P.E.R.C. NO. 83-66

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-81-116-130

ELIZABETH TEACHERS UNION,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that the Elizabeth Board of Education violated the New Jersey Employer-Employee Relations Act when a principal, relying on a memorandum the superintendent issued, denied the Elizabeth Teachers Union equal access to teachers' mailboxes during the open period for filing representation petitions. The Commission orders the Board to revise the superintendent's memorandum to make clear that all competing employee organizations are entitled to equal access to mailboxes during the open period.

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Charging Party.

Appearances:
For the Respondent, Murray & Granello, Esqs.
(James P. Granello, of Counsel)

For the Charging Party, Victor Gualano

DECISION AND ORDER

On October 15, 1980, the Elizabeth Teachers Union ("ETU"), a minority employee organization, filed an unfair practice charge against the Elizabeth Board of Education ("Board") with the Public Employment Relations Commission.[1/] The charge alleged, inter alia, that the Elizabeth Board of Education violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"), specifically subsections 5.4(a)(1), (2), (3), and (7),[2/] when it denied ETU access to its facilities, teacher mailboxes, and lists of teaching staff members during the "open

1/ The original charge also alleged unfair practices by the Elizabeth Education Association ("Association"), the majority representative of Board-employed teachers. The Hearing Examiner dismissed these allegations on September 15, 1981. ETU has not appealed that dismissal.

2/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act; (2) Dominating or interfering with the formation, existence or administration of any employee organization; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act; and (7) Violating any of the rules and regulations established by the commission."

period" for the filing of representation petitions with the Commission.[3/] ETU also alleged that its president, Victor Gualano, was denied permission to leave his school building for a meeting with other ETU supporters during the same open period.

On May 1, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The Board filed an Answer denying that it violated the Act.

On September 15, 1981, Commission Hearing Examiner Arnold Zudick commenced a hearing at which the parties examined witnesses, presented evidence, and argued orally. At the conclusion of the testimony on that day, the Board moved to dismiss the Complaint. The parties submitted briefs and, on November 17, 1981, the Hearing Examiner denied the Motion, In re Elizabeth Bd. of Ed., H.E. No. 82-19, 7 NJPER 667 (¶12301 1981). The hearing concluded on March 19, 1982. Both parties filed post-hearing briefs.

On May 20, 1982, the Hearing Examiner issued his report and recommendations, H.E. No. 82-52, 8 NJPER 334 (¶13152 1982) (copy attached). He concluded that the Board technically violated subsections 5.4(a)(1) and (2) of the Act when the principal of School 21 removed ETU's organizational material from unit members' school mailboxes during the open period. Relying on In re Union County Regional Board of Education, P.E.R.C. No. 76-17,

3/ Pursuant to N.J.A.C. 19:11-2.8(c)(3), the open period for the filing of a representation petition in a case involving a school district is that period of time between September 1 and October 15, inclusive, within the last 12 months of an existing agreement. The collective agreement in effect at the time of the alleged violations expired on June 30, 1981, and thus there was an open period from September 1 - October 15, 1980, inclusive.

2 NJPER 50 (1976) ("Union County"), he reasoned that the Board was required to provide equal access to competing organizations for organizational purposes during the open period. Since the superintendent issued a memorandum which allowed only the incumbent Association such access, the Board violated the Act by refusing to permit ETU equal access during the open period. The Hearing Examiner, however, recommended that the Commission not order any remedy because ETU had not notified the Board of its intent to use the facilities during the open period and had not proved that it suffered any substantial injuries. Finally, he recommended dismissal of the Complaint insofar as it alleged violations of 5.4(a)(3) and (7).

The Board and ETU filed Exceptions, respectively, on June 1[4/] and June 22, 1982. Each party filed further statements, respectively, on June 30, and August 13, 1982.[5/]

We have reviewed the record. We adopt and incorporate the Hearing Examiner's findings of fact, except as modified hereafter. Under the totality of the circumstances, we conclude that the Board did violate subsections 5.4(a)(1) and (2) and that a remedy is appropriate. We, however, find no evidence to establish a violation of subsections 5.4(a)(3) and (7) and dismiss these allegations.

4/ Pursuant to N.J.A.C. 19:14-8.2, the Board has requested oral argument. Because the matter has been thoroughly litigated, we deny the request.

5/ ETU's last statement was out of time and therefore will not be considered.

ETU excepts to the Hearing Examiner's failure to find that the Board prevented ETU representatives from communicating in person with unit members for organizational purposes. Specifically, ETU refers to a February 26, 1980 memorandum indicating that the Board's business office must approve in advance all meetings by organizations held in school buildings, an April 10, 1980 memorandum indicating that the Board would not permit ETU to hold union meetings in school buildings, and a September 22, 1980 memorandum admonishing ETU's president for leaving his building during a preparation period without permission. This Exception is meritless. The first two memoranda were issued well outside the open period,[6/] and thus outside the boundaries of this litigation as set by the Complaint and tried by the parties.[7/] The last memorandum, although issued during the open period, was issued in response to the president's departure from his building to perform non-union business during the school day (Tr. I at pp. 80-89).

We next consider ETU's Exception that the Hearing Examiner erred in failing to consider the absence of any serious attempts by either the Board or the Association to enforce the exclusivity clause in the contract between September 13, 1973 and

6/ ETU's president testified that he did not request meetings during the open period.

7/ Accordingly, we will not now consider what rights employee organizations may have to use employer facilities or mailboxes outside the open period. We note, however, that the United States Supreme Court recently granted certiorari in a case which may shed some light on the nature of these rights. Pennsy Local Educators' Association v. Hohlt, 652 F.2d 1286 (7th Cir. 1981), cert. granted, ___ U.S. ___ (1982). That case was argued in October, 1982.

February 4, 1980. ETU specifically contends that since the Board and the Association had not enforced the exclusivity clause in the past, the Board could not resurrect the exclusivity clause through the February 4, 1980 memorandum its superintendent issued. We believe, however, that this case, as pleaded and tried, has a narrower focus: did the Board commit an unfair practice by denying ETU equal access during the open period? In short, we consider only whether the exclusivity clause was improperly applied during the open period.

We next hold that the Hearing Examiner correctly concluded that the Board's denial of ETU's requests for lists of teaching personnel did not violate the Act. ETU did not prove that these requests occurred during the open period,[8/] the period in issue in this litigation.

The Board excepts to the Hearing Examiner's finding that the principal of School 21 removed ETU materials from teacher mailboxes on September 22, 1980. While the record does not establish the exact day, the testimony of ETU's president (Tr. I, pp 31-35) and the principal (Tr. II at pp. 47-48) establishes that the principal did remove ETU materials from mailboxes sometime during September 1980 and thus within the open period.

8/ We do not consider under what circumstances, if any, lists should be provided under our Act upon a minority organization's request outside of the open period. Compare Elizabeth Teachers Union v. Board of Education of the City of Elizabeth, 1975 S.L.D. 227.

The Board excepts to the finding of a technical violation based on the principal's removal of ETU flyers from teacher mailboxes during the open period. The Board stresses that ETU never requested or received the superintendent's approval to place its unenclosed materials in teacher mailboxes during the open period and that had the Association placed unenclosed materials in the mailboxes during this period without receiving the superintendent's approval, the Board would have had the contractual right to remove these materials.[9/] The Board concludes that since its obligation was to provide equal access to the Association and ETU during the open period, it could not have violated this obligation by removing ETU material it would have had a right to remove if inserted by the Association.

We agree with the Hearing Examiner that, under all the circumstances of this case, a technical violation occurred. The critical fact is that the principal removed ETU's materials in reliance on a February 4, 1980 memorandum which could not be legally applied to allow the Association, but deny ETU, access during the open period. That memorandum, from the superintendent to all principals, stated:

> The contract between the [Board] and the [Association] spells out the Association's Rights and privileges, under Article V, Sections C and D, that exclusive rights to the school mail boxes are given to the Association.
>
> Therefore, it is incumbent upon every principal to make certain that only the Association has reasonable use of the school mail boxes. Please make certain to enforce the Article of the contract....
> (Emphasis supplied)

9/ Under its contract with the Board, the Association apparently had the right to place enclosed materials in mailboxes without prior approval. There is no evidence that the Board denied ETU a similar right during the open period.

The memorandum clearly instructs the principals to deny all employee organizations besides the Association any access to teacher mailboxes. It does not instruct the principals, as Union County holds, that this rule of exclusivity does not apply during the open period. Nor can it be interpreted to suggest that principals should permit other organizations to place open materials in the mailboxes during the open period, provided these organizations first obtain the superintendent's approval. Significantly, the memorandum was posted at the mailboxes (Tr. II, p. 47) during the open period. When the principal observed ETU's president placing materials in the mailboxes, he pointed to the memorandum and told the president that under the memorandum he did not have the right to mailbox access. The principal did not suggest that the materials could be inserted provided the superintendent approved them or provided they were enclosed. Thus, under all these circumstances, it is clear that the principal, in accordance with the superintendent's instruction, was denying ETU all mailbox access rather than denying access conditionally.

The Board is correct that had the Association inserted flyers in the mailboxes without receiving prior approval, these flyers could have been removed until the superintendent's approval was obtained. But ETU was in a different position from the Association because of the superintendent's memorandum and the principal's improper reliance on that memorandum to deny ETU access during the open period. While the contract clearly spelled out the Association's rights to access and its obligations, the publicly posted memorandum defined ETU's: none. The principal

then enforced this memorandum. Based on the superintendent's posted memorandum and the principal's application of this memorandum, it would have been useless for ETU to ask the superintendent for permission to insert the unenclosed materials in the mailboxes. The Board's agents cannot erroneously deny ETU access unconditionally and then, at this juncture, argue that ETU had an obligation to comply with an unknown condition. To hold otherwise would reward a party for misrepresenting and improperly denying the rights of a competing employee organization during the open period.

The Hearing Examiner recommended that no remedy besides the finding of a technical violation be ordered. We agree that ETU has not shown that it suffered substantial injuries. Specifically, ETU has not demonstrated that it had initiated the process of filing a representation petition or that the Board's actions prevented it from doing so. We also observe that only one violation of the equal access rule occurred at only one school. We do believe, however, that the Board should be directed to modify its superintendent's February 4, 1980 memorandum to make clear that all competing organizations are entitled to equal access to mailboxes during the open period for filing representation petitions. Accordingly, we enter the following order.

ORDER

The Elizabeth Board of Education is ordered to:

1. Cease and desist from relying upon the memorandum of February 4, 1980 to deny competing employee organizations equal access to teachers' mailboxes during the open period for filing representation petitions,

2. Modify its superintendent's memorandum of February 4, 1980 to make clear that all competing organizations are entitled to equal access to teachers' mailboxes during the open period for filing representation petitions, and

3. Provide the Chairman of the Commission within twenty (20) days of receipt of this Order, with a copy of its revised memorandum.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Graves and Butch voted for this decision. Commissioners Hipp and Newbaker abstained. None opposed. Commissioners Hartnett and Suskin were not present at the time of the vote on this decision.

DATED: Trenton, New Jersey
November 17, 1982
ISSUED: November 18, 1982

H.E. NO. 82-52

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

In the Matter of

ELIZABETH BOARD OF EDUCATION,

Respondent,

-and-

DOCKET NO. CO-81-116-130

ELIZABETH TEACHERS UNION
LOCAL 733, AFT-AFL-CIO,

Charging Party.

SYNOPSIS

A Hearing Examiner finds in reliance upon In re Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976), that the Elizabeth Board of Education violated § 5.4(a)(1) and (2) of the New Jersey Employer-Employee Relations Act when it failed to provide the Elizabeth Teachers Union with equal access to its facilities for organizational purposes during the open period of September 1 through October 15, 1980. The Hearing Examiner, however, did not recommend the posting of a notice or any additional remedy because of the Charging Party's actions or lack thereof which contributed to the Board's technically unlawful act.

However, the Hearing Examiner recommended that the § 5.4 (a)(3) and (7) allegations of the Complaint be dismissed because the Charging Party did not establish that the Board discriminated with regard to hire or tenure of employment, nor did the Charging Party set forth any rules or regulations of the Commission alleged to have been violated.

A Hearing Examiner's Recommended Report and Decision is not a final administrative determination of the Public Employment Relations Commission. The case is transferred to the Commission which reviews the Recommended Report and Decision, any exceptions thereto filed by the parties, and the record, and issues a decision which may adopt, reject or modify the Hearing Examiner's findings of fact and/or conclusions of law.

H.E. NO. 82-52

STATE OF NEW JERSEY
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PUBLIC EMPLOYMENT RELATIONS COMMISSION

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ELIZABETH TEACHERS UNION
LOCAL 733, AFT-AFL-CIO,

Charging Party.

Appearances:

For the Respondent
Murray, Granello & Kenney
(James P. Granello of counsel)

For the Charging Party
Victor A. Gualano, President/Elizabeth Teachers Union

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 15, 1980, by the Elizabeth Teachers Union, Local 733 ("Charging Party" or "Union") alleging in part that the Elizabeth Board of Education ("Board") had engaged in unfair practices within the menaing of the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charging Party has primarily alleged that the Board unlawfully denied the Union access to and use of its facilities and teacher mailboxes during the open

period for representation, denied access to and use of lists of teaching staff members employed by the Board and, that it has permitted the Elizabeth Education Association ("Association") to use the school mail boxes, school facilities, and faculty lists during this time. In addition, the Charging Party alleged that in September 1980, its President, Victor Gualano, was denied permission to leave his school building for a meeting with other union individuals, all of which was alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (7). [1/] The Board denied committing any violation of the Act.

It appearing that the allegations of the Unfair Practice Charge, if true, may constitute unfair practices within the meaning of the Act, a Complaint and Notice of Hearing was issued on May 1, 1981 pursuant to which a hearing was conducted on September 14, 1981. At the hearing, the Charing Party had the opportunity to present its full case which consisted of the testimony of one witness, after which it rested. Subsequently, the Board made a Motion to Dismiss the Charging Party's case alleging that a prima facie case had not been established. The parties were given the opportunity to submit a brief with respect to that Motion, the last of which was received on October 26, 1981.

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 of any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act. (7) Violating any of the rules and regulations established by the commission."

Thereafter, on November 17, 1981, the undersigned issued his Decision and Order on the Motion to Dismiss, In re Elizabeth Bd. of Ed., H.E. No. 82-19, 7 NJPER 667 (¶ 12301 1981), wherein the undersigned denied the Board's Motion.

Subsequent to the Decision on the Motion to Dismiss, the parties engaged in settlement discussions in an effort to finally resolve the matter. However, by February 1982, it became clear that a settlement was no longer possible. Thereafter, an additional hearing was scheduled for March 19, 1982 at which time the Board presented its case with respect to this Charge and at the conclusion of its case, the Board renewed its Motion to Dismiss. Since the hearing was actually completed on March 19, the undersigned, by letter dated March 24, 1982, indicated that the decision on the Motion would be merged with a decision on the whole. Post-hearing briefs were filed by both parties which were received on April 16, 1982.

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

FINDINGS OF FACT

1. The Elizabeth Board of Education is a public employer within the meaning of the Act and is subject to its provisions.

2. The Elizabeth Teachers Union Local 733 and the Elizabeth Education Association are public employee representatives

within the meaning of the Act and are subject to its provisions.

3. The Elizabeth Education Association is the majority representative of a unit of employees employed by the Board which the Charging Party is interested in representing. The Board and the Association were parties to a collective agreement covering the unit in question and a copy of said agreement was admitted into evidence as Exhibit J-1, and covers the period of July 1, 1979 - June 30, 1981.

4. Article V Sections C and D of Exhibit J-1 provide that the Association shall have the right to exclusive use of school mail boxes, as follows:

> C. The Association shall have the right to reasonable use of the school mailboxes; open material shall receive prior approval of the Superintendent or his representative.
>
> D. The rights and privileges of the Association and its representatives as set forth in this Agreement shall be granted only to the Association as the exclusive representaitve of the teachers, and to no other organization.

5. Pursuant to N.J.A.C. 19:11-2.8(c)(3), the open period for the filing of a representation petition in a case involving a school district is that period of time between September 1 and October 15, inclusive, within the last 12 months of an existing agreement. Since Exhibit J-1 expired on June 30, 1981, the open period with respect to that collective agreement was September 1, 1980 - October 15, 1980, inclusive.

6. Union President Victor Gualano, testified that in September 1980, prior to utilizing the mailboxes, he notified the

secretary to the Superintendent of Schools that he was going to put union material in the mailboxes and sent the Superintendent copies of that material.[2/] However, Gualano did not establish that he notified the Superintendent in writing, nor did he establish that he asked the Superintendent, in compliance with Article V Section C of the Association's agreement, whether he could put open material in the mailboxes. Finally, the evidence did not establish that the Charging Party ever filed a petition at any time with respect to this matter.

7. Victor Gualano, testified that during the open period in September 1980, Principal Intile of School 21, specifically, on September 22, 1980, told him not to put union material in the mailboxes and he testified that Intile then told him he would remove the material. [3/] In fact, Mr. Intile testified at the March 19 hearing and confirmed the fact that he removed certain material that Mr. Gualano had placed in the mailboxes in September 1980, and that he did so in compliance with the Superintendent's memo dated February 4, 1980, Exhibit RB-16. That memo states as follows:

> TO: All Principals
>
> FROM: Rocco J. Colelli, Superintendent of Schools
>
> The contract between the Elizabeth Board of Education and the Elizabeth Education Association, spells out the Association's rights and privileges, under Article V, Sections C and D, that exclusive rights to the school mail boxes are given to the Association.
>
> Therefore, it is incumbent upon every principal to make certain that only the Association has

2/ Transcript ("T") I, pp. 31-32, 107

3/ T. I, pp. 31-34, 100-101, 110-111

> reasonable use of the school mail boxes. Please make certain to enforce this Article of the contract between the Elizabeth Board of Education and the Elizabeth Education Association.

8. Gaulano also testified that he had been denied lists of teachers which he had requested prior to September 1, 1980, and that he had, at various times prior to September 1, 1980, been denied access to certain school buildings for the purpose of conducting union business. Gaulano never established that the Charging Party had been denied lists during the open period or that the Association had been permitted lists during that same period. Moreover, other than the September 22 incident with Intile, the Charging Party did not demonstrate that it was denied any other rights protected by the Act.

9. That at no time during the presentation of its case, either by way of testimony or exhibits, did the Charging Party establish that the Association actually used school facilities, including bulletin boards and mailboxes during the period of September 1 through October 15, 1981.

However, the record shows, i.e., Exhibit J-1, that the Association had the right to use the mailboxes during the relevant open period, and there was no evidence produced to establish that the Board withdrew the Association's access to the mailbox facilities during the open period.

ANALYSIS LAW AND FACT

As the undersigned indicated in In re Elizabeth, supra, the question of the use of school mailboxes and other

facilities during the open period is controlled by In re Union Cty. Reg. Bd. of Ed., P.E.R.C. No. 76-17, 2 NJPER 50 (1976). 4/ In that decision, the Commission held that despite an exclusivity clause, once a timely representation petition is filed, or during an open period when such a petition could be filed, a public employer could not treat employee organizations differently in the competition for a unit of employees. Furthermore, the Commission held that during this time period if the incumbent organization were permitted access to the facilities for communication with the employees, the employer must permit the challenging organization similar access to the facilities for communication with the employees. The pertinent portion of that decision is set forth below:

> It cannot be denied, however, that the exclusive use provisions do grant the incumbent Associations an advantage over any challenging organization in the ability to keep the employees apprised of their activities. During the insulated period of a contract this limited advantage is consistent with the interests already discussed. However, once a timely representation petition is filed or during an open period when such a petition could be filed, the interests of the individual employees in being able to freely choose their representative will outweigh the need for stability. If an incumbent is permitted the use of the employer's facilities for communication with the employees, the employer will have to make provisions to allow the challenging group access to the facilities. The potential for abuse in the exclusive use of the facilities is obviously enhanced during such periods. Additionally, the requirement of strict neutrality by the employer during such periods shifts the balance against exclusivity.
> 2 NJPER at 53

4/ See also In re Newark Bd. of Ed., D.U.P. No. 81-5, 6 NJPER 389 (¶ 11201 1980); and In re Essex Cty. Voc./Tech. Bd. of Ed., D.U.P. NO. 81-23, 7 NJPER 367 (¶ 12165 1981), aff'd. P.E.R.C. No. 82-23, 7 NJPER 509 (¶ 12227 1981).

The undersigned believes that the critical wording in In re Union Cty. Reg. Bd. of Ed., supra, is whether the incumbent organization was "permitted access" to those facilities while at the same time, the employer denied access to those facilities to the challenging organization.

The question of permitting equal access to the employer's facilities has also received support in the Federal sector. See N.L.R.B. v. Magnavox Co. of Tenn., 415 U.S. 322, 85 LRRM 2475 (1974); N.L.R.B. v. Mid-States Metal Products, Inc., 403 F.2d 702, 69 LRRM 2656 (5th Cir. 1968); River Manor Health Related Facility, 224 NLRB 227, 93 LRRM 1069 (1976); and Gale Products, 142 NLRB 1246, 53 LRRM 1242 (1963). In Mid-States Metal Products, supra, the Court stated:

> It has been held consistently that an employer commits an unfair labor practice not only by dominating a representative but by favoring or supporting a representative over a rival. Thus there is a policy in favor of employer neutrality when employees are exercising the basic § 7 right of choosing a representative or choosing between them. 69 LRRM at 2659

In addition to the Commission's decision in Union Cty. Reg. Bd. of Ed., the New York Public Employment Relations Board in In re Triborough Bridge & Tunnel Authority, 6 PERB 3127 (¶ 3078 1973), has determined that during the challenge period all organizations must be granted equal organizational opportunities.

It is therefore well established in law that an employer must treat labor organizations equally during the open period and/or after a timely petition has been filed. That raises a

difficult question -- what effect does such a policy have on the existence and implementation of an exclusivity clause during such time periods? The undersigned believes that the answer is contained within Union Cty. Reg., supra. The portion of that decision cited hereinabove indicates clearly that during the open period or at other times when a timely petition may be filed the balance shifts against (emphasis added) exclusivity and the employer is required to treat all labor organizations equally. Moreover, the Commission, in that decision, stated that if the incumbent is permitted to use the employer's facilities for communication with the employees, "the employer will have to make provisions to allow the challenging group access to the facilities."

The application of that language to such exclusivity clauses means that during the open period or during the existence of a timely petition exclusive use of the employer's facilities cannot be permitted, and therefore, such a clause would be temporarily inoperable. In addition, the challenging organization(s) will be entitled to the same access to the employer's facilities normally provided to the incumbent organization on an exclusive basis.

In view of Union Cty. Reg., the undersigned believes that it would not be an unfair practice for a public employer to refuse to implement an exclusivity clause during an open period or during the existence of a timely petition. In fact, during the relevant period it is the employer's obligation to be neutral, but in doing so, the employer has the obligation to act affirmatively

to provide a challenging organization with equal access to its facilities if an incumbent is permitted access to such facilities. Nothing in Union Cty. Reg. requires proof that the incumbent has actually availed itself of such access, nor is the challenging organization required to prove that it has filed a petition or that it has informed the employer of its intent to file a petition. The only thing required is that the employer grant access to a challenging organization during the relevant time period if it grants such access to the incumbent. If the employer has not previously granted access to the incumbent, then the challenger is not entitled to access either.

Although a challenging organization need not prove that it has, or will file a petition, it seems reasonable to conclude that the challenging organization should notify the public employer of its desires to utilize the employer's facilities on an equal basis with the incumbent during the open period or after a timely petition has been filed. Such notice should be in writing and obviously should be delivered to the employer prior to the challenger's attempted use of the facilities. Without such notice the public employer or its agents may be legitimately unaware of the challenger's desire to utilize its facilities which could result in an unlawful denial of the same. Thereafter, the employer could determine whether to grant equal access to the challenger (assuming the incumbent has any access) or deny access to both

(or all) organizations. 5/

In applying the above legal analysis to the instant matter, the undersigned is convinced that a technical violation of the Act was committed despite Mr. Gualano's failure to notify the Board in writing of his desire to utilize its facilities during the open period. The basis of such a finding is simply that Gualano did attempt to utilize the facility during the open period for organizational purposes and his material was placed in mailboxes to which the Association had access. It is immaterial whether the Association actually utilized the facilities during the open period. When Mr. Intile removed the material from the mailboxes, he did so in reliance upon Exhibit RB-16 which indicated that only the Association was permitted access to such facilities. In contrast, Intile did not remove the material in reliance upon

5/ The undersigned is not suggesting that the denial of access to both organizations during the open or another timely period in the face of an exclusivity clause for one of them, is the preferred method. Rather, the undersigned believes that the preferred method during such a time period and/or in the face of such a clause would be to permit both organizations access to the facilities. The employer must be careful in denying access to both organizations during an open period because there is a line of cases at least in the private sector that suggests that employees are permitted certain organizational rights during nonworking hours and certainly in nonworking areas. Consequently, the undersigned is not making a recommendation that public employers deny access to its facilities during an open period, or in the face of an exclusivity clause. Rather, the undersigned recommends that the employer simply permit any challenging organizations the same access to its facilities normally provided to the incumbent. The undersigned believes that the Commission should make a policy decision in this matter or perhaps in a more appropriate case whether an employer could deny access to both (all) organizations during an open period especially in the face of an exclusivity clause.

the Union's failure to comply with Section C of Article V of the Association's agreement. Thus the removal of the Union's material from the mailboxes was done to restrict its access to the facilities in compliance with Exhibit RB-16 rather than because of Gualano's failure to obtain the Superintendent's approval. Such an act by Mr. Intile amounted to the technical violation.

The Board argued however that Mr. Intile's actions were not a violation of the Act, or were at least, de minimus in their effect upon the Charging Party. That argument is based upon their assertion that Mr. Gualano never advised the Board that he or the Union had filed a representation petition or that he had intended to file such a petition. However, as the undersigned has previously stated herein, Union Cty. Reg., does not require a challenging organization to establish that it has filed, or will file a petition during the open period. In addition, a finding that Mr. Intile's actions had a de minimus effect on the Union would suggest that his removal of the material was an unimportant or trifling act. However, such is not the case. Intile's actions had more than a de minimus effect upon the Union in the exercise of its protected rights to organize during the open period. Consequently, that argument cannot override the finding of a technical violation.

Equally important evidence is that the Board in its brief for the first time in this matter, argued that Intile's actions were not unlawful because Mr. Gualano failed to comply with Section C Article V of the Association's contract. That

section provides that open material which may be placed in the mailboxes must first be approved by the Superintendent. The Board in furtherance of that position argued that by failing to get the Superintendent's approval to put its flyers in the mailboxes on September 22, 1980, Mr. Gualano had failed to comply with that section, and therefore, the Board through Mr. Intile was within its rights to remove the material from the mailboxes.

The undersigned is not unsympathetic to the Board's position that Mr. Gualano should comply with the same requirements as imposed upon the Association in the utilization of the exclusivity clause. However, it is quite clear from Mr. Intile's testimony, as well as Exhibit RB-16, that the primary reason the Charging Party's material was removed on September 22 was because of Exhibit RB-16 rather than Mr. Gualano's failure to comply with Section C Article V. Consequently, the undersigned is unwilling to dismiss the Association's charge on the argument that Gualano failed to comply with the exclusivity clause because that was, at most, only a secondary basis for the removal of the material, and it was not apparent from Mr. Intile's actions that he personally considered that clause as a basis for the removal of the material on September 22, 1980.

REMEDY

It seems quite clear to the undersigned that both parties in this matter misunderstood the meaning of Union Cty. Reg. which has, to some extent, created the problems that resulted herein. For example, the Board, throughout the hearing appeared

to believe that the Charging Party was required to show some proof of its intent to file the representation petition prior to and having the ability to gain access during the open period. However, as the undersigned has stated above, such a requirement does not exist.

Even more important however was that the Charging Party consistently and throughly misunderstood, and has, as evidenced by its post-hearing brief, continued to misunderstand the rights that a challenging organization has both prior to and during the open period. For example, the Charging Party throughout the hearing, as well as in its post-hearing brief, argued consistently that it was upset that the employer did not provide it with a list of names and that it did not provide them access to certain facilities for organizational meetings despite carefully informing all the parties of the purpose of the meeting. The Union Cty. Reg. decision clearly states that exclusivity clauses are appropriate except during the open period or when a timely petition has been filed. In this matter, Mr. Gualano has consistently failed to distinguish between his attempts to organize prior to the open period from his attempts to organize during the open period. In an effort to clarify the Charging Party's rights, the undersigned wants to emphasize that the Association's exclusivity clause in this matter is legal and appropriate. The effect of such a clause can lawfully restrict the Charging Party's access to facilities that are guaranteed to the Association by the exclusivity clause at any time other than during the open period as previously

defined or after a timely (emphasis added) representation petition has been filed. This means that the Charging Party is not and was not entitled to the use of mailboxes during the course of the Association's collective negotiations agreement except during the relevant time period and is certainly not and was not entitled to lists of employees during the existence of such a clause. In fact, the exclusivity clause does not provide that the Association is entitled to any lists of employees and consequently, the Charging Party would not be and was not entitled to any employee lists at any time unless the Board provided such lists to the Association during the open period or after timely petitions have been filed. Moreover, it is important to note herein that the Board did not violate the Act in refusing to give the Union lists of employees, nor did it violate the Act in any of the actions complained of by the Charging Party which occurred prior to September 1, 1980.

In considering the remedy herein, the undersigned has had to consider all of the factors which have previously been discussed including both parties' misunderstanding of the law in this area. In addition, the undersigned must consider the Board's argument that the Charging Party is not entitled to anything more than the Association would have been in compliance with Article V. In that regard, during the open period or after a timely petition has been filed, the Charging Party must comply with Article V on the same basis normally required of the Association. Therefore, the Charging Party during the relevant time period

would be required to obtain permission from the Superintendent to use the mailbox facilities if it were seeking to put open material in those mailboxes. Since the material put in the mailboxes in the instant matter was open material, and since Mr. Gualano failed to obtain approval of the Superintendent, then the Board has a right to remove that material pursuant to a failure to comply with Article V.

Such a finding however, does not justify a dismissal of the instant Charge nor does it justify a finding that Mr. Intile's actions were of a de minimus nature. The reason for that as stated earlier, is because Mr. Intile removed the Charging Party's material from the mailboxes not because Gualano failed to comply with Section C Article V, but because of the Board's implementation of Exhibit RB-16 which says that only the Association shall have access or use of those facilities. Consequently, the technical basis for the removal of the Charging Party's material was to deny the Charging Party equal access to the facility during the open period.

That finding however does not justify any substantial remedy in this matter. The undersigned believes that it is enough to have found that a technical violation was committed by the Board but no additional remedy and no posting of notices is necessary. The basis for that recommendation is that Mr. Gualano's actions, or lack thereof, including his failure to notify the Board of his intent to utilize facilities during the open period, and his failure to obtain the Superintendent's approval to put

open material in the mailboxes as required by Section C Article V, contributed to the confusion that resulted in the Board's removal of the material. Moreover, there was no showing by the Charging Party that it suffered substantial injuries (other than the effect on the Union's organizational rights) as a result of the Board's actions which required a stronger remedy or that it was, in fact, in the process of filing a representation petition or that the Board's actions prevented it from doing so.

Accordingly, for the reasons set forth above, the undersigned finds that the Board violated § 5.4(a)(1) and (2) of the Act. However, there was no violation of § 5.4(a)(3) of the Act because there has been no showing that the Board discriminated in regard to hire or tenure of employment of any Union adherents, and there was no violation of § 5.4(a)(7) of the Act because no rules or regulations of the Commission were alleged to have been violated. The undersigned therefore recommends the dismissal of the complaint with respect to the § 5.4(a)(3) and (7) allegations.

CONCLUSIONS OF LAW

1. The Elizabeth Board of Education violated § 5.4(a)(1) and (2) of the Act when it denied the Elizabeth Teachers Union equal access to its facilities during the open period of September 1 through October 15, 1980.

2. The Board did not violate § 5.4(a)(3) of the Act since the Charging Party did not establish that the Board discriminated in regard to hire or tenure of employment of any Union

adherents. In addition, the Board did not violate § 5.4(a)(7) of the Act since no rules or regulations of the Commission were alleged to have been violated. Consequently, both the § 5.4(a)(3) and (7) allegations should be dismissed in their entirety.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission FIND:

A. That the Elizabeth Board of Education violated § 5.4 (a)(1) and (2) of the Act when it denied the Elizabeth Teachers Union equal access to its facilities during the open period of September 1 through October 15, 1980, but that no additional remedy be provided.

B. That the Commission dismiss the § 5.4(a)(3) and (7) allegations in their entirety.

Respectfully submitted,

Arnold H. Zudick
Hearing Examiner

DATED: May 20, 1982
Trenton, New Jersey