H.E. NO. 96-15

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

In the Matter of

NEWARK HOUSING AUTHORITY,

Respondent,

-and- Docket No. CO-H-95-129

SERVICE EMPLOYEES INTERNATIONAL
UNION, AFL-CIO, LOCAL 74,

Charging Party.

SYNOPSIS

A Hearing Examiner of the Public Employment Relations Commission recommends the Commission find that the Newark Housing Authority violated the New Jersey Employer-Employee Relations Act by refusing to negotiate with Local 74 while employee Gregory Robinson was on its team, and by failing to negotiate in good faith with Local 74 with the desire to reach an agreement. The Hearing Examiner recommended the Authority be required to negotiate with Local 74's team even if Robinson was included, and recommended the Authority be required to negotiate upon demand, and in good faith with Local 74 for at least 60 days with the desire to reach an agreement.

The Hearing Examiner also recommended that a decertification petition that was blocked by this unfair practice charge be dismissed.

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. If no exceptions are filed, the recommended decision shall become a final decision unless the Chairman or such other Commission designee notifies the parties within 45 days after receipt of the recommended decision that the Commission will consider the matter further.

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Appearances:

For the Respondent: Elio Mena, Associate Counsel

For the Charging Party: Manning, Raab, Dealy & Sturm, Esqs.
(Ronald Raab, of counsel)

HEARING EXAMINER'S REPORT
AND RECOMMENDED DECISION

On October 24, 1994, Service Employees International Union, AFL-CIO, Local 74, filed an unfair practice charge with the New Jersey Public Employment Relations Commission, which it amended on June 14, 1995, alleging that the Housing Authority of the City of Newark (aka Newark Housing Authority) violated subsections 5.4(a)(1), (3), (4) and (5) of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-3 et seq.[1/]

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the

Footnote Continued on Next Page

In its original charge, Local 74 generally alleged: 1) that the Authority did not respond to its request to resolve challenges from a prior representation election; 2) that the Authority failed to provide it with a list of employees subject to layoff; 3) that the Authority refused to schedule a meeting with it to commence negotiations and resolve challenges; 4) that the Authority was only willing to schedule a preliminary meeting if it was not used for negotiations; and 5) that the Authority discriminatorily targeted the following employees for layoff because of their membership in, and activities on behalf of, Local 74:

Claudia Smith
Theresa-Anne Hatchett
James Helper
Lee Douglas, Jr.
Terry Lucas
Gwendolyn Nelson
Tom Mee
Gregory Robinson
Hakim Rashed
Roy Parson
Linda Thomas

In its amended charge, Local 74 generally alleged: 1) that the Authority failed to respond to its requests to provide contract counterproposals; 2) that the Authority unilaterally increased wages

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1/ Footnote Continued From Previous Page

rights guaranteed to them by this act. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (4) Discharging or otherwise discriminating against any employee because he has signed or filed an affidavit, petition or complaint or given any information or testimony under 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."

of employees in the unit, then withdrew those increases; 3) that the Authority did not respond to Local 74's April 5th and April 19th written requests to schedule further negotiation sessions; 4) that on or about May 3, 1995, an employee in the unit was offered a wage increase by "management personnel" to sign a petition repudiating Local 74; 5) that the Authority is intimidating unit members to destroy their support for Local 74; 6) that the Authority failed to attend a scheduled negotiation session for May 18, 1995; and 7) that the Authority has failed to negotiate in good faith.

A Complaint and Notice of Hearing was issued on the original charge on February 28, 1995. The Authority filed an Answer (C-2) on March 20, 1995, denying it violated the Act. Pursuant to N.J.A.C. 19:14-2.2(a), I amended the Complaint on October 18, 1995 to include the amended charge.

Hearings were held on July 6, October 18 and November 1, 1995.[2/] On August 17, 1995, a petition was filed with the Commission seeking to decertify Local 74 as the majority representative of its negotiations unit (Docket No. RD-96-1). Local 74 moved before the Director of Unfair Practice and Representation that the unfair practice proceeding here block the further processing of the decertification petition. By letter of September 29, 1995, the Director blocked the further processing of the petition until this unfair practice case was decided.

2/ The transcripts will be referred to as 1T, 2T and 3T respectively.

Both parties filed post-hearing briefs by February 2, 1996. Local 74 requested a cease and desist order, "lost wages" for any unjustly laid off employees or those who were denied wage increases, and fines for any future refusal to negotiate. The Authority sought the dismissal of the entire Complaint.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. On August 5, 1994, Local 74 was certified by the Commission as the majority representative of all secondary level supervisors employed by the Authority.[3/] Attached to the certification was an appendix listing specific titles included in the unit (J-1). The list included several coordinator titles, and other titles, but did not refer to any "numerical" or "letter grade" titles.

Employees included in Local 74's secondary level supervisors unit supervised primary level supervisory employees employed by the Authority. Those employees were represented in a separate unit by OPEIU, Local 32 (1T14-1T15).

Prior to the August 5th certification, a dispute had arisen between the Authority and Local 74 regarding whether certain "challenged" titles should be included in the unit. Challenged titles did not affect the Commission's decision to certify Local 74

3/ See Docket No. RO-94-108.

as the majority representative, thus, none of the challenged titles were included in the certification (1T18). After the certification issued, a Commission staff agent suggested Local 74 contact the Authority and attempt to resolve whether the challenged titles should be included in its unit (1T15-1T16).

2. On August 26, 1994, Local 74's Business Representative, Sam Boyian, and its Organizer, Mary Higgins, sent a certified letter (CP-2) to Authority Executive Director, Harold Lucas, informing him that employees Gwendolyn Nelson and Gregory Robinson were acting stewards on behalf of Local 74. In CP-2, Boyian and Higgins also asked Lucas to send them a list of all "letter grade" titles. Letter grade titles are those in a pay grade above 70, thus, the employees covered by Local 74, by that definition, are in letter grade titles (1T19). Local 74 did not directly receive a written or verbal response to CP-2 (1T20), but was already aware of the titles in its unit as set forth in Appendix A of its certification, J-1.

On September 1, 1994, Boyian and Higgins sent a certified letter to Executive Director Lucas (CP-1) suggesting they try to resolve the challenged ballots, and asking Lucas to contact them with convenient dates to meet. The Authority did not directly respond to CP-1, and no meetings were held to resolve the challenged ballots (1T17).

3. In September 1994, members of the unit represented by Local 74 informed Boyian and Higgins that a number of people in the unit were targeted for layoff (1T20-1T21). On September 15, 1994,

Boyian and Higgins wrote a letter to Executive Director Lucas (CP-3) asking for a copy of the layoff list. In CP-3, Local 74 indicated they understood the Authority would first layoff certain provisional employees, then certain permanent employees.

Prior to the fall of 1994, the Authority had notified approximately 195 employees they were subject to layoff (2T69, 2T72, R-9). As a result, on September 16, 1994, Larry Howell, the Authority's Assistant Personnel Officer, requested all unions representing Authority employees attend a meeting regarding the planned layoffs (1T20, 2T69). Mary Higgins, Greg Robinson and Gwendolyn Nelson attended the meeting on behalf of Local 74 (2T71, R-9). Local 74 represented 50 to 55 employees at that time (1T34). A list of employees who were subject to layoff, R-9, was handed out to those individuals attending the meeting, including Local 74's representatives (2T71, 2T77, 2T80).

Of the 195 employees targeted for layoff in R-9, only 12 employees in Local 74's unit were targeted for layoff (2T77). Of those 12 targeted employees, 11 employees were either laid off in October 1994, or they bumped down because their positions were eliminated (1T22, 1T73). Seven of those 11 employees, including Robinson and Nelson, bumped down to lower positions covered by OPEIU, Local 32 (1T22). The four remaining employees of the original eleven, Claudia Smith, Theresa-Anne Hatchett, James Helper,

and Elizabeth Lambacker, actually lost their jobs (1T46-1T47).[4/] Other than perhaps signing cards for Local 74 there was no evidence that Claudia Smith, Theresa-Anne Hatchett, Roy Parson, Hakim Rashed, James Helper, Elizabeth Lambacker or Dalton Barnett engaged in protected activity (1T35-1T39, 1T41-1T42).

Prior to October 1994, the Authority employed four area coordinators that supervised approximately eight housing managers each (1T71-1T72). Gregory Robinson was Housing Coordinator; Lee Douglas Jr. was Coordinator of Housing Management Services; Terry Lucas was Senior Area Coordinator; and Tom Mee was Coordinator Maintenance Services (1T71, R-9).

In the fall of 1994, Antonio Barroquerio, the Authority's Director of the Department of Housing Management, recommended the Authority eliminate all of the above coordinator titles because he believed they were a layer of management that was no longer needed and would result in a less costly operation (3T8-3T9). Thus, all of

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4/ It was not actually clear from the record how many employees were laid off, and how many lost their jobs. Higgins testified as to the eleven layoffs, and that seven of those employees bumped to a lower job (1T22, 1T46-1T47). But Larry Howell, the Authority's Assistant Personnel Officer, testified that seven employees were actually laid off, and he relied on R-10, a list he compiled. R-10 included Smith, Hatchett, Helper and Lambacker, and three other employees, as being laid off, but did not include Robinson or Nelson. Since there was no dispute that Robinson and Nelson were laid off and bumped to lower positions (1T22, 1T72-1T73, 2T30), I cannot be certain that R-10 is an accurate list of the layoffs since it is not clear whether R-10 was intended to represent the employees who bumped. Thus, I relied on Higgins testimony on this issue.

those titles were eliminated (1T74). Robinson bumped into a housing manager position and may not have lost even one work day (2T30). Gwendolyn Nelson, who had been Chief of Operation, Housing, also bumped into another title and may not have lost any work days (2T31, R-9).

In response to Local 74's request that it be notified of the titles subject to layoff (CP-3), Wendell Wilson, the Authority's Chief of Recruitment, Labor Relations, sent a letter to Higgins on February 9, 1995 (R-8) listing the titles subject to layoff (2T33). It took between September 1994 and February 1995 to notify Local 74 of the titles subject to layoff because many of the employees had bumping rights pursuant to New Jersey Department of Personnel procedures, and it took the DOP several months to resolve who could be laid off (2T45). The titles listed for layoff included Nelson's, and those of the four coordinators; as well as Smith's, Hatchett's, Helper's and Lambacker's titles (the employees who actually lost their jobs); and the titles of employees Dalton Barrett and Linda Thomas (R-8, R-9). The titles for Hakim Rashed, Building Superintendent; and Roy Parson, Maintenance Supervisor, were not included on R-8, and there was no evidence that those employees suffered any loss.

Higgins testified that she did not receive a written or verbal response to her request in CP-3 for a list of the employees affected by the layoff (1T21). I do not credit that testimony. The combination of information from R-8 and R-9 is an adequate response to that request.

4. Prior to 1994 employees in titles commonly referred to as "letter grades" had not been receiving raises as regularly as other employees employed by the Authority (1T75, 1T82-1T83, 2T39). But, in 1994, employees holding letter grade titles that were not included in Local 74's unit received a six percent raise (1T83, 2T37). Employees in Local 74's unit did not receive an increase because Local 74 and the Authority had not reached a collective agreement (2T37-2T38). Those employees who had been in Local 74's unit, but bumped into titles in Local 32's unit, received a pro rata increase based upon when they entered Local 32's unit because Local 32 and the Authority had reached a collective agreement which resulted in increases to those unit members.

5. Prior to July 1994, the four area coordinators, including Robinson, told Director Barroquerio that they were involved in organizing a union (1T76, 3T14-3T15, 3T19, 3T24). Robinson claims Barroquerio "scolded" him about his union activities (1T77). Shortly thereafter, but before the election leading to Local 74's certification, Barroquerio spoke to the coordinators telling them they were not allowed to participate in union activities on Authority time (3T10-3T12). Barroquerio wanted to make certain the Authority was not being cheated out of time (3T11-3T12). He told the coordinators that if they were performing union activity they should not list it as time worked on their time cards (3T19-3T23).

Robinson said that Barroquerio told him that if he were caught doing union activity during Authority time he could be disciplined, and that the Authority administration did not like his union activity (1T87). Barroquerio emphatically denied discouraging or threatening Robinson or any employee from participating in union activities (3T10-3T11), and denied telling Robinson that he would be disciplined if caught doing union activity on Authority time (3T16). He merely wanted to prevent them from being paid while performing union activity (3T11-3T12).

I credit Barroquerio's testimony about the discussion with Robinson. I believed his explanation that he wanted the employees to account for their time, and use their time cards properly. I find he did not scold, threaten or discourage Robinson for participating in protected activity.

6. When Robinson's coordinator position was eliminated he bumped from a title in Local 74's unit, to a title in Local 32's unit. Since Robinson remained a Local 74 steward even after his move into Local 32's unit, the Authority was concerned whether that created a conflict of interest. As a result, a meeting was conducted between Authority and Local 74 representatives (including Robinson) regarding the issue. The Authority was concerned, at least in part, about how Robinson would be compensated when representing Local 74. The meeting resulted in the Authority's Personnel Officer, Joseph Menella, sending Robinson the following letter on November 21, 1994 (CP-10 and R-1) (1T82; 2T11-2T14).

> At our last meeting you had indicated a desire to continue an advisory relationship with the Service Employees International Union, Local 74. This was mentioned because of your new membership affiliation with the Office and Professional Employees International Union, Local 32.
>
> If it is your decision to represent Local 74, any period of time dedicated to this effort cannot occur during the Housing Authority's (NHA) business hours. Nor will you be compensated on an NHA payroll for Local 74's concerns. Moreover, items of mutual interest regarding Local 74's issues will not be entertained in the same forum with Local 32's officers.
>
> This is the NHA's position, however, we will pursue this matter further with the Public Employment Relations Commission.

Robinson claimed that after receiving CP-10/R-1, he met with Mennella and Wendell Wilson, the Authority's Chief of Recruitment Labor Relations, who told him that he "could not participate in union activities for Local 74 at all because there was a conflict of interest", and, that if he continued "it may lead to disciplinary action" (1T81).

Wilson vigorously denied threatening Robinson, or any Local 74 member, because they engaged in union activity. He indicated the Authority does not encourage union activity during work hours, and that if an employee was engaged in union activity during the work day it had to be recorded as personal, vacation or administrative leave (2T35-2T36). Wilson may have told Robinson that his continued activity "could possibly lead to disciplinary action" (1T80), but I credit Wilson's testimony that he did not threaten Robinson for engaging in union activity. The record, including CP-10/R-1, shows

that the Authority did not want Robinson, or others, to conduct union activity on Authority time. I infer that Wilson's remark addressed that issue, nothing more.

7. By letter of October 5, 1994 from Boyian and Higgins to Executive Director Lucas, Local 74 made its first formal request to schedule negotiation sessions with the Authority (CP-4, 1T23), but Local 74 did not suggest any dates. Higgins testified she received no response to CP-4 (1T23), but I do not credit that testimony. Higgins admitted that after CP-4 was sent, Terry Ridley, the Authority's Senior Associate Counsel, telephoned her suggesting dates for negotiations (1T24, 1T42).

On December 13, 1994, Ridley sent a letter to Boyian (R-2) advising him that the Authority wanted to arrange negotiation sessions for December 28, 1994 and January 18, 1995. But Higgins acknowledged those dates were not convenient for Local 74 (1T42-1T43).

On February 3, 1995, Windell Wilson sent Boyian two letters. One letter (R-4), scheduled March 16 and 20, 1995 as negotiation sessions with Local 74. The second letter (R-3), scheduled a meeting between the Authority and all unions representating Authority employees for April 13, 1995.[5/]

The first negotiation session was held on March 16, 1995. Wilson, serving as the Authority's chief negotiator (2T40), together

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5/ R-3 actually listed the date of the meeting as April 13, 1994, but that was a mistake, it was 1995.

with the Authority's counsel, Terry Ridley, represented the Authority. Normally, there are other members of the Authority's negotiating team which are brought in after the preliminaries are completed (2T58). Boyian, Robinson and Local 74 attorney, Regina Faul, represented Local 74 (1T52). Wilson believed the meeting was more to set groundrules for negotiations and obtain the Union's proposals, than it was to negotiate (2T17-2T18). There was no contrary evidence.

At the March 16 meeting Local 74 submitted proposals in the form of a proposed collective agreement (CP-5). The parties began reviewing CP-5, but Wilson soon raised an objection to Robinson's presence at the negotiations (1T55). Wilson was concerned that since Robinson's job title was represented by Local 32, there may be a conflict of interest with him representing Local 74 at the negotiations (1T56, 1T77, 2T55-2T56). Faul responded that the Authority did not have the right to determine the composition of Local 74's negotiations committee (1T56). Wilson resisted further negotiations with Robinson at the meeting, however, and asked Robinson to leave. He did. (1T56; 1T77-1T78; 2T56).[6/]

6/ Robinson testified that Wilson and Ridley would not negotiate with Local 74 if he was at the meeting (1T78). Wilson denied taking the position that he wouldn't negotiate if Robinson was present (2T56). I credit Robinson's testimony. Even if Wilson did not "take the position that he wouldn't negotiate" if Robinson remained at the meeting, that was the practical effect of his actions. Wilson stopped reviewing CP-5, raised the objection about Robinson, asked Robinson to leave, and did not continue reviewing CP-5 until Robinson left. Under these circumstances I find that he, at the very least, resisted further negotiations until Robinson left.

The parties then reviewed CP-5. The recognition clause of that document (Article 1, Section 1) provided that the Union was the exclusive negotiations representative for the secondary level supervisors employed by the Authority. That language comports with the language in the Commission's certification in RO-94-108 (J-1). But in Article 11, Section 2 of CP-5, Local 74 proposed language that "all new hires in the unit (in grades 71 and above) will be represented by Local 74." That language was different than the language in the certification and the recognition clause.

Wilson objected to the language in CP-5 referring to grades 71 and above. He explained to Local 74's team that they did not represent grades, only specific titles, thus, a contract could not be negotiated based upon grades or individuals, it had to be negotiated based upon titles they represented (2T19-2T20, 2T23-2T24, 2T59).

The parties continued to review CP-5, but did not review the entire document. Wilson raised objections to some items, but not to others, but no agreements were reached (1T57). Local 74's team said they would make some changes and submit another proposal (2T19-2T20, 2T59).

The second negotiation session was held on March 20, 1995. Boyian and Faul represented Local 74, and Wilson represented the Authority. The parties continued to review CP-5, but reached no agreements (1T57-1T59). They agreed to meet again on April 3, 1995 (1T60, 2T60).

On March 28, 1995, Faul sent a letter to Wilson (CP-9) informing him that Robinson would remain a member of Local 74's team, and confirming the session set for April 3, 1995. Wilson did not get that letter within a reasonable time because it had the wrong zip code (2T65). He subsequently cancelled that session (1T60).

On April 5, 1995, Faul sent Wilson a letter (CP-6) requesting that she or Boyian be contacted to reschedule negotiations. That letter was FAXed and mailed to the wrong location/address, and Wilson did not receive it until much later (2T61-2T62).

On April 13, 1995, the Authority conducted the meeting that Wilson had arranged through R-3. Wilson was not there (2T17). The purpose of the meeting was to announce policies concerning budget limitations (2T42). It was not a negotiations session.

On April 19, 1995, Faul sent Wilson a letter (CP-7) telling him he had failed to contact her or Boyian to reschedule negotiations. She asked Wilson to contact her to schedule negotiations for the weeks of April 24 or May 1, 1995. Exhibit CP-7, like CP-6 and CP-9, had an incorrect zip code, and Wilson did not receive that letter in a reasonable time (2T62).

Boyian did not talk to anyone from the Authority regarding the scheduling of negotiations after CP-7 was sent (1T62).

Out of frustration over not having scheduled meetings, Boyian asked Faul to notify the Authority about a negotiations

session the Union was scheduling for May 18, 1995 (1T62). By letter of May 10, 1995 (CP-8), Faul notified Wilson that the Union had scheduled the next negotiations session for May 18. That letter, too, contained the wrong zip code and Wilson did not receive it within a reasonable time (2T62). No meeting was held on May 18.

Despite not receiving CP-6, CP-7, CP-8 and CP-9 within a reasonable time, Wilson had made an effort to contact Boyian. Local 74 had a Hackensack office and telephone number at which Wilson called and left messages. At times, those calls were forwarded to a New York telephone number, and Wilson said Local 74 did not answer his calls (1T69; 2T47). Boyian had received at least one call from the Authority at the New York Office (1T70). Wilson explained that he had notified Local 74 of the telephone communication problem which they finally corrected (2T57). There was no contrary evidence, thus I credit Wilson's testimony.

On or about May 17, 1995, Local 74 gave Executive Director Lucas a new contract proposal (R-5). They did not give it to Wilson (2T59). R-5 is different from CP-5, primarily because it eliminated the reference to "grades 71 and above" in Article II, Section 2, and it contained other changes from CP-5 (2T21-2T23). Local 74 has not submitted additional proposals. The Authority has not submitted any proposals (2T44).

On May 26, 1995, Wilson sent Higgins a letter (R-6), confirming a telephone conversation he had had with her that the Authority was scheduling a meeting for May 31, 1995. Wilson wanted

to discuss contracts, monetary issues, and the position the Authority's budget had been placed in by HUD (2T25-2T26). Wilson, apparently, wanted to meet with several unions to discuss the budget reductions HUD was imposing. This meeting, therefore, was not a negotiations session. Local 74 representatives did not attend the meeting (2T26-2T27).

On June 16, 1995, Authority Personnel Officer Mennella sent a letter to Higgins confirming her attendance at a meeting with Executive Director Lucas scheduled for June 29, 1995 (R-7). That meeting was held as scheduled. Union attorney, Regina Faul, and Higgins, Robinson, and two negotiations committee members, Helper and Warren, attended for Local 74 (1T25-1T26; 1T79). Executive Director Lucas attended for the Authority. Wilson did not attend the meeting (2T48; 2T56).

The meeting was intended as an opportunity for Lucas to introduce himself to Local 74. Lucas told Local 74 that contract negotiations would take place soon. He was surprised to learn that there had already been two meetings (1T26). No proposals or counterproposals were made by either side at that meeting (1T28).

Lucas then raised an objection over Robinson's participation in negotiations on behalf of Local 74. He expressed that it was a conflict of interest for Robinson to represent Local 74 since he was represented by Local 32. Lucas did not want Robinson on Local 74's negotiations committee. Local 74 disagreed.

Lucas requested Local 74 provide him with case law which supported their position (1T27-1T28).[7/]

No evidence was presented that any additional negotiation sessions have been held.

8. Robinson had been asked by the Authority to testify on its behalf at a Commission hearing brought by employee Lucy Dodson against the Authority. Robinson refused to voluntarily testify on the Authority's behalf, and did not attend the hearing (1T95-1T96). There was no showing when the hearing was held, when Robinson was asked, and when he refused to testify.

ANALYSIS

The Authority violated subsection 5.4(a)(5) and derivatively (a)(1) of the Act by failing to negotiate in good faith with Local 74. Although the Authority made some effort to meet and negotiate, its resistance to negotiating with Local 74 while Robinson was on the team violated the Act.

The Authority, however, did not violate subsections 5.4(a)(3) and (4) of the Act. The Authority did not select employees for layoff, or actually lay off employees, because of

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7/ Robinson testified that on June 29, Lucas told him that he did not like him and that was why he did not want him on Local 74's committee. But he also testified that Lucas said it was a conflict of interest for him to be on the committee (1T79-1T80). Higgins only testified about the conflict of interest. She said nothing about Lucas not liking Robinson (1T27). I find that Lucas wanted Robinson off the committee because he believed there was a conflict of interest.

their exercise of protected activity, nor did it discriminate against any employee because of any activity anyone engaged in before the Commission.

The Original Charge

The allegations in the original charge must be dismissed. Local 74 did not establish that the Authority's conduct resulting in those allegations violated the Act.

First, the Authority's failure to respond to CP-1, or meet with Boyian and Higgins in an effort to resolve challenged ballots did not violate the Act. Challenged ballots from a representation election need not be formally resolved unless their resolution is needed to determine the outcome of an election. If a determination is needed to resolve the election, the Commission will resolve those challenges through hearing or an administrative investigation, as part of the representation petition. Here, the challenges were not determinative, thus, the Commission certified Local 74 as the majority representative of a unit including only the titles listed in J-1. The challenged ballots were not resolved, and the representation petition was then closed. The titles covered by the challenged ballots were not included in J-1; Local 74 did not represent them at that point; and although voluntary discussion of any matter is always encouraged, the Authority was not obligated to negotiate about them with Local 74.

While the Act generally permits a public employer and a majority representative to determine which titles (i.e., employees) shall be included in a unit, it also provides that if an agreement cannot be reached the Commission shall make the determination. See State v. Prof. Ass'n of N.J. Dept. Ed., 64 N.J. 231, 242 (1974); Bd. of Ed. W. Orange v. Wilton, 57 N.J. 404, 422 (1971); Elizabeth Fire Officers Ass'n v. City of Elizabeth, 114 N.J.Super. 33, 37 (App. Div. 1971); Borough of Wood-Ridge, P.E.R.C. No. 88-68, 14 NJPER 130 (¶19051 1988). The parties obviously could not agree on the inclusion of the employees who voted subject to challenge. Therefore, if Local 74 wanted to "resolve" the challenged ballots, i.e., wanted to represent the titles covered by those challenges, it had the responsibility and opportunity to file a clarification of unit petition (CU) with the Commission to resolve that issue. N.J.A.C. 19:11-1.5. See Clearview Reg. Bd. Ed., D.R. No. 78-2, 3 NJPER 248 (1977).

Second, contrary to Local 74's assertion, the Authority provided the Union with a list of employees subject to layoff. The combined information from Exhibits R-8 and R-9, together with the information Higgins, Robinson and Nelson obtained at the meeting in September 1994, provided Local 74 with sufficient information to determine the layoffs from its unit.

Third, the evidence does not support Local 74's allegation that the Authority refused to schedule negotiation sessions. In fact, the Authority acted reasonably to schedule such sessions. In

its post hearing brief Local 74 argued that it repeatedly requested the Authority schedule sessions between October 1994 and March 1995, but it did not prove that assertion. Just after Local 74 sent CP-4 to Executive Director Lucas on October 5, 1994 seeking to schedule negotiation sessions, the Authority's attorney, Terry Ridley, called Higgins suggesting dates for negotiations. On October 13, 1994, Ridley sent R-2 to Boyian seeking to schedule sessions for December 28, 1994 and January 18, 1995, but Higgins acknowledged those dates were not good for the Union. Then Wilson sent R-4 on February 3, 1995 scheduling the sessions that were held on March 16 and 20, 1995. Local 74 did not produce evidence of any other communications during that period regarding the scheduling of negotiation sessions.

In fact, there was insufficient evidence that the Authority deliberately sought to avoid scheduling negotiation sessions at least through March 1995.

Fourth, the evidence does not support Local 74's allegation that the Authority was only willing to schedule a preliminary meeting conditioned on it not being used for negotiations. Local 74 did not offer any documents to support that allegation. R-2 and R-4, the Authority's letters scheduling negotiation sessions, clearly indicated an intent to schedule "negotiation" sessions, and there was no conditional language in either letter.

Limiting negotiation meetings to specific purposes, however, is not necessarily a violation of the Act. Initial meetings are often limited to establishing groundrules, exchanging

proposals, and, perhaps, scheduling additional sessions. Such limitations are not, per se, unlawful. While parties cannot insist until impasse on particular groundrules, there is a mutual obligation to seek agreement on groundrules. Phillipsburg Bd. Ed., P.E.R.C. No. 83-34, 8 NJPER 569 (¶13262 1982).

A party's position to limit a negotiation session for a particular purpose is different than refusing to meet. A limitation that does not result in impasse is permitted as part of the negotiations process, a refusal to meet is not. Here, Wilson testified that the purpose of the March 16 session was to set groundrules and obtain proposals from Local 74. He noted that was the process the Authority normally followed (2T17-2T18). There was no showing that the Authority insisted on that process/limitation to impasse, in fact, it appears Local 74 agreed to meet under those groundrules. Consequently, limiting the March 16 session to obtaining Local 74's proposals and discussing other preliminary matters was not a violation of the Act.

Fifth, the Authority did not violate subsection 5.4(a)(3) of the Act by selecting for, or laying off, the eleven people listed in its charge. A public employer violates §5.4(a)(3) of the Act if a charging party proves by a preponderance of the evidence 1) that the employee(s) engaged in protected activity, 2) the employer knew of the activity, and 3) the employer was hostile toward the exercise of the protected activity. Bridgewater Tp. v. Bridgewater Public Works Ass'n., 95 N.J. 235, 242, 246 (1984). If a charging party

satisfies those tests, the burden shifts to the employer to prove that the adverse action would have occurred for lawful reasons even absent the protected conduct. Id. at 242. The burden will not shift to the employer, however, unless the charging party proves that anti-union animus was a motivating or substantial reason for the employer's actions.

Here, Local 74 did not satisfy its Bridgewater burden. There was no evidence that Smith, Hatchett, Helper, Rashed, Parson, or Thomas participated in union activity, or if they did, that the Authority had knowledge of it. At most, the evidence showed that some of those individuals signed cards on behalf of Local 74, but no showing the Authority was aware of that activity. Therefore, the Authority did not violate the Act by selecting them for layoff.

The decision on whether a charging party has proved hostility in (a)(3) cases is based upon consideration of all the evidence presented at hearing which includes the evidence offered by the employer, as well as the credibility determinations and inferences drawn by the hearing examiner. Rutgers Medical School, P.E.R.C. No. 87-87, 13 NJPER 115, 116 (¶18050 1987). Here, the record shows that the Authority's Director of Housing Management, Antonio Barroquerio, knew that coordinators Robinson, Douglas, Lucas, and Mee were involved in organizing a union. That met the first two Bridgewater standards. But the evidence also shows that Barroquerio selected their coordinator positions for layoff because they were an unnecessary layer of management. In its post-hearing

brief Local 74 argued that the Authority targeted Robinson, and the other employees, for layoff because they were Union supporters. I reject that argument. There was no evidence disputing Barroquerio's assessment of the coordinator positions and I concluded that he had selected the coordinators for layoff for legitimate reasons.

Additionally, I find that although Barroquerio told them not to engage in union activity on Authority time, that was not improper conduct. It is a commonly accepted labor law principle that employees are generally not entitled to engage in protected activity during work time. Compare, County of Bergen, P.E.R.C. No. 84-2, 9 NJPER 451, 455 (¶14196 1983).

Robinson claimed that Barroquerio threatened him for exercising his protected activity, but I credited Barroquerio's denial that he made such remarks. I find that Barroquerio's statements were limited to preventing employees from engaging in union activity on Authority time.

Menella's November letter to Robinson (CP-10 or R-1) was consistent with Barroquerio's earlier statements. It cautioned Robinson not to engage in union activity during business hours which I inferred meant "work time". Robinson claimed that after receiving CP-10 in November 1994, Menella and Wilson told him he could not participate in union activity, but that claim cannot be the basis of a violation in this case. First, Local 74 did not make an independent 5.4(a)(1) allegation in its charge. Second, the alleged November remarks would have occurred after the original charge was

filed (thus, not included therein), and more than six months before the amended charge was filed, therefore, it was out of time for either charge, and third, I credited Wilson's testimony that he did not threaten Robinson. Consequently, I find Robinson, and the other coordinators, were laid off from the coordinator positions for legitimate reasons.

Although the evidence also shows that the Authority had to be aware of some of Nelson's activity on behalf of Local 74, there was no evidence of any hostility directed to or involving her because she engaged in protected activity. Thus, there is no basis for finding that her selection for layoff was violative of the Act.

Local 74 argued that the timing of the layoffs--in relation to the election--made them suspect, and cited Mantua Twp., P.E.R.C. No. 84-151, 10 NJPER 433 (¶15194 1984); Borough of Teterboro, P.E.R.C. No. 83-137, 9 NJPER 278 (¶14128 1983); and Newark Housing Authority, H.E. No. 81-1, 6 NJPER 359 (¶11182 1980), in support. While those cases are examples of employer actions that were too close in time to protected activity to be justified, they are all distinguishable from this case. In those cases the employers laid off or suspended employees within five days to two weeks of the exercise of protected activity. There were no legitimate economic reasons for the employers actions, and hostility was a clearly proven factor. Here, the layoffs were not connected to Local 74's organizational efforts, the majority of employees eligible for layoff were not in Local 74's unit, and there was insufficient evidence to prove hostility.

Finally, Local 74's allegation of a 5.4(a)(4) violation was not supported by the evidence. There was no showing that any of the eleven employees listed in the charge filed an affidavit, petition or complaint or gave information or testimony under this Act, or that the Authority had knowledge of, and reacted to the same. The burden was on Local 74 to explain and prove its theory of the case on that allegation, not for me or the Commission to construct the argument.

Nevertheless, to the extent Local 74 was alleging that the Authority selected Robinson and the other coordinators for layoff because they were active in organizing the unit, the evidence does not support a 5.4(a)(4) violation. I found that the coordinators were selected for layoff for legitimate reasons. Similarly, to the extent Local 74 was alleging that Robinson was selected for layoff because he refused the Authority's request to testify at the hearing concerning Lucy Dodson, lacks merit. There was no showing when that occurred, and Robinson never actually testified. Consequently, there was insufficient basis for finding a 5.4(a)(4) violation.

Accordingly, the allegations in the original charge should be dismissed.

The Amended Charge

Local 74 specifically alleged that it repeatedly requested counterproposals and that the Authority failed to respond. But the evidence did not support the allegation as plead, thus, I recommend

it be dismissed. While there was no evidence that the Authority submitted counterproposals, there was also no evidence that any Local 74 representative repeatedly, or ever, requested the same. There is a difference between whether the Authority failed to respond to a specific demand, and whether it was required to provide counterproposals as part of its good faith negotiations obligation. The former is not a violation because there was no evidence that a demand was made, consequently, there could not have been a failure to respond.

The latter, however, must be considered in the context of the Authority's total negotiations conduct which requires a more comprehensive analysis. In its final allegation in the amended charge Local 74 claimed the Authority "failed and refused to bargain collectively" which was an allegation that it failed to negotiate in good faith. The issue regarding counterproposals must be analyzed in that context.

In State of N.J., E.D. No. 79, 1 NJPER 39, 40 (1975), aff'd 141 N.J.Super. 470 (App. Div. 1976), the Commission created the standard for determining whether a party has refused to negotiate in good faith. It stated it was dependent upon an analysis of the overall conduct and/or attitude of the party charged, and became known as the "totality of conduct" test.

The object of the analysis, the Commission explained, was:

> ...to determine the intent of the respondent, i.e., whether the respondent brought to the negotiating table an open mind and a sincere desire to reach an agreement, as opposed to a

> pre-determined intention to go through the motions, seeking to avoid, rather than reach, an agreement. Id. at 40.

The Commission recognized, however, that the parties could lawfully engage in hard bargaining and even take adamant positions on a number of issues, and that good faith negotiations did not require one party to adopt the position of the other. But the Commission also held there had to be a willingness to negotiate the issues with an open mind and a desire to reach an agreement. Id. at 40. See also Hamilton Twp. Bd. of Ed., P.E.R.C. No. 87-18, 12 NJPER 737 (¶17276 1986); Ocean County College, P.E.R.C. No. 84-99, 10 NJPER 172 (¶15084 1984); N.J. Dept. Human Services, P.E.R.C. No. 82-83, 8 NJPER 209, 215 (¶13088 1982).

The Authority's negotiations conduct here violated subsection 5.4(a)(5) of the Act because it did not demonstrate a desire to reach an agreement. The Authority engaged in subtle stall tactics which seemed more designed to avoid, rather than reach, an agreement. It began with the Authority's refusal to negotiate with Local 74 if Robinson remained on its negotiations team. While Robinson's inclusion on the team may have raised legitimate questions, the Authority could have resolved those questions through the Commission. Compare, Camden Police Dept., P.E.R.C. No. 82-89, 8 NJPER 226, 227 (¶13094 1982); E. Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279 (1976). But the Authority took no action to review that matter. Local 74, generally, had the right to choose its own negotiations representatives, Bogota Bd. of Ed., P.E.R.C.

No. 91-105, 17 NJPER 304 (¶22134 1991); See e.g., Bor. of Bradley Beach, P.E.R.C. No. 81-74, 7 NJPER 25 (¶12010 1980); No. Brunswick Tp. Bd. Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980), but that right is not absolute. The Commission has held that where the composition of a negotiations team presents a substantial potential for conflict of interest and/or interference, the team composition had to be changed. Borough of Somerville, P.E.R.C. No. 88-77, 14 NJPER 218 (¶19077 1988); Town of Kearny, P.E.R.C. No. 81-137, 7 NJPER 339 (¶12153 1981). In both Somerville and Kearny, the Commission found the inclusion of supervisory and non-supervisory employees on the same team was inappropriate based upon the particular facts of those cases.

But here, the Authority did not present evidence challenging the composition of Local 74's negotiations team. On its face, placing one Local 32 unit member (Robinson) on a Local 74 team dominated by employees in Local 74's unit combined with Local 74's organizer and business representative is not sufficient evidence of conflict to warrant the teams recomposition. See Somerville. Consequently, the Authority's insistence that Robinson be removed from Local 74's team before it was willing to further engage in the negotiations process violated the Act.

The Authority's subtle stall tactics became more evident at the meeting on June 29, 1993. Prior to that meeting Local 74 had already submitted two proposals (CP-5 and R-5). It came to the June meeting with a full negotiations team prepared to negotiate. But

Wilson, who had claimed to be the Authority's chief negotiator, was not there. Instead, Executive Director Lucas acted surprised there had already been two sessions, and said negotiations would soon begin. While I believe Lucas may have feigned surprise, I do not believe he was unaware of the two prior sessions. By suggesting negotiations would soon begin, Lucas was sending an inescapable message to the Union that they were going to start over. That was not the behavior of an Employer who wanted to reach an agreement. It was the behavior of an Employer who sought to delay the process.

Standing alone, the fact that an employer has not submitted counterproposals does not automatically become a violation of the Act. It must be viewed in the totality of conduct, and may be one indicia leading to a determination that an employer had not demonstrated a desire to reach an agreement. See Hamilton Twp. Bd. Ed. That is the result here. The Authority's not having submitted counterproposals was not an independent (a)(5) violation, but it was indicative of the Authority's delay tactics, and part of the overall (a)(5) violation.

The remaining allegations in Local 74's amended charge must be dismissed. First, there was no evidence that the Authority unilaterally increased wages of employees in Local 74's unit, or if

it did, that it then withdrew those increases.[8/] The only evidence in this record of wage increases was to employees not in Local 74's unit. In its post hearing brief Local 74 noted that the Authority had increased the wages of letter grade employees not represented by Local 74, but refused increases to those in its unit, then alleged that the Authority told unit employees they would have received increases if they were not in a union. Local 74 cited Robinson's testimony as support (1T87-1T90), but that testimony did not provide the support attributed to it. It was not a violation of the Act with respect to Local 74 for the Authority to give increases to letter grade employees outside Local 74's unit and none to employees in the unit. The Authority and Local 74 had not reached a collective agreement, therefore, it would have been unlawful for the Authority to unilaterally grant an increase to employees in Local 74's unit.

Similarly, it was not a violation of the Act for the Authority to give pro rata wage increases to employees who had been in Local 74's unit, but bumped into Local 32's unit as a result of the layoffs. Once those employees became members of Local 32's unit they were entitled to an increase based upon the collective agreement between Local 32 and the Authority.

8/ It can be an unfair practice to unilaterally grant an increase, and a separate unfair practice to then unilaterally withdraw the increase. See Hunterdon County and CWA, P.E.R.C. No. 87-35, 12 NJPER 768 (¶17293 1986), P.E.R.C. No. 87-150, 13 NJPER 506 (¶18188 1987), aff'd NJPER Supp.2d 189 (¶168 1988), 116 N.J. 322 (1989).

Second, the Authority did not violate the Act by not responding to CP-6 and CP-7, the April 5th and 19th letters, respectively. The record shows that those letters had the wrong zip code, and there was no evidence contradicting Wilson's assertion that he had not received them within time to respond.

Third, Local 74 did not present evidence that on May 3, 1995, or at any time, any unit member was offered a wage increase or any benefit by management to repudiate Local 74.

Fourth, there was no evidence that the Authority intimidated any unit member to destroy Local 74's support.

Finally, Local 74's allegation that the Authority violated the Act by failing to attend a session scheduled for May 18, 1995 lacks merit. The Union unilaterally scheduled that meeting by letter of May 10, 1995 (CP-8), but that letter, like CP-6 and CP-7, contained the wrong zip code. There was no proof that Wilson received it in time to even respond prior to May 18.

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

Conclusions of Law

The Authority violated subsection 5.4(a)(5) and derivatively (a)(1) of the Act by insisting on Robinson's removal from Local 74's negotiations team, and generally, by not negotiating in good faith to reach an agreement. However, the Authority did not violate subsections 5.4(a)(3) or (4) of the Act by selecting Union supportors for layoff, or by any other action.

Remedy

Since the Authority's failure to engage in negotiations to reach agreement in June of 1995 may have prevented Local 74 from having the opportunity to reach an agreement prior to August 5, 1995, the date its certification bar had run, it must be given a reasonable period of time, free of any decertification petition (or other petition), to attempt to reach an agreement. That time period will not include additional time to remedy the Authority's insistence that Robinson be removed from Local 74's team. The remedy for that violation is an order requiring the Authority to negotiate with Local 74's team even if Robinson is included. Compare, Borough of Bradley Beach, 7 NJPER at 26; No. Brunswick Twp. Bd. Ed., 6 NJPER at 195.

In order to remedy the Authority's failure to negotiate in good faith to reach an agreement, I recommend Local 74's certification bar be extended for 60 days within which the Authority will be required to meet as much as is reasonably necessary, and to negotiate in good faith with Local 74, with the intent to reach an agreement. Since an employer must cease negotiations during the pendancy of a petition raising a question concerning representation, Middlesex County (Roosevelt Hospital), P.E.R.C. No. 81-129, 7 NJPER 266 (1981), the petition in RD-96-1 must be dismissed in order for the 60 day time period to present a meaningful negotiations opportunity for the parties to reach an agreement. Compare, Glassboro Housing Authority, P.E.R.C. No. 90-16, 15 NJPER 524

(¶20216 1989); Jersey City Bd. Ed., D.R. No. 78-45, 4 NJPER 213 (¶4106 1978).[9/]

In its post hearing brief Local 74 requested lost wages for employees within its unit that were "unjustly laid off or transferred"; lost wages for all unit members that were denied wage increases in October 1994; and, punitive fines for any future violation or refusal to comply with a Commission decision. Those requests are denied. Such remedies are not warranted by the facts of this case. No employees were unlawfully laid off or transferred, no evidence was presented that any employee otherwise unlawfully lost wages; no evidence demonstrated that unit members were unlawfully denied wage increases; and, the Commission does not have the authority to issue punitive fines. If a respondent does not comply with a Commission order a charging party may request the Commission to seek enforcement of its decision. N.J.A.C. 19:14-10.3.

RECOMMENDED ORDER

I Recommend the Commission ORDER:

A. That the Newark Housing Authority cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the

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9/ If a collective negotiations agreement is not reached by the parties within the time provided the certification bar will expire and a new petition could be filed.

Act, particularly by insisting that Gregory Robinson be removed from Local 74's negotiations team before it would negotiate with the Union, and by failing to negotiate in good faith with Local 74 with the desire to reach an agreement.

2. Refusing to negotiate in good faith with Local 74 concerning terms and conditions of employment of employees in its unit, particularly by insisting that Gregory Robinson be removed from Local 74's negotiations team before it would negotiate with the Union, and by failing to negotiate in good faith with Local 74 with the desire to reach an agreement.

B. That the Authority take the following action:

1. Negotiate upon demand and in good faith with Local 74's negotiations team even if that team includes Gregory Robinson.

2. Negotiate upon demand and in good faith with Local 74 as often as is reasonably necessary during the 60 days after the issuance of a Commission decision with the desire to reach a collective agreement.

3. Post in all places where notices to employees are customarily posted, copies of the attached notice marked as Appendix "A." Copies of such notice shall, after being signed by the Respondent's authorized representative, be posted immediately and 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.

4. Notify the Chairman of the Commission within twenty (20) days of receipt what steps the Respondent has taken to comply with this order.

C. That the 5.4(a)(3) and (a)(4) allegations, and all other allegations raised in the charges be dismissed.

D. That Local 74's certification bar be extended for 60 days from the issuance of a Commission decision and the decertification petition in RD-96-1 be dismissed.

Arnold H. Zudick
Hearing Examiner

Dated: February 22, 1996
Trenton, New Jersey

NOTICE TO 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:

H.E. NO. 96-15

WE WILL NOT interfere with, restrain or coerce our employees in the exercise of the rights guaranteed to them by the Act, particularly by insisting that Gregory Robinson be removed from Local 74's negotiations team before WE will negotiate with the Union, and by failing to negotiate in good faith with Local 74 with the desire to reach an agreement.

WE WILL NOT refuse to negotiate in good faith with Local 74 concerning terms and conditions of employment of employees in its unit, particularly by insisting that Gregory Robinson be removed from Local 74's negotiations team before WE will negotiate with the Union, and by failing to negotiate in good faith with Local 74 with the desire to reach an agreement.

WE WILL negotiate upon demand and in good faith with Local 74's negotiations team even if that team includes Gregory Robinson.

WE WILL negotiate upon demand and in good faith with Local 74 as often as is reasonably necessary during the 60 days after the issuance of a Commission decision with the desire to reach a collective agreement.

Docket No. CO-H-96-129 Newark Housing Authority

(Public Employer)

Date: _____ By: _____

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, CN 429, Trenton, NJ 08625-0429 (609) 984-7372

APPENDIX "A"

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