10), aff'd sub. nom. AFSCME Local 1959 v.

P.E.R.C. 114 N.J. Super. 463 (App. Div. 1971), the Commission established the following policy:

The Commission presumes that an election conducted under its supervision is a valid expression of employee choice unless there is evidence of conduct which interfered or reasonably tended to interfere with the employee's freedom of choice. Conduct seemingly objectionable, which does not establish interference, or the reasonable tendency thereto, is not a sufficient basis to invalidate an election. The foregoing rule requires that there must be a direct relationship between the improper activities and the interference with freedom of choice, established by a preponderance of the evidence.

The Commission reaffirmed that policy in Passaic Valley Sewerage Commission, P.E.R.C. No. 81-51, 6 NJPER 504 (¶11258 1980), and emphasized that the "reasonable tendency to interfere" was the primary test to be used to determine whether certain conduct would justify overturning an election. The Commission further emphasized that the need for evidence of actual interference with employees' free choice varied depending upon the reasonable tendency of the conduct to affect the results of the election. Passaic Valley, supra, at 505.

The Commission in Jersey City Medical Center, P.E.R.C. No. 49 (1970), also adopted the private sector - National Labor Relations Board (NLRB) - standard enunciated in Hollywood Ceramics Co., 140 NLRB 221, 51 LRRM 1600 (1962) for cases dealing with factual misrepresentations.^{14/} That standard is:

^{14/} See also General Knit of Calif., 239 NLRB 101, 99 LRRM 1687 (1978).

An election should be set aside only where there has been a misrepresentation or other similar campaign trickery, which involves a substantial departure from the truth, at a time which prevents the other party or parties from making an effective reply, so that the misrepresentation, whether deliberate or not, may reasonably be expected to have a significant impact on the election.

The Commission relied on the NLRB standard in County of Salem, D.R. No. 81-30, 7 NJPER 182 (¶12080 1981), request for review denied P.E.R.C. No. 81-121, 7 NJPER 239 (¶12107 1981).^{15/}

The unfair practice standard used to consider whether employer communications to employees is violative of the Act also developed in the private sector when the court in N.L.R.B. v. Corning Glass Works, 204 F.2d 422 (1st Cir. 1953), 32 LRRM 2136 (1953), interpreted the free speech provision of the National Labor Relations Act ("NLRA")^{16/} The court held:

^{15/} In Middletown Twp. Sewerage Authority, D.R. No. 84-14, 10 NJPER 2 (¶15001 1983), the Hollywood Ceramics language was relied upon without citing that case.

^{16/} The free speech section of the NLRA, §8(c) provides that:

The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this subchapter, if such expression contains no threat of reprisal or force or promise of benefit.

...[T]he Constitution of the United States protects an employer with respect to the oral expression of his views on labor matters provided his expressions fall short of restraint or coercion...and section 8(c) of the Act...protects an employer with respect to like expressions in written, printed, graphic or visual form, provided his expressions contain "no threat of reprisal or force or promise of benefit." 32 LRRM at 2139.

The U.S. Supreme Court adopted that same language in NLRB v. Gissel Packing Co., 395 U.S. 575, 618, 71 LRRM 2481, 2497 (1969) when it said:

...[A]n employer is free to communicate with his employees any of his general views about unionization or his specific views about a particular union, so long as his communications do not contain a "threat of reprisal or force or promise of benefit."

Although the specific language in section 8(c) of the NLRA is not present in our Act, the Commission, through the adoption of Hearing Examiner recommendations, has adopted the 8(c) standard in New Jersey.^{17/} Camden Fire Dept., P.E.R.C. No. 82-1-3, 8 NJPER 309 (¶13137 1982) adopting H.E. No. 82-34, 8 NJPER 181 (¶13078 1982); Rutgers, The State Univ., P.E.R.C. No. 83-136, 9 NJPER 276

^{17/} See Lullo v. Int'l Assn. of Fire Fighters, 55 N.J. 409 (1970), and Galloway Twp. Bd.Ed. v. Galloway Twp. Assn. of Ed'l Secys., 78 N.J. 1, 4 NJPER 328 (¶4162 1978) to support the recommendation that 8(c) of the NLRA be adopted in New Jersey. In Galloway the New Jersey Supreme Court reasoned that our Act was based upon the NLRA and, accordingly,

...the absence of specific phraseology in a statute may...be attributable to a legislative determination that more general language is sufficient to include a particular matter within the purview of the statute without further elaboration...78 N.J. at 15.

(¶14127 1983) adopting H.E. No. 83-26, 9 NJPER 177 (¶14083 1983).^{18/}

Finally, the unfair practice standard for finding an independent 5.4(a)(1) violation of the Act does not require a motive, or proof of actual interference or coercion. New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978); New Jersey Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979). Rather, that standard is similar to the representation standard established in Jersey City Dept. of Public Works, supra, in that it is the "tendency" of an employer's conduct to interfere with employee rights that is the controlling element. Commercial Twp. Bd.Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 552 (¶13253 1982), aff'd App. Div. Docket No. A-1642-82T2 (12/8/83). City of Hackensack, P.E.R.C. No. 78-71, 4 NJPER 190 (¶4096 1978), aff'd App. Div. Docket No. A-3562-77 (3/5/79); City of Hackensack (Hackensack v. Winner), P.E.R.C. No. 77-49, 3 NJPER 143, 144 (1977), rev'd on other grounds 162 N.J.Super. 1 (App. Div. 1978), aff'd as modified 82 N.J. 1 (1980).

C-2A and CP-5

In applying the above law to the facts of this case I find that C-2A and CP-5 did not violate the Act because they contained no

^{18/} The first recommendation to the Commission to adopt the NLRB standard was actually issued by Hearing Examiner Howe in In re Jersey City, H.E. No. 79-2, 4 NJPER 276 (¶4141 1978). However, that case was settled and withdrawn prior to Commission action.

threats or promises of a benefit, and they were sent at a time that would have permitted an effective reply. I find that those letters did not have the tendency to interfere with the employees' free choice. Those letters generally just asked the employee(s) to vote no. There were no apparent substantial departures from the truth contained therein, and certainly no threats or promises. The portion of the Charge dealing with those letters should, therefore, be dismissed.

The "Vote No" Remark

Although mere campaigning on the day of - or prior to - an election is not misconduct, City of Atlantic City, D.R. No. 82-54, 8 NJPER 344 (¶13158 1982); County of Atlantic, D.R. No. 79-17, 5 NJPER 18 (¶10010 1979), in application of the above case law, Ciarlo's "vote no" remark to Minacapilli on April 25 violated the Act because it had the tendency to interfere with Minacapilli's free choice, and because the remark promised a benefit - Minacapilli's possible reemployment.

The vote-no remark could not have been a campaign remark because by April 25 Ciarlo knew that Minacapilli would not be reemployed, and he knew that the College would challenge his (Minacapilli's) ballot. Having just learned the day before that he would not be reemployed, Minacapilli had to be upset by Ciarlo's remark. The remark was an independent 5.4(a)(1) violation because based on its timing, and because it, by inference, promised a benefit - his possible reemployment - it had the tendency to interfere with Minacapilli's free choice.

Similarly, that remark violated §5.4(a)(2) of the Act because it interfered with the Association's attempt to organize the unit by promising a benefit to an employee if he would vote no. I infer from Ciarlo's remark that if Minacapilli voted no, he would have had a chance at being reemployed.^{19/} That possibility of reemployment was the unlawful promise of a benefit that violated the Act.^{20/}

The Direction of Election

The Association alleged that the College violated §5.4(a)(7) of the Act by Ciarlo's interfering with the Commission's direction of election in RO-85-96. Although Ciarlo's "vote no" remark was a violation of the Act, that does not establish a violation of 5.4(a)(7). There was no evidence offered to prove that Ciarlo violated any Commission Rule or Regulation related to the direction of election. That part of the Complaint should, therefore, be dismissed.

Accordingly, based upon the entire record and the above analysis, I make the following:

^{19/} I am not finding that Ciarlo guaranteed Minacapilli's reemployment if he (Minacapilli) voted no. Nor am I finding that Ciarlo, on his own, could have effectuated Minacapilli's reemployment. It is enough to find that Ciarlo could have made a recommendation to reemploy Minacapilli, and therefore, Ciarlo's remark had the tendency to interfere with Minacapilli's protected rights.

^{20/} Compare Twp. of Moorestown, P.E.R.C. No. 82-35, 8 NJPER 599 (¶12266 1981) which adopted H.E. No. 82-5, 8 NJPER 554 (¶12246 1981), both of which dismissed a §5.4(a)(2) allegation because there was no evidence of threats, coercion or promises of benefit.

Conclusions of Law

1. The College violated §§5.4(a)(1) and (2) of the Act when Academy Director Ciarlo made a "vote no" remark to Minacapilli.

2. The College did not violate §§5.4(a)(1) and (2) of the Act when Ciarlo distributed C-2A and CP-5 to the employees prior to the election.

3. The College did not violate §5.4(a)(3) of the Act by refusing to reemploy Minacapilli. Minacapilli's employment was not renewed because of educational considerations.

4. The College did not violate §5.4(a)(7) of the Act. There was no evidence that any Commission Rule or Regulation was violated.

Recommended Order

I recommend that the Commission ORDER:

A. That the College - and Academy Director Ciarlo in particular - cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by interfering with their freedom of choice in representation elections particularly by interfering with Gaetano Minacapilli's choice in the representation election held on April 25, 1985.

2. Dominating or interfering with the formation of the Association as a majority representative by promising a benefit to Gaetano Minacapilli if he voted "no" in the election.

B. That the College take the following affirmative action:

1. 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 to ensure that such notices are not altered, defaced or covered by other materials.^{21/}

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

C. That the Complaint be dismissed regarding the allegation that the College violated §§5.4(a)(3) and (7) of the Act and dismiss that portion of the §§5.4(a)(1) and (2) allegation of the Complaint regarding the issuance of campaign letters.


Arnold H. Zudick
Hearing Examiner

Dated: July 9, 1986
Trenton, New Jersey

^{21/} The Notice was designed not only to alert the employees to the fact that the College had violated the Act in the 1985 election, but to ensure that the College take no similar action in any future representation election.

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 cease and desist from interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act by interfering with their freedom of choice in representation elections, as we had interfered with Gaetano Minacapilli's freedom of choice in the representation election held on April 25, 1985.

WE WILL cease and desist from dominating or interfering with the formation, existence or administration of the Association as the majority representative by making threats or promises of a benefit to employees to vote "no" in representation elections as we did with Gaetano Minacapilli on April 25, 1985.

WE WILL NOT interfere with the rights of employees of the Culinary Arts Academy of the College by threatening them or coercing them, or promising them a benefit to persuade them to vote "no" or against the Association in any future representation election.

ATLANTIC COMMUNITY COLLEGE

(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, CN 429 495 W. State Street, Trenton, New Jersey 08625, Telephone (609) 292-9830