P.E.R.C. NO. 91-115

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

RUTGERS, THE STATE UNIVERSITY,

Respondent,

-and-

Docket No. CI-H-90-7

ROBERT BRENNAN,

Charging Party.

SYNOPSIS

The Public Employment Relations Commission grants summary judgment for Rutgers, the State University. Robert Brennan had alleged that the University violated the New Jersey Employer-Employee Relations Act by changing his title because he filed a grievance seeking equalization of overtime. The Commission finds that Rutgers changed Brennan's title upon the request of Brennan and his union.

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Charging Party.

Appearances:

For the Respondent, Christine B. Mowry, attorney

For the Charging Party, Purzycki & Gorney, attorneys (Edward W. Gorney, of counsel)

DECISION AND ORDER

On July 14, 1989, Robert Brennan filed an unfair practice charge against Rutgers, the State University. The charge alleges that Rutgers violated the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq., specifically subsections 5.4(a)(3) and (5),[1/] by changing his title because he filed a grievance seeking equalization of overtime. A related charge against AFSCME, Council 52, Local No. 888 was filed the same day. On September 28,

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1/ These subsections prohibit public employers, their representatives or agents from: "(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."

1990, we granted summary judgment for AFSCME but denied Rutgers' motion to dismiss. P.E.R.C. No. 91-34, 16 NJPER 540 (¶21243 1990).

On December 17, 1990, Rutgers filed a motion for summary judgment with supporting affidavit and documents. On January 7, 1991, Brennan filed an answering brief. On December 21, the Chairman referred the motion to Hearing Examiner Alan R. Howe.

On March 21, 1991, the Hearing Examiner recommended that the motion be granted and the Complaint dismissed. H.E. No. 91-32, 17 NJPER ___ (¶_____ 1991). He found that the decision by Rutgers' third-step hearing officer to change Brennan's title originated with AFSCME and Brennan.

On April 9, 1991, Brennan filed exceptions. He claims that the Hearing Examiner: (1) placed undue weight on Rutgers' affidavit; (2) erred by finding that Brennan agreed to the title change; and (3) erred by relying on the decision of Rutgers' hearing officer without giving Brennan a chance to cross-examine or offer other evidence.

On April 25, 1991, Rutgers filed an answering brief. It claims that: (1) the exceptions are untimely; (2) the exceptions are irrelevant to the question of whether there is any genuine issue of material fact; and (3) the reference to subsection 5.4(a)(1) is irrelevant because no Complaint issued on an (a)(1) allegation. Rutgers urges adoption of the recommended decision.

We have reviewed the record. The Hearing Examiner's findings of fact (H.E. at 5-7), based on the unfair practice charge and the affidavit and ten documents submitted in support of the motion, are accurate. We incorporate them.

> Summary judgment will be granted:
>
> If it appears from the pleadings, together with the briefs, affidavits and other documents filed, that there exists no genuine issue of material fact and the movant...is entitled to its requested relief as a matter of law.... [N.J.A.C. 19:14-4.8(d)]

But summary judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against the movant, and the summary judgment procedure may not be used as a substitute for plenary trial. State of New Jersey (Dept. of Human Services), P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988).

In his charge, Brennan alleged that Rutgers discriminated against him on his grievance and a previous grievance. He further alleged that the grievance was for the equalization of overtime, and that the hearing officer failed to answer the grievance as filed and changed his title from high voltage electrician to senior electrician. Finally, he alleged that if the hearing officer wants to eliminate a job classification, it should be the junior employee according to the contract. In P.E.R.C. No. 91-34, we concluded that a cause of action was suggested by these facts:

> The charging party filed a grievance protesting the employer's failure to equalize overtime. Allegedly as a result of his pursuing that grievance, the employer changed his job title and thereby effectively negated his ability to pursue his grievance. That allegation, standing alone, suggests a cause of action of discrimination for filing a grievance. [16 NJPER at 514]

We noted, however, that should a motion for summary judgment be filed, any factual allegations relied on by either party must be supported by depositions, admissions or affidavits.

Rutgers has put before us, through an affidavit, its third-step hearing officer's response to Brennan's grievance. That report states that the "Union and Mr. Brennan also stated that if Mr. Brennan was not being assigned high voltage electrical work, his title should be changed to one appropriate to his current assignments." Brennan has submitted no evidence by way of affidavit or document to rebut that assertion. Finding no genuine issue of material fact as to Rutgers' motivation in changing Brennan's title, we grant Rutgers summary judgment on this issue.

We also dismiss Brennan's other allegations. We have no jurisdiction over a claim relating to his veteran status. Allegations concerning his July 1986 termination are untimely. See N.J.S.A. 34:13A-5.4(c). And in the absence of a finding that AFSCME breached its duty of fair representation, we will not entertain Brennan's allegations that Rutgers breached it contract with AFSCME when it eliminated a job classification.

ORDER

Rutgers' motion for summary judgment is granted. The Complaint is dismissed.

BY ORDER OF THE COMMISSION

James W. Mastriani
Chairman

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

DATED: June 20, 1991
Trenton, New Jersey
ISSUED: June 21, 1991

H.E. NO. 91-32

STATE OF NEW JERSEY
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-and-

Docket No. CI-H-90-7

ROBERT BRENNAN,

Charging Party.

SYNOPSIS

In response to a remand by the Commission in P.E.R.C. No. 91-34, 16 NJPER 540 (¶21243 1990), the Hearing Examiner recommends that the Motion for Summary Judgment filed thereafter by the Respondent Rutgers be granted for the reason that: (1) the Undisputed Findings of Fact clearly establish that there are no genuine issues of material fact which require resolution at a plenary hearing; and (2) Rutgers is entitled to judgment as a matter of law.

The only conceivable theory upon which a violation could have been founded was that Brennan was frustrated in pursuing a grievance, involving equalization of overtime, by the conduct of the hearing officer at the Third Step of the grievance procedure, who changed Brennan's job title. However, the documentary record clearly demonstrated that the decision by the Third Step hearing officer to change the job title originated with the union and Brennan at the hearing as an alternative resolution of the grievance.

All of the other allegations made by Brennan in his Unfair Practice Charge were either beyond the Commission's jurisdiction [Vietnam veterans status], time-barred or involved managerial prerogatives such as promotion and hiring.

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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STATE OF NEW JERSEY
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-and- Docket No. CI-H-90-7

ROBERT BRENNAN,

Charging Party.

Appearances:

For the Respondent, Rutgers
(Christine B. Mowry, of counsel)

For the Charging Party,
Purzycki & Gorney, Esqs.
(Edward W. Gorney, of counsel)

HEARING EXAMINER'S RECOMMENDED DECISION ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

An Unfair Practice Charge was filed with the Public Employment Relations Commission ("Commission") on July 14, 1989, by Robert Brennan ("Charging Party" or "Brennan"") alleging that Rutgers, The State University ("Rutgers") 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 Brennan, a tenured employee who is also a Vietnam veteran, has been discriminated against by Rutgers because of his grievance, which was for the equalization of overtime in the HVE classification and, also, because of a prior grievance where he was discharged and

then reinstated with a suspension of five weeks; that one Julian Amkraut has circumvented the contract by not answering Brennan's grievance as filed; that Amkraut, in avoiding the HVE issue, claimed that there was no discrepancy in the "Electrician's Work Unit," which has nothing to do with the HVE classification; that Amkraut changed Brennan's title from HVE to Senior Electrician; that the HVE title was a promotional opportunity, for which Brennan bid in 1984 and was promoted; that since that date Rutgers has hired another HVE who is junior to Brennan in seniority; and that if Amkraut wished to eliminate a job classification it must be that of the junior employee according to the contract; all of which is alleged to in violation of N.J.S.A. 34:13A-5.4(a)(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 Consolidated Complaint and Notice of Hearing was issued on December 11, 1989.[2/] An Answer was filed by Rutgers as

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1/ These subsections prohibit public employers, their representatives or agents from: "(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."

2/ The instant Unfair Practice Charge was initially consolidated with a separate Charge in Docket No. CI-H-90-6 wherein Brennan alleged certain violations of the Act by AFSCME, Council No. 52, Local No. 888 ("AFSCME"). Both Charges were filed on the same date, namely, July 14, 1989. The procedural history of these two matters follows.

to CI-H-90-7 on January 3, 1990, which contained two undisputed admissions. Although hearing dates were originally scheduled in January 1990, no hearing was ever held because on March 2, 1990, AFSCME filed with the Chairman of the Commission a Motion for Summary Judgment, which was referred to the undersigned for disposition pursuant to N.J.A.C. 19:14-4.8. On May 1, 1990, this Hearing Examiner recommended that AFSCME's Motion be granted and that the Complaint against it be dismissed.[3/] On September 28, 1990, the Commission adopted the above recommendation of the Hearing Examiner and AFSCME's Motion for Summary Judgment was formally granted.[4/]

On May 18, 1990, Rutgers filed a Motion to Dismiss with the Commission, which was referred to the undersigned for disposition pursuant to N.J.A.C. 19:14-4.2(a). On August 2, 1990, the Hearing Examiner recommended that the Motion be granted and that the Complaint against Rutgers be dismissed.[5/] The Commission disagreed and denied the motion because Rutgers had failed to satisfy the requisites necessary to the grant of a motion to dismiss prior to hearing. The Commission quoted from Reider v. N.J. Dept. of Transport., 221 N.J. Super. 547, 552 (App. Div. 1987), noting that the judicial standard governing a motion to dismiss requires

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3/ See H.E. No. 90-47, 16 NJPER 333 (¶21138 1990).

4/ See P.E.R.C. No. 91-34, 16 NJPER 540 (¶21243 1990).

5/ See H.E. No. 91-4, 16 NJPER 471 (¶21202 1990).

that the inquiry be confined "...to a consideration of the legal sufficiency of the alleged facts apparent on the face of the challenged claim..." [P. & J. Auto Body v. Miller, 72 N.J. Super. 207, 211 (App. Div. 1962)]. The Commission then observed that since the parties had not presented any depositions, admissions or affidavits, Rutgers' Motion to Dismiss could not be converted into a motion for summary judgment: P. &. J. Auto Body, 72 N.J. Super. at 211. Thus, did the Commission conclude as follows:

> We look then to the charge itself and determine whether a cause of action is suggested by the facts. Reider. We believe it is. The charging party filed a grievance protesting the employer's failure to equalize overtime. Allegedly as a result of his pursuing that grievance, the employer changed his job title and thereby effectively negated his ability to pursue his grievance. That allegation, standing alone, suggests a cause of action of discrimination for filing a grievance... (16 NJPER at 541).

The matter was de facto remanded to this Hearing Examiner for disposition by hearing or decision on any motion for summary judgment which might thereafter be filed.[6/]

On December 17, 1990, Rutgers filed a formal Motion for Summary Judgment, dated December 15, 1990, supported by the Affidavit of Christine B. Mowry, the purpose of which was to proffer ten (10) documentary exhibits ["A" through "J"]. On January 7, 1991, Brennan's counsel filed a Brief In Opposition, dated January

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6/ As a caveat, the Commission in its remand stated that if a motion for summary judgment was filed then "...any factual allegations relied on by either party must be supported by depositions, admissions or affidavits..." (16 NJPER at 541)(Emphasis supplied).

4, 1990 (sic). Significantly, this Brief was submitted without any supporting affidavit or documentation whatsoever, notwithstanding the Commission's admonition above that the factual allegations relied upon by the parties "...must be supported by depositions, admissions or affidavits..." Brennan's Brief In Opposition contains only an excerpt from the Commission's decision, supra, and an excerpt from Brennan's Unfair Practice Charge followed by several pages of argument. The Mowry Affidavit in support of Rutgers' Motion for Summary Judgment is not disputed.7/

Based upon Brennan's Unfair Practice Charge against Rutgers and the ten exhibits incorporated within the Mowry Affidavit, without reference to the findings made in the prior proceedings, which involved AFSCME and Rutgers, supra [see H.E. No. 90-47, 16 NJPER 333 (¶21138 1990) and H.E. No. 91-4, 16 NJPER 471 (¶21202 1990)], the Hearing Examiner now makes the following:

UNDISPUTED FINDINGS OF FACT

1. Rutgers, The State University is a public employer within the meaning of the Act, as amended, and is subject to its provisions.

2. Robert Brennan is a public employee within the meaning of the Act, as amended, and is subject to its provisions.

7/ In the absence of any conflicting allegations in the form of "depositions, admissions or affidavits...," the Hearing Examiner must ultimately find that there exists no genuine issue as to any material fact within the meaning of the summary judgment standard, infra.

3. On November 9, 1988, Brennan filed a grievance requesting equalization of overtime between the High Voltage Electricians ("HVE's").[8/]

4. Brennan's grievance proceeded to a Third Step hearing, which was held on June 14, 1989, before Julian S. Amkraut, the Associate Director of the Office of Employee Relations. On June 23, 1989, Amkraut denied the grievance[9/] because there was no "...disparity between Mr. Brennan's overtime and others in his unit, and that he has worked many more hours than Mr. Dowd..."[10/] In support of this conclusion, Amkraut noted that the distribution of overtime was equitable as to Brennan in relation to other employees in his work unit and that Brennan's overtime hours were twice those of Dowd. In his decision denying the grievance, Amkraut stated that he had considered the position of the Union and Brennan concerning Brennan's job title and "...as such, Mr. Brennan's job title is to

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8/ The precise language in Brennan's grievance was "Equlize (sic) O.T. between high votage (sic) electrician" [Mowry Affidavit, Exhibit "G"].

9/ This denial is set forth in a two-page decision, consisting of a complete statement of the positions of the "Union" and the "Department" [Rutgers] together with "Discussion" and Amkraut's ultimate "Decision," all of which appears in Mowry's Affidavit as Exhibit "H."

10/ Brennan's grievance had complained that one Dennis Dowd, a High Voltage Electrician like Brennan, was receiving an unfair amount of overtime compared to Brennan.

be changed to Senior Electrician/Maintenance Mechanic..." [Mowry Affidavit, Exhibit "H," p. 2].[11/]

5. Brennan's Unfair Practice Charge against Rutgers states in toto:

> (a)(3) As a tenured employee who also happens to be a "Viet-Nam Veteran" I have been discriminated against by Rutgers on this grievance and also the last one where I was fired for 5 weeks and then reinstated with my firing changed to suspension.[12/]
>
> (a)(5) Julian Amkraut has circumvented the Contract by not answering the grievance as filed. The grievance was for the equilization (sic) of overtime in the High Voltage Electrician classification. Avoiding the issue of the H.V.E. he claimed there is no discrepancy in the Electricians Work Unit which has nothing to do with the H.V.E. classification. Furthermore, he has changed my title from H.V.E. to Senior Electrician. The H.V.E. title was a promotional opportunity which I bid for in 1984 and was promoted. Since that time R.U. has hired another H.V.E. in 1988?(87) who is junior to me in seniority. If Amkraut wants to eliminate a job classification it must be junior to senior man according to the contract. [Emphasis by Brennan].

11/ Amkraut's conclusion that Brennan's job title should be changed to Senior Electrician/Maintenance Mechanic originated from the position taken by the "Union" (and Brennan) at the hearing on June 14th, supra. According to Amkraut, "...The Union and Mr. Brennan also stated that if Mr. Brennan was not being assigned High Voltage Electrical work, his title should be changed to one appropriate to his current assignments..." (Mowry Affidavit, Exhibit "H," p. 1)(Emphasis supplied).

12/ The Hearing Examiner will not give further consideration to Brennan's allegation of discrimination by Rutgers based on his Vietnam veteran status since in the Mowry Affidavit, Exhibit "F," and at Point III Brennan's Brief In Opposition, he acknowledges that the Commission lacks jurisdiction of any such claim.

* * * *

STANDARD APPLICABLE TO MOTION FOR SUMMARY JUDGMENT

The standard which the Commission utilizes in deciding whether or not to grant a motion for summary judgment is governed by N.J.A.C. 19:14-4.8(b), namely, "...If it appears from the pleadings, together with the briefs...and other documents filed, that there exists no genuine issue of material fact and the movant or cross-movant is entitled to its requested relief as a matter of law..." (emphasis supplied), summary judgment may be granted and the requested relief may be ordered. The Commission has, in many cases, followed the applicable New Jersey Civil Practice Rule (R.4:46-2) and a leading decision of the New Jersey Supreme Court in Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954) in deciding motions for summary judgment under N.J.A.C. 19:14-4.8. Both the Civil Practice Rules and Judson apply the same standard.

"Material facts" are those which tend to establish the existence or non-existence of an element of the charge or of a defense that is derived from controlling substantive law. See Lilly, Introduction to the Law of Evidence [West Publishing Co., 2d ed. (1978) at p. 18] and McCormick on Evidence [West Publishing Co., 2d. ed. (1978) at p. 434].

But summary judgment is to be granted with extreme caution. The moving papers must be considered in the light most favorable to the opposing party, all doubts must be resolved against

the movant, and the summary judgment procedure may not to be used as a substitute for a plenary hearing: Dept. of Human Services, P.E.R.C. No. 89-52, 14 NJPER 695 (¶19297 1988), citing Baer v. Sorbello, 177 N.J. Super. 182, 185 (App Div. 1981); and Essex Cty. Ed. Services Comm'n., 9 NJPER 19 (¶14009 1982).

ANALYSIS

The Record Establishes That There Exists No Genuine Issue Of Material Fact Requiring A Plenary Hearing.

In applying the standard utilized by the Commission in deciding whether or not to grant a motion for summary judgment the sole task is to determine whether or not any genuine issues of material fact exist. The grant or denial of the motion then turns on the issues of law.

The Hearing Examiner has carefully analyzed and evaluated the "undisputed" facts relevant to the case at bar and has concluded that there exists no genuine issues of material fact, warranting the holding of a plenary hearing. This conclusion is buttressed by the failure of Brennan to have responded to Mowry's supporting Affidavit. Brennan's Brief In Opposition contains a partial restatement of his Unfair Practice Charge. However, mere reference to the language of the Unfair Practice Charge does not per se create a "genuine issue of material fact." Further, an issue of fact cannot be created in a brief: Jersey Central Power & Light Co. v. Tp. of Lacey, 772 F.2d 1103, 1109-10 (3rd Cir. 1985), cert. den. 475 U.S. 1013 (1986).

Although the record would appear to indicate at this point that no genuine issue of material fact exists, a threshold issue is presented in the last paragraph of the Commission's decision [quoted above at p. 4]. Having concluded that a "cause of action is suggested by the facts" alleged in the Charge, the Commission constructed the following syllogism: (1) Brennan filed a grievance protesting the failure to equalize overtime; (2) as a result of pursuing his grievance, Brennan's job title was changed, thereby "effectively" negating his ability to pursue his grievance; and (3) therefore, the latter [(2), supra] "standing alone, suggests a cause of action of discrimination for filing a grievance."

This syllogism must be deconstructed before proceeding further. A fair reading of the Unfair Practice Charge, as written by Brennan, discloses that: (a) he did indeed file a grievance requesting equalization of "overtime between High Voltage Electrician(s)" [Mowry Affidavit, Exhibit "G" & Undisputed Finding of Fact No. 5]; and (b), after alleging that Amkraut failed to answer "the grievance as filed" (at the Third Step), it was alleged further that Amkraut had avoided the H.V.E. equalization issue and that Amkraut stated that "there is no discrepancy in the Electricians Work Unit [Brennan's emphasis] which has nothing to do

with the H.V.E....." Finally, Amkraut changed Brennan's job title from "H.V.E. to Senior Electrician...."[13/]

The Hearing Examiner cannot infer from Brennan's allegations, as analyzed above, that the pursuit of his equalization grievance was causally connected to his job title change at the Third Step of the grievance procedure since Amkraut's decision states clearly that this change originated with the Union and Brennan [Undisputed Finding of Fact No. 4; uncontradicted by Brennan]. In other words, when Brennan's grievance was heard at the Third Step, it was the position taken by the Union and Brennan that ultimately caused Amkraut to change Brennan's job title. This sequence of events seems to be at odds with the conclusion suggested by the Commission, i.e., that the change in Brennan' title "...thereby effectively negated his ability to pursue his grievance...." [see above at p. 4].[14/]

It is of interest to note at this point that Brennan filed a related grievance on July 14, 1989, the same date that the instant

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13/ The remaining three sentences in the Unfair Practice Charge deal with Brennan's 1984 promotion to H.V.E., the hiring of a junior H.V.E. in 1987 or 1988 and the proper way to eliminate a job classification under the contract. Since these allegations are either time-barred, or are matters of managerial prerogative or of contract interpretation, they will not be considered further in this decision.

14/ The Hearing Examiner here takes administrative notice of the fact that AFSCME refused Brennan's request to arbitrate his equalization of overtime grievance and that AFSCME's refusal has previously been sustained by the Commission [supra, 16 NJPER at 541].

Unfair Practice Charge was docketed. However, this grievance was never made the subject of amendment in this proceeding. In his grievance of July 14th Brennan sought to "bump" Dowd as an H.V.E. based upon Brennan's classification seniority. This grievance was also denied by Amkraut at the Third Step on the basis of his decision of June 23, 1989, on the equalization grievance, supra. [Mowry Affidavit, Exhibits "B," "C" & "D"].

Further, no inference implying retaliation or discrimination against Brennan for having filed the equalization grievance may reasonably be drawn from Brennan's allegation that Amkraut "...circumvented the Contract by not answering the grievance as filed...." The Third Step decision by Amkraut contains a complete contractual rationale, which was derived from the "Positions" of the parties and thereafter incorporated into his "Discussion" and "Decision" [Undisputed Finding of Fact No. 4; uncontradicted by Brennan].

All of the foregoing leads the Hearing Examiner to the ineluctable conclusion that this record is devoid of any "genuine issue of material fact" and that the instant dispute is, thus, ripe for decision under the Commission's standard for deciding motions for summary judgment, supra. The Hearing Examiner restates his finding and conclusion that, based upon his complete analysis of the record, Rutgers' Motion for Summary Judgment must be granted and the Complaint must be dismissed. In so concluding, the Hearing Examiner has viewed the moving papers in the light most favorable to Brennan

and has given him the benefit of all favorable inferences. Further, the Hearing Examiner has resolved all doubts against Rutgers.

Brennan Has Failed To State A Cause Of Action Under Section 5.4(a)(3) Of The Act.

As previously noted, to the extent that Brennan's allegations with respect to Section 5.4(a)(3) of the Act are based upon his status as a Vietnam veteran the Commission is without jurisdiction (Undisputed Finding of Fact No. 5). However, a vestige of "(a)(3)" may be inferred from Brennan's averment of his having "...been discriminated against...on this grievance..."

In order to establish a violation of this subsection of the Act by Rutgers, Brennan must first make a sufficient showing to support an inference that his protected activity of filing the equalization grievance was a "substantial" or a "motivating" factor in Amkraut' decision to deny his grievance at the Third Step on June 23, 1989. Recall that Amkraut found that there was no disparity between Brennan's overtime and that of others in his unit since he had worked twice the amount of overtime compared to Dowd. Additionally, Amkraut concluded that Brennan's job title should be changed from H.V.E. to Senior Electrician/Maintenance Mechanic for the reason previously stated.

This initial burden upon Brennan derives from the decision of the Supreme Court of New Jersey in Bridgewater Tp. v. Bridgewater Public Works Ass'n, 95 N.J. 235 (1984). Assuming that this initial burden has been met by Brennan, Rutgers must then demonstrate that

the same action would have taken place even in the absence of Brennan's protected activity of having filed his overtime grievance (see 95 N.J. at 242).

In determining whether or not Brennan has met the Bridgewater test, the Hearing Examiner concludes, initially, that Brennan was engaged in protected activity by having filed his overtime grievance on November 9, 1988, and that Rutgers knew of this activity. However, Brennan has failed to establish that Rutgers by its conduct has manifested any hostility or anti-union animus toward him in the course of the processing of his grievance through the grievance procedure (see 95 N.J. at 246). It is clear beyond peradventure of doubt that close scrutiny of the allegations in Brennan's Unfair Practice Charge and the Mowry Affidavit demonstrates that Rutgers' representatives in no way manifested hostility or anti-union animus toward Brennan. Therefore, Brennan's claim that Rutgers violated Section 5.4(a)(3) of the Act must be dismissed.

Brennan Has Failed To State A Cause Of Action Under Section 5.4(a)(5) Of The Act.

The heart of Brennan's allegations appear under the Section 5.4(a)(5) heading and need not be recited again beyond stating that his complaint is addressed solely against the conduct of Amkraut, who acted as the Third Step hearing officer and decided the merits of Brennan's equalization of overtime grievance. One looks in vain for anything other than Brennan's complaints about Amkraut's: (1)

circumventing the contract by not answering the grievance as filed; (2) avoiding the H.V.E. issue by having perceived no discrepancy between the "Electricians Work Unit" and the H.V.E. classification; and (3) changing Brennan's title from H.V.E. to Senior Electrician.

It might first be noted that even though Brennan's basic complaint is his change in job title from H.V.E. to Senior Electrician, the instant case does not involve transfers between or among job titles such as in National Park Board of Education, P.E.R.C. No. 87-102, 13 NJPER 194 (¶18082 1987) or Boro of Butler, P.E.R.C. No. 87-121, 13 NJPER 292 (¶18123 1987). Nor, is this case about the abolition of job titles followed by transfers to other job titles carrying a lower rate of compensation such as Rahway Valley Sewerage Authority, P.E.R.C. No. 89-37, 14 NJPER 654 (¶19275 1988).

What this case does involve is whether Brennan, an individual employee, has the requisite standing to sustain an unfair practice charge against Rutgers, a public employer, under Section 5.4(a)(5) of the Act. By its terms this subsection prohibits a public employer from refusing to negotiate in good faith "...with a majority representative..." AFSCME, not Brennan, is the "majority representative" within the meaning of Section 5.4(a)(5) of the Act.

A fair statement of Commission precedent on this issue is found in Camden County College, D.U.P. No. 89-15, 15 NJPER 292 (¶20131 1989) where the Director of Unfair Practices stated that

> ...an individual, lacks standing to maintain a claim that an employer has violated subsection 5.4(a)(5).

> Rutgers University, P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988); City of Atlantic City, D.U.P. No. 88-6, 13 NJPER 805 (¶18308 1987); City of Jersey City, P.E.R.C. No. 87-56, 12 NJPER 853 (¶17329 1986)...[15 NJPER at 293].

In New Jersey Dept. of Higher Ed., P.E.R.C. No. 85-77, 11 NJPER 74 (¶16036 1985), the Commission explained that the issue under N.J.A.C. 19:14-1.1 [who may file] is not procedural but substantive. As a general rule, individual employees, in the absence of alleged collusion and unfair representation, lack standing to litigate charges against their employers concerning negotiations because the exclusive right to negotiate is vested in the majority representative.

Even assuming, arguendo, that Brennan was able to overcome his lack of standing to file a Section 5.4(a)(5) unfair practice charge, supra, he would still be confronted by the Commission's decision in New Jersey Turnpike Authority (Jeffrey Beall), P.E.R.C. No. 81-64, 6 NJPER 560 (¶11284 1980) where it rendered a definitive decision on when, and under what circumstances, an individual may charge a public employer with having violated subsection (a)(5) of the Act. Following Beall's termination for work-related reasons, he filed a grievance that was processed through the grievance procedure to an administrative hearing, the step immediately prior to arbitration. The hearing officer sustained his discharge. He then requested that the union proceed to arbitration. This the union refused to do because it concluded that there was little likelihood of success. The employer refused Beall's request that it proceed to

arbitration with him alone. The Hearing Examiner rejected Beall's contention that the employer and the union had colluded to deprive him of his right to pursue his grievance to arbitration.

The Commission in Beall found no evidence of collusion, noting that he was attempting to have the merits of his discharge grievance adjudicated as an unfair practice, i.e., that his discharge was not for just cause under the agreement. The Commission also stated that under Section 5.3 of the Act only a majority representative may file a Section of 5.4(a)(5) unfair practice charge, alleging a claimed breach of the collective agreement. Since Beall's charge amounted to exactly such a claim, the Commission stated: "As a general matter, we do not believe that an individual employee, in the absence of any allegations of collusion or unfair representation by the majority representative, can use the unfair practice forum to litigate an alleged breach of a collective negotiations agreement unrelated to union activity..." (6 NJPER at 561).[15/]

* * * *

15/ See also, Rutgers, The State University and AFSCME, Council 52, Local 888 and David L. Jennings, H.E No. 88-48, 14 NJPER 290 (¶19108 1988), adopted P.E.R.C. No. 88-130, 14 NJPER 414 (¶19166 1988). Just as AFSCME was found not to have breached its duty of fair representation (DFR) as to Jennings so, too, has AFSCME been found not to have breached its DFR as to Brennan: P.E.R.C. No. 91-34, 16 NJPER 540 (¶21243 1990), supra.

The Hearing Examiner, having concluded that Brennan has failed to provide any legal underpinning to his Unfair Practice Charge as analyzed and discussed above, must recommend the grant of Rutgers' Motion for Summary Judgment and the dismissal of the Complaint.

* * * *

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

CONCLUSION OF LAW

The Respondent Rutgers, The State University, did not violate N.J.S.A. 34:13A-5.4(a)(3) or (5) by its conduct herein, particularly, that of its Hearing Officer, Julian S. Amkraut, who, in his Third Step decision on June 23, 1989, changed the job title of Robert Brennan in the course of denying his overtime equalization grievance.

RECOMMENDED ORDER

The Hearing Examiner recommends that the Commission ORDER that the Motion for Summary Judgment, filed by Rutgers, The State University, be granted and the Complaint be dismissed in its entirety.

Alan R. Howe
Hearing Examiner

Dated: March 21, 1991
Trenton, New Jersey