P.E.R.C. NO. 82-122

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

OCEAN COUNTY COLLEGE,

Respondent,

-and-

Docket No. CI-81-87-1

SHIRLEY FRIEDLANDER,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission holds that Ocean County College did not violate the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., when it reduced the employment of a clerk-typist from full-time to half-time. The reduction resulted from the termination of CETA funding, one half of the funding for the position, rather than the employee's union activities. The Commission also declines to find a violation of subsection 5.4(a)(1) of the Act based on a remark of the Director of Community Education. The Charging Party did not plead or argue that the remark constituted an independent violation of subsection 5.4(a)(1), but instead used the remark solely as evidence that the position was reduced.

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Appearances:
For the Respondent, Berry, Kagan, Privetera & Sahradnik, Esqs. (Seymour J. Kagan, of Counsel)

For the Charging Party, Sterns, Herbert & Weinroth, Esqs. (Michael J. Herbert, of Counsel)

DECISION AND ORDER

On June 18, 1981, Shirley Friedlander (the "Charging Party"), filed an unfair practice charge with the Public Employment Relations Commission. The charge alleged that the Board of Trustees, Ocean County College (the "College") 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) and (3) [1/], when it reduced her employment as a clerk-typist from full-time to half-time in retaliation for her activities as grievance chairperson, first vice president and negotiating committee member for the Ocean County College Supportive Staff Association ("Association"). The charge alleged, as evidence of anti-union

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; and (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."

animus, that the Director of Community Education told Friedlander's immediate supervisor that he was unhappy about her union activities. Friedlander requested reinstatement and back pay.

On July 2, 1981, the Director of Unfair Practices issued a Complaint and Notice of Hearing. The College filed an Answer denying that it reduced Friedlander's employment status in retaliation for her union activities.

On October 1 and November 11, 1981, Commission Hearing Examiner Arnold H. Zudick conducted hearings at which the parties examined witnesses, presented evidence and argued orally. The parties also filed post-hearing briefs.

On February 18, 1982, the Hearing Examiner issued his Recommended Report and Decision, H.E. No. 82-33, 8 NJPER ____ (¶_____ 1982) (copy attached). The Hearing Examiner concluded that the College did not retaliate against Friedlander for her union activities when it reduced the Charging Party's position from full time to half time. Instead, the College made this change because a CETA grant which funded half of Friedlander's salary had not been renewed. The Hearing Examiner concluded, however, that the comment of the Director of Community Education about Friedlander's union activities did violate subsection 5.4(a)(1) of the Act and recommended an order requiring the College to post a notice concerning this violation.

On March 2, 1982, the College filed Exceptions in which it contended that the Director of Community Education's remark did not violate subsection 5.4(a)(1) because it was not made directly to Friedlander, it was not motivated by anti-union animus

but by concern for her health, it was isolated and taken out of context, and it was merely an unauthorized, personal observation.

On April 2, 1982, after receiving an extension of time, Friedlander's attorney filed Exceptions. The Exceptions stated, in part:

> The fundamental error made by the Hearing Examiner is that he misconstrued the unfair practice complaint. That complaint related solely to the reduction of the Charging Party's employment to half-time status in April 1981 (see Paragraph 11 of complaint) and therefore sought reinstatement to a full-time position with back pay. As evidence of this charge, Mrs. Friedlander asserted that Dr. Heston had advised her immediate supervisor, Ilene Cummings within weeks of placing Charging Party on half-time status, that he wished she had not been so involved in Union activities. The Hearing Examiner concluded that this statement was a violation of the Act, but was totally unrelated to the job reduction. It was this job reduction, and not the remarks, which formed the basis of this complaint.

The Exceptions then stated that the Hearing Examiner should have found -- based on Friedlander's union activities, Heston's remark, a remark of a Personnel Director that Friedlander should not attend a grievance hearing, the fact that only Friedlander's position was reduced, and the subsequent hiring of a full-time clerical employee -- that anti-union animus motivated the reduction.

We have reviewed the record. The Hearing Examiner's findings of fact are supported by substantial evidence. We adopt and incorporate them here.

We agree with the Hearing Examiner that anti-union animus did not motivate the reduction in Friedlander's employment

status. Rather, the preponderance of the evidence establishes that the termination of the CETA funding (one-half of the funding for the position) caused the reduction in her position from full-time to half-time. The countervailing indications of anti-union animus which Friedlander cites are marginal in comparison to the testimony on the funding of this position.[2/] Accordingly, we hold that the College did not violate subsection 5.4(a)(3) of the Act.

We do not agree with the Hearing Examiner that we should find a violation of subsection 5.4(a)(1) based on the remark of the Director of Community Education. As the Charging Party itself stresses in its Exceptions, it has not contended at any time that the remark alone constituted an independent violation of subsection 5.4(a)(1). The pleadings, never amended, make clear that this remark was cited only as evidence of anti-union animus. In fact, as the Hearing Examiner found, the remark does not reflect anti-union animus because it was made out of concern for the Charging Party's health and was not transmitted to her or

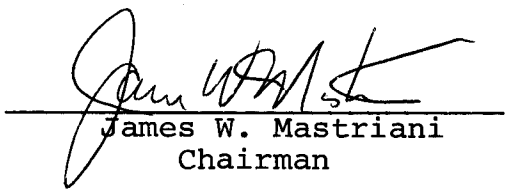
2/ Given the Hearing Examiner's finding, with which we agree, that Heston's remark was not motivated by anti-union animus, we attach no significance to it in this regard. Further, we agree with the Hearing Examiner that Cargile's remarks were not causally linked to the reduction, one year later, in Friedlander's employment status. Further, Friedlander's position was not the only one which was reduced due to the termination of CETA funding. Finally, the subsequent hiring of a temporary senior clerk occurred because Small Business Administration funds became available for that position, but not Friedlander's. Friedlander could have applied for that position, but did not because she had not seen the job announcement. The College had no obligation to notify her personally of this opening. The position was later terminated for lack of funds.

other employees in the negotiations unit with the intent to intimidate or coerce. We will not go beyond the Charging Party's pleadings and presentation and theory of the case to find a subsection 5.4(a)(1) violation based on this single remark.

ORDER

The Complaint is dismissed.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

Chairman Mastriani, Commissioners Hartnett and Newbaker voted in favor of this decision. None opposed. Commissioners Butch and Hipp abstained. Commissioner Suskin was not present at the time of the vote. Commissioner Graves was not in attendance.

DATED: Trenton, New Jersey
June 3, 1982
ISSUED: June 4, 1982

H. E. No. 82-33

STATE OF NEW JERSEY
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Docket No. CI-81-87-1

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SYNOPSIS

A Hearing Examiner finds that the Ocean County College did not violate § 5.4(a)(3) of the New Jersey Employer-Employee Relations Act when it reduced an active union official to half-time. In application of the Wright Line (a)(3) standard, the Hearing Examiner concluded that legitimate and substantial business justification existed for the reduction. It was recommended that the (a)(3) allegation be dismissed.

However, the Hearing Examiner, in application of § 5.4 (a)(1) standards concluded that the College committed an independent (a)(1) violation when its agent stated that he wished the Charging Party was not so active in union activities.

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.

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For the Respondent
Berry, Kagan, Privetera & Sahradnik, Esqs.
(Seymour J. Kagan, of counsel)

For the Charging Party
Sterns, Herbert & Weinroth, Esqs.
(Michael J. Herbert, of counsel)

HEARING EXAMINER'S
RECOMMENDED REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission (the "Commission") on June 18, 1981, by Shirley Friedlander (the "Charging Party") alleging that Ocean County College (the "College") has engaged in unfair practices within the meaning of the New Jersey Employer-Employee Relations Act, as amended, N.J.S.A. 34:13A-1 et seq. (the "Act"). The Charging Party alleged that the College discriminated against her by reducing her position from full to part time, and through certain comments concerning her allegedly made by Warner Heston, Director of Community Education, in retaliation for the exercise of her union activity, all of which was alleged to be a violation of N.J.S.A. 34:13A-5.4(a)(1) and (3)

of the Act. 1/

The Charging Party asserted that she was an active grievance chairperson and member of the negotiating committee at the time she was unilaterally changed from a full to a part-time position. She also asserted that prior to her position change, her immediate supervisor, Dr. Heston, commented that he wished she was not so involved in union activities. The College denied that it discriminated against the Charging Party or that it changed her position because of her union activity. Rather, it argued that the Charging Party was changed to a part-time employee because of legitimate business justifications. The College also denied that Dr. Heston's comment was unlawful.

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 July 2, 1981, and hearings were held on October 1 and November 11, 1981, 2/ in Trenton, New Jersey, at which time the parties were given the opportunity to examine and cross-examiner witnesses, present relevant evidence and argue orally. Both parties filed post-hearing briefs, the last of which was received by January 4, 1982. The Charging Party filed a reply brief which was received on January 13, 1982, and the Respondent filed a reply statement which was received on January 21, 1982.

1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this Act; (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this Act."

2/ The hearings were originally scheduled herein for September 9 and 10, 1981. By agreement of the parties the hearings were rescheduled for October 1 and November 11, 1981.

An 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.

Upon the entire record, the Hearing Examiner makes the following:

Findings of Fact

1. Ocean County College is a public employer within the meaning of the Act and is the employer of the Charging Party and is subject to the provisions of the Act.

2. Shirley Friedlander is a public employee within the meaning of the Act and is employed by the College.

3. The Charging Party was first employed by the College on August 16, 1977, as a full-time temporary senior clerk, she was promoted to a temporary senior records clerk on July 1, 1980, and subsequently went on an extended leave of absence from July 28, 1980 through March 14, 1981. See Exhibit CP-1. The Charging Party returned to work on March 16, 1981, and worked on a part-time basis due to her health through March 31, 1981. On April 1, 1981, the Charging Party resumed her full-time position which lasted until April 17, 1981. Thereafter, the Charging Party has worked on a part-time basis.

4. From the time she was first employed by the College through April 17, 1981, the Charging Party's full-time salary was only paid in part by the College and in part by a variety of Federal

grants. See Exhibit CP-1. By memorandum dated April 6, 1981 (Exhibit CP-12) Dr. Heston advised the Charging Party that the funds for that half of her position funded by CETA (the Federal Comprehensive Employment Training Act) had been terminated and her last day of full-time employment would be April 16, 1981.

5. The facts show that on August 8, 1977, when the Charging Party first accepted employment with the College she signed a document which indicated that her job was contingent upon receipt of Federal funding. Exhibit R-1. Thereafter, by letters dated July 2, 1980 (CP-5), September 26, 1980 (CP-6), December 2, 1980 (CP-7), and January 28, 1981 (CP-9), the Charging Party was advised by C. B. Cargile, the College Director of Personnel, that the particular CETA grant funding which was paying one-half of her salary at those respective times was due to expire. In each case, the letter indicated that if the grant were not renewed she would revert to half-time, but in each case, the new funding was found or the existing grant was extended.

While testifying, the Charging Party admitted several times that she understood at the time she was hired that half of her position was funded outside of the College, and she understood that if those funds were eliminated that her job would either be eliminated or cut back. 3/

Finally, on March 23, 1981, John Riismandel, the College official responsible for administering CETA funds, sent a memo to Dr. Heston (Exhibit CP-11) informing him of CETA cutbacks effective April 17, 1981. Riismandel informed Heston that because of the

3/ Transcript ("T"), pp. 176, 190, 206.

cutback of those funds he would need to withdraw those funds used to pay one-half of the Charging Party's salary. Subsequently, on April 6, 1981, the Charging Party was sent Exhibit CP-12 advising her that she would revert to half-time after April 17, 1981.

6. It is uncontested that the Charging Party was a very active union adherent. She served as second vice president of the Supportive Staff Association (the "Association") which included the responsibility of grievance committee chairperson, and she has more recently been a member of the negotiations committee. As grievance chairperson she processed several grievances including the Janet Banner grievance. The Banner grievance occurred in early 1980 concerning an evaluation of Banner and certain comments by Personnel Director Cargile. Banner testified that Cargile told her that the issue had nothing to do with union activity so do not bring Shirley Friedlander with you to the meeting. 4/ The record shows that Friedlander, nevertheless, processed and handled the Banner grievances which resulted in a partial resolution of the issues.

7. Subsequent to hearing of her reduction to half-time status the Charging Party filed a grievance on March 26, 1981 (Exhibit CP-2G) alleging that the reduction was as a result of her union activities and was intended to intimidate the employees. The grievance was processed through various levels of the grievance procedure and resulted in the College denying the grievance. See Exhibits CP-2A, 2B, 2C, 2E, 2H and 2I.

4/ T, p. 42.

8. In support of her case that she was unlawfully reduced the Charging Party testified that she did not recall receiving any job announcements that would show positions that were available on a full-time basis after April 17, 1981, and that no College administrator advised her to apply for any available positions. 5/ Subsequently, however, the Charging Party admitted that she did see job announcements for clerical and secretarial positions after April 17, 1981, but that they did not pertain to her. 6/ She also testified that job announcements are posted, but that she did not wish to change her job. 7/ However, she did admit to applying for one position, "managerial tech" in the personnel department. 8/ The Charging Party, nevertheless, had some doubt as to whether she was made aware of all job vacancies. 9/

The Charging Party further testified that despite her reduction to half time, she was aware that the College was filling certain clerical positions during the same general time period within which she was being reduced. 10/ Finally, the Charging Party testified that she was only aware of one other person who was reduced from full to part time, 11/ but she admitted on direct examination that that information had very little bearing on her filing the instant charge. 12/

5/ T, p. 123.
6/ T, pp. 123-124.
7/ T, p. 195.
8/ T, p. 197.
9/ T, p. 186.
10/ T, p. 131, Exhibit CP-3A.
11/ T, pp. 134, 216.
12/ T, p. 216.

9. On direct examination the Charging Party testified that there were three reasons she filed the instant charge; her reduction to part-time status, certain rude comments by Dr. Silver, a College official, and because of the comment made by Dr. Heston. 13/ Although the Charging Party did not hear Dr. Heston's alleged comment, Ilene Cummings, the former Director of the College Center for Adults in Transition and the Charging Party's immediate supervisor during the relevant time period, testified that in a conversation with her during one of the first three months of 1981 Dr. Heston said "he wished Shirley [the Charging Party] wasn't so involved in union activities." 14/ Cummings later testifed that the conversation with Heston occurred in February or March 1981, and he made the above comment while they were discussing the Charging Party's return to work from her sick leave. 15/ Cummings later told the Charging Party what Heston had stated.

Dr. Heston testified that he could not recall having made that comment to Ilene Cummings, but he acknowledged that he could have made such a statement in the context of discussing the Charging Party's return to work after a sick leave and the pressures she would be required to deal with and out of a humane consideration as to how much she was going to be involved with on her return to work. 16/ He indicated that that was the basis for his recommending that her first two weeks back from her sick leave be on a part-time basis. 17/ Sub-

13/ T, pp. 217-218.
14/ T, pp. 22, 31.
15/ T, pp. 31-32.
16/ T, pp. 85-87.
17/ Id.

sequently, Heston admitted that he would not dispute Cummings' testimony. 18/

Despite his comment concerning the Charging Party, Heston testified that the Charging Party's position was reduced because of financial considerations, and that had the funds for her full-time position been available she would have been continued on a full-time basis. 19/ He also testified that he had approved the Charging Party's second request for leave of absence on July 17, 1980 (Exhibit R-5). 20/ Finally, Heston testified that to his knowledge the Charging Party had not applied for other positions. 21/

10. Personnel Director Cargile testified that at the time the Charging Party was hired he informed her that if the outside funding source for her position was terminated she would be reduced to half time. 22/ He further testified that between April 17, 1981 through September 30, 1981, nine positions were cut because of the revocation of outside funding, four of which were cut to half time. 23/ In addition to these cutbacks, Cargile indicated that the Academic Advisors Program with 25 advisors was cut, and that several positions were frozen (not to be filled). 24/

11. Finally, the record reflects another clerical employee, Sophie Nitka, was employed as an administrative assistant on February 26, 1981 on a CETA grant which expired on June 15, 1981. In April 1981 she applied for a temporary senior clerk position which

18/ T, pp. 100-101.
19/ T, p. 100.
20/ T, pp. 84-85.
21/ T, p. 116.
22/ T, p. 255.
23/ T, pp. 263-264, Exhibit R-10.
24/ T, p. 277.

was funded by an SBA (Small Business Administration) grant and she assumed that position in June 1981. 25/ Dr. Heston admitted that he did not ask the Charging Party if she would be interested in applying for the temporary senior clerk title, but that he did have the position announcement distributed throughout the institution. 26/ Heston further testified that the SBA funds for Nitka's position could not be used for the Charging Party's position 27/ but that the Charging Party could have, but did not, apply for that title. 28/ The Charging Party admitted that no one told her she could not apply for Nitka's position, but she stated that she had not seen the job announcement. 29/ Finally, contrary to the Charging Party's assertion, Nitka testified that no one told her the Temporary Senior Clerk position would not be announced, and she was certain that the announcement was circulated. 30/

Analysis

The Silver and Cargile Statements

The Charging Party never alleged in her charge that statements by Dr. Silver and Mr. Cargile were violative of the Act. It was only while testifying that the Charging Party alleged that Dr. Silver's remarks to her concerning procedural problems relevant to

25/ T, pp. 236-240.

26/ T, pp. 107-109.

27/ T, p. 114.

28/ T, p. 116.

29/ T, p. 135.

30/ T, p. 240. Both parties filed reply briefs within which they set forth additional facts concerning Sophie Nitka and her position. These facts were unavailable at hearing because they occurred in late 1981, and the undersigned does not believe they are necessary to reach the proper determination herein because the controlling facts are contained in the record and occurred in early and mid-1981. In addition, the undersigned cannot be certain about the accuracy of those new facts.

the processing of her grievance were rude. There was no allegation or evidence that Silver's remarks were related to the Charging Party's reduction, and standing alone they do not rise to the level of violative conduct.

With respect to Mr. Cargile's remarks to Janet Banner that she should not bring the Charging Party with her (Banner) to a meeting, these remarks occurred in early 1980, well beyond the six-months statute of limitations period. Moreover, there is no evidence linking those remarks with the Charging Party's eventual reduction to part time approximately one year later. Consequently, Cargile's remarks, like Silver's remarks, do not form the basis for a violation of the Act in this matter.

The Heston Statement

The undersigned is convinced that Dr. Heston made the remarks concerning the Charging Party's union activity, or something substantially similar, that was attributed to him by Ilene Cummings. Heston did not deny making the remark nor did he dispute Cumming's testimony. In fact, Heston testified that it was very possible that he made the remark.

Standing alone, the remark would be an independent violation of § 5.4(a)(1) of the Act. Such remarks can have an intimidating effect on unit members. However, in the instant matter the College, more specifically Dr. Heston, argued that the remark would have been made in the context of concern for the Charging Party's health and well being, and not in the labor relations context. Therefore, the issue presented herein was whether or not Heston's defense, i.e.,

the fact that his remarks were made in a different context, was sufficient to overcome the otherwise violative statement. In addition, the undersigned must consider whether Heston's remark, since made to Cummings and not the Charging Party, could form the basis for a violation herein.

Under the College theory Heston's statement was excusable since it was not made in an improper context. That theory fails to consider the effect of Heston's remark on other people - particularly the Charging Party and other unit members. Heston's good intentions are not enough to excuse an illegal remark since his intent is not the controlling factor.

The Commission has established a standard for finding an independent (a)(1) violation. That standard was first enunciated in In re New Jersey College of Medicine and Dentistry, P.E.R.C. No. 79-11, 4 NJPER 421 (¶4189 1978) where the Commission held:

> It shall be an unfair practice for an employer to engage in activities which, regardless of the absence of direct proof of anti-union bias, tend to interfere with, restrain or to coerce a reasonable employee in the exercise of rights guaranteed by the Act, provided the actions taken lack a legitimate and substantial "business" justification. At slip. op. pp. 5-6.

The Commission in that decision further held:

> In determining initially whether particular actions tend to interfere with, restrain or coerce...we will consider the totality of evidence proffered during the course of a hearing and the competing interests of the public employer and the employee organization and/or affected individuals. At slip. op. p. 6.

In a subsequent decision, In re New Jersey Sports & Exposition Authority, P.E.R.C. No. 80-73, 5 NJPER 550 (¶10285 1979)(in

footnote No. 1) the Commission modified the above standard by deleting the word "reasonable" from that standard. The Commission indicated that the modified term was made in order to conform the standard to the one utilized by the National Labor Relations Board. 31/

The NLRB standard was implemented by the U.S. Supreme Court and other Federal courts. In Textile Workers v. Darlington Mfg. Co., 380 U.S. 263, 58 LRRM 2657, 2659 (1965), the Court held:

> A violation of § 8(a)(1) alone therefore presupposes an act which is unlawful even absent a discriminatory motive. 32/

Finally, in a more recent case, Soule Glass and Glazing Co. v. NLRB, 107 LRRM 2781, 2789 (5th Cir. 1981), the court held that:

> It is not necessary to show that particular employees actually felt coerced, etc., or that the employer intended to produce the impermissible effect. 33/

The undersigned concedes that in the instant case Heston probably did not intend his remark to have an unlawful or intimidating effect. However, based upon the existing standard Heston's intent will not justify making the remark. The undersigned is convinced that the remark does tend to interfere with and restrain or coerce an employee in the exercise of his/her rights, and specifically the Charging Party was so affected by the remark. The undersigned is also con-

31/ It is well settled law in this State that the Commission is constrained to follow NLRB precedent where "appropriate." Lullo v. Int'l Assoc. of Fire Fighters, 55 N.J. 409 (1970), Galloway Twp. Bd/Ed v. Galloway Twp. Assoc. Ed. Sec., 78 N.J. 1, 9 (1978).

32/ See also Crown Central Petroleum Corp. v. NLRB, 430 F.2d 724, 729, 74 LRRM 2855, 2857 (5th Cir. 1970).

33/ See also Caterpillar Tractor Co. v. NLRB, 106 LRRM 2853, 2854 (9th Cir. 1981).

vinced that Heston's remark was not made in the context of legitimate and substantial business justification. His conversation with Cummings may have concerned a legitimate business issue, but it was not substantial. At most, the amount of business justification involved with his remark was de minimis, and does not outweigh the tendency of the remark to interfere with the Charging Party's protected rights.

The undersigned's conclusion concerning Heston's statement remains unchanged despite the fact that Heston made the remark to Cummings and not to Friedlander. Cummings relayed the remark to Friedlander with the perception that the remark was improper. Once Cummings, another agent of the employer, relayed the remark to Friedlander, she felt intimidated by the remark and it therefore tended to interfere with her protected rights. The evidence of the effect of the remark on Friedlander lies in her testimony where she indicated that Heston's remark was one of the prime reasons for her filing the instant charge.

The appropriate remedy for the above unlawful action is an order requiring the posting of a notice indicating that the College through its agents will not make statements that have the effect of discouraging the exercise of employee rights.

The Reduction to Half-Time

The Charging Party argued that her reduction to half-time was a result of her union activity and therefore constituted a violation of § 5.4(a)(3) of the Act. The Commission has established standards which must be met prior to finding that an employer vio-

lated (a)(3) of the Act. 34/ Those standards have been updated recently to endorse the (a)(3) standards established by the NLRB in Wright Line, A Division of Wright Line, Inc., 251 NLRB No. 150, 105 LRRM 1169 (1980). 35/

Wright Line established a standard that where a prima facie case has been established 36/ the burden shifts to the employer who must show that his actions were motivated by business justifications. If this can be done then the Hearing Examiner must determine if the same action would have been taken even if there had been no discriminatory motive involved. If the answer is in the affirmative, then the action is upheld.

In applying the instant facts to the Wright Line standards it is evident that the Charging Party's reduction to half time was not violative of the Act. First, the undersigned concludes that the Charging Party did not establish a prima facie (a)(3). The most that was established was that Friedlander was a very active union adherent of which the College had knowledge. However, the

34/ The (a)(3) standards were initially set in In re Borough of Haddonfield Bd/Ed, P.E.R.C. No. 77-36, 3 NJPER 71 (1977), updated by In re Cape May City Bd/Ed, P.E.R.C. No. 80-87, 6 NJPER 45 (¶ 11022 1980).

35/ The Commission specifically endorsed the Wright Line standard in In re Bd/Ed Vocational Schools in Essex County, P.E.R.C. No. 82-32, 7 NJPER 585 (¶ 12263 1981); and, In re Madison Bd/Ed, P.E.R.C. No. 82-46, 7 NJPER (¶ 1981).

36/ In Cape May, supra note 34, the Commission held that to prove a prima facie (a)(3), the Charging Party must prove by a preponderance of the evidence (1) that an employee was disciplined or discharged, etc. (2) has engaged in protected activity and that the employer had knowledge of such activity and (3) that the employer was hostile toward the charging party.

facts show that Friedlander was aware beginning with her initial employment and thereafter, that one-half of her job was funded by outside funds which, if expired, would result in her being reduced to half-time. In addition, there is no nexus between Heston's unlawful remark and Friedlander's reduction to half-time. The facts show that it was Mr. Cargile and/or Mr. Riismandel who decided that the Charging Party had to be reduced because of the cutback in CETA funds. Furthermore, the Charging Party's argument that the College could have and should have found other funds and another position for Friedlander as evidenced by the Sophie Nitka facts does not establish a violation of the Act. The Act does not impose a requirement on public employers to find other positions for employees whose positions were legitimately changed. In fact, Heston testified that had the money for Friedlander's position been available he would have kept her on his staff and the undersigned finds that to be credible testimony. Finally, the record shows that but for one position in Cargile's office, the Charging Party did not apply for or seek any other position including Nitka's.

Second, even assuming that a prima facie case had been established, the undersigned concludes pursuant to Wright Line, that the College established legitimate and substantial business justifications for Friedlander's reduction and that she would have been reduced even absent any discriminatory motive. Once again, the facts show that the College CETA and other outside funding sources were severely cut back, and the College did only what it had warned Friedlander it would do since her initial employment if such funds

were terminated. Her reduction to half-time therefore was based upon economic reasons and not union activity. Consequently, the (a)(3) allegation should be dismissed in its entirety. 37/

Conclusions of Law

1. Ocean County College and specifically its agent, Dr. Warner Heston, violated § 5.4(a)(1) of the Act when Dr. Heston stated he wished Shirley Friedlander was not so involved in union activities. Such action tended to interfere with the exercise of the rights guaranteed to her by the Act. 38/

2. The College did not violate § 5.4(a)(3) when it reduced Shirley Friedlander to half-time and the portions of the Complaint dealing with that issue should be dismissed in their entirety.

Recommended Order

The Hearing Examiner recommends that the Commission ORDER

A. Respondent cease and desist from interfering with, restraining or coercing Shirley Friedlander or other employees in the exercise of the rights guaranteed to them by the Act by making statements which have the effect of discouraging the exercise of those rights.

37/ The Commission and the Appellate Division have previously upheld a finding of an independent (a)(1) violation while dismissing an (a)(3) allegation. See In re Belvidere Bd/Ed, P.E.R.C. No. 81-13, 6 NJPER 381 (¶ 11197 1980), affirmed App. Div. Docket No. A-4981-79T3 (10/14/81).

38/ The undersigned recognizes that although the Wright Line standards were primarily intended to apply to (a)(3) allegations, they were also intended to apply to alleged violations of (a)(1) which turned on employer motivation. Here, the (a)(1) involved a statement rather than the act of an employer and for that reason, and the reasons stated above, the instant (a)(1) does not turn on employer motivation. Therefore, Wright Line does not apply to the instant (a)(1) because Heston's statement - even absent an unlawful motive - tended to interfere with the Charging Party's protected activity and was not made in furtherance of "substantial" business justifications.

B. That the Respondent take the following affirmative action:

1. Post at all places where notices to employees are customarily posted, copies of the attached notice marked as "Appendix A." Copies of such notice, on forms to be provided by the Commission, shall be posted immediately upon the receipt thereof, and, after being signed by the Respondent's authorized representative, shall be maintained by it for a period of sixty (60) consecutive days. Reasonable steps shall be taken by the Respondent to ensure that such notices are not altered, defaced or covered by other materials.

2. Mail a copy of the attached notice marked Appendix "A," duly signed by Respondent's authorized representative, to Shirley Friedlander. Mailing shall be by regular mail to the resident address of Shirley Friedlander as appears on the files of the Respondent.

3. Notify the Chairman of the Commission within twenty (20) days of receipt of the Commission's Order, what steps the Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the sections of the Complaint alleging that the Ocean County College has engaged in a violation arising under N.J.S.A. 34:13A-5.4(a)(3) with regard to Shirley Friedlander's reduction to half-time be dismissed in its entirety.

Arnold H. Zudick
Hearing Examiner

DATED: February 18, 1982
Trenton, New Jersey

Appendix "A"

NOTICE TO ALL EMPLOYEES

PURSUANT TO

AN ORDER OF THE

PUBLIC EMPLOYMENT RELATIONS COMMISSION

and in order to effectuate the policies of the

NEW JERSEY EMPLOYER-EMPLOYEE RELATIONS ACT,

AS AMENDED

We hereby notify our employees that:

WE WILL NOT interfere with, restrain or coerce Shirley Friedlander or other employees in the exercise of the rights guaranteed to them by the Act by making statements which have the effect of discouraging the exercise of those rights.

OCEAN COUNTY COLLEGE
(Public Employer)

Dated _____ By _____
(Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with James Mastriani, Chairman, Public Employment Relations Commission, 429 E. State State Street, Trenton, New Jersey 08608 Telephone (609) 292-9830.