

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOMENT RELATIONS COMMISSION

In the Matter of

BERGEN COUNTY UTILITIES AUTHORITY,

Respondent,

-and-

Docket No. CO-82-232-6

UTILITY WORKERS UNION OF AMERICA,
AFL-CIO, LOCAL 534,

Charging Party.

BERGEN COUNTY UTILITIES AUTHORITY,

Respondent,

-and-

Docket No. CO-83-5-7

UTILITY WORKERS UNION OF AMERICA,
LOCAL 534,

Charging Party.

SYNOPSIS

The Chairman of the Public Employment Relations Commission, acting pursuant to authority delegated to him by the full Commission and in the absence of any exceptions, finds, in accordance with a Hearing Examiner's recommendation, that the Bergen County Utilities Authority violated subsections 5.4(a)(1) and (3) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it discriminatorily denied access to a particular gate to employees of a negotiations unit represented by the Utilities Workers Union of America, AFL-CIO, Local 534. The Chairman dismisses all other allegations of the Complaint against the Authority.

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LOCAL 534,

Charging Party.

Appearances:

For the Respondent, Giblin & Giblin, Esqs.
(Paul J. Giblin, of Counsel)

For the Charging Party, John T. Moriarty, Senior
National Representative

DECISION AND ORDER

On March 10 and July 12, 1982, the Utility Workers Union of America, AFL-CIO, Local 534 ("Local 534") filed unfair practice charges against the Bergen County Utilities Authority ("Authority") with the Public Employment Relations Commission. The charges allege that the Authority violated subsections 5.4 (a) (1), (2), (3), (5), and (7)^{1/} of the New Jersey Employer-Employee

^{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
(continued)

Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"), when it discriminatorily denied employees whom Local 534 represents^{2/} access to the Authority premises through its Mehrhof Road gate while permitting such access to non-unit employees.

On July 21, 1982, the Director of Unfair Practices consolidated the charges and issued a Complaint and Notice of Hearing pursuant to N.J.A.C. 19:14-2.1. The Authority filed an Answer admitting that it had denied unit employees use of the Mehrhof gate while permitting non-unit employees to use that gate, but denying that it had discriminated against unit employees in violation of the Act. It averred instead that it had made a managerial decision to deny gate access to unit employees because of its desire to accommodate Mehrhof Road residents who had complained about the amount of traffic on that road.

On September 29, September 30, and October 14, 1982, Hearing Examiner Charles A. Tadduni conducted a hearing. The parties examined witnesses, presented exhibits and argued orally. The parties also filed post-hearing briefs.

1/ (continued)

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

2/ Local 534 represents the Authority's blue collar, white collar, and technical employees. In December, 1977, it was certified to represent the blue collar employees. On July 21, 1981, it was certified to represent white collar and technical employees.

On November 22, 1983, the Hearing Examiner issued his report and recommended decision. H.E. No. 84-29, 9 NJPER ____ (¶ ____ 1983). He concluded that the Authority violated sub-sections 5.4(a)(1) and (3) when it discriminatorily denied access to the Mehrhof gate to unit employees while allowing non-unit employees to continue to use that gate. As a remedy, he recommended an order requiring the Authority to cease and desist from its violation, restore access to the Mehrhof gate to its white collar and technical employees, and to post a notice of its violations and remedial action taken. The Hearing Examiner recommended that all other allegations of the Complaint be dismissed.

The Hearing Examiner served a copy of his report on the parties and informed them that exceptions, if any, had to be filed on or before December 7, 1983 under N.J.A.C. 19:14-7.3. Neither party has filed exceptions or requested an extension of time to do so.

Pursuant to N.J.S.A. 34:13A-6(f), the full Commission has delegated authority to me to review the report and recommended decision in the absence of exceptions. I have reviewed the record. The Hearing Examiner's findings of fact are accurate, and I adopt

and incorporate them here. Based on these findings of fact, I agree with the Hearing Examiner that under all the circumstances of this particular case, the Authority violated N.J.S.A. 34:13A-5.4(a)(1) and (3). I also adopt the recommended remedial order. All other allegations of the Complaint are dismissed.^{3/}

ORDER

The Bergen County Utilities Authority is ordered to:

A. Cease and desist from:

1) Discriminating in regard to hire or tenure of employment or any term and condition of employment of any employee -- particularly, the discriminatory denial of Mehrhof gate access to the blue collar employees and white collar/technical employees -- to discourage its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, which includes the right to form, join and assist any employee organization without fear of penalty or reprisal; and

2) In any other manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly with regard to the periodic grants and denials of Mehrhof gate access to the blue collar employees.

^{3/} Since I agree with the Hearing Examiner, under all the circumstances of this case, that the Authority did not refuse to negotiate in good faith over the question of gate access and thus did not violate subsection 5.4(a)(5), I do not believe it is necessary to determine in the abstract whether a public employer has a non-negotiable managerial prerogative to determine gate access questions for non-discriminatory reasons.

B. Take the following affirmative action:

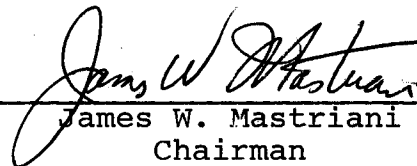
1) Forthwith restore to white collar/technical employees access to the Mehrhof gate;

2) Post at the Central Offices of the Bergen County Utilities Authority copies of the attached notice marked Appendix "A." Copies of such notice on forms to be provided by the Commission shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced or covered by other material; and

3) Notify the Commission in writing within twenty (20) days of receipt of this Order what steps Respondent has taken to comply herewith.

The portions of the Complaint alleging that the Authority violated N.J.S.A. 34:13A-5.4(a)(2), (5), and (7) are dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: Trenton, New Jersey
December 13, 1983

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 discriminate in regard to hire or tenure of employment or any term and condition of employment of any employee to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, which include the right to form, join and assist any employee organization without fear of penalty or reprisal.

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act.

WE WILL forthwith restore to white collar/technical employees access to the Mehrhof gate. We will not discriminate against blue collar or white collar/technical employees in making future determinations concerning gate access.

 BERGEN COUNTY UTILITIES AUTHORITY

(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
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BERGEN COUNTY UTILITIES AUTHORITY,

Respondent,

-and-

Docket No. CO-83-5-7

UTILITY WORKERS UNION OF AMERICA,
LOCAL 534,

Charging Party.

Synopsis

A Commission Hearing Examiner recommends that the Public Employment Relations Commission find that the Bergen County Utilities Authority had engaged in unfair practices proscribed by N.J.S.A. 34:13A-5.4(a)(1) and (a)(3), by discriminatorily withdrawing access to the front gate of the Authority facility from the employees in the Utility Workers Union negotiations unit. Based upon the timing of the employer's actions, statements made by management representatives and actions taken by the employer during negotiations, the Hearing Examiner concludes that the Authority's withdrawal of front gate access from unit employees was discriminatory and was motivated by a desire to discourage the exercise of rights protected by the Act. The Hearing Examiner rejected the Authority's proffered business reasons for its withdrawal of front gate access to the unit employees.

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 conclusions of law.

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Appearances:

For the Respondent, Giblin and Giblin, Esqs.
(Paul J. Giblin, Esq.)

For the Charging Party
(John T. Moriarty, Senior National Representative)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

Two Unfair Practice Charges ("Charge") were filed with the Public Employment Relations Commission ("Commission") on March 10, 1982 and July 12, 1982, respectively, by the Utility Workers Union of America, AFL-CIO, Local 534 ("Local 534"), alleging that the Bergen County Utilities Authority ("Authority") had engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. ("Act"). It is alleged in the Charge that the Authority is discriminating against Local 534 and certain bargaining unit employees by denying

the employees access to the Authority premises through the Mehrhof Road gate because they had supported the union (Local 534). Local 534 contends that said conduct is violative of N.J.S.A. 34:13A-5.4 (a) (1), (2), (3), (5) and (7). ^{1/}

On July 21, 1982, the Director of Unfair Practices issued an Order Consolidating Cases and, it appearing to the Director that the allegations of the Charges, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued in the above-referred consolidated matters. Pursuant to the Complaint and Notice of Hearing, hearings were held on September 29, September 30 and October 14, 1982, in Newark, New Jersey, at which time all parties were given the opportunity to examine witnesses, present evidence and argue orally. Subsequent to the close of hearing, briefs were submitted by the parties by December 8, 1982.

Based upon the entire record in this proceeding, the undersigned Hearing Examiner finds and determines as follows.

The Bergen County Utilities Authority, Respondent herein, is a public employer within the meaning of the Act, is subject to its provisions and is the employer of the employees who are involved in this proceeding.

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

The Utility Workers Union of America, AFL-CIO, Local 534, Charging Party herein, is an employee organization within the meaning of the Act and is subject to its provisions.

Positions of the Parties

Charging Party Local 534 asserts that the union and the Authority have long been at odds over the Authority's intermittent attempts to stop blue collar Authority employees from using the Mehrhof Road gate access route to the Authority facility (the front gate to the Authority) and to compel their use of the Empire Boulevard gate (the back gate to the Authority) in traveling to and from the Authority facility. In July 1981, Local 534 was certified as the exclusive majority representative for white collar and technical Authority employees. Local 534 points to several occurrences, which occurred during the period that commenced with its efforts to organize the white collar employees and continued through the execution of a contract by the parties, to support its contention that the Authority is discriminating against unit employees -- particularly the newly organized white collar employees -- by withdrawing Mehrhof Road gate access from them because they supported the union.

The Authority disputes these contentions, stating that its withdrawal of the Mehrhof gate access from "hourly employees" of the Authority was not motivated by anti-union animus but rather was motivated by legitimate business reasons -- including an attempt to accommodate the desires of Mehrhof Road residents who complained about the amount of traffic engendered by the Authority. The Authority further argues that its decision to deny to certain em-

ployees the use of an entrance is a management right and that use of an entrance is not a term and condition of employment. In buttressing its arguments against the charge, the Authority notes that it had long intended to direct Authority traffic from Mehrhof Road to Empire Boulevard and that Empire Boulevard is a larger, safer access route to the Authority facility.

Analysis: Findings of Fact
and Discussion of Law

The Bergen County Utilities Authority is a governmental entity whose task is to collect and dispose of sewage from approximately 43 Bergen County towns that are within its district. The Authority employed 200 employees at the time of this proceeding, approximately 100 of whom were blue collar employees in the unit represented by Local 534 and 25 of whom were white collar employees who had recently been organized by Local 534. ^{2/}

The Authority facility is located in southern Bergen County, in the southeastern corner of the Borough of Little Ferry adjacent to the Hackensack River. ^{3/} The Authority facility encompasses a comparatively large land area and thus is quite near several surrounding towns: moving clockwise from the north they are -- South Hackensack, Bogota, Ridgefield Park, Ridgefield, Carlstadt, East Rutherford, Moonachie, Hasbrouck Heights and Teterboro.

There are two separate access routes to the Authority facility: Mehrhof Road, which runs north from the Authority facility, and Empire Boulevard, which runs west from the Authority facility.

^{2/} At Tr. 1/78, O'Hare states there are 140 Authority employees. However, Plant Superintendent Zablatzky later corrects that figure and states there are 200 total Authority employees. See Tr. 1/34, 78. Tr. 3/39-40.

^{3/} See inset map, Exhibit J-2a.

At its inception in the early 1950s, the Authority facility was much smaller and was served by one access road (Mehrhof Road). Since that time, there have been two major plant expansions, the most recent having commenced in the early 1970s and which was beginning to wind down at the time of these proceedings. Thus, periodically from the early 1970s to date, much of the Authority facility has been under construction or somehow otherwise affected by construction projects.

In April 1977, the Authority began restricting access to the Mehrhof gate by "plant" (blue collar) employees. ^{4/} In subsequent months, several notices were posted by the Authority reminding the blue collar employees (variously referred to as "plant" employees or "hourly and laboratory" employees) that they were not permitted to use the Mehrhof gate between the hours of 6 a.m. and 5 p.m. and that during those hours, they were to use the Empire gate. ^{5/} At that time (1977) white collar and technical employees were not restricted in their use of the Mehrhof gate. ^{6/} In December 1977, Local 534 was certified as the exclusive majority representative of all blue collar employees employed by the Authority. ^{7/}

In approximately spring 1981, Local 534 began an organizing drive among the group of white collar/technical employees at the Authority. In June 1981, the Authority posted another reminder notice prohibiting Mehrhof gate use to Local 534's blue collar unit. On July 21, 1981, Local 534 was certified by the Commission as the

^{4/} Exhibit R22.

^{5/} Exhibits R3, R2 and R5.

^{6/} Tr. 1/31-33, 61-62, 94-98. Tr. 2/28, 39.

^{7/} The blue collar unit did not include the employees in the solid waste (landfill) division of the Authority.

exclusive majority representative of the white collar/technical employee group at the Authority. After it was certified to represent the white collar/technical employee unit, Local 534 requested that the Authority allow the white collar/technical group to come under the extant, blue collar employee unit contract (which was due to expire on December 31, 1981). The Authority refused to accede to this request. ^{8/} On July 21, 1981, another reminder notice was posted by the Authority and on July 24, 1981, a full page "clarification" of the July 21, 1981 notice was posted concerning the restrictions on the use of the Mehrhof gate. ^{9/}

The August 1981 grievance filed by H. Reicen --

In August 1981, Local 534 filed a grievance (Exhibit P2) concerning the discriminatory treatment of their blue collar unit employees who were restricted from using the Mehrhof gate. In September 1981, the Authority replied to the grievance by indicating that more information was required inasmuch as the Authority was aware that some unit employees were then using the Mehrhof gate. ^{10/}

The subsequent course and resolution of the August 1981 grievance is not wholly clear in this record. There is no further documentation in the record specifically concerning the handling or resolution of this grievance. There is no denial of the grievance by the Authority, no written compromise and no written with-

^{8/} Tr. 2/46-48.

^{9/} Exhibit R10.

^{10/} The record indicates that in August-September 1981, the white collar/technical employee group was not being treated as part of the extant blue collar unit represented by Local 534 and thus continued to enjoy Mehrhof gate access during that period.

drawal by Local 534. Additional information is provided in the record through the testimony of Local 534 President O'Hare and Mr. Hansford. ^{11/} Mr. O'Hare testified that the August 1981 grievance was informally resolved -- the parties' agreement was that the union would drop the grievance and the Authority would allow blue collar unit employees access to the Mehrhof gate.

In fact, something along those lines occurred -- the union allowed the grievance to die and on October 14, 1981, the Authority posted a notice (Exhibit R-6) indicating that the Empire gate would be closed to all traffic due to construction in the area. All employees were then directed to use the Mehrhof gate. The Authority argues that Exhibit R-6 and the resolution of the August 1981 grievance were wholly unconnected -- that the closing of the Empire gate was dictated by the Authority's construction needs and that the consequent Mehrhof gate access which was allowed to employees in Local 534's blue collar unit was intended as a

11/ O'Hare testified concerning two Mehrhof gate access grievances and at points in his testimony, he appears a bit confused concerning the year in which one of the grievances was filed. The Hearing Examiner has set forth in this footnote what he believes to be the correct interpretation of O'Hare's testimony on the grievances.

The record indicates that in November 1980, the Authority posted another notice concerning the Mehrhof gate restriction. A unit employee (Paul DeBartolo), who had allegedly violated the Mehrhof gate restriction policy and who had subsequently received a warning letter about the violation, filed the first Mehrhof gate grievance at the end of 1980 (Tr. 1/25-26 and 49-50).

At that time, O'Hare was a trustee of the union and as such was not directly involved in the grievance procedure. He believes that the result of this filing was that the grievance was allowed to just "fade away" and the employee continued to use the Mehrhof gate.

A second Mehrhof gate grievance was filed in August 1981 by shop steward H. Reicen (Exhibit P2). (Tr. 1/28-31, 59-62 and 80-83; Tr. 3/63-64). This grievance is discussed above.

temporary measure until the Empire gate access road construction was completed. The Authority proffered several picture exhibits which purport to show the Empire gate access road before (R-23E, taken on 9/10/81), during (R-23A and R-23B, taken on 10/10/81) and after (R-23 and R-23C, taken on 12/17/81 and R-23D, taken on 3/30/82) the construction. ^{12/} The Authority further suggests that Local 534 was aware that the August 1981 grievance "resolution" was only temporary because in the union's initial submission of contract proposals to the Authority in fall 1981, the union included a proposal concerning Mehrhof gate access.

The union denies that it was ever told that the August 1981 grievance resolution (withdraw the grievance and the blue collar unit gains Mehrhof gate access) was temporary. Local 534 asserts that the Authority's periodic granting and restriction of Mehrhof gate access had become an increasingly sore point among its membership over the years since 1977. The union contends that it included the proposal (concerning the elimination of discriminatory rules concerning Mehrhof gate access for its blue collar unit) in its initial set of contract demands because it wanted to finally settle the Mehrhof gate problem. Mr. O'Hare further testified that the Empire gate access road construction was not begun for several weeks after October 14, 1981 and was completed in November or December 1981. ^{13/} Local 534 argues that the Authority is trying to use the ongoing construction at the Authority facility to mask its Mehrhof gate machinations. Mr. O'Hare's testimony concerning the completion date of the work on the Empire gate access road is

^{12/} Tr. 3/40-43.

^{13/} Tr. 1/62-64.

buttressed by a close examination of exhibits R-23 (a picture of the Empire gate access road taken on 12/17/81) and R23D (a picture of the Empire gate access road, taken on 3/30/82 from approximately the same location as was exhibit R23). The pictures show the same stretch of the Empire gate access road, each showing roadway surface of apparently the same width and quality. The only discernible difference in the roadway which is depicted by the two pictures (taken three months apart) is that R23D shows a steel guardrail, approximately three feet high, was added to both sides of one part of the roadway. Most of this roadway has water on both sides and most of the roadway has no guardrails on it. Thus, there appears to be no cogent reason why the Authority could not have re-routed traffic to the Empire gate as early as mid-December 1981.

What conclusions may be drawn from the filing and processing of the August 1981 Mehrhof gate grievance? First, the Hearing Examiner rejects the Authority's contention that the demise of the grievance and the granting of Mehrhof gate access to Local 534's blue collar employees were unconnected. Did the parties understand this de facto resolution to be temporary or permanent? The undersigned would conclude -- based upon testimony from O'Hare and Hansford -- that there was no discussion by the parties that this was a "temporary" solution. That issue -- temporary or permanent -- was very likely not specifically addressed at the time the grievance was resolved in fall 1981. The parties had just commenced their negotiations (fall 1981) for a successor to the then-current contract that was due to expire on December 31, 1981. The Mehrhof gate issue, which had been simmering for quite some time, was then beginning to boil.

The Hearing Examiner believes that the parties were at that moment intent upon removing a potentially insurmountable impediment to their contract negotiations -- the Mehrhof gate problem -- and that that is precisely what they did. They removed the Mehrhof gate obstacle in October 1981 with the idea that they could continue a dialogue on it -- should that be necessary -- during the course of their negotiations. 14/

Occurrences during contract negotiations --

In the fall 1981, the Authority and Local 534 commenced their negotiations for a successor collective negotiations agreement. As indicated above, one of Local 534's initial proposals submitted to the Authority concerned the removal of discriminatory restrictions upon the use of the Mehrhof gate. Local 534 also proposed that both the blue collar unit and the white collar/technical unit -- it was the white collar/technical unit for which the union was recently certified as the majority representative -- be included under one agreement. The Authority was opposed to that proposal and contended that each unit should be covered by a separate labor agreement.

Negotiations continued through the end of 1981 and into early 1982 with the parties still not having reached agreement on a successor pact. There was considerable discussion concerning negotiations ground rules -- the makeup of the union negotiations committee(s), and whether there would be one or two contracts. In early February 1982, the Authority agreed to negotiate one contract with one overall negotiations committee to cover both the blue collar group and the white collar/technical group; however, at the same

14/ The Hearing Examiner notes that there is no indication in the record, during the chronology of these events, that the Authority took the position during contract negotiations with Local 534 that the gate issue was a non-negotiable managerial prerogative.

time, a dispute arose between the parties concerning other negotiations ground rules --specifically, the times for union caucuses and negotiations sessions and whether or not the employees on the negotiations team would be paid for that time when these sessions took place during regular business hours. 15/

When the union negotiations team arrived for the caucus meeting slated to begin at 1 p.m. (prior to a joint bargaining session scheduled for 2 p.m.) on February 1, 1982, they were informed by Authority representatives that they should not meet at 1 p.m. because the Authority would not pay them for the time. A dispute immediately arose. The resolution of the dispute on that day was that the Authority would pay the employees (for that day) for the caucus and negotiations meetings which took place during the regular workday. However, this dispute lingered over several more meetings and again resulted in a confrontation when Authority Personnel Director May sent a letter to the union on February 19, 1982 (Exhibit P11) and stated therein that future negotiations sessions should be held on an alternating basis, beginning at 2 p.m. and 7 p.m. respectively. Mr. May further indicated that the Authority would not permit the union its pre-negotiations session caucus time. The union responded with a letter (Exhibit P12) from its Senior International Representative, John Moriarty, which indicated that the 2 p.m. negotiations time and the one-hour union caucus prior thereto were, based upon the parties' past negotiations, an established practice. Mr. Moriarty's letter stated that the union considered this a breach of contract and requested that the Authority reconsider its position. Mr. O'Hare testified that the 2 p.m. negotiations time and the

union's prior caucus time were the established negotiations procedures by which the parties had abided in the past. ^{16/} Subsequent to Mr. Moriarty's letter, the parties resumed negotiations, apparently following their prior negotiations procedures concerning starting times, caucus meetings and pay for the employees engaged in negotiations.

On February 22, 1983, while negotiations were ongoing, the Authority issued another notice concerning the Mehrhof gate (Exhibit R-11) which stated that hourly personnel were restricted from using the Mehrhof gate during the hours from 6 a.m.-5 p.m., as of March 1, 1982. On February 25, 1982, Local 534 filed a grievance concerning the renewed restriction on the use of the Mehrhof gate by blue collar employees. On March 2, 1982, Authority Chief Engineer Jerome Sheehan denied the grievance. While it is not clear on the face of the Authority's February 22, 1982 notice (Exhibit R-11), it soon became apparent that the Authority intended that the restriction on the use of the Mehrhof gate be applied to both the blue collar and the white collar/technical employee groups. This was the first time that the white collar/technical employees were restricted from using the Mehrhof gate. ^{17/} Accordingly, on March 10, 1982, Local 534 filed the first of the two above-referred unfair practice charges.

^{16/} While O'Hare was not a direct participant in contract negotiations prior to the negotiations for the 1982 contract, he was involved in the union's activities and in the immediately preceding contract negotiations, was a trustee on the local's bargaining team.

^{17/} Tr. 1/114-116. Tr. 2/28, 39.

On April 29, 1982, the parties executed a memorandum of agreement concerning a successor to their collective negotiations agreement which had expired on December 31, 1981. On June 7, 1982, the parties executed a successor collective negotiations agreement covering the period from January 1, 1982 to December 31, 1984. On July 12, 1982, the second of the two above-referred charges was filed herein.

-- -- -- --

In the testimony of Elaine Berg, a clerical employee of the Authority who is in the unit represented by Local 534, several noteworthy points are found. Prior to the organizational campaign by Local 534 among the white collar/technical employees (spring-summer 1981), another union had attempted to organize that group in late 1980, early 1981. During that organizational attempt, Ms. Berg testified that she was called to the office of Authority Executive Director John Costello; Ms. Berg testified that Executive Director Costello "accused" her of being the reason for the union's presence at the Authority to organize the white collar employees. Later in 1981 (spring-summer), during Local 534's organizational campaign, Ms. Berg stated that several employee meetings were held by Authority Executive Director Costello wherein he campaigned against the union. At one of these employee meetings, Ms. Berg testified that Mr. Costello stated that "certain employees" would not fare as well with the union as they would if they remained outside the negotiations unit. Ms. Berg also testified that at one of the campaign meetings where Mr. Costello spoke to the employees,

he stopped mid-sentence, turned to Berg and asked if she was taking notes to turn over to the union.

Ms. Berg was hired by the Authority in January 1977 as an office manager. Upon hire, she was issued a Mehrhof gate card ^{18/} and had thereafter always used the Mehrhof entrance to the plant. A copy of the February 22, 1982 Mehrhof gate notice was distributed to Ms. Berg. She then went to see Jerome Sheehan (the author of the February 22, 1982 notice) and indicated that it was her impression that she was not considered to be an hourly employee and she felt the memo was mistakenly given to her. Mr. Sheehan replied that he was following instructions from Executive Director Costello. Thereafter, on February 26, 1982, Ms. Berg wrote a memo (Exhibit P4) to Mr. Sheehan wherein she (Berg) stated that she considered Sheehan's memo to be a unilateral change in her terms and conditions of employment during negotiations and that she further considered this unilateral withdrawal of the Mehrhof gate benefit to be a harassment of her by the Authority for joining the union.

On April 29, 1982, new Mehrhof gate cards were issued only to those employees whom the Authority had "authorized" to use that gate. Ms. Berg was not issued such a card. However, she continued to "use" the gate by commuting to work in the car of an employee who had been issued a new Mehrhof gate card (and therefore presumably was authorized to use the Mehrhof gate). Ms. Berg was given a memo (Exhibit P5) by Authority Personnel Director Jerry May

¹⁸ The Mehrhof gate is electronically operated. It may be activated in one of two ways: (a) employees are issued gate cards which, when inserted into a slot at the gate, opens the gate long enough for a vehicle to pass through; or (b) the gate can be activated by an employee sitting in a remote location who communicates with the person attempting to enter the Mehrhof gate through a voice-activated "squawk box."

advising her to stop using the Mehrhof gate. Mr. May told her she was not given a Mehrhof gate card because she was in the bargaining unit. 19/

-- -- -- --
After the Authority issued the February 22, 1982 Mehrhof gate restriction notice, certain people -- both Authority employees and outsiders -- continued to enjoy access to the Mehrhof gate under the new policy. Those with access to the Mehrhof gate include: all Authority commissioners and officers, all Authority management and supervisory personnel, Authority attorneys, accountants, construction contractors and their employees, local police, fire and ambulance companies, and employees of the Authority's landfill division. 20/

19/ Tr. 1/100-105. Tr. 2/23-24.

While some of Berg's testimony is of a hearsay nature, the undersigned has cited it in this decision for several reasons.

Some of the testimony concerning statements by Costello, May and Sheehan are not necessarily being offered to prove the truth of the matter asserted, but rather to illustrate the attitude taken by the Authority toward the union.

However, May's statement concerning why Berg wasn't issued a gate card was to some extent hearsay in nature. In the context of this matter -- essentially an (a)(3) anti-union animus case -- her testimony concerning May's statement would clearly fall into an admission-against-interest exception.

Further, Costello, May and Sheehan are Authority managerial executives who certainly could have been called by the Authority to refute Berg's testimony. They were not called.

After evaluating the witness, her overall testimony and the overall proofs in this case, the undersigned believes Berg's testimony on these occurrences to be reliable.

20/ Tr. 1/37-40, 43, 65-66, 85, 109-112. Tr. 2/31-35. Tr. 3/38-40. Exhibit R15. Note that the employees in the Authority's landfill division were represented by another union, not Local 534.

Note also that several managerial employees of the Authority have each been issued several Mehrhof gate cards.

Further, all shift employees, including those in Local 534's negotiations unit, must use the Mehrhof gate between the hours of 5 p.m. and 6 a.m. This is due to the fact that the Empire gate is closed from 5 p.m. to 6 a.m. for security reasons. Thus, between the hours of 5 p.m. to 6 a.m., all Authority employees, all Authority vehicles and equipment and all outsiders coming to and from the Authority premises must utilize the Mehrhof gate. 21/ The Empire gate is also closed on weekends and holidays.

The Authority's reply --

The Authority has steadfastly denied that the Mehrhof gate restriction -- to either blue collar or white collar employees -- was motivated by anti-union animus. The Authority notes that there are historical roots for its Mehrhof gate restriction policy. Plant Superintendent Zablatsky testified that the Authority began making plans for a large scale expansion in the late 1960's. One of the many factors which was considered in planning for the expansion was the adequacy of the extant lone access route to the facility (Mehrhof Road). The Authority planners recognized that with its greatly expanded plant capacity would come a much higher volume of traffic -- from Authority trucks and equipment, suppliers and service companies and more employees. Another reason which the Authority proffers for the planning of the second access route was that it received complaints from the local community concerning the amount of traffic engendered by the Authority on local streets. Accordingly, the planners saw a need for an additional access route capable of accommodating the anticipated increased traffic -- particularly commercial traffic.

While the Authority goes to some trouble to show that plans for the Empire Boulevard access route were begun long before Local 534 arrived on the Authority scene, no specific facts are adduced which indicate that the Authority was planning to shift the majority of its traffic flow from Mehrhof Road to Empire Boulevard. More importantly herein, there is simply no factual basis upon which to conclude that the Authority had long planned to reroute its commuter traffic (employees) from the Mehrhof gate to the Empire gate. Mr. Zablatsky's testimony on this issue is mostly in the form of broad generalities and conclusionary statements; at best, it establishes that the Authority recognized the need for and began planning for an additional roadway to accommodate anticipated higher traffic volume. 22/

Other than R-21 (a newspaper article from the Bergen Record dated June 28, 1972, concerning community complaints about Authority trucks), there is no documentary evidence of any sort to indicate that the Authority had received any complaints from residents or local officials about traffic on Mehrhof Road. Further, an examina-

22/ Exhibit R-16 is a three page exhibit with a cover page entitled "Contract 87" and dated February 1976. In the first paragraph of the third page, it states:

The Contractor shall do all work necessary...to maintain this temporary roadway and crossing of the Losen Slote to allow...use of the roadway for the work under this...contract and by the owner's personnel.

While there are some date discrepancies between this exhibit and the testimonial record, the problems are not germane to the point made herein below.

The above language is the only specific indication in the record of any plan for the Authority's employees to use the Empire Boulevard access route. Note that the language is specifically couched in terms of temporary construction. The testimonial record is replete with references to the havoc created by the ongoing construction. There were times when the Mehrhof gate was inaccessible; there were times when the Empire gate was inaccessible. Thus, in planning the construction, it was important to the Authority that a second access route be quickly developed and that it be suitable for the Authority's employees to travel on, because it was anticipated that construction could tie up the Mehrhof access route.

tion of Mr. Zablatzky's testimony and a reading of Exhibit R-21 show clearly that the complaints of the Little Ferry residents were directed specifically at the Authority's use of sewage trucks (large tank trucks hauling raw septic material) over Mehrhof Road. Again, the Authority's proofs no where implicate a problem involving employees commuting over Mehrhof Road in private passenger automobiles.

Ms. Berg testified that during the period of time when she functioned as an office manager in the Authority's administrative office, she did not recollect the office receiving any complaints about Authority traffic -- by telephone or in writing -- along Mehrhof Road. What she did remember were numerous residential complaints about the odors which emanated from the Authority's premises. Berg further testified that during this period, she either personally typed, or had typed by others, numerous pieces of correspondence concerning the construction contracts. Through all of this, she stated that she never became aware of any "master plan" to reroute most or all Authority traffic (particularly commuter traffic) from Mehrhof Road to Empire Boulevard.

In explaining the occurrence of the on and off access to the Mehrhof gate which Local 534's employees were permitted, the Authority points to the evidence concerning the ongoing construction at its premises and argues that this was the essential reason for having permitted the blue collar employees intermittent use of the Mehrhof gate. The Authority then sought to link its asserted long range plan for the Empire Boulevard access to current conditions on

the two roadways.

The Authority presented testimony from Steven Mizerek, a civil engineer employed by the Authority and who is part of its management group. Much of Mr. Mizerek's testimony concerned the physical description of both Mehrhof Road and Empire Boulevard -- size, road surface, pictures and diagrams. Mr. Mizerek also proffered opinion testimony concerning the safety and capacity utilization of the respective roadways.

Prior to the hearing, Mr. Mizerek went to Mehrhof Road and to Empire Boulevard and photographed (and supervised another employee who took photographs of) several areas of each road. Mr. Mizerek also took measurements and made observations at each location. Mr. Mizerek testified that Mehrhof Road was 30.2 feet in total width. He stated that with cars parked on both sides of the street, in opposite positions, the traveling lanes were reduced to a total width of 17.1 feet. Mr. Mizerek testified that a standard car is approximately 7 feet wide; therefore, that left a total of 3.1 feet for spacing between the cars (i.e. approximately 12 1/2" spacing between cars).

Mr. Mizerek testified that the Highway Capacity Manual of 1965 (a reference tool which he indicated was utilized by traffic engineers) recommended that travel lanes be 10 feet in width. Based upon the foregoing, Mr. Mizerek concluded that, because of the spacing between cars traveling in opposite directions, an unsafe condition exists on Mehrhof Road. Mr. Mizerek further testified

that based upon his observations, he would assess Mehrhof Road as being at 100% of its capacity utilization. ^{23/} Mr. Mizerek assessed Empire Boulevard to be a safer route than Mehrhof Road. These were

23/ An objection was raised to Mr. Mizerek's opinion testimony based, in part, upon relevance and his qualification to testify about the topics on which he was giving opinion testimony.

Mr. Mizerek was trained as a civil engineer. In the course of that training, Mizerek took one course in traffic engineering and one course in urban planning. Mizerek worked for the Authority for 11 months. He had been a licensed civil engineer for two months. Prior to working for the Authority, he worked for the Hackensack Meadowlands Development Commission ("HMDC"). He worked as a civil engineer (unlicensed) reviewing site plans to insure that any proposed development conformed to zoning regulations, building regulations and construction codes. While at HMDC, he indicated that he did do some traffic analysis of site plans for facility parking lots, driveways and access roads. However, he further indicated that traffic and transportation analysis and planning -- especially on large and complex projects such as those proposed for this Authority -- were done by the HMDC's Transportation Engineer. Mizerek did not work in the transportation section of the HMDC. Mizerek had never worked for a department of transportation or an urban traffic planning division nor was he ever involved in planning highway or street construction. Mizerek never characterized himself as a transportation engineer or urban traffic planner (although the Authority's counsel did).

The Hearing Examiner determined (over the union's objection) that Mizerek was qualified to give opinion testimony on the issue before him: he is a civil engineer with some limited experience in traffic planning. While the above recited qualifications will enable Mizerek's testimony to come into the record, what weight to accord it is another matter. In assessing what weight to give Mizerek's opinion testimony, the Hearing Examiner makes the following observations. Mr. Mizerek is not a transportation planning and safety expert. The figures and calculations stated in the record based upon which the opinion was given do not seem to tally correctly. If a street is 30.2 feet wide, has cars parked on both sides (which are a standard width of 7 feet each), and has cars traveling in opposite directions, we are left with 2.2 feet of total clearance space between vehicles (or approximately 8 3/4 inches between each vehicle). Mathematics notwithstanding, what most troubles the Hearing Examiner about the calculations is the assertion that a standard car is 7 feet in width. That is simply an incorrect assumption -- not even reasonably close. Because Mizerek's opinion testimony is based in part upon this information, the substantially incorrect assumption which was made
(Continued)

entirely Mr. Mizerek's opinions; they were not determinations made by either the New Jersey Department of Transportation or a municipal traffic planning department.

In his direct testimony, Mr. Mizerek stated that based upon his observations, drivers' sight lines were impeded due to hedges and buildings near the street at the Mehrhof Road/Washington Avenue intersection.

Mr. Mizerek stated that Empire Boulevard was 42.2 feet wide at his measuring point and no parking was permitted on either side.

The union presented testimony concerning the condition and safety of the respective roadways through Mr. O'Hare and Ms. Berg. Mr. O'Hare's opinion was that because of certain left turn areas, Empire Boulevard was more hazardous than Mehrhof Road as an approach route to the Authority. ^{24/} The picture exhibits of Empire Boulevard (R-17-1 through R-17-5) show it to be a fairly wide, crown-topped asphalt street, curbed with a double yellow line down the center. It runs through a light industrial area.

23/ (Continued) herein undermines the entire opinion. Finally, regarding his reference to the recommendation that travel lane widths be 10 feet, there is no indication for what kind of roadway such a recommendation is made: all roads, suburban residential, suburban commercial, parkway, etc?

There are no facts adduced in the record with regard to his capacity utilization opinion. Based upon all of the foregoing, the undersigned would conclude that Mizerek's opinion testimony is in the record, it is his opinion only and no special weight should be accorded to it.

24/ Note that on cross examination, Mizerek indicated that in making his comparative assessments of Empire Boulevard and Mehrhof Road (i.e. Empire is safer than Mehrhof), he did not take into consideration the possible routes which employees would have to travel from their homes to get to each roadway. See also Tr. 1/35, 45-46, 105. Tr. 2/9-12.

The picture exhibits of Mehrhof Road show it to be a crown-topped asphalt street, curbed, treelined and without any lines dividing it. It runs through a residential neighborhood. The undersigned would disagree with Mr. Mizerek's testimony, based upon Exhibit R-17-9, that hedges and buildings would impede drivers' sight lines. The hedges are not high and neither buildings nor hedges seem close to the curb. Other picture exhibits of Mehrhof Road tend to support this conclusion, most notably Exhibits P-7 and P-8.

The testimony and exhibits indicate that the Empire gate access road is approximately 20 feet wide and has water on both sides of it. Testimony indicates that the road has potholes and dips which have damaged employees' cars. Exhibits R-18B, R-18C, P-18, P-18A, P-18B and P-18C would seem to support the testimony concerning the road's condition.

Analysis and Discussion of Law --

A. N.J.S.A. 34:13A-5.4(a)(1) and (a)(3) allegations.

East Orange Public Library v. Taliaferro, 180 N.J. Super. 155 (1981), sets forth the test for determining if an employer's alleged anti-union motivation makes a personnel action illegal. The charging party must first establish that its protected activity was a substantial or motivating factor in the employer's decision. If the charging party succeeds, then the employer must go forward and present evidence that it would have reached the same decision

in the absence of the Charging Party's protected activity. ^{25/}

The union argues that all of the foregoing facts amount to the employer retaliating against the union and its membership for having exercised the protected rights to organize, support a union and negotiate collectively. The employer counters by indicating that gate access is a managerial prerogative and that it had legitimate business reasons for having acted as it did.

The union and the employer began their dispute concerning access to the Mehrhof gate in 1977, when the union was first certified to represent the Association's blue collar employees. The parties have had a tug-of-war on the issue, with the blue collar employees intermittently gaining access to the Mehrhof gate, sometimes tacitly, sometimes directly. The charging party never established that it had permanently secured Mehrhof gate access for its blue collar employees. There is no indication that a contract provision concerning Mehrhof gate access had been negotiated and agreed to by the parties. Nor was a past practice established in the record showing that the blue collar employees had secured consistent use of the Mehrhof gate over an extended period of time. Finally, the "resolution" of the August 1981 grievance was sufficiently clouded (as stated above) so that the Hearing Examiner is unable to conclude that the Authority had agreed to give permanent Mehrhof gate access to blue collar employees

^{25/} The Taliaferro Court borrowed this test from the decision of the National Labor Relations Board in Wright Line, A Division of Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980), aff'd as modif. 108 LRRM 2513, 662 F.2d 899 (1st Cir. 1981), cert. den. (March 1, 1982). The NLRB, in turn, based its test on the decision of the United States Supreme Court in Mt. Healthy City School Dist. Bd. of Ed. v. Doyle, 429 U.S. 274 (1977). See also, e.g., In re County of Bergen-Operating Bergen Pines County Hospital, P.E.R.C. No. 82-117, 8 NJPER 360 (¶13165 1982).

in August 1981.

However, Local 534 contends that the periodic grants and withdrawals of Mehrhof gate access from its blue collar group were harrassment which was calculated to interfere with protected employee rights. The Authority contends that the periodic nature of the blue collar employees' Mehrhof gate access was due to the ongoing construction at the Authority. The undersigned notes, however, that the record shows only one link between the construction and the granting of the Mehrhof gate access to the blue collar employees (in October 1981). Further, the subsequent withdrawal of Mehrhof gate access (on February 22, 1982) from the blue collar employees occurred substantially after (2 1/2 months) construction interference on the Empire gate access route had ceased. The eventual, final withdrawal of Mehrhof gate access from the blue collar employees (in February 1982) coincided with, inter alia, a period of heightened negotiations "stress."

The white collar/technical employees of the Authority had always enjoyed Mehrhof gate access prior to February 1982. These employees had been unorganized and unrepresented until July 1981 when Local 534 was certified as their majority representative. Local 534 then requested that the white collar employees be allowed to come under the remainder of their then-current (blue collar unit) collective negotiations agreement (which was due to expire December 31, 1981). The Authority refused to accede to that request. Thus, the white collar employees, although formally organized in July 1981, went uncovered by any collective negotiations agreement for the balance of 1981.

When the parties began their negotiations (September 1981) for a 1982 agreement, Local 534 demanded that the contract be negotiated to cover both groups of Authority employees which it then represented. The Authority again resisted this one-contract concept. The old agreement expired, negotiations intensified and the union continued pressing its one-contract demand. In the midst of these negotiations, the Authority attempted to change other negotiations ground rules (concerning meeting time and pay for negotiating employees) which had been established in the parties' negotiations of prior agreements. The Authority finally conceded the one-contract point and sometime later gave up trying to change the time of the parties' negotiations sessions and the practice of paying the employees who conducted negotiations. Shortly thereafter, the employer issued the notice withdrawing Mehrhof gate access from its blue collar employees and, for the first time, its white collar employees.

The union also presented testimony from an employee which indicates that the Authority had a rather unfriendly attitude toward the union. The employee's testimony further indicated that the Authority's Personnel Director had told her point blank -- you don't have a Mehrhof gate card because you're in the bargaining unit. -- That testimony is unchallenged and unrefuted in the record.

The undersigned would note that at the outset of this sequence of events, Local 534 represented the blue collar employees of the Authority -- the single largest organizable group within the Authority. Local 534 then organized and became certified to represent the white collar and technical employees at the Authority. Finally,

Local 534 began to seek support among the landfill employees at the Authority. The significance of the growth of Local 534's membership (and thus its strength) was not lost on the Authority.

The Authority states that its withdrawal of Mehrhof gate access to its hourly employees had its origins in the early 1970's when it realized the need for and began planning a second access route to the Authority facility. However, the proofs concerning this contention at best indicate that they realized they would need an additional road into the Authority because the one existing road (Mehrhof Road) would be inadequate to handle the volume of traffic, particularly the heavy trucks and equipment, that would be coming to and from the Authority. The increased traffic volume would derive largely from the Authority's own expanded operation -- its own trucks and equipment, suppliers, construction contractors etc. While the number of employees at the Authority has increased, nothing in the early 1970's plans gave any indication that commuting employees would be forced to use a different access route to and from the Authority.

The Authority also sought to show that complaints from residents and its concern for the safety of the local residential community resulted in the shunting of commuting hourly employees from the Mehrhof gate to the Empire gate. However, there is no showing in the record that local residents had complained to the Authority or anyone else about employees commuting in their private automobiles along Mehrhof Road. If the record indicates any concern among local residents, it is with regard to Authority trucks and contractors' equipment.

With regard to the Authority's safety argument, (a) the proofs simply do not bear it out and (b) the undersigned is convinced that it is a pretextual argument. After considering all the testimony on road descriptions, all the opinions on safety, and after studying all the diagrams and pictures submitted, the undersigned cannot conclude that Mehrhof Road is less safe than Empire Boulevard. Empire Boulevard is a little wider than Mehrhof Road, but Mehrhof Road is far closer to the employees' parking area, work area and reporting area. Further, the access road to Empire Boulevard is very narrow, fairly rough, has water and marsh land on both sides and along certain stretches has what appears to be a narrow, sloping, washed-out shoulder. Taken together with their access routes (both internal and external), neither Mehrhof Road nor Empire Boulevard emerges as a more desirable route (from a safety standpoint) for Authority employees to commute on.

The undersigned finds that there are several problems with the Authority's proffer of community safety as the explanation for its withdrawal of Mehrhof gate access from its blue and white collar employees.

First, the undersigned notes that Mr. Mizerek's study (diagrams and photographs) of the two access routes (Mehrhof Road and Empire Boulevard) did not occur until just shortly before the hearing in this matter. Thus, when the Authority withdrew Mehrhof gate access from the employees in February 1982, it was not based upon Mr. Mizerek's study and his conclusions.

Next, if the Authority was truly concerned about the volume of traffic which it is funneling onto Mehrhof Road, its actions

have not been consistent with those concerns. No (prior) traffic survey study was done to determine (a) what level of traffic Mehrhof Road should have ideally; (b) what level of traffic there was on Mehrhof Road; (c) what level of traffic was contributed thereto by the Authority; and (d) what the deletion of some or all Authority traffic therefrom would accomplish. When Mr. Mizerek's study was finally undertaken, it was after the Authority had withdrawn Mehrhof gate access from Local 534's employees. Further, his study was perfunctory and inadequate to the task of truly assessing the traffic considerations of the Mehrhof Road area. No survey was undertaken among the Authority's own employees to determine how many of them even used the Mehrhof Road access route. ^{26/} There is something inherently problematic in an employer deciding that traffic must be reduced at gate X, and based upon nothing else, deciding to reduce the traffic at gate X by forbidding its use by union employees (or to use the Authority's code word therefor, "hourly employees").

That the Authority was really not concerned with traffic volume along Mehrhof Road is underscored by other actions taken by the Authority. The Authority still issued a substantial number of Mehrhof gate passes to Authority officers, management employees,

26/ It was shown in the record that employees tended to use -- or would want to use -- that gate that was most convenient to their homes. Thus, some employees (managerial or union) would want to use Empire Boulevard; others would want to use Mehrhof Road. The point which the Hearing Examiner makes here is that no effort was undertaken by the Authority to determine, if, by imposing a blanket restriction against all union employees using the Mehrhof gate, a meaningful reduction in traffic was achieved (assuming a reduction was even needed) on Mehrhof Road.

attorneys, accountants and other business personnel. The Mehrhof gate was also used by construction contractors and their employees and a group of employees at the Authority represented by Council 5, NJCSA. Further, white collar employee Andretta testified that there was a rule restricting union personnel from walking through Mehrhof gate. Consistent with the last inconsistency in the Authority's approach to Mehrhof gate access was Ms. Berg's testimony concerning the warning given to another employee (who was authorized to use the Mehrhof gate) not to use the Mehrhof gate when traveling with Berg in her vehicle.

One final point which contributes to the Hearing Examiner's rejection of the Authority's community safety/traffic business reason: the Authority closes the Empire gate at night (from 5 pm to 6 am), on weekends and on holidays, thus forcing all traffic to and from the Authority -- commuting employees, Authority trucks and equipment, any trucks and equipment from construction contractors and suppliers and all Authority visitors -- onto Mehrhof Road. Is it wise, if one is concerned with traffic volume on a residential street, to increase the traffic volume at these times? There is still light outside after 5 pm from April to October and children are home from school and are outside. So too is this true on weekends and holidays. Further, at and after 5 pm, local residents would be arriving home from work thereby increasing the traffic flow on Mehrhof Road. Forcing all traffic onto Mehrhof Road all through the night-time hours would further seem to belie a concern for the safety and convenience of local residents.

Based upon all of the foregoing -- the timing of the Authority's actions relative to the union's activities, statements by Authority management, and actions taken by the Authority during negotiations, -- including the withdrawal of the Mehrhof gate benefit at a sensitive point in those negotiations -- the undersigned concludes that Local 534 has met its burden of proving that the Authority's withdrawal of Mehrhof gate access from the white collar/technical and blue collar employee groups was discriminatory and was motivated by a desire to discourage the exercise of rights protected by the Act. The undersigned further concludes that the Authority has not succeeded in proving its reasons for withdrawing Mehrhof gate access. The undersigned remains firmly convinced that if they had not organized, white collar employees would today be coming through the Mehrhof gate. Accordingly, the undersigned concludes that the Authority's actions were violative of N.J.S.A. 34:13A-5.4(a)(3).

The undersigned further concludes that the Authority's actions in withdrawing the Mehrhof gate benefit from the white collar and blue collar employees in the context presented by this case has had a chilling effect upon all of Local 534's employees and thus has necessarily interfered with, restrained and coerced unit employees (both blue and white collar employees) in the exercise of their rights protected by the Act. Accordingly, the undersigned concludes that the Authority has violated N.J.S.A. 34:13A-5.4(a)(1).

B. N.J.S.A. 34:13A-5.4(a)(5) allegations.

Local 534 charges that the Authority unilaterally changed terms and conditions of employment (during collective negotiations)

when it took away Mehrhof gate access from the blue collar employees and white collar/technical employees in March 1982. The Authority, inter alia, contends that plant access is a managerial prerogative and is not a mandatory subject for collective negotiations.

The undersigned would note that this case was litigated primarily as a 5.4(a)(1), (a)(3) matter. However, there are (a)(5) allegations raised herein and accordingly the undersigned must address those issues. This Commission has not yet decided a gate access scope of negotiations matter. Accordingly, the undersigned will look to the general guidelines set forth by the New Jersey Supreme Court and followed by the Commission in making scope of negotiations determinations. The Supreme Court has defined negotiable terms and conditions of employment to be "those matters which intimately and directly affect the work and welfare of public employees and on which negotiated agreement would not significantly interfere with the exercise of inherent managerial prerogatives pertaining to the determination of governmental policy." State v. State Supervisory Employees Association, 78 N.J. 54, 67 (1978). In Board of Education of Woodstown-Pilesgrove v. Woodstown-Pilesgrove Education Association, 81 N.J. 582 (1980), the court stated:

The nature of the terms and conditions of employment must be considered in relation to the extent of their interference with managerial prerogatives. A weighing or balancing must be made. When the dominant issue is an educational goal, there is no obligation to negotiate...

On the other hand, a viable bargaining process in the public sector has also been recognized by the Legislature in order to produce stability and further the public interest in efficiency in public employment. When this policy is preeminent, then bargaining is appropriate.

In the instant matter, the employer had made several key decisions regarding the Mehrhof gate at the time it withdrew union employees' access: the Authority had decided that the Mehrhof gate would always be open (i.e., it would be open or accessible during regular business hours, at night, on weekends and on holidays); the Authority had decided that outside regular business hours, the Mehrhof gate would be the only access to the Authority; the Authority decided that during the regular business day, it would allow only a certain number of employees to utilize the Mehrhof gate; and finally, it decided which employees would be given access to the Mehrhof gate. It is, of course, this last decision which is at the heart of the unilateral change allegation.

The decision to remove Mehrhof gate access from certain employees may affect various "work and welfare" factors of the employees: commutation distance, commutation time, commutation mode ^{27/} and commutation cost. Clearly, the employer's decision concerning which employees can use the Mehrhof gate can have significant meaning for the employees.

On the other hand, the employer's decisions concerning which employees can use the Mehrhof gate during regular business hours may be linked to considerations of premises security, internal operations procedures (internal regulation of traffic flow), company image & customer relations and community relations & safety.

^{27/} The record indicates that certain employees lacking Mehrhof gate access, who had previously commuted with employees who were given Mehrhof gate access, had to change their mode of traveling to the Authority.

Based upon this record, the actual effects on employees and the actual effects on the employer of access to the Mehrhof gate (or the lack thereof) are somewhat uncertain. There would be some effects on employees by denying Mehrhof gate access to them. On the other hand, forcing the employer to negotiate which employees to permit Mehrhof gate access could "significantly...trench upon... managerial prerogatives..." Woodstown-Piles Grove, supra, at p. 594. The undersigned believes this to be a close issue. On balance, after considering the potential effects of this issue on both the employer and the employees, the undersigned would conclude that the issue of which employees receive Mehrhof gate access may not be a mandatorily negotiable term and condition of employment.

Accordingly, the Authority's unilateral withdrawal of Mehrhof gate access from the blue and white collar/technical employees was not violative of subsection 5.4(a)(5) of the Act. Accordingly, it is recommended that the complaint as to this allegation be dismissed.

C. N.J.S.A. 34:13A-5.4(a)(2) and (a)(7) allegations.

The undersigned finds that no evidence has been adduced in this record concerning the alleged (a)(2) and (a)(7) violations. Accordingly, it is recommended that the complaint as to these allegations be dismissed.

Recommended Order

Accordingly, for the reasons set forth above, it is hereby ordered that the Respondent, Bergen County Utilities Authority, shall

Cease and desist from:

1) Discriminating in regard to hire or tenure of employment or any term and condition of employment of any employee -- particularly, the discriminatory denial of Mehrhof gate access to the blue collar employees and white collar/technical employees -- to discourage its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, which includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

2) In any other manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly with regard to the periodic grants and denials of Mehrhof gate access to the blue collar employees.

Take the following affirmative action:


3) Forthwith, restore to white collar/technical employees access to the Mehrhof gate.

4) Post at the Central Offices of the Bergen County Utilities Authority copies of the attached notice marked Appendix "A." Copies of such notice on forms to be provided by the Commission shall, after being duly signed by Respondent's representative, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of at least sixty (60) consecutive days thereafter in conspicuous places including all places where notices to its employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced or covered by

any other material.

5) Notify the Commission in writing within twenty (20) days of receipt of this Order what steps Respondent has taken to comply herewith.

6) It is further recommended that the Commission order the sections of each Complaint alleging that the Bergen County Utilities Authority was engaged in conduct violative of N.J.S.A. 34:13A-5.4(a) (2), (5) and (7) be dismissed.


Charles A. Tadduni
Hearing Examiner

DATED: November 22, 1983
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 discriminate in regard to hire or tenure of employment or any term and condition of employment of any employee -- particularly the denial of Mehrhof gate access to the blue collar and white collar/technical employees -- to discourage our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, which includes the right to form, join and assist any employee organization without fear of penalty or reprisal.

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the New Jersey Employer-Employee Relations Act, particularly with regard to the periodic grants and denials of Mehrhof gate access to the blue collar employees.

WE WILL forthwith restore to the white collar/technical employees access to the Mehrhof gate.

BERGEN COUNTY UTILITIES AUTHORITY

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