P.E.R.C. NO. 91-105

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

BOGOTA BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-100

BOGOTA CUSTODIAL AND MAINTENANCE
WORKERS ASSOCIATION,

## SYNOPSIS

The Public Employment Relations Commission finds that the Bogota Board of Education violated the New Jersey Employer-Employee Relations Act by objecting to the Bogota Custodial and Maintenance Workers Association's choice of negotiations representative and by failing to recall, by seniority, custodians terminated to discourage them from participating in the Association. The Commission dismisses allegations concerning the Board's alleged deception during negotiations and its decision to subcontract custodial services.

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BOGOTA BOARD OF EDUCATION,

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Docket No. CO-H-90-100

BOGOTA CUSTODIAL AND MAINTENANCE WORKERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Oury, DeClemente & Mizdol, attorneys (Dennis J. Oury, of counsel)

For the Charging Party, Bucceri & Pincus, attorneys (Louis P. Bucceri, of counsel)

DECISION AND ORDER

On October 12, 1989, the Bogota Custodial and Maintenance Workers Association filed an unfair practice charge against the Bogota Board of Education. The charge alleges that the Board violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(1), (2), (3) and (5),[1/] by deceiving the Association during negotiations about

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

Footnote Continued on Next Page

plans to subcontract unit positions; refusing to negotiate so long as the Association's president was on the Association's negotiations team; offering beneficial treatment to unit members if they withdrew from Association membership; and subcontracting unit work and terminating unit members in retaliation for employees having joined the Association.

On December 13, 1989, a Complaint and Notice of Hearing issued. On December 26, the Board filed its Answer. It denies that it deceived the Association, offered any employees beneficial treatment to leave the Association, or subcontracted in retaliation for protected activities. It asserts that it informed the Association that its president could remain outside the meeting room for consultation purposes, subcontracted in good faith for economic reasons, and kept the Association informed of its plans.

On March 5, April 11, and April 12, 1990, Hearing Examiner Alan R. Howe conducted a hearing. The parties examined witnesses and introduced exhibits. They waived oral argument but filed post-hearing briefs by July 2, 1990.

On November 30, 1990, the Hearing Examiner issued his report and recommendations. H.E. No. 91-13, 17 NJPER 25 (¶22012

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1/ Footnote Continued From Previous Page

employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit...."

1990). He recommended dismissing the allegations that the Board misled the Association about its intent to subcontract and that the Board subcontracted to eliminate employees who had joined the Association. But he found that the Board violated the Act when it refused to meet with the Association's president in negotiations and when it failed to rehire certain terminated custodians by seniority. As a remedy, he recommended an order requiring the Board to restore the status quo by offering to rehire the terminated custodians in such positions "as may now be vacant/available."

On December 12, 1990, the Association filed exceptions. It claims that the Hearing Examiner erred by failing to find that the June 30, 1989 terminations were discriminatory and by making the rehiring of terminated custodians contingent on vacancies.

On January 22, 1991, after an extension of time, the Board filed cross-exceptions. It claims that the Association had no right to include its president on its negotiations committee after he had been discharged and that it was not obligated to rehire any of the eight terminated employees.

On January 23, 1991, the Association filed a reply urging rejection of the cross-exceptions.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 4-15) are generally accurate. We incorporate them with these additions and modifications.

We add to finding no. 4 that Board member Benson testified that, before June 1988, informal discussions about subcontracting

took place at more than one public board meeting, but that prior to that year, there was a decision not to take that step (2T97). Superintendent Montagna testified that, before June 1988, he might have been asked informally to investigate subcontracting (3T13). No minutes or other documents were introduced to support or refute their testimony.

We add to finding no. 5 that in July 1988, after speaking to Harvath in the bathroom, Minkus was called into Montagna's office and asked whether he spoke to Harvath about anything concerning the union (1T187-1T188).

We modify finding no. 6 to show that the Association's witnesses did not confirm Montagna's testimony about the September 1988 meeting where the hiring of a custodial service was addressed. Montagna testified that he denied that the Board had already hired a custodial service and mentioned that the Board was investigating hiring one (3T13-3T15). The Association's witnesses testified that Montagna told them that the rumors that there was going to be a cleaning crew were false (1T35; 1T68; 1T95; 1T149).

We add to finding no. 14 that in estimating the savings to be realized through subcontracting, Board secretary/business administrator Tarantino included the salaries of two custodians who had quit more than four months before and had not been replaced. Tarantino testified he included the two positions because they would have to be replaced. The two custodians were at steps three and five of the salary guide. The three custodians hired in February

1990 were hired at step one. In addition, Tarantino projected an eight percent salary increase plus increments for each custodian including the two who had quit. He testified that he added eight percent because similar increases had been awarded in the past (2T131). He also added eight percent to the cost of stipends.[2/]

We modify finding no. 21 to delete the legal conclusion that Kerkowski had the actual or apparent authority to bind the Board to recall laid off custodians by seniority. We also add that Edward McCarthy testified that, after the terminations, Tarantino told him that the rest of the men who didn't want the Union should file a grievance with the Union (2T46). Tarantino explained that he had received a letter or petition from the remaining custodians, who did not belong to the union, saying that they wanted to negotiate outside of the union. He just wanted to "notify Eddie, Mr. McCarthy, about what was happening and that he should be aware of it" (2T128).

We add to finding no. 25 that J. Wilkens, one of the two terminated employees who was not paying dues to the Association, was the only terminated employee contacted about reemployment (2T140-2T141).

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2/ Not included in the projection was the cost of sending the subcontractor's employees to school to obtain Black Seal licenses or the costs of increased overtime for remaining custodians to provide Black Seal coverage. The Hearing Examiner limited this testimony and we are not prepared to find that Tarantino knew, or should have known, about these costs at the time subcontracting was being considered.

We adopt the Hearing Examiner's recommendation regarding the employer's objection to the Association's choice of negotiations representative. The Association had a right to choose its own negotiations representative. See, e.g., Bor. of Bradley Beach, P.E.R.C. No. 81-74, 7 NJPER 25 (¶12010 1980); No. Brunswick Tp. Bd. of Ed., P.E.R.C. No. 80-122, 6 NJPER 193 (¶11095 1980); see also N.J.S.A. 34:13A-5.3. A contrary holding would allow an employer to control or prevent the use of non-employee representatives. See Colfor, Inc. and UAW, 282 N.L.R.B. 1173, 124 LRRM 1204 (1987), enf'd 838 F.2d 164, 127 LRRM 2447 (6th Cir. 1988).

In the absence of exceptions, we also adopt the Hearing Examiner's recommendation regarding the Board's alleged deception during negotiations. Our assessment of the totality of the Board's conduct during negotiations indicates that it kept the Association apprised of its efforts to subcontract unit jobs. See State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd 141 N.J. Super. 470 (App. Div. 1976). There was conflicting testimony about what Montagna told the custodial staff about subcontracting in September 1989; but we need not resolve that conflict because the Board's negotiations representatives accurately reported the possibility of subcontracting later.

That the Board did not hide its plans about subcontracting does not answer whether the Board was illegally motivated in deciding to subcontract. That answer is controlled by the standards in In re Bridgewater Tp., 95 N.J. 235 (1984). The charging party

must prove, by a preponderance of the evidence on the entire record, that protected conduct was a substantial or motivating factor in the adverse action. This may be done by direct evidence or by circumstantial evidence showing that the employee engaged in protected activity, the employer knew of this activity and the employer was hostile toward the exercise of the protected rights. Id. at 246.

If the employer did not present any evidence of a motive not illegal under our Act or if its explanation has been rejected as pretextual, there is sufficient basis for finding a violation without further analysis. Sometimes, however, the record demonstrates that both motives unlawful under our Act and other motives contributed to a personnel action. In these dual motive cases, the employer will not have violated the Act if it can prove, by a preponderance of the evidence on the entire record, that the adverse action would have taken place absent the protected conduct. Id. at 242. This affirmative defense, however, need not be considered unless the charging party has proved, on the record as a whole, that anti-union animus was a motivating or substantial reason for the personnel action. Conflicting proofs concerning the employer's motives are for us to resolve.

The Association was formed in December 1987, and in early 1988 made a demand for voluntary recognition. Thus, the Association has proved that the terminated custodians engaged in protected activity and that the Board knew about that activity.

We also find that the employer was hostile towards that protected activity. The employer refused to negotiate if the Association's team included the Association's president. Its superintendent said that "all of a sudden Charlie Harvath came in the district and now we have a union," and he called in a custodian and questioned him about whether he had spoken to Harvath about the union. Its business administrator informed one of the remaining custodians about an effort to decertify the union. We are also troubled by evidence that the Board secretary/business administrator weighted his cost savings projection to maximize the savings to be achieved by subcontracting. Finally, despite its president's pledge to recall custodians by seniority, the Board contacted only one non-union employee about reemployment and then hired three new employees. When viewed in light of the timing of the decision to subcontract, these facts convince us that the employer was hostile to the formation of the union and that its hostility was a motivating factor in its decision to hire an outside cleaning service. Cf. Downe Tp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1985) (timing an important factor in assessing motivation).

But Bridgewater requires another inquiry. Did the Board prove that it would have taken the same action absent its hostility to protected rights? The Hearing Examiner found that it would have. Given his factual findings, we also conclude that the Board proved its affirmative defense. In particular, we have evidence that the Board had fiscal problems and had informally considered

subcontracting before the Association sought recognition. That evidence, credited by the Hearing Examiner, supports finding an independent, lawful motive for the subcontracting and concluding that the Board would have subcontracted even absent the custodians' exercise of protected activities. We therefore adopt the Hearing Examiner's recommendation and dismiss the allegation that the subcontracting was in retaliation for the exercise of protected rights.

Finally, we find that the employers failure to recall three terminated custodians violated subsections 5.4(a)(1) and (3). We have already found that the employer was hostile to the exercise of protected rights. We concluded that the employer did not violate the Act when it terminated the employees because it proved that it would have subcontracted even absent the protected conduct. But the Board has offered no convincing evidence that it would not have recalled its experienced employees, by seniority, had they not joined a union. We need not consider whether the Board's president bound the Board to recall employees by seniority. The Board adhered to seniority in terminating the eight custodians. It then abandoned seniority when it was time to recall three. Rather than recall its experienced custodians, it hired new custodians, at least one of whom it then had to send to school at its own expense to obtain a Black Seal license. Given the evidence of anti-union animus and the Board's failure to prove that it would not have recalled the terminated custodians absent their union activity, we hold that the

Board violated subsections 5.4(a)(1) and (3). Cf. Associated Services for the Blind, Inc. v. ASB Employees Group, 299 NLRB No. 163, 136 LRRM 1093, 1095-1096 (1990). We order the Board to recall, by seniority, three employees off the list of terminated employees with back-pay less any interim earnings plus interest pursuant to R. 4:42-11 and to recall additional terminated employees should there be any additional vacancies.

## ORDER

The Bogota Board of Education is ordered to:

A. Cease and desist from:

1. Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by the Act, particularly by objecting to the Bogota Custodial and Maintenance Workers Association's choice of negotiations representative, including terminated employee Charles Harvath, and by failing to recall, by seniority, custodians terminated effective June 30, 1989 to discourage custodians from participating in the Bogota Custodial and Maintenance Workers Association.

2. 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 the Act, particularly by failing to recall, by seniority, custodians terminated effective June 30, 1989 to discourage custodians from participating in the Bogota Custodial and Maintenance Workers Association.

B. Take this action:

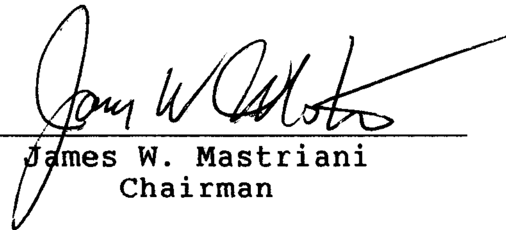
1. Offer reemployment in order of seniority to custodians terminated effective June 30, 1989, until such time as three accept employment or the list is exhausted, with back-pay less any interim earnings plus interest pursuant to R. 4:42-11.

2. Recall additional terminated employees by seniority should there by any additional vacancies.

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.

BY ORDER OF THE COMMISSION



James W. Mastriani
Chairman

DATED: May 21, 1991
Trenton, New Jersey
ISSUED: May 21, 1991

Chairman Mastriani, Commissioners Goetting, Johnson, Smith and Wenzler voted in favor of this decision. None opposed. Commissioners Bertolino and Regan abstained from consideration.

# 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:

We will cease and desist from interfering with, restraining or coercing our employees in the exercise of the rights guaranteed to them by the Act, particularly by objecting to the Bogota Custodial and Maintenance Workers Association's choice of negotiations representative, including terminated employee Charles Harvath, and by failing to recall, by seniority, custodians terminated effective June 30, 1989 to discourage custodians from participating in the Bogota Custodial and Maintenance Workers Association.

We will cease and desist from 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 the Act, particularly by failing to recall, by seniority, custodians terminated effective June 30, 1989 to discourage custodians from participating in the Bogota Custodial and Maintenance Workers Association.

We will offer reemployment in order of seniority to custodians terminated effective June 30, 1989, until such time as three accept employment or the list is exhausted, with back-pay less any interim earnings plus interest pursuant to R. 4:42-11.

We will recall additional terminated employees by seniority should there by any additional vacancies.

Docket No. CO-H-90-100 BOGOTA BOARD OF EDUCATION

(Public Employer)

Dated: ______________________ 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"

H.E. NO. 91-13

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

In the Matter of

BOGOTA BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-100

BOGOTA CUSTODIAL AND MAINTENANCE
WORKERS ASSOCIATION,

Charging Party.

## SYNOPSIS

A Hearing Examiner recommends that the Public Employment Relations Commission find that the Respondent violated Sections 5.4(a)(1) and (5) of the New Jersey Employer-Employee Relations Act when its representatives objected to the presence of the Association's President in negotiations on the erroneous ground that since he had been terminated several weeks prior thereto he could be barred. Further, the Hearing Examiner recommended that a violation of Sections 5.4(a)(1) and (3) of the Act be found as to the Respondent based upon its having failed to rehire certain of its custodial employees who were terminated by strict seniority following the subcontracting of their work. Instead of rehiring the terminated custodians in reverse order of seniority, as the Respondent had agreed to do, it advertised and then hired non-unit outside individuals. As to this violation, the Hearing Examiner recommended the restoration of the *status quo ante*, followed by an unconditional offer to rehire the terminated employees, in accordance with seniority, and a make-whole remedy including interest.

The Hearing Examiner recommended the dismissal of allegations that the Respondent violated Sections 5.4(a)(2) and (5) by having misled the Association regarding its intent to subcontract its custodial services. The proofs established that the Respondent acted in complete good faith and in no manner misled the Assocition as to its intentions preceding the actual award of a subcontract on June 13, 1989.

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.

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

In the Matter of

BOGOTA BOARD OF EDUCATION,

Respondent,

-and-

Docket No. CO-H-90-100

BOGOTA CUSTODIAL AND MAINTENANCE
WORKERS ASSOCIATION,

Charging Party.

Appearances:

For the Respondent, Robert P. Glickman, Attorney

For the Charging Party, Bucceri & Pincus, Attorneys
(Louis P. Bucceri, of counsel)

HEARING EXAMINER'S RECOMMENDED
REPORT AND DECISION

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on October 12, 1989, by the Bogota Custodial and Maintenance Workers Association ("Charging Party" or "Association") alleging that the Bogota Board of Education ("Respondent" or "Board") 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. ("Act"), in that, [COUNT I] the Association was certified as majority representative on October 4, 1988; in or around May 1989, and prior

thereto, the parties had been engaged in collective negotiations; during the period of these negotiations and up until June 13, 1989, the Respondent's representatives repeatedly denied any intent to subcontract the custodial services performed by unit members and the Association relied upon these representations; however, in June 1989, the Board subcontracted the work performed by eight of the 15 custodial and maintenance unit members; and on June 13, 1989, only seven out of the 15 custodial unit positions were renewed for 1989-90; [COUNT II] that on September 26, 1989, the Board through its Secretary/Business Administrator advised the Association that the Board would refuse, and later did refuse, to meet in negotiations for a successor collective negotiations agreement so long as the Association President, Charles Harvath, was a member of the negotiating team; the asserted reason for this refusal by the Board was that Harvath was one of the custodial employees whose contract was not renewed for 1989-90; [COUNT III] that the Board has offered beneficial treatment, improved working conditions and improved compensation to specific individuals in return for their agreement to refrain from paying dues to and membership in the Association; [COUNT IV] that on June 13, 1989, the Board deliberately implemented a plan to eliminate from its employ those employees who had joined the Association at the outset but not those employees who had refused to join the Association from its inception; on the pretext of layoffs, due to subcontracting based upon seniority, the Board failed to renew the employment contracts

of eight of 15 unit employees for 1989-90 and, of those eight terminated, all had been members of the Association since its inception; of the seven unit employees who were rehired, five had never been dues paying members of the Association; all of which is alleged to be in violation of N.J.S.A. 34:13A-5.4(a)(1), (2), (3) and (5) of the Act.[1/]

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 December 13, 1989. Pursuant to the Complaint and Notice of Hearing, and after several adjournments, hearings were held on March 5, April 11 and April 12, 1990 in Newark, New Jersey, at which time the parties were given an opportunity to examine witnesses, present relevant evidence and argue orally. Oral argument was waived and the parties filed post-hearing briefs by July 2, 1990.

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1/ These subsections prohibit public employers, their representatives or agents from: "(1) Interfering with, restraining or coercing employees in the exercise of the rights guaranteed to them by this act. (2) Dominating or interfering with the formation, existence or administration of any employee organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage employees in the exercise of the rights guaranteed to them by this act. (5) Refusing to negotiate in good faith with a majority representative of employees in an appropriate unit concerning terms and conditions of employment of employees in that unit, or refusing to process grievances presented by the majority representative."

The Respondent moved to dismiss at the conclusion of the Charging Party's case and the following rulings were made: COUNTS I & II - denied (2 Tr 74, 80); COUNT III - granted (2 Tr 75, 76, 80); COUNT IV - denied (2 Tr 76, 80); and granted as to the Section 5.4(a)(2) allegations in COUNTS II through IV (2 Tr 76, 80).

An Unfair Practice Charge having been filed with the Commission, a question concerning alleged violations of the Act, as amended, 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. The Bogota Board of Education is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. The Bogota Custodial and Maintenance Workers Association is a public employee representative within the meaning of the Act, as amended, and is subject to its provisions.

3. The Association was formed in December 1987, through the efforts of three custodians: Thomas Van Geldren, Charles Harvath and Herbert Minkus. Harvath became President, Van Geldren became Secretary and Minkus became a member of Negotiating Committee. Sometime thereafter, authorization cards were signed by other custodians and maintenance men and, early in 1988, a demand for voluntary recognition was made by the Association upon the Board with the assistance of Leon Nisenson, an NJEA representative. The Board formally declined this request in a letter to Harvath dated June 8, 1988, from the Business Administrator/Secretary. [1 Tr 9-12, 23-25, 58-60, 78-80, 141; 2 Tr 97, 98; CP-3].

4. Between January 1988, and the Board's refusal to extend voluntary recognition to the Association in June of that year, the Board had begun to explore the savings to be gained from subcontracting its custodial services (2 Tr 84; 3 Tr 13). Impetus for this action was based upon the defeat of the Board's budget by the voters of Bogota in four of the prior five years and the later defeat of a bond referendum to remedy code violations and purchase equipment. This was documented by the testimony of the Board's Superintendent, Salvatore V. Montagna, the Business Administrator/Secretary Christopher Tarantino, and Board member James Benson. [2 Tr 81, 82, 123, 124; 3 Tr 5-12]. Two Association witnesses also acknowledged the defeat of recent budgets by the voters (1 Tr 175, 176; 2 Tr 19).

5. In response to the Board's refusal to extend voluntary recognition to the Association on June 8th, the Association filed a Petition for Certification of Representative with the Commission on July 29, 1988 (Docket No. RO-89-11). Thereafter, an election was conducted on September 20, 1988, and the Association was certified as the majority representative for a unit of custodians, maintenance workers and field matrons on October 4, 1988 (CP-4).

6. Several weeks prior to the conduct of the election by the Commission, Montagna called a meeting of the entire custodial staff on September 2, 1988, for several purposes (1 Tr 69, 68). One purpose was to introduce the custodial staff to Tarantino, who had commenced employment with the Board on August 15, 1988, and another

was to dispel a number of rumors that had been "...all over the place...," suggesting that the Board had already hired a custodial service company to displace all of the custodians and maintenance employees (3 Tr 13, 14). Montagna testified flatly that he assured the custodial staff that no custodial service had been hired and that anything to the contrary was "...absolutely not true..." (3 Tr 15). The Association's witnesses confirmed the testimony of Montagna as to what he said at this meeting (1 Tr 35, 67-69, 95, 148, 149).

7. However, on July 14, 1988, the Board's Business Administrator/Secretary had mailed seven invitations to custodial service contractors, soliciting "...you're available programs..." for contracting custodial services on an annual basis (R-3 through R-7). One response was received under date of July 18, 1988 (R-2).

8. Negotiations for a first agreement commenced in November 1988 (1 Tr 142; 2 Tr 86, 87). The Board's negotiating team was comprised of the Board President, John Kerkowski, Board member Benson, Montagna and Tarantino (2 Tr 85, 126). The Association's negotiating team consisted of Nisenson, Van Geldren and Minkus (1 Tr 26, 27, 61, 62, 142; 2 Tr 85, 86, 126). There were approximately nine negotiations sessions during the months of November and December 1988, and January and February 1989. Montagna attended all of the sessions while Benson and Tarantino attended six of the nine sessions. Minkus was the only Association witness who testified clearly as to the sessions that he attended, namely, after missing

the first one or two in November, he attended all of the sessions thereafter. [1 Tr 142; 2 Tr 87, 88, 126; 3 Tr 15, 16].

9. The Board's witnesses were unanimous that at each and every one of the negotiations sessions with the Association the members of the Board's negotiating team mentioned that the Board was considering contracting out its custodial services. Benson recalled specifically that at the session on November 14, 1988, Kerkowski stated that the Board was considering contracting out and that it was expecting "...the bids to come in next week..." [2 Tr 85-86, 126; 3 Tr 16-18]. In fact, the Board had adopted a resolution authorizing Tarantino to solicit bids for custodial services at a regular meeting on November 15, 1988 (R-1). This was followed by a report from Montagna to the Board on January 6, 1989, in which he stated that specifications were being drawn up for the cost of an outside custodial service contract (R-8). Based upon the Board's evidence, which essentially stands uncontradicted, the Hearing Examiner finds as a fact that the Association was apprised of the possibility of subcontracting during the period between November 1988 and February 1989, when the parties were engaged in contract negotiations. Therefore, he does not credit Minkus' general denial that there was no discussion of subcontracting during the parties' negotiations between November 1988 and February (1 Tr 149).

10. At the last negotiations session on February 6, 1989, a memorandum of agreement was initialed by the parties and this ultimately became Exhibit J-1, which was executed on July 13, 1989

(1 Tr 62, 63, 155, 201; 2 Tr 108, 109). The lapse of time from February 6th to the signing of the contract on July 13, 1989 was attributed by Minkus to dissatisfaction with Nisenson, who was replaced in mid-May 1989 by Mark Press, an NJEA consultant, and not to the Board (1 Tr 150, 151, 194).

11. On February 22, 1989, the Board placed a legal advertisement in the "Record," requesting bids for custodial services in accordance with specifications provided by the Board (CP-5). Association members either saw or heard of this advertisement (1 Tr 46, 152).

12. Minkus testified candidly that in March 1989, Tarantino spoke to the custodians and maintenance men and stated that the Board was having problems financially and that they were looking into "...hiring a cleaning crew..." but they would not do so unless they could save $100,000 (1 Tr 152). Van Geldren also testified that Tarantino used the same figure (1 Tr 36, 37, 69, 70). The Hearing Examiner does not credit Tarantino's testimony that he never mentioned the figure $100,000 but merely said that the Board would "...consider it (subcontracting) if there was a possible savings..." (2 Tr 120). The contrary testimony of Van Geldren and Minkus that Tarantino used the figure "$100,000" is deserving of credit based upon their respective demeanors in relation to that of Tarantino on this issue and the absence of likelihood that both Van Geldren and Minkus would have testified thusly unless Tarantino had so stated.

13. The Board held a meeting on May 2, 1989, and Vincent Perna, an NJEA Field Representative, addressed the Board. He outlined the disadvantages of subcontracting custodial services in considerable detail. [2 Tr 91-93; R-9; 1 Tr 73-75, 179]. At that meeting Tarantino presented financial data on the contemplated savings to be made by subcontracting, one figure being $54,000 and another $83,000 or $84,000 (2 Tr 93, 94, 121-123; R-10).

14. The Board met next on June 13, 1989, and Press was present on behalf of the Association (1 Tr 199). At this meeting the Board voted unanimously to award a contract for custodial services to Control Building Services, Inc. in the sum of $202,164 for the 1989-90 school year (CP-6; 2 Tr 94). Tarantino testified that the bids solicited earlier had been received in March 1989, and that Control Building Services, Inc. was the low bidder (2 Tr 135, 136). Tarantino had prepared and submitted to the Board in May 1989, a document entitled "Estimated Salary - Maintenance & Custodians - 1989-1990," which was ultimately used by the Board to measure the expected savings of approximately $54,100, to be realized by subcontracting custodial services (R-10, p. 2; 2 Tr 121-123, 129-137).

15. Based upon a "Seniority List" prepared by Tarantino's office, eight of the fifteen custodians and maintenance men then employed were sent an identical letter of termination under date of

June 14, 1989, over the signature of Tarantino.[2/] This letter stated, in part, "...that due to budgetary constraints, (the Board)...has elected to contract out its' custodial services. Therefore, as of July 1, 1989 your services will no longer be needed..." (CP-9; 1 Tr 101, 102). It was undisputed that "seniority" was observed by the Board and that the eight employees terminated were "junior" to those retained in accordance with the "Seniority List." [2 Tr 125; CP-7; 1 Tr 70, 71, 132, 173, 174, 200; 2 Tr 18, 90].

16. Of the eight employees terminated, five were identified as paying dues to the Association but J. Dambrosio and J. Wilkens were not so identified; Squeo's status is unknown (1 Tr 27-29; CP-1). Finally, of the seven employees retained, only E. McCarthy and H. Minkus were dues payers (1 Tr 28; CP-1, CP-7).

17. At the negotiations session on July 13, 1989, the parties executed the 1988-89 collective agreement, which had expired June 30, 1989 (J-1, p. 28; 1 Tr 201), and the Association submitted its proposals for a successor agreement. Press then asked about the procedure used for the terminations of the eight custodial employees and was told that it was "...done by seniority..." Press next requested the seniority list (CP-7), and, also, the financial data showing the money being saved by subcontracting. [1 Tr 200, 202,

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2/ The names of the terminated employees appear on Exhibit CP-7 as follows: M. Acito, J. Dambrosio, T. Van Geldren, C. Harvath, D. Mora, G. Ricca, J. Wilkens and C. Squeo.

203]. These items were provided at the next session on August 8th (1 Tr 202, 203).

18. Additionally, at the July 13th negotiations session, representatives of the Board objected to the presence of Harvath since his employment had been terminated as of June 30th (1 Tr 106, 107, 155, 156, 201, 202; 2 Tr 28, 110). Press argued that he needed Harvath because he was on the negotiating committee and, as the President of the Association, he had a right to be present (1 Tr 107; 2 Tr 28, 29).

19. The problem of Harvath's presence in negotiations surfaced again at the next session on August 8th. The objection to Harvath's presence continued at the next session on September 25th. However, on this occasion Press personally handed Tarantino a letter that he had prepared and dated September 25, 1989, in which he outlined the Association's position as to the legal right of Harvath to be present. [CP-14; 1 Tr 204-206]. The Board then caucused and, after reading the letter, Press was advised that their original position was reaffirmed and that they would not negotiate with Harvath present (1 Tr 206).

20. On September 28, 1989, counsel for the Board addressed a letter to Press, in which he acknowledged having seen Press' letter to Tarantino to September 25th, but then directed Press "...not to bring Charles Harvath to any negotiation sessions between the Custodians Association and the Board of Education..." (CP-15; 1 Tr 207). Counsel for the Board in his letter also stated explicitly

that it was inappropriate for Press to seek to have Harvath present since he was no longer an employee of the district and "...has no right to attend such sessions..." (CP-15). There have been no negotiations sessions between the parties since September 25, 1989 (1 Tr 207).

21. Further, at the August 8th session, Press raised the question of recall rights for the eight terminated employees and requested that they be "...rehired in order of reverse seniority in the event of any opening..." (1 Tr 204). According to Press, Kerkowski "...indicated that would be agreeable..." (1 Tr 204). This testimony of Press was corroborated without equivocation by Harvath and Minkus, the latter testifying that Kerkowski said, "...yes, if there is any work available, the men will definitely be rehired..." (1 Tr 155; 106, 133). Benson testified to the contrary that Kerkowski stated to Press only "...that we would be more than willing to consider them for rehire just as we would consider anyone else who applied..." [without mention of seniority] (2 Tr 89). Also, according to Montagna, Kerkowski only said to Press "...that the Board would have no problem with interviewing those people in the same way that they would interview anyone for the job..." (3 Tr 23). The Hearing Examiner has resolved this conflict in testimony by crediting the Association's witnesses [Press, Harvath and Minkus] based on their respective demeanors on this issue. Equally important is the fact that the above testimony of Benson and Montagna is in direct conflict with the stress which the Board had

placed upon its decision in June to terminate the eight employees based strictly upon the "Seniority List" that Tarantino had had prepared for the purpose [compare 2 TR 90 & 125 with 2 Tr 89 & 3 Tr 23]. Thus, the Hearing Examiner finds as a fact that Kerkowski, as the President of the Board and its spokesman in negotiations, had the actual or apparent authority to bind the Board to the recall or rehire of the eight terminated employees by seniority in accordance with the "Seniority List" and did so.

22. In January 1990, the Board undertook to advertise for custodians and at a regular meeting on February 13, 1990, it hired three new custodial employees (CP-16; 1 Tr 208-210). The minutes of that meeting indicate that custodial contracts were issued on a probationary basis to one Sergio Mejia at $16,500 pro-rated per annum, effective January 18, 1990 through March 18, 1990; to one Lawrence Brandt at $16,500 pro-rated per annum, effective January 29, 1990 through March 29, 1990; and to one Edward Perham at $16,500 pro-rated per annum, effective February 1, 1990 through April 1, 1990 (CP-16, p. 5).[3/]

23. With the assistance of Press, Van Geldren, Harvath and Dominick Mora sent identical letters to Tarantino, in which they applied for the custodial/maintenance positions then being

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3/ The fact of their employment was brought to the attention of Press by either Harvath or Minkus. Press personally spoke to each of the three individuals. Press learned that they were hired in early February and also that they were working substantial overtime hours. [1 Tr 208, 209]. This testimony was corroborated by Van Geldren and Harvath (1 Tr 53-56, 110).

advertised by the Board (CP-8, CP-10, CP-17; 1 Tr 129, 211). Although each letter was undated, it was stipulated that the Board received them on January 23, 1990 (1 Tr 18, 112, 212, 213).

24. Tarantino was unable to provide a reason for the hiring of the three new custodial employees but he did acknowledge that it had nothing to do with any change in the service provided by the subcontracting companies (2 Tr 137, 138).[4/] Tarantino's testimony was that by the time that the Board had received the three application letters from Van Geldren, Harvath and Mora on January 23, 1990, the Board had already made its hiring decision[5/] and, further, that he had been authorized to proceed prior to January 23rd (2 Tr 138, 139).

25. Montagna claimed that he only knew of the fact of the hiring of the three new custodial employees since he had not been involved in the hiring process and did not know when the interviews had been conducted nor when the advertisement had been placed in the newspaper (3 Tr 19-22). Although the hiring by the Board occurred on February 13, 1990, Montagna could not testify with specificity when the Board had authorized these three hirings (3 Tr 20, 21). However, he did testify that when the Board authorized the hiring of

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4/ Due to dissatisfaction with its initial subcontractor, Control Building Services, Inc., the Board on January 16, 1990, changed its custodial contractor, effective January 15, 1990 (CP-18).

5/ The applications of those newly hired employees were received prior to January 23, 1990, and within a day after the Board's newspaper advertisement [not in evidence] (2 Tr 138, 139).

three new custodians no issue was raised as to whether or not those custodial employees previously terminated should be rehired (3 Tr 21).

* * * *

## ANALYSIS

### The Respondent Board Violated Sections 5.4(a)(1) And (5) Of The Act When, Commencing On July 13, 1989, It Objected To The Presence of Association President Charles Harvath In Negotiations For The Stated Reason That His Employment Had Been Terminated On June 30th

The Association's proofs establish clearly that the Board violated the Act as alleged in Count II of the Complaint. The Board does not dispute that, beginning with the negotiations session of July 13, 1989, its representatives objected to Harvath's presence on the ground that he had been terminated as of June 30th. Apparently, no consideration was given to Press' contention that he needed Harvath because he was on the negotiating committee and was still the President of the Association who had a right to be present. [See Finding of Fact No. 18].

The issue surfaced again at the parties' negotiations session on August 8th where the same objection was registered by the Board. At the next negotiations session on September 25th, Press handed a letter to Tarantino, in which he outlined the Association's position on the right of Harvath to be present. After caucusing, the Board reiterated its position that its representatives would not negotiate with Harvath present. [See Finding of Fact No. 19].

Finally, on September 28, 1989, the Board's counsel sent a letter to Press, referring to Press' letter of September 25th to Tarantino. He then articulated the same position that the Board had taken previously, namely, that it was inappropriate for Press to seek to have Harvath present since he was no longer an employee of the District. There have been no collective negotiations between the parties since September 25, 1989. [See Finding of Fact No. 20].

The cases supporting the Association's position that the Board violated the Act when it refused to negotiate with Harvath present are legion. For example, in _No. Brunswick Twp. Bd. of Ed_., P.E.R.C. No. 80-122, 6 _NJPER_ 193, 194 (¶11095 1980) the Board stated that it would not negotiate with the Association's negotiating team until members from other negotiations units within the District were removed. The Commission, relying on applicable federal precedent, rejected the Board's position and found that it had violated Section 5.4(a)(5) of the Act. It concluded that the Association's objective was lawful since it was merely seeking to coordinate its strategies in collective negotiations among several units through the use of a single negotiating team.

Another case in which an employer was found to have violated the Act because it sought to dictate the composition of the union's negotiating team is that of _Boro of Bradley Beach_, P.E.R.C. No. 81-74, 7 _NJPER_ 25 (¶12010 1980). There the mayor of the borough had sent a letter to the union, in which he requested that it refrain from naming to its negotiating team any of the last three members appointed to the Police Department.

Finally, in Salem Cty., I.R. No. 86-23, 12 NJPER 546 (¶17206 1986) the employer refused to negotiate because the union's negotiator had been suspended for striking his foreman. The County's position was rejected, based upon Bradley Beach and No. Brunswick Bd. of Ed., supra.

Compare: Boro of Somerville, P.E.R.C. No. 88-77, 14 NJPER 218 (¶19077 1988), adopting H.E. No. 88-33, 14 NJPER 102 (¶19037 1988).

Thus, the Hearing Examiner must conclude that, under the above Commission precedent, the Respondent Board violated the Act as alleged and an appropriate remedy will be recommended hereinafter.

The Respondent Board Did Not Violate Sections 5.4(a)(1) And (5) Of The Act When It Subcontracted Its Custodial Services On June 13, 1989

The Association alleges in Count I that the Board, in having subcontracted its custodial services during the course of collective negotiations, intentionally deceived the Association, and that this constituted a failure to negotiate in good faith. However, the Association's proofs failed to support its allegations and, thus, Count I must be dismissed.

The Association encountered no great difficulty in obtaining recognition as the collective negotiations representative for the Board's custodians and maintenance men. When voluntary recognition was denied in June 1988, the Association was compelled to obtain certification through a Commission-conducted election on

September 20, 1988 (see Findings of Fact Nos. 3, 5). Although the Association could not have been privy to the Board's inquiry into the savings to be gained by the subcontracting of its custodial services early in 1988, the Association's witnesses acknowledged that recent budgets had been defeated by the voters (see Finding of Fact No. 4).

The Board did not mislead its custodians and maintenance men on September 2, 1988, when Montagna denied "rumors" that the Board had "already" subcontracted its custodial services since this was the fact at that time (see Finding of Fact No. 6). However, the Board had on July 14th solicited custodial service contractors for cost information (see Finding of Fact No. 7).

Following the Association's certification by the Commission on October 4, 1988, the Board promptly entered into contract negotiations, which began in November 1988 and resulted in the initialing of a memorandum of agreement on February 6, 1989, following seven or nine negotiations sessions (see Findings of Fact No. 5, 8, 10). The Hearing Examiner has found as a fact that, notwithstanding the general denial of Minkus, who attended most of the negotiations sessions, the Board has proven that it regularly apprised the Association of the possibility of its subcontracting its custodial services during the sessions from November through February 6, 1989 (see Finding of Fact No. 9). During this period, a resolution to solicit bids was adopted at a regular meeting of the Board on November 15, 1988. Since the minutes of regular meetings

are public records, the Association could have learned of this resolution to solicit bids by due diligence.

Even if the Board's intent to subcontract its custodial services had never been made known to the Association through early February 1989, its own witnesses acknowledged seeing or hearing of the February 22, 1989 advertisement in the "Record," which requested bids for custodial services (see Finding of Fact No. 11). Although Tarantino said in March 1989 that the Board would not subcontract unless they could save $100,000, his function with the Board was to provide input for its decisions and not to make its decisions (see Findings of Facts No. 12, 13).

Before it decided to award a subcontract for custodial services to "Control" on June 13, 1989, the Board had afforded Perna an opportunity to address it on May 2nd, in order to outline the disadvantages. The Board nonetheless decided to subcontract its custodial services as of July 1, 1989, on the basis of savings of approximately $54,100. [See Findings of Fact Nos. 13, 14].

* * * *

The Association cites the Supreme Court decision in IFPTE Local 195 v. State, 88 N.J. 393 (1982) for the proposition that public employers are not granted "...limitless freedom to subcontract for any reason..." (88 N.J. at 411). The Court posited as an example that an employer could not subcontract "...in bad faith for the sole purpose of laying off public employees or substituting private workers for public workers..." Id. Thus, the

Supreme Court made clear that it was not leaving public employees vulnerable to "...arbitrary or capricious substitutions of private workers for public employees..." Id.

The Hearing Examiner, in addressing the subcontracting issue presented, is fully aware of the limitations suggested by the Court in Local 195. However, there appears to be nothing in the conduct of the Respondent herein which remotely amounts to "bad faith" in the terminating of eight of its custodial employees and substituting private employees in their stead. Nor was the Board's conduct in subcontracting "arbitrary or capricious."

Subcontracting was not a substantive issue in the negotiations which resulted in J-1. What the Association has sought to prove was that the Board concealed its ultimate intent to subcontract its custodial services to the detriment of eight of its fifteen custodial and maintenance employees, and since this conduct spanned the course of collective negotiations, ergo, the Board acted in "bad faith."

The Commission has cited many times an early decision dealing with the requisites for a finding of "bad faith" in collective negotiations: State of New Jersey, E.D. No. 79, 1 NJPER 39 (1975), aff'd. 141 N.J. Super. 470 (App. Div. 1976). It was there stated that "bad faith" in negotiations must be measured by the "totality" of the conduct of the party charged. The question becomes one of whether the party charged brought to the negotiating table an open mind and a sincere desire to reach an agreement, as

opposed to a pre-determined intent to go through the motions, seeking to avoid, rather than reach, an agreement (see 1 NJPER at 40).

While the analysis in that case may not be precisely apposite, it appears to support the conclusion that the Board manifested "good faith," and not "bad faith," based upon the "totality" of its conduct during negotiations, and continuing through the date of the award of the custodial subcontract on June 13, 1989.

For these reasons the Hearing Examiner will recommend dismissal of Count I of the Complaint.

The Respondent Board Did Not Violate Sections 5.4(a)(1) Or (3) Of The Act When It Subcontracted Its Custodial Services, Effective July 1, 1989

The Association alleges in Count IV of the Complaint that the Board on June 13, 1989, deliberately implemented a plan to eliminate from its employ those of its custodial employees who had joined the Association from its inception without, however, removing from its employ those who had refused to join the Association, also from its inception. It alleges further that the subcontracting decision was a pretext to terminate eight out of the fifteen unit employees as of June 30, 1989. However, the facts as found by the Hearing Examiner fail to support these allegations and, thus, he must recommend the dismissal of Count IV.

The Hearing Examiner has previously concluded that the Board's conduct was devoid of "bad faith" during the course of the parties' collective negotiations and extending to the subcontracting decision on June 13, 1989. Having exonerated the Board of "bad faith" conduct *prior* to June 13th, the Association must have adduced evidence of *subsequent* illegal conduct by the Board's representatives in order to meet its burden of proof that the Act was violated as alleged in Count IV.

Since the thrust of Count IV is that the Board violated Section 5.4(a)(3) of the Act, the Association's proofs must be assessed under the first part of *Bridgewater*.[6/] Clearly, the Association has satisfied the first two of the three requisites, namely: (1) that five of the eight terminated employees were engaged in the protected activity of membership in the Association and, in the case of Harvath, the holding of office; and (2) that the Board necessarily knew of these activities.

However, the Association's proofs fall short of satisfying the third requisite, *i.e.*, that the Board was hostile to or manifested animus toward the exercise of this protected activity. In fact, the Hearing Examiner finds no evidence that the Board's representatives engaged in any conduct which constituted *prima facie* proof of hostility or animus within the meaning of *Bridgwater*.

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6/ See *Bridgewater Tp. v. Bridgewater Public Works Assn.*, 95 *N.J.* 235 (1984).

Even assuming, *arguendo*, that the first part of the *Bridgewater* test is deemed to be satisfied, the Hearing Examiner would still be compelled to conclude that the Board did not violate Section 5.4(a)(3) of the Act since it has proven by a preponderance of the evidence that its action of subcontracting its custodial services, and terminating eight of its custodial employees, would have occurred even in the absence of protected activity since its decision was made in good faith.

The Hearing Examiner's conclusion that the Association has failed to satisfy the *Bridgewater* test follows directly from the record and Findings of Fact Nos. 15-17 and 21. The "Seniority List" prepared by Tarantino's office was carefully followed by the Board in implementing the terminations. Of significance is that of the eight employees terminated only five were identified as paying dues to the Association while two others were not and the status of Squeo is not known. Of like note is the fact that of the seven employees retained, two were Association dues payers. When Press inquired about the procedure used for the terminations, he was told at the July 13th session that it was "done by seniority." Press was able to verify this statement when he received a copy of the seniority list at the August 8th session.

The Hearing Examiner rejects the Association's contention that a suspect element of "timing" is present in this case, which operated to taint the Board's decision to subcontract its custodial services. [See Association Brief (pp. 8-10)]. The Board's course

of conduct in ultimately deciding to subcontract spanned about 18 months from January 1988 to June 13, 1989. This can hardly be deemed suspect, particularly, when the final decision to subcontract did not occur until over four months after the parties initialed a memorandum of agreement on February 6, 1989. Compare Downe Twp. Bd. of Ed., P.E.R.C. No. 86-66, 12 NJPER 3 (¶17002 1986) and Dennis Twp. Bd. of Ed., P.E.R.C. No. 86-69, 12 NJPER 16 (¶17005 1985).

Further, the Hearing Examiner cannot conclude that proof of hostility has been established by Montagna's statement, at an unspecified time, that "all of a sudden" Charlie Harvath came in the District, and "now we have a union..." (1 Tr 82). This occurrence is so lacking in nexus to the Board's conduct at issue that it cannot support an inference that the Board was hostile either to the Association or to the terminated employees.

For these reasons the Hearing Examiner concludes that the Board did not violate Sections 5.4(a)(1) and (3) of its Act and will recommend that Count IV be dismissed.

Respondent Board Violated Sections 5.4(a) (1) and (3) Of The Act By Having Refused To Rehire Three Of The Eight Terminated Custodial Employees In January Or February 1990

Although the Association's Complaint was not amended after its original filing on October 12, 1989, either prior to or at the

hearing, the Hearing Examiner nevertheless concludes that the issue of the Board's failure to rehire three of its terminated custodial employees in January or February 1990 was fully and fairly litigated during the hearing. Thus, the requisites adopted by the Commission in Commercial Twp. Bd. of Ed., P.E.R.C. No. 83-25, 8 NJPER 550, 553 (¶13253 1982), aff'd. App. Div. Dkt. No. A-1642-82T2 (1983) have been satisfied. In other words, even though the Complaint was never amended, the Hearing Examiner may conclude that the Board violated the Act since the issue of its violation was fully and fairly litigated at the hearing.

The proofs on this issue, as previously found, establish that: (1) in terminating eight of its custodians as of June 30, 1989, the Board scrupulously followed the "Seniority List" prepared by Tarantino's office (CP-7; (2) the fact that seniority had been followed was reiterated by the Board's representatives to Press at the July 13th negotiations session; (3) when Press raised the matter of recall rights in reverse order of seniority at the August 8th session, Kerkowski, exercising his actual or apparent authority on behalf of the Board,[7/] committed it to rehire the eight terminated employees in reverse order of seniority; (4) although there had been no change in the service provided by the subcontracting companies, the Board in January 1990, advertised for custodians and received

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7/ See East Brunswick Bd. of Ed., P.E.R.C. No. 77-6, 2 NJPER 279, 281, 282 (1976) and Long Branch Bd. of Ed., P.E.R.C. No. 77-70, 3 NJPER 300, 301, (1977).

applications from three individuals within a day after the advertisement; (5) these three individuals were interviewed and were formally hired by the Board at a regular meeting on February 13, 1990; (6) the decision to hire three new employees as custodians had occurred prior to January 23, 1990, the date on which the Board had received identical letters of application for the advertised positions from Van Geldren, Harvath and Mora, each of whom had been terminated by seniority on June 30, 1989; (7) Tarantino was unable to provide a reason for the hiring of three new custodial employees since it had nothing to do with a change in the service provided by the subcontractors; and (8) although Montagna had no knowledge whatsoever of the hiring of three new custodial employees, he testified that when the Board authorized the hiring no issue was raised as to whether or not those custodial employees previously terminated should be rehired. [See Findings of Fact Nos. 15, 17, 21-25].

First, the Hearing Examiner concludes preliminarily that none of the eight terminated custodial employees was under _any_ legal obligation to make an application to the Board for a custodial position in January 1990, notwithstanding that the Board placed an advertisement in a newspaper. If the Board had determined that it needed additional custodial employees, following its subcontracting as of July 1, 1989, it was under an _affirmative_ legal obligation to communicate with the eight employees, and, following reverse seniority, it was required to offer to rehire them.

Tarantino's lame explanation that the applications of Van Geldren, Harvath and Mora, which arrived on January 23rd, came after the Board had already made its hiring decision is unavailing. Even if this was the fact, which is doubtful, the initial conclusion above remains unchanged, *i.e.*, it was the Board's legal obligation to communicate with the terminated custodial employees and offer to rehire them on the basis of reverse seniority, adhering to CP-7. Given the fact that the Board found it necessary to change custodial subcontractors on January 15, 1990, it is conceivable that a need for additional custodial employees had occurred, notwithstanding Tarantino's testimony that the hiring undertaken by the Board had nothing to do with any change in the service provided by the subcontractors.

The *Bridgewater* test, *supra*, has now been satisfied by the Association in this instance since it is clear that, in addition to the exercise of protected activity and knowledge thereof by the Board, it manifested hostility and/or animus toward the exercise of protected activity by the eight terminated employees. Thus, an inference can be drawn that the Board discriminated against them on account of their exercise of protected activity when it failed to follow its commitment to rehire them by reverse seniority.

Although the Hearing Examiner has stated above that the eight terminated employees were under no obligation to file applications for the custodial positions advertised in January 1990, the fact that three did so reinforces their claim to have been

rehired in reverse order of seniority before the hiring of any individuals from outside the collective negotiations unit. See Borough of Seaside Park, P.E.R.C. No. 81-18, 6 NJPER 392, 394 (¶11203 1980) and Bergen Pines County Hospital, P.E.R.C. No. 82-117, 8 NJPER 360, 361 (¶13165 1982).

Because the Hearing Examiner is satisfied that the Board had an affirmative obligation to offer to rehire all of the employees terminated as of June 30, 1989, in accordance with the "Seniority List," and since Van Geldren, Harvath and Mora were the only members of the Association who applied for the open positions in January 1990, there is no need to consider the hearsay testimony of Tarantino that non-members, who were terminated in June 1989, were offered reemployment (see 2 Tr 140, 141). The Hearing Examiner is satisfied that the Board granted a discriminatory preference to non-unit, outside applicants. Obviously, this worked to the detriment of the eight terminated custodial employees, who were entitled to be rehired by seniority in reverse order.

For all of these reasons, the Hearing Examiner finds and concludes that the Respondent Board violated Sections 5.4(a)(1) and (3) of the Act by its failure to rehire terminated employees by seniority in January or February 1990, and an appropriate remedy will be recommended.

* * * *

Upon the entire record in this case, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1) and (5) on and after July 13, 1989, when representatives of the Responded objected to the presence of Charles Harvath, the President of the Association, in negotiations because his employment had been terminated as of June 30, 1989.

2. The Respondent Board violated N.J.S.A. 34:13A-5.4(a)(1) and (3) when in January or February 1990, it refused to rehire in reverse order of seniority the eight custodial employees, who were terminated on June 30, 1989, hiring instead from outside of the collective negotiations unit.

3. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (5) when, after negotiating a first collective negotiations agreement with the Association between the dates of November 1988 and February 6, 1989, it unilaterally subcontracted its custodial services on June 13, 1989 for the 1989-90 school year in the absence of bad faith based upon the totality of the Respondent's conduct.

4. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(1) and (3) since its decision to subcontract its custodial services on June 13, 1989 was not in furtherance of a deliberate plan to eliminate from its employ those employees who had been members of the Association from its inception while retaining as employees those who had not been members.

5. The Respondent Board did not violate N.J.S.A. 34:13A-5.4(a)(2) by its conduct herein.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER:

A. That the Respondent Board cease and desist from:

1. Interfering with, restraining or coercing its employees in the exercise of the rights guaranteed to them by the Act, particularly: by objecting to the presence of terminated custodial employees in negotiations such as Charles Harvath, the President of the Association, or others like situated; and by refusing to rehire in reverse order of seniority, when vacancies occur, the eight custodial employees, who were terminated on June 30, 1989.

2. Refusing to rehire in reverse order of seniority the eight custodial employees, who were terminated on June 30, 1989 when vacancies occur.

B. That the Respondent Board take the following affirmative action:

1. Forthwith restore the status quo ante as of the adoption of the hiring resolution of February 13, 1990, by unconditionally offering to rehire in reverse order of seniority the eight custodial employees, who were terminated on June 30, 1990 into such custodial positions as may now be vacant/available.

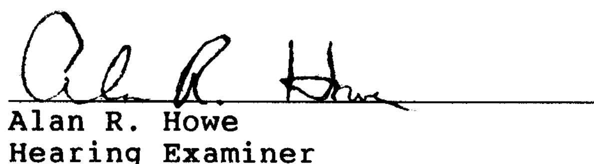
2. Forthwith make payment to each of the terminated custodial employees, who are rehired herein, in accordance with the "Seniority List" (CP-7), all lost wages and benefits, retroactive to

the date that each would have been rehired, following the adoption of the hiring resolution of February 13, 1990, together with interest with the monies due him or them at the rate authorized by R.4:42-11 for 1989 and 1990, respectively.

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 herewith.

C. That the allegations that the Respondent Board violated N.J.S.A. 34:13A-5.4(a)(2) be dismissed in their entirety.



Alan R. Howe
Hearing Examiner

Dated: November 30, 1990
Trenton, New Jersey

Appen ix "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 our employees in the exercise of the rights guaranteed to them by the Act, particularly: by objecting to the presence in negotiations sessions of terminated employees such as Charles Harvath, the President of the Association, or others like situated; and by refusing to rehire in reverse order of seniority, when vacancies occur, the eight custodial employees, who were terminated on June 30, 1989.

WE WILL NOT refuse to rehire in reverse order of seniority the eight custodial employees, who were terminated on June 30, 1989 when vacancies occur.

WE WILL forthwith restore the status quo ante as of the adoption of the hiring resolution of February 13, 1990, by unconditionally offering to rehire in reverse order of seniority the eight custodial employees, who were terminated on June 30, 1990, into such custodial positions as now may be vacant/available.

WE WILL forthwith make payment to each of the terminated custodial employees, who are hereby rehired, all lost wages and benefits, retroactive to the date that each would have been rehired, in accordance with the "Seniority List" (CP-7), following the adoption of the hiring resolution of February 13, 1990, together with interest on the monies due him or them at the rate authorized by R.4:42-11 for 1989 and 1990, respectively.

Docket No. CO-H-90-100     Bogota Board of Education
(Public Employer)

Dated ____________     By ____________
(Title)

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

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Public Employment Relations Commission, 495 West State St., CN 429, Trenton, NJ 08625 (609) 984-7372.